The addition of Illinois to the above list of states which have adopted the doctrine indicates a growing acceptance of a more complete advocation of the concept of comparative negligence.

SUSAN ST. JOHN

CIVIL RIGHTS—TITLE II—AWARDING OF ATTORNEY'S FEES

The United States Supreme Court has recently ruled[1] that a federal court hearing an action seeking injunctive relief against discrimination in places of public accommodations[2] may disallow the award of reasonable attorney's fees to the successful party only where special circumstances would render such an award unjust. The decision, which construes a provision of the Civil Rights Act of 1964,[3] specifically overrules the "subjective test" of bad faith and delay tactics laid down by the court of appeals.[4] The Court reasoned that because a federal court already possessed the power to award fees under circumstances covered by the "subjective test," Congress, in enacting the provision, must have intended a broader exercise of that power in Title II cases for the two-fold purpose of (1) punishing those who deliberately advance untenable arguments and (2) encouraging individuals injured by racial discrimination to seek judicial relief.

The question of attorney's fees in the case arose on appeal.[5] Plaintiffs had brought the suit in the district court to enjoin discrimination at five drive-in restaurants and a sandwich shop owned and operated by the defendants.[6] The district court ruled that Title II did not cover drive-in restaurants of the sort involved in the case. The court of appeals reversed the decision and in light of the defendant's contentions,[7] remanded the

19 ALBANY L. REV. 4 (1955); Prosser, *supra*, note 28; Bress, *Comparative Negligence: Let Us Hearken to the Call of Progress*, 43 A.B.A.J. 127 (1957); Harkavy, *Comparative Negligence: The Reflections of a Skeptic*, 43 A.B.A.J. 1115 (1957).

1. Newman v. Piggie Park Enterprises, Inc., 36 U.S.L.W. 4243 (U.S. Mar. 18, 1968).
2. 78 Stat. 243, 42 U.S.C. §2000a (1964). Title II of the Civil Rights Act of 1964, hereinafter referred to as Title II.
3. "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 78 Stat. 244, 42 U.S.C. §2000a-3(b) (1964).
4. "[T]he test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees . . . from taking a position in court in which he honestly believes—however lacking in merit that position may be." Newman v. Piggie Park Enterprises, Inc., 377 F.2d 433, 437 (4th Cir. 1967).
5. *Id.*
6. Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941 (D.C.S.C. 1966).
7. The defendants denied discrimination at the drive-ins and sandwich shop although they ". . . could not and did not undertake at the trial to support their denials." They contended that Title II was unconstitutional on the grounds foreclosed in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and that Title II was "invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion'." Newman v. Piggie Park Enterprises, Inc., 377 F.2d 433, 437-38 (4th Cir. 1967).

case to the district court to determine on the basis of the "subjective test" whether reasonable attorney's fees ought to be awarded the successful plaintiffs.

While in the United States the awarding of attorney's fees in an action as part of the costs is the exception to the general rule,[8] it is not a new concept, historically or internationally. In England it has been for the past 700 years the general practice to award attorney's fees to the prevailing party;[9] it is also the general practice in Continental systems.[10] Moreover, at the time of the American Revolution, awarding of attorney's fees to the prevailing party was part of the common law adopted by the colonies.[11] However, because of a general distrust of lawyers and a belief that the English system favored the wealthy and unduly penalized the losing party, the practice was abolished or fees made trivial by statute.

Today, renewed interest has appeared concerning the adoption of a modified form of the English system. Two states now provide that attorney's fees should generally be awarded the successful party.[12] Numerous other states allow fees to be awarded under certain circumstances.[13] In addition, many authors are advocating adoption of a modified form of the English system to alleviate congestion in trial and appellate courts and to make the wronged person whole.[14]

In federal courts[15] the power to award attorney's fees has generally been limited to equity jurisdiction which evolved from the remedies, practices, and procedures of the English Court of Chancery.[16] Originally broad, this

8. 6 MOORE'S FEDERAL PRACTICE 1348 (1966 ed.); MCCORMICK, DAMAGES §60 (1935).
9. Although under early English common law, costs, as such, were not awarded to either party, a series of statutes extending from the thirteenth to the seventeenth centuries made it possible for a successful plaintiff, and later a successful defendant to collect attorney's fees as costs when appropriate. At law, costs went to the prevailing party until 1875 when the common law rule was changed to conform to the chancery rule that costs shall be at the discretion of the court. For a comprehensive discussion of the history of the English practice and how it works today, see Goodhart, *Costs*, 38 YALE L.J. 849 (1929); also MCCORMICK, DAMAGES, §§60, 71 (1935).
10. Comment, *Distribution of Legal Expense among Litigants*, 49 YALE L.J. 699 (1940); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).
11. 6 MOORE'S FEDERAL PRACTICE 1302 (1966 ed.); MCCORMICK, DAMAGES, §60 (1935); Goodhart, *Costs*, 38 YALE L.J. 849 (1929).
12. ALASKA STAT. ANN. §9.60.010 (1962) and NEV. REV. STAT. §18.010 (1963).
13. In Georgia, for example, the expenses of litigation may be awarded "if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." GA. CODE ANN. §20-1404 (1965). For an overview of other state statutory provisions, see MCCORMICK, DAMAGES, §§62-70 (1935).
14. *See, e.g.*, Comment, *Use of Taxable Costs To Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1965).
15. Discussion hereafter is limited to federal courts as Title II provides that an aggrieved party may institute a civil action for an injunction or restraining order in a federal district court, unless the state or locality in which the violation occurs provides a remedy. 78 Stat. 244, 42 U.S.C. §2000-3 (a) - (c) (1964).
16. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

power was severely limited by a 1796 decision[17] which allowed award of fees only when "changed or modified by statute." Exceptional circumstances are still necessary to justify such an award.[18]

Today there are numerous federal statutes which "change" the 1796 rule. Usually of a regulatory nature, they fall into two broad categories:[19] (1) Those which are mandatory in terms, providing that attorney's fees "shall" be awarded to the party bringing suit if he is successful;[20] and (2) Those which, like Title II, are discretionary in terms providing that the court "may" grant counsel fees to the prevailing party whether that party be plaintiff or defendant.[21]

The copyright statute[22] is closely analogous in language and construction[23] to the Title II provision and suggests under what circumstances the courts can be expected to disallow the award of fees in Title II cases. While the purpose of the copyright provision is as much to penalize the losing party as to compensate the prevailing party,[24] it has been held that the prevailing party is not entitled to counsel fees as a matter of right.[25] Rather the award of fees is discretionary with a trial court[26] or an appellate court,[27] and only when there has been an abuse of that discretion will a grant or denial of fees be reversed.[28] Counsel fees to a successful plaintiff have been

17. Aracambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). This rule was said to be "a deliberate departure from the English practice." Conte v. Flota Mercante Del Estado, 277 F.2d 664, 672 (2d Cir. 1960).
18. These exceptions, in addition to statutes, include contractual provisions between the parties, "fund" cases, rules of court, and, where an unfounded action or defense is maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." *See* 6 MOORE'S FEDERAL PRACTICE, 1349-53 (1966 ed.).
19 Bell v. Alamatt Motel, 243 F. Supp. 472, 474 (N.D. Miss. 1965).
20. *E.g.*, Fair Labor Standards Act, 52 Stat. 1069, 29 U.S.C. §216(b) (1965); anti-trust laws, 38 Stat. 731, 15 U.S.C. §15 (1963); Interstate Commerce Act (dealing with water carriers), 54 Stat. 40, 49 U.S.C. §908(b) (1963).
21. *E.g.*, (action for copyright infringement) 61 Stat. 652, 17 U.S.C. §116 (1952); (patent infringement actions) 66 Stat. 813, 35 U.S.C. §285 (1954); Securities Act, 48 Stat. 907, 15 U.S.C. §77k(e) (1963); Trust Indenture Act, 53 Stat. 1171, 15 U.S.C. §77000(e) (1963).
22. 61 Stat. 652, 17 U.S.C. §116 (1952), provides: "In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs."
23. It is "usually appropriate" to award counsel fees to a copyright proprietor in his successful suit to recover for infringement. Advertisers Exchange, Inc. v. Hinkley, 199 F.2d 313 (8th Cir. 1952).
24. Rose v. Bourne, Inc., 176 F. Supp. 605 (S.D.N.Y. 1959).
25. Amsterdam v. Triangle Publications, Inc., 189 F.2d 104 (3rd Cir. 1951); Buck v. Bilkie, 63 F.2d 447 (9th Cir. 1933); Key West Hand Print Fabrics, Inc. v. Serbin, Inc., 269 F. Supp. 605 (S.D. Fla. 1965).
26. Norbay Music, Inc. v. King Records, Inc., 290 F.2d 617 (2d Cir. 1961); Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957); Toksvig v. Bruce Pub. Co., 181 F.2d 664 (7th Cir. 1950); Taylor Instrument Co. v. Fawley-Brost Co., 139 F.2d 98 (7th Cir. 1943); Rose v. Bourne, Inc., 176 F. Supp. 605 (S.D.N.Y. 1959).
27. Boucher v. Du Boyes, Inc., 253 F.2d 948 (2nd Cir. 1958); Alexander v. Irving Trust Co., 228 F.2d 221 (2nd Cir. 1955); Edward B. Marks Music Corp. v. Continental Record Co., 222 F.2d 488 (2nd Cir. 1955); April Productions, Inc. v. Strand Enterprises, Inc., 221 F.2d 292 (2nd Cir. 1955); Overman v. Loesser, 205 F.2d 521 (9th Cir. 1953); F. W. Woolworth Co. v. Contemporary Arts, Inc., 193 F.2d 162 (1st Cir. 1951).
28. Amsterdam v. Triangle Publications, Inc., 189 F.2d 104 (3rd Cir. 1951); Official Aviation Guide Co. v. American Aviation Associates, 162 F.2d 541 (7th Cir. 1947).

denied where the defendant acted under an honest although mistaken view of his rights,[29] where he immediately ceased the infringement upon receiving a notice from the plaintiff,[30] where the questions presented to the court were close or novel,[31] where the award of counsel fees would be burdensome to the defendant,[32] or where the plaintiff could well afford to pay his own fees.[33] A successful defendant has been allowed to recover counsel fees if the plaintiff did not bring the suit in good faith[34] or, having brought the suit, unduly prolonged it.[35]

In determining what are "reasonable" attorney's fees in copyright suits the courts look to the same factors considered under other federal statutes providing for the award of fees. These factors, which can be expected to control under the Title II provision, include the amount of work necessary and the amount done, the skill used, the result obtained, the interest involved, the time necessarily spent, and the skill, professional standing and reputation of the attorney.[36]

While it may be argued that awarding reasonable attorney's fees to the prevailing party is contrary to our democratic ideas of justice,[37] this argument appears untenable in reference to suits brought under Title II. Congress has made discrimination in public accommodation facilities unlawful.[38] Therefore in bringing litigation, plaintiffs do so not for their own benefit alone, but also for that of the public.[39] They act as "private attorneys general,"[40] in effect enforcing the law, a task normally borne by the state.

In looking toward the effects of the decision, it can be expected, as suggested by the court, that individuals injured by racial discrimination will be encouraged to seek judicial relief,[41] and this will probably apply most

29. Gross v. Van Dyk Gravure Co., 230 F.2d 412 (2nd Cir. 1916); Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954).
30. Buck v. Bilkie, 63 F.2d 447 (9th Cir. 1933).
31. Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541 (2nd Cir. 1959); Davis v. E. I. DuPont de Nemours & Co., 257 F. Supp. 729 (S.D.N.Y. 1966); Loew's, Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165 (S.D. Cal. 1955).
32. Local Trademarks, Inc. v. Grantham, 166 F. Supp. 494 (D. Neb. 1957).
33. Lindsay & Brewster, Inc. v. Verstein, 21 F. Supp. 264 (S.D. Me. 1937).
34. Cloth v. Hyman, 146 F. Supp. 185 (S.D.N.Y. 1956).
35. Lampert v. Hollis Music, Inc., 138 F. Supp. 505 (E.D.N.Y. 1956).
36. Lewys v. O'Neill, 49 F.2d 603 (S.D.N.Y. 1931); M. Witmark & Sons v. Calloway, 22 F.2d 412 (E.D. Tenn. 1927); Key West Hand Print Fabrics, Inc. v. Serbin, Inc., 269 F. Supp. 605 (S.D. Fla. 1965). For a full discussion of the awarding of reasonable attorney's fees under other federal statutes, see Annot., 8 L. Ed.2d 88 (1963). *See also* Comment, *The Nature of "A Reasonable Attorney's Fee" In Private Antitrust Litigation*, 1966 WASH. U.L.Q. 102 (1966).
37. "[E]very man has an inalienable right to go to law. Longstanding apathy toward reforming the ancient statutes allowing nominal sums as costs suggests that American sentiment does not conform to the English premise that the winning party should be reimbursed in full for the necessary expense of his suit." Comment. *Distribution of Legal Expense among Litigants*, 49 YALE L.J. 699, 703 (1940).
38. 78 Stat. 243, 42 U.S.C. §2000a (1964).
39. Newman v. Piggie Park Enterprises, Inc., 36 U.S.L.W. 4243 (U.S. Mar. 18, 1968).
40. *Id. See* Comment, *Private Attorneys-General. Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574 (1949).
41. Newman v. Piggie Park Enterprises, Inc., 36 U.S.L.W. 4243 (U.S. Mar. 18, 1968).

strongly in regard to necessitous litigants.[42] Defendants with unmeritorious or questionable defenses will be encouraged to desegregate their facilities rather than run the risk of paying a sizable attorney's fee.[43] Moreover, it may be that attorneys heretofore reluctant to take a Title II case will, for possible pecuniary gain, be so encouraged.[44] This may also apply to attorneys wary of taking an "unpopular cause,"[45] a matter of expressed concern of the court.[46] Further, awarding of attorney's fees, particularly to the prevailing plaintiff, will be fairer to those with some financial means[47] who do not receive assistance from the United States Attorney General.[48] Plaintiffs will be punished for bringing unmeritorious claims.[49] Appeals and delays on strictly technical grounds will likely be curtailed,[50] perhaps indirectly alleviating the critically congested calendar of the Fifth Circuit.[51] Most important, of course, the decision should encourage owners of public accommodations to comply with Title II, preventing members of minority groups from totally rejecting the law as a means of enforcing their rights.

JOANNE W. CLICK

42. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792 (1966).
43. Experience of the English practice has been to discourage unmeritorious defenses. Goodhart, *Costs,* 38 YALE L.J. 849 (1929).
44. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792 (1966).
45. Pollitt, *Counsel for the Unpopular Cause: the "Hazard of Being Undone,"* 43 N. CAR. L. REV. 9 (1964).
46. "[T]he militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community . . . ." But there is "an apparent dearth of lawyers who are willing to undertake such litigation." NAACP v. Button, 371 U.S. 415, 435, 443 (1963).
47. 78 Stat. 244, 42 U.S.C. §2000a-3 (a) (1964) provides: "[I]n such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security."
48. 78 Stat. 244, 42 U.S.C. §2000a-3 (a) (1964) permits intervention by the United States Attorney General in privately initiated Title II suits "of general importance."
49. Newman v. Piggie Park Enterprises, Inc., 36 U.S.L.W. 4243 (U.S. Mar., 18, 1968).
50. This, again, has been the experience under the English system. Goodhart, *Costs,* 38 YALE L.J. 849 (1929).
51. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration,* 42 TEX. L. REV. 949 (1964).