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Gary A. Rosen, *Unfair to Genius: The Strange and Litigious Career of Ira B. Arnstein*, Oxford University Press, 2012, 307+ xv pages

By [Daniel Kegan](#)

Arnstein v. Porter, [154 F2d 464](#), 68 USPQ 288 (2d Cir 1946) is still considered a seminal case defining copyright infringement, as well as denying summary judgment when a witness's credibility may be determinative. Gary Rosen's biography of copyright and perennial plaintiff Ira B Arnstein presents the perspectives of panel judges Leonard Hand, Jerome Frank, and Charles Clark as they wrestled with the right to summary judgment for a poor plaintiff's case (impoverished plaintiff and his case apparently unlikely to prevail). (Cf. Richard Posner, *How Judges Think*, 2010).

But the book is much more: Tin Pan Alley, sheet music pluggers, Cantor Josef Rosenblatt, tune detective Sigmund Spaeth, the 1914 birth of the American Society of Composers, Authors and Publishers, ASCAP's antitrust issues, the 1939 birth of Broadcast Music, Inc, litigation procedure before and after the 1938 Federal Rules of Civil Procedure (merging law and equity procedures), and a reminder of law and life in early 20th Century.

In the nineteenth century federal circuit courts heard both appeals from inferior district courts and heard original trials over certain causes of action including copyright matters. Supreme Court justices "rode circuit," sitting twice yearly in each district within an assigned circuit. November 1845 Chief Justice Roger Taney heard *Reed v. Carusi*, 20 F Cas 431 (CC Md 1845, #11,642) concerning "The Old Arm Chair." Plaintiff claimed Defendant copied, Defendant claimed his version was based on his own earlier work "New England." Jury verdict for plaintiff, \$100 for Plaintiff and \$100 for the government. Carusi sought pardon from President Polk, who forgave the damages owed the government, citing "the trifling value of the music, and the inconsiderable injury, if any, inflicted on Reed."

Until the 1890s, music publishers in the US depended on religious works, instructional materials, and reprints of European music. Foreign works were not then protected by copyright in the US. Before radio, television, and the Internet, the main form of home entertainment was music making—singing and player pianos. The main music revenue source was sale of sheet music, which was promoted by "pluggers" having minstrel shows, vaudeville, burlesque, revues, and other variety shows insert songs into the performances. Price fixing, payola, and group boycotts were common.

In the 1920s phonographs and radio were supplanting pianos for home music, and movies were taking revenue from live

musical entertainment. The 1909 Copyright Act expanded musical composition rights to include “mechanical” reproductions, nullifying the Supreme Court decision that copyright only covered tangible reproduction that could be “seen and read” by humans, not player piano rolls (*White-Smith Music Publishing Co v. Apollo Co*, [209 US 1](#), 1908).

The 1897 Copyright Act granted a right of public performance for profit, but it was rarely enforced, partly due to the logistic difficulties of monitoring the many “ephemeral, fleeting, and fugitive” performances. *Herbert v. Shanley Co* ([242 US 591](#), 1917) held the public performance right extended to incidental use of music in restaurants and hotels, more than only where there was an admission charge to hear music.

What Baron Münchhausen was to mendacity, Ira B. Arnstein was to querulousness. Arnstein’s tragedy was that he sought artistic validation in a forum that could never deliver it. Courts are designed to award compensation from harm, no recognition and honors for achievement. His litigation mania doomed him to a life of personal and professional isolation, and a level of poverty more abject than that of the starving artist he was always meant to be.

Ira Arnstein was born in southwest Czarist Ukraine, performed in Madame Lineff’s Russian Peasant Choir as a boy soprano at the 1893 World’s Columbian Exposition in Chicago, and was a musical prodigy. He composed some musical works, and thereafter found similarities between others’ popular tunes and his own works.

In 1912 Arnstein prompted SD NY District Attorney Charles H Tuttle to indict Nathaniel Shikret for criminal copyright infringement by his “Lady Devine” of Arnstein’s “Light My Life with Love.” Tuttle moved on to challenge Governor Roosevelt in the 1930 election, and successor District Attorney George Medale dropped the case.

Other Arnstein losses, detailed by Rosen, include:

- *Arnstein v. Shilkret*, SD NY 1933 (unpublished);
- *Arnstein v. Edward B Marks Music Corp*, [82 F2d 275](#) (2d Cir 1936);
- *Arnstein v. ASCAP (MultiSuit)*, [29 FSupp 388](#) (SD NY 1939);
- *Arnstein v. Berlin*, (NYSupCt 7758, 1928);
- *Arnstein v. BMI*, [137 F2d 410](#) (2d Cir 1943);
- *Arnstein v. Porter*, SD NY 29-754; 2d Cir 169, 1945; 2d Cir 20386; SD NY 91-169), [154 F2d 464](#) (2d Cir 1946);
- *Arnstein v. Twentieth-Century Fox*, [52 FSupp 114](#) (SD NY 1943);
- *Arnstein v. Crestview Music Corp*, (NYSupCt 1948-16737);
- *Arnstein v. Warner Brothers Pictures*, (SD NY9-49).

Several of plaintiff and defendant’s tunes are available at Charles Cronin’s webpages, the UCLA Music Copyright Infringement Resource, <mcir.usc.edu>, together with commentary and court opinion.

There is no doubt that he was delusional and more than a little paranoid. but that is hardly a full or satisfactory diagnosis. Most folks who think they are being persecuted don’t spend thirty years of their life fighting in court over it. A small body of psychiatric literature discusses a behavior disorder—“morbid querulousness”—

characterized by the pursuit of personal vindication “in a manner seriously damaging to the individual’s economic, social, and personal interests, and disruptive to the functioning of the courts.”

Technology develops, society changes, and the law tries to catch up¹ (Benjamin Cardozo, *The Growth of the Law*, 1924). Ira Arnstein’s persistent copyright complaints gave the courts the specific cases and controversies they constitutionally needed to develop the law of musical copyright infringement (Con. Art III, Sec 2, Clause 1). While Arnstein’s sad story illustrates copyright law, Rosen’s detailed history also illuminates the music industry and how its components utilized litigation, lobbying, legislation, and public relations seeking to define “the public interest” while enriching their own sector. ■

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1. *“It is the beginning of a new century, and the music industry is facing a crisis. New technology and innovative business practices are challenging the copyright principles that have underpinned the industry for as long as anyone can remember. Taking advantage of a revolutionary process that allows for exact copying, ‘pirates’ are replicating songs at a tremendous rate —on the order of a million copies a year. The public sees nothing wrong in doing business with them.”* (Adrian Johns, *Pop Music Pirate Hunters*, 131 *Daedalus* 67, Spring 2002. Early twentieth century new technology of lithography encouraged sheet music copyright pirates, parallel to Internet, Napster, and peer sharing a century later.

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