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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 15-375, Supap Kirtsaeng v.
5 John Wiley & Sons.

6 Mr. Rosenkranz.

7 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

8 ON BEHALF OF THE PETITIONER

9 MR. ROSENKRANZ: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 When Congress modified the American Rule in
12 the Copyright Act, it was not just trying to punish
13 those who took unreasonable positions. It wanted to
14 encourage parties to advance important principles even
15 where the other side's arguments are good; indeed, I
16 would say, especially where the other side's arguments
17 are good.

18 When a defendant is trying to decide whether
19 to fight for a principle, the availability of attorneys'
20 fees can make all the difference in that decision, and
21 in turn can make all the difference in whether the
22 public's rights are vindicated.

23 The Second Circuit's standard flouts. The
24 plain language of the statute undermines Congress's goal
25 and is consistent with this Court's opinion in Fogerty.

1 It does nothing to encourage a defendant who has a good
2 defense but is facing off against a powerful adversary
3 armed with a reasonable position. That encouragement
4 has not happened once in the last 15 years. That's not
5 once in 187 cases decide -- decided under the Second
6 Circuit's Matthew Bender rubric, and will never happen
7 anywhere outside the Second Circuit.

8 JUSTICE GINSBURG: Mr. Rosenkranz, if
9 Kirtsaeng had lost this case -- if he had lost this
10 case, should fees have been awarded to Wiley, given the
11 significance of this decision? I mean, it's an
12 important decision. It needs both sides to be aired
13 before the Court. So suppose he had lost and Wiley won,
14 would Wiley be entitled to attorneys' fees?

15 MR. ROSENKRANZ: Wiley would have an
16 argument, Your Honor, certainly on one of the factors
17 that we have suggested, which is it would say we won an
18 important case. It didn't win it against the --

19 JUSTICE SOTOMAYOR: It would have had more
20 than that. It would have had circuit precedent. It
21 could have been woefully infringing, correct?

22 MR. ROSENKRANZ: Not --

23 JUSTICE SOTOMAYOR: If I were going to bet,
24 I would say yes to that question. Wouldn't you?

25 MR. ROSENKRANZ: I'm sorry. Our client

1 would have been -- was already found to have woefully
2 infringed.

3 JUSTICE SOTOMAYOR: Right.

4 MR. ROSENKRANZ: So our client had a lot
5 already weighing against him.

6 But just to get back to finish the answer to
7 Justice Ginsburg's question, but there would have been
8 other factors. The Court would have -- the district
9 court would have evaluated what the incentives for both
10 sides were. So Wiley would have had an enormous
11 economic incentive to advance its position. Kirtsaeng
12 would have had much less of an incentive to do anything
13 other than to cave.

14 JUSTICE GINSBURG: Why? It was a lucrative
15 business he was engaged in.

16 MR. ROSENKRANZ: Your Honor, he was a
17 student who had this side business who was making just a
18 few dollars per book. I mean, it was a -- it was a
19 large volume, but the --

20 JUSTICE BREYER: Several hundred thousand.

21 MR. ROSENKRANZ: Several hundred thousand
22 dollars in revenues, Your Honor, but not in profit. And
23 as to Wiley -- as to the books of Wiley that he sold, it
24 was \$37,000, Your Honors, for which he was hit with a
25 \$600,000 judgment, which also would have been considered

1 by the district court. It would have thought -- it
2 would have asked itself: Is this fair?

3 But the problem with the Second Circuit's
4 position is that it prejudices in every case there is
5 going to be substantial weight on the reasonableness.

6 JUSTICE KAGAN: Mr. Rosenkranz, just to
7 continue on with what Justice Ginsburg was asking you.
8 As an ex-post matter, you have a great David versus
9 Goliath story to tell. But as an ex-ante matter, I
10 wonder if the rule that you suggest is not going to harm
11 the Kirtsaengs of the world.

12 And you know, you might take these couple
13 things into account: That the Kirtsaengs of the world
14 will probably think that the -- that they are spending
15 less on their lawyers than the John Wileys of the world.
16 And that they're also more risk averse, because they
17 have less money. So, you know, given those two factors,
18 doesn't your rule, actually as an ex-ante matter, cut
19 against the Kirtsaengs of the world?

20 MR. ROSENKRANZ: Your Honor, the answer is
21 no, and for this reason. The Kirtsaengs of the world,
22 when they are facing off against a John Wiley, the first
23 questions on their minds before they ever think about
24 attorneys' fees being awarded against them is how am I
25 going to pay for this? And critical answer to that

1 question will be in many circumstances, there's the
2 availability of attorneys' fees --

3 JUSTICE KAGAN: Well, but that's only one
4 side of the question. I mean, what you're doing is
5 you're upping the stakes generally so that Kirtsaeng is
6 going to know, well, it's true I might be able to get my
7 fees back; but at the same time, I run the risk of
8 having to pay John Wiley's fees. And John Wiley, as I
9 said, is probably going to be paying its lawyers more
10 than I'm going to be paying mine. And I'm very
11 risk-sensitive as a Kirtsaeng type. So that's a huge
12 deal for me to increase my stakes that much.

13 MR. ROSENKRANZ: Your Honor, understood.
14 That will be part of the calculus.

15 Now, in the Ninth Circuit where the test
16 that we are suggesting predominates, and in every
17 circuit that doesn't accept the Second Circuit's
18 position, which is to say every other circuit, there is
19 not a dearth of copyright litigation. People in
20 Kirtsaeng's position are fighting ahead. And why is
21 that? It's because district courts have been entrusted
22 with making reasonable judgments and asking the
23 question: If a defendant is in exactly this position in
24 the next case, what are the incentives that will
25 appropriately incentivize both the plaintiff to push on

1 and the defendant.

2 CHIEF JUSTICE ROBERTS: I thought you
3 told -- I thought you told us that there haven't been
4 any awards under the -- maybe I misunderstood -- the
5 Second Circuit test in 15 years. Or what was the point
6 you were making at the beginning, 187 cases, 15 years?

7 MR. ROSENKRANZ: 178 cases, Your Honor, that
8 were decided under the Second Circuit's Matthew Bender
9 standard, not once did any defendant -- defendant, that
10 is, ever prevail in receiving attorneys' fees except
11 where the plaintiff --

12 CHIEF JUSTICE ROBERTS: Right.

13 MR. ROSENKRANZ: -- has been -- has engaged
14 in unreasonable --

15 CHIEF JUSTICE ROBERTS: Unreasonable.

16 MR. ROSENKRANZ: -- conduct.

17 CHIEF JUSTICE ROBERTS: But I thought your
18 point -- your point now is that the defendants in
19 copyright cases still show up.

20 MR. ROSENKRANZ: No, Your Honor. I'm
21 talking about the rest of the world. I'm talking about
22 the Ninth Circuit.

23 The Court: Okay.

24 MR. ROSENKRANZ: So in the Ninth Circuit,
25 plaintiffs show up, starving artists show up, and

1 starving artists defend.

2 CHIEF JUSTICE ROBERTS: And they don't in
3 the Second Circuit?

4 MR. ROSENKRANZ: Then the truth is there are
5 very few starving artists in any copyright litigation.
6 So, yes, they may show up, but they won't be able to pay
7 for their own lawyer. And so --

8 JUSTICE ALITO: Do you suggest that one of
9 the solutions to that problem is for the district court
10 to take into account the relative financial resources of
11 the parties; is that correct?

12 MR. ROSENKRANZ: Yes, Your Honor, as -- as
13 one of the factors. So what the district court should
14 do in every case, in addition to all of the footnote 19
15 factors, is to ask itself: If a -- if a party in the
16 same position reads the precedents or their lawyers read
17 the precedents, what lessons will they glean from them?
18 And one of the things a district court should be
19 analyzing in every case looking backwards is: What
20 would have been the right economic incentives for this
21 plaintiff and this defendant?

22 CHIEF JUSTICE ROBERTS: Is there anything --

23 JUSTICE ALITO: Have we ever said in a --
24 have we ever said that the availability of attorneys'
25 fees is dependent on the financial resources of the

1 party?

2 MR. ROSENKRANZ: Your Honor, it's -- it's
3 certainly -- it has long been a part of the standard
4 that courts have consistently applied in attorneys' fees
5 cases. This Court said in Fogerty you've got to
6 evaluate the incentives, and the incentives run both
7 ways.

8 A John Wiley did not need attorneys' fees in
9 order to proceed, and was not worried about attorneys'
10 fees, in order to protect its interest in a
11 \$1.8-billion-a-year business for which, on this
12 particular issue, it stood to gain hundreds of millions
13 of dollars. It wasn't worried about whether it would
14 have to pay Sam Israel's \$125,000 in fees.

15 A Kirtsaeng, on the other hand, would have
16 been worried about that under -- under any standard.
17 And in a standard where he stands to gain attorneys'
18 fees for defending, that would have been an important
19 incentive to -- to encourage him to soldier on --

20 JUSTICE GINSBURG: Mr. Rosenkranz --

21 MR. ROSENKRANZ: -- under --

22 JUSTICE GINSBURG: -- it does sound like, as
23 Justice Kagan put it, that your rule is if David faces
24 Goliath and David wins, David gets fees no matter how
25 reasonable Goliath's position was. That's what it seems

1 to come down to.

2 MR. ROSENKRANZ: Your Honor, it doesn't. On
3 that factor of -- I mean, there are easily six factors a
4 court should be considering. On that factor, a David is
5 better positioned than a Goliath to make the argument
6 that he should get fees. But there's a lot more to it.
7 There's, what else does the defendant stand to gain?
8 What does the plaintiff stand to gain? What were the
9 motivations of the parties?

10 One of the factors that the district court
11 said was completely irrelevant was, what was the
12 significance of the win to the public? So all of --

13 JUSTICE KAGAN: So one thing that concerns
14 me about a test like that, Mr. Rosenkranz, is it's very
15 hard for people to make judgments ex ante and to figure
16 out what their chances are. It's very hard to predict.
17 And if you're concerned about the Kirtsaengs of the
18 world, the Davids in these kinds of suits, what you
19 might want is a pretty clear safe harbor.

20 In other words, if I'm taking a reasonable
21 position, I'm not going to be stuck with the other
22 side's fees, which are likely to dwarf my own. And
23 that's something that somebody can predict, as opposed
24 to this 22-factor test, which it's like I just don't
25 know how this is going to come out, and I might well be

1 stuck with John Wiley's fees, depending on what judge I
2 draw and, oh, a number of other things that I don't have
3 any control over.

4 MR. ROSENKRANZ: Understood, Your Honor. So
5 what the -- what the Congress did was to select a
6 standard based upon the totality of the circumstances.
7 It affirmatively rejected the standard that sat there in
8 the Patent Act and in the Lanham Act that was based on
9 exactly the clear line that you've described, Your
10 Honor, exceptional circumstances.

11 To this day, Wiley has not explained how its
12 test is any different from the one that Congress
13 adopted. It's exactly what Justice Kennedy --

14 JUSTICE BREYER: What is -- what about -- I
15 suppose I start this thinking district judges do have a
16 job. In part of that job, they do things that we would
17 do worse, not better. And one of the things that they
18 know is the case in front of them. And what we said in
19 the -- our case was: It's up to them as long as they
20 act reasonably. So you started with a factor, which I
21 guess they could have taken into account. Nothing in
22 our law prohibits it. In fact, it encourages it.

23 So what's the problem? What is it? Are you
24 saying we should, in fact, change what we said in
25 Fogerty? In my own mind, I don't know how to do it.

1 MR. ROSENKRANZ: No, Your Honor. I --

2 JUSTICE BREYER: All right. So you don't
3 want to believe that. Okay. So you want case-specific
4 correction of what you believe is a failure to apply to
5 realize what Fogerty meant. Is that the idea?

6 MR. ROSENKRANZ: Yes, Your Honor. So let me
7 be more precise.

8 I've already said one of the things that is
9 wrong with the Matthew Bender standard, that it is
10 atextual.

11 A second thing, directly to the question on
12 Fogerty, is that Fogerty says, quote, "defendants who
13 seek to advance meritorious copyright defenses should be
14 encouraged to litigate them. There" is nothing in
15 Matthew Bender that encourages a defender to litigate.

16 JUSTICE BREYER: No, but you want us
17 case-specific or you want us to say something? I mean,
18 one -- one whole -- one result would be the Second
19 Circuit seems not to have taken account of what we said,
20 which is that all considerations -- all considerations
21 that are consistent with the purposes of the Copyright
22 Act can be relevant. It depends on the case, period.

23 MR. ROSENKRANZ: Absolutely, Your Honor.
24 Although, I -- I would add a little bit more. I --

25 JUSTICE BREYER: You wanted this other

1 thing, which I don't know how to do. The other thing is
2 whether you really advance the law. I mean, maybe at
3 the time, Marbury v. Madison was viewed by many people
4 as being just about an appointment, and it didn't really
5 advance the law.

6 MR. ROSENKRANZ: Your Honor --

7 JUSTICE BREYER: Maybe others thought it
8 did. I don't know. How do we know which advances the
9 law?

10 MR. ROSENKRANZ: Your Honor, district courts
11 know what cases are advancing the law and what cases are
12 more specific --

13 JUSTICE SOTOMAYOR: Mr. Rosenkranz, I -- I
14 think that Justice Breyer is getting to something.

15 Put on a hat that doesn't want to win
16 outright. Okay? Put on a hat where we're trying to
17 announce a rule. And I'm sympathetic to your argument
18 that the Second Circuit rule obviously stacks everything
19 in favor of a winning plaintiff, publish a winning
20 copyright holder because 80 percent are now winning, if
21 not more. In the Second Circuit, it's almost 89
22 percent. It means, when you're talking about the
23 reasonableness of a -- a winning party's position, in
24 most cases the copyright holder has a reasonable
25 position. So -- and the defendant, by losing, tends to

1 have an unreasonable position.

2 I looked at what happened after Fogerty, and
3 the -- after Fogerty and Fantasy, that's where the Ninth
4 Circuit tests began. And the Court there said there's
5 different incentives for plaintiffs and defendants. You
6 can't make the reasonableness of the position the
7 centerpiece for prevailing defendants, or otherwise,
8 they're never going to get fees, or hardly ever.

9 So going back to Justice Breyer's question,
10 how do we articulate what the Second Circuit is doing
11 wrong without necessarily endorsing all of the factors
12 of the Ninth Circuit?

13 MR. ROSENKRANZ: Understood, Your Honor.
14 The simple answer is: What the Second Circuit did was
15 to pick one factor out of a jumble of possible factors
16 and say, this will be the one that gets substantial
17 weight. And what the district courts do with that is
18 then hold up that one factor and ask, is there anything
19 that outweighs that factor when, in the context of a
20 particular case, that might not be the most important
21 factor?

22 But I see the Court wrestling with --

23 JUSTICE SOTOMAYOR: So the test would be,
24 it's okay to have it one among others, but not a
25 presumption that says that's always going to entitle you

1 to defend against an award or to win an award.

2 MR. ROSENKRANZ: Agreed. And what Matthew
3 Bender does is essentially to announce a presumption.

4 But I see the Court wrestling with -- with
5 how to articulate a test. I can articulate the test in
6 four sentences in a way the district courts can
7 administer.

8 So our rule is that a district court should
9 consider the totality of the circumstances, including
10 all of the Fogerty factors, and ask itself, would a fee
11 award here advance the purposes of the Copyright Act?
12 Is this the sort of case in which, if the same scenario
13 were to present itself again, the availability of fees
14 would create the right litigation centives --
15 incentives, that is, for both parties with the right
16 result for the public?

17 The district court should -- should consider
18 each of the Fogerty factors and do it through the lens
19 of the purposes of the Copyright Act. It should also
20 consider the significance and nature of the win and the
21 litigation incentives on both sides of the deed,
22 including any disparity in resources.

23 That is -- if -- if this Court were to say
24 those four sentences, district courts would have a lot
25 of guidance. And if this Court were to say, Fogerty,

1 too, actually does it right -- it didn't just consider
2 litigation incentives on one side. It considered the
3 litigation incentives for the plaintiffs.

4 JUSTICE KENNEDY: But it seems to me that
5 you -- a -- a party can advance the law and a -- a case
6 can advance the law by insisting on principled,
7 consistent application of settled principles. That's an
8 advancing of the law. I -- I can see the excitement
9 about granting fees if there's some -- some
10 breakthrough, something we've never thought about.

11 On the other hand, there's something that's
12 commendable about applying the law consistently,
13 routinely in regular cases. That advances the law.

14 MR. ROSENKRANZ: Of -- of course, it does.
15 And -- and in the right case, that can support a fees
16 award. For example, the only way to define fair use is
17 case-by-case, accretively where a common law develops.
18 Someone who advances a fair use defense and wins ought
19 to be at least within range of a copyright --

20 JUSTICE GINSBURG: Mr. Rosenkranz, can we go
21 back to your test now? Would you say we'll make it
22 something district courts can understand and readily
23 apply?

24 So take my question. Kirtsaeng loses and
25 Wiley win -- wins. Apply your four-sentence test, and

1 tell me whether Wiley gets fees.

2 MR. ROSENKRANZ: The answer will depend on a
3 district court's specific balancing, but I'll do the
4 balance that I would do -- that I would argue to the
5 district court.

6 I would say, well, first, Wiley did win
7 something really big here. Although it wasn't against
8 huge headwinds, the precedent was in its favor. Good
9 for Wiley. It gets credit for that. But Wiley had
10 every incentive to protect hundreds of millions of
11 dollars. It didn't need attorneys' fees in order to
12 incentivize it.

13 Kirtsaeng also did something important. It
14 stood up -- he stood up. He had a reasonable position.
15 That counts. It's not dispositive, but it counts. And
16 what good would it have -- would it have future
17 litigants -- would it do for future litigants to hit
18 this poor guy who is a student with attorneys' fees when
19 he's already got a \$600,000 judgment against him?

20 That would be my advocacy. I could see a
21 district court adopting it. I could see a district
22 court going the other way. But a common law will
23 emerge, as it has in the Ninth Circuit. Impecunious
24 defendants are not shying away from fighting a big
25 copyright Goliath if they can afford the lawsuit that is

1 to pay their own attorneys' fees on this rampant
2 copyright litigation in the Ninth Circuit, and in the
3 other circuits that don't start with a presumption
4 against attorneys' fees if the other side was
5 reasonable.

6 JUSTICE KAGAN: Can I -- can I ask,
7 Mr. Rosenkranz, one of the things that confused me about
8 this case and about, actually, both sides' arguments,
9 I -- I don't really understand why it is that the fees
10 are awarded in such a high percentage of the cases, both
11 in the Second Circuit and elsewhere. I mean, the Second
12 Circuit says that its -- the first-among-equal factors
13 is the reasonableness, but it awards fees in more -- way
14 more than half the cases. Is it that so many of the
15 cases are utterly frivolous?

16 MR. ROSENKRANZ: So, Your Honor, the answer
17 has two parts: There is a different test for defendants
18 than for plaintiffs, notwithstanding what you read in
19 Matthew Bender. So the plaintiff --

20 JUSTICE KAGAN: Before -- before you talk to
21 me about the -- the way this might or might not be
22 pro-plaintiff or pro-defendant, just why are they all so
23 high?

24 MR. ROSENKRANZ: Well -- well, the numbers
25 are so high for plaintiffs because plaintiffs are

1 generally getting copyright fees, even if the other side
2 was perfectly reasonable, because there's a
3 blameworthiness element to it.

4 So this -- you know, this so-and-so
5 infringer should be smacked with a -- with attorneys'
6 fees. And by the way, there's often willfulness, as
7 there was in this case, because a legal defense is no
8 defense.

9 On the defendant's side -- and the Second
10 Circuit is certainly not more than half. It's around
11 half. And that's only where the other side has behaved
12 unreasonably, either in its litigation position, that
13 is, the validity of its claim, or in its litigation
14 position's sort of aggressive tactics.

15 Those are the only circumstances in 178
16 cases in which defendants have ever had copyright fees
17 awarded in their favor. And this is something that --
18 that we have yet to hear --

19 JUSTICE BREYER: Well, you know, it's -- I
20 have no idea why. I could speculate. One problem is
21 that a lot of college students think they should listen
22 to all the music they want and they don't pay any
23 copyright. That would be outrageous, right? That's --
24 I read that in the papers and other places as a problem.

25 MR. ROSENKRANZ: Sure --

1 JUSTICE BREYER: Maybe, from time to time,
2 the copyright owners feel that, you know, my employees
3 have to pay for gasoline at Exxon; why should Exxon's
4 employees take all my works for free?

5 MR. ROSENKRANZ: Sure, Your Honor. And
6 that's why --

7 JUSTICE BREYER: Okay. So we have no idea
8 why -- at least from these briefs, I have no idea why
9 the copyright numbers come out the way they do on fees;
10 therefore, I'm thinking, quite honestly, it's going to
11 vary from case to case. I understand appellate lawyers
12 love to create standards. I do not have that love at
13 this moment.

14 (Laughter.)

15 MR. ROSENKRANZ: Your Honor, I -- I -- I
16 understand the lack of love. If that's what the -- what
17 is motivating the Court, it should reject Matthew
18 Bender. That's --

19 JUSTICE BREYER: It might be you say we go
20 back and say have they taken what used to be an
21 all-factors test, and have they in fact said -- and then
22 we could all go home. We say -- we say what they've
23 done here is they've said we're never going to -- or
24 hardly ever going to take a favorable account of having
25 clarified the law. And in your view what we should say

1 is, well, don't say never. Don't lay down a standard.
2 There are too many different kinds of cases. Beware of
3 trying to -- is that -- that's what you want us to.
4 That's it.

5 MR. ROSENKRANZ: Yes. Yes. And I would
6 also encourage the Court to say when -- when a district
7 court is evaluating each factor, it should be thinking
8 to itself, what's the purpose --

9 JUSTICE BREYER: You have added a couple of
10 standards. Your first two sentences were fine. They
11 said roughly what -- what we've been talking about. And
12 then you had two later sentences which I began to think,
13 hey, that's going to be a little tough to apply.

14 MR. ROSENKRANZ: Your Honor, my later
15 sentences -- you're -- you are right, were two
16 sentences. One is: Think of the Fogerty factors in
17 Footnote 9 and do it through the lens of the purposes of
18 the Copyright Act. And the second is: By the way,
19 Fogerty was about more than footnote 19. It was about
20 incentivizing each side correctly. Don't forget about
21 that. So consider the incentives on both sides.

22 JUSTICE ALITO: The problem with that is
23 that different judges are going to have very different
24 views about what will further the purposes of the
25 Copyright Act. Don't you think both the Second Circuit

1 and the Ninth Circuit -- I'm sorry -- the Seventh
2 Circuit think that their rules are the rules that best
3 further the purposes of the Copyright Act?

4 MR. ROSENKRANZ: Yes, Your Honor. And
5 that's why both of them are wrong. I would love the
6 Court to adopt the Seventh Circuit's standard, but it
7 too prejudices -- in every case it says here's what will
8 further the purposes of the --

9 JUSTICE BREYER: The -- the footnote does
10 not say further the purposes of the Act. What the
11 footnote says is, Judge, when you award these fees, be
12 certain that you are faithful to the purposes of the
13 Act. And that's very different. It means don't do
14 something that's going to undermine the Act, as opposed
15 to sitting there and figuring out whether the basic
16 purpose of the Act is to what extent to encourage
17 authors at the expense of the readers, or the expense of
18 those people who do not want to undergo huge transaction
19 costs getting ahold of dead authors, all right?

20 So we have several different conflicting
21 purposes. You want to bring them in when you say
22 "further," and the court did not bring them in because
23 it said "are faithful to."

24 You don't have to answer that.

25 MR. ROSENKRANZ: No, your Honor. But my

1 answer is --

2 JUSTICE BREYER: Yes.

3 MR. ROSENKRANZ: -- very short. Yes, I
4 agree. I accept what I think is a friendly amendment to
5 my --

6 JUSTICE BREYER: Right.

7 MR. ROSENKRANZ: -- description of Fogerty.
8 Thank you Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Smith.

11 ORAL ARGUMENT OF PAUL M. SMITH

12 ON BEHALF OF THE RESPONDENT

13 MR. SMITH: Mr. Chief Justice, and may it
14 please the Court:

15 This is a case, I submit, where the lower
16 courts did everything right. As courts have been doing
17 in copyright cases for more than a century, the district
18 court focused first on the question of whether or not
19 the losing party, here Wiley, had -- had taken an
20 unreasonable litigation position on the law or on the
21 facts, and concluded that it obviously had not.

22 And then it looked at all the other
23 potentially relevant factors, including all of the
24 factors that had been suggested by Kirtsaeng's counsel,
25 and concluded that --

1 JUSTICE SOTOMAYOR: Except there is --
 2 Mr. Smith, I'm trying by what's happening in the Second
 3 Circuit. I've actually, with the help of the library,
 4 looked at cases in the Second and the Ninth Circuit for
 5 the last three years, and this is what I'm coming out
 6 with: In the Ninth Circuit, prevailing defendants have
 7 received fees 20 times and lost 17 times, about 50
 8 percent. In the Second circuit, prevailing defendants
 9 have received fees three times and lost 16 times.
 10 That's a huge difference.

11 If I look at what's happening with
 12 prevailing plaintiffs, in the Second Circuit, prevailing
 13 plaintiffs awarded fees 23 times, and prevailing
 14 plaintiffs denied fees seven. In the Ninth, prevailing
 15 plaintiffs got it 46 times and denied fees twice.

16 Prevailing plaintiffs are winning everywhere
 17 in extraordinary numbers. And in both circuits,
 18 prevailing defendants are not winning hardly at all. At
 19 best, 50 percent in the Ninth Circuit.

20 So does it say something that somehow,
 21 prevailing -- that this presumption that the Second
 22 Circuit is giving is unfair to defendants and to the
 23 purposes of the copyright law?

24 MR. SMITH: No, your Honor. First of all, I
 25 would note that Mr. Kirtsaeng's own attorneys have

1 reported that if a -- a more complete study of the
2 Second Circuit record says that defendants are winning
3 them 50 percent of the time.

4 The --

5 CHIEF JUSTICE ROBERTS: Sorry. Five-oh, 50?

6 MR. SMITH: Yes, Your Honor. That's in
7 their reply brief.

8 JUSTICE SOTOMAYOR: But that was a study
9 from 2000, correct?

10 MR. SMITH: No, no, no. They did -- they
11 did their own study, and -- and they reported that in
12 the reply brief and said they would provide the data if
13 you want.

14 The 80 percent figure that they report for
15 plaintiffs in the Second Circuit includes, by the way, a
16 great number of default judgments where fees are both
17 very small and --

18 JUSTICE SOTOMAYOR: Having practiced in this
19 area, I know you're right.

20 MR. SMITH: So, you know, these statistics
21 can be thrown around, but it is not as if defendants in
22 general are not succeeding in getting attorneys' fees
23 when they're appropriate, but what you --

24 JUSTICE SOTOMAYOR: But -- but isn't there a
25 problem in having one factor outweigh all others? It's

1 much harder to start a -- with a presumption up here and
2 all the other factors have to tie against that one to
3 overcome it.

4 MR. SMITH: But it's the fact --

5 JUSTICE SOTOMAYOR: Why don't we just have
6 the Fogerty factors, which are it's one among many?

7 MR. SMITH: Your Honor, two -- two
8 responses. First of all, when people -- when judges are
9 given discretion to award fees, looking at whether the
10 losing party had a substantial case or not is something
11 that instinctively you arrive at. That's the -- the
12 standard you -- you enunciated in Octane for the patent.
13 It's the standard that you enunciated in Martin for the
14 removal statute. Of course that's what you give a lot
15 of primacy to in deciding whether, in your discretion as
16 judges, you're going to shift fees for -- alter the
17 American Rule or not. That's just natural. It -- it's
18 what courts have been doing under the Copyright Act
19 since 1909.

20 That is the -- the law that was reported to
21 Congress when they reenacted this -- this provision in
22 1976, in the Brown Study, in the register report.
23 Congress understood that it -- what the -- what -- the
24 way the rule works is that fees are being shifted when
25 one side or the other has an unreasonable litigation --

1 JUSTICE SOTOMAYOR: But since most
2 plaintiffs are not going to sue unless their position is
3 arguably, reasonably present, shouldn't we be looking at
4 how reasonable the defendant's position was?

5 MR. SMITH: You do when they -- when the
6 plaintiff wins.

7 JUSTICE SOTOMAYOR: When the defendant wins.

8 MR. SMITH: When the defendant wins, if you
9 have a rule that says we're going to shift fees against
10 reasonable plaintiffs, then you're going to have the
11 wrong incentives. When you have a case where both sides
12 have a reasonable position, what you're trying to do in
13 that case under Fogerty is incentivize both parties to
14 keep litigating so that the law can be clarified.

15 This -- this is a classic example here.
16 This is a case that was a complete coin flip because the
17 law was totally indeterminant. Nobody knew whether the
18 first-sale doctrine applied here or didn't apply here.
19 There was no law in the Second Circuit when the case was
20 filed. By the time the case gets to this Court, this
21 Court has already ruled 4-to-4 that the -- on the issue.
22 So nobody -- it was -- it was a coin flip.

23 And in that situation, the last thing you
24 want to do to the parties, if you're trying to get them
25 to keep litigating so that they -- the issue gets

1 clarified is tell them, oh, by the way, we're going to
2 raise the stakes. Whoever wins is going to get fees,
3 and whoever loses is going to have to pay double.
4 That's just not the way risk-averse, profit-maximizing
5 participants in litigation behave.

6 If you want -- you -- you suppress
7 litigation by imposing the British Rule presumptively in
8 this kind of case because people simply aren't going to
9 keep fighting. They're going to find a way to get out
10 of the case.

11 JUSTICE KENNEDY: As you understand the
12 Petitioner's position, do they take the argument you've
13 just made about the necessity for continuing the
14 litigation and then add a David and Goliath factor to
15 it? Is that your understanding of their position, or am
16 I --

17 MR. SMITH: My understanding of their
18 position -- and it is a little hard to nail down,
19 Your Honor; it seems to vary at times -- is from Pages
20 40 and 41 of the merits brief, the blue brief. And what
21 they say there is if the result of the litigation is to
22 clarify the law, then whichever party has the good
23 fortune of being the winner, wins the coin flip,
24 get's -- gets fees. That's what they say -- generally
25 you have to --

1 JUSTICE BREYER: He's departing from that.
2 He's departing from that.

3 MR. SMITH: Excuse me?

4 JUSTICE BREYER: He's departing from that,
5 at least.

6 So you say, just don't say never. And,
7 indeed, the Second Circuit did say never. It said a
8 court should not award attorneys' fees where the case is
9 novel or close because such a litigation clarifies the
10 boundaries of copyright law.

11 MR. SMITH: Certainly did not say never,
12 Your Honor. The rule in the Second Circuit is that
13 other factors can overrule that, and indeed, the court
14 has -- the Second Circuit has so said. They have --

15 JUSTICE BREYER: The way they wrote this
16 here, and they were quoting, it says, "As this Court has
17 reasonably explained." Am I in the right place? I'm in
18 Page 18a, 19a of the -- of the petition. Maybe I'm
19 reading the wrong petition; that's been known.

20 That's -- and what they do is they quote.
21 It says, "As this Court recently explained." And it
22 seems to me they underlined the word "not," so I may not
23 have read it properly. I -- I don't know.

24 MR. SMITH: But, Your Honor --

25 JUSTICE BREYER: Anyway, your position is it

1 shouldn't be never.

2 MR. SMITH: And that is the law --

3 JUSTICE BREYER: And maybe everybody agrees.

4 MR. SMITH: That is the law in the Second
5 Circuit. The -- the Viva Video case, the -- the
6 Zalewski case both cited --

7 JUSTICE KAGAN: Mr. Smith, when you have
8 a -- a system, which the Second Circuit does, of saying,
9 look, this is the first among equal factors, and you
10 need something, you know, pretty exceptional to outweigh
11 this factor, if I'm a district judge and I'm thinking,
12 you know, who likes to be overruled by the Second
13 Circuit, it does seem as though it sends a pretty strong
14 signal to district courts that this is the key factor
15 and that they are not -- you know, probably not in their
16 lifetimes going to see a case in which that factor is
17 outweighed.

18 MR. SMITH: The fact that -- that can
19 outweigh it, and has outweighed it, is litigation
20 misconduct. So you end up in the Second Circuit with a
21 rule very much like the rule that this Court enunciated
22 for -- for patent law, which is if the case is
23 unreasonable on either side or if there's been something
24 that has magnified the cost of litigation through
25 litigation abuse, those are situations in which courts

1 appropriately, in their discretion, should award fees.

2 But if we have two reasonable parties
3 litigating appropriately and we don't. They -- they
4 simply don't know who is going to win because the law is
5 unclear, we don't want to raise the stakes in that
6 situation because those are the people you want to keep
7 fighting.

8 And this case is a perfect illustration. At
9 the point where this case is going to go to this Court,
10 you've already divided 4-to-4. Nobody knows where
11 Justice Kagan is going to come out on the issue.
12 First -- Kirtsaeng has to decide whether to file that
13 cert petition. He knows at that point that he's going
14 to get free representation. But if you had Petitioner's
15 rule in effect, he would also be -- know that he had a
16 50 percent chance of losing in this Court and having to
17 pay all of John Wiley's attorney' fees.

18 CHIEF JUSTICE ROBERTS: You mentioned that
19 he's getting free representation. Do you -- you've
20 mentioned the fact that he was represented by pro bono
21 counsel. Is that a factor that the Court should take
22 into consideration?

23 MR. SMITH: I think it can affect the --
24 some of the other factors that are relevant under
25 Fogerty, in particular the means --

1 CHIEF JUSTICE ROBERTS: Well, it seems --

2 MR. SMITH: -- of compensation. You don't
3 need to compensate Mr. Kirtsaeng for representation that
4 he didn't pay for.

5 CHIEF JUSTICE ROBERTS: Well, it seems to me
6 that's quite an intrusion into the relationship between
7 the -- the party and -- and counsel. I mean, do you
8 look at it and say, oh, well, you have discovery on --
9 about whether -- what the relationship was between him
10 and his counsel --

11 MR. SMITH: I think it's --

12 CHIEF JUSTICE ROBERTS: -- with the counsel
13 giving a discount on fees and all that? I -- I'm not
14 sure that should be a pertinent consideration.

15 MR. SMITH: Perhaps not. It's -- it didn't
16 have any major impact on the outcome here. But it
17 certainly was something that the district court
18 mentioned. And, in fact, the Second Circuit kind of
19 disagreed with them on that in a -- in a footnote in
20 their opinion.

21 But the -- the main thing is that you don't
22 want to have a rule that says if you file that cert
23 petition, Mr. Kirtsaeng, you're going to be -- 50
24 percent chance you're going to have a big bill at the
25 end of it.

1 And even from the point of view of John
2 Wiley. Sure -- sure, it's a big company, and it's a
3 repeat player and everything, but look where they were.
4 Once Mr. Kirtsaeng files that cert petition, if
5 Petitioner's rule is in place, they know they have a 50
6 percent chance of losing in the Supreme Court and having
7 to pay not only all their lawyers' fees, but all
8 of Mr. Kirtsaeng --

9 CHIEF JUSTICE ROBERTS: I mean, are you
10 seriously suggesting it's a tough call for them whether
11 to oppose the cert petition or not?

12 MR. SMITH: Well, maybe not. But I think
13 it's important to look at the economic situation. They
14 had a \$600,000 judgment, and they would have known,
15 under his rule, they had a 50 percent of paying --

16 CHIEF JUSTICE ROBERTS: Well, what are --
17 what are the annual --

18 MR. SMITH: -- several million dollars in
19 fees.

20 CHIEF JUSTICE ROBERTS: What are the annual
21 revenues that you're --

22 MR. SMITH: Mr. Rosenkranz said 1.8 billion.
23 Maybe that's correct. I don't know, actually,
24 Your Honor. But it is -- it is certainly a substantial
25 publishing outfit, and it's a repeat player and had

1 incentives to litigate this case.

2 But I don't think you can do these things
3 sort of after the fact on -- based on each party's
4 particular incentives. You need a rule that says to
5 people, here's how we're going to decide these things so
6 you have predictability, so people can tell whether or
7 not this is likely to be --

8 JUSTICE SOTOMAYOR: The problem with your
9 situation is that you're looking at incentives. If I'm
10 Wiley, I'm looking at this and saying, there's a
11 90 percent chance -- 80 to 90 percent chance I'm going
12 to get fees, because willful infringers -- and that's
13 the judgment that was being defended below -- almost
14 always, the winning plaintiff gets fees.

15 If I'm a defendant, I'm Kirtsaeng, I know
16 that the probability is -- taking Mr. Rosenkranz's
17 numbers, are that maybe 50 percent of the prevailing
18 defendants gets fees. If without pro bono counsel, do
19 you think he would have continued?

20 MR. SMITH: I -- I assume he probably --

21 JUSTICE SOTOMAYOR: And would have gone into
22 debt for it? I -- I don't know the answer, but the --
23 the incentives are very, very different for a defendant
24 who's being asked to go on with the litigation because
25 the likelihood of them getting fees is so much smaller.

1 MR. SMITH: I think there was never any
2 significant likelihood of anybody getting fees under a
3 proper application of the Second Circuit's rule here
4 because, obviously, both sides had objectively
5 reasonable positions. And I just don't think that that
6 is something that would have happened in -- in this.

7 JUSTICE SOTOMAYOR: He got a willfulness
8 found below.

9 MR. SMITH: Well, but --

10 JUSTICE SOTOMAYOR: How do you get a
11 willfulness found in a situation where you know there's
12 a circuit --

13 MR. SMITH: But --

14 JUSTICE SOTOMAYOR: -- where there is a
15 chance of a split court, 4-to-4?

16 MR. SMITH: But the -- the conduct was --
17 was intentional, but the law was 50/50. There was --
18 was a complete coin flip. And -- and so it seems to me
19 that while he says, we don't want to pretermit
20 discretion here, the reality is you have to have some
21 structure to the decision making so people can predict
22 what the outcome's going to be and be incentivized.
23 Otherwise, you just have a black box. You say, well,
24 each district judge takes six factors. We're not going
25 to really tell you how you to decide them. And then

1 you're not doing what Fogerty asks.

2 What Fogerty asks is use the fee decision
3 whether to award fees, how much, to incentivize people
4 to clarify the law because of the peculiar importance of
5 copyright having the --

6 JUSTICE SOTOMAYOR: Are you asking us, in
7 our decision, to endorse the Second Circuit test and
8 reject the Ninth Circuit test, articulate it the way
9 that the Ninth Circuit does, what -- the Second Circuit
10 does? Ask us exactly what you want us to announce with
11 respect to what the test should be or not be.

12 MR. SMITH: We think the Second Circuit's
13 test makes eminent sense and ought to be upheld. I
14 would note, though, that since all of the factors here
15 went the same way in the judgment of the district court,
16 even if you decided that they shouldn't be giving
17 substantial weight to one factor, there wouldn't be a
18 basis for a reversal in this -- this particular case.
19 But we do think that starting with the objective
20 reasonableness makes a lot of sense. It leads to the
21 right outcome and the right incentives, and it gives
22 people some basis for being able to figure out what's
23 going to happen in the case and decide which cases to
24 litigate to the end and which cases to settle or simply
25 to abandon.

1 JUSTICE GINSBURG: How do you answer the
2 argument that you -- you referred to patent cases, but
3 the patent statute says "fees" in exceptional cases.

4 MR. SMITH: Right.

5 JUSTICE GINSBURG: The Copyright Act doesn't
6 say that.

7 MR. SMITH: And I think that is, in fact,
8 how it's played out. The fees are much more rare in
9 patent cases than they are in copyright cases. It's
10 certainly not -- not true that they're exceptional in --
11 in copyright cases. Quite the opposite. It's clearly a
12 large majority of cases are -- are having fees awarded.

13 It -- the point, though, is even if you --
14 if you layer on that exceptionality requirement, the
15 factors that you look at, was it badly litigated, should
16 it not have been litigated, was there a reasonable
17 basis, was there abusive conduct, that's the factors you
18 should look at. That's what courts have always looked
19 at. Why would you look at something else?

20 I mean, that is the reason why one awards
21 fees is either because somebody brought a case they
22 shouldn't have, or litigated a defense they shouldn't
23 have, or abused the process and --

24 JUSTICE KAGAN: Do you have a view,
25 Mr. Smith, as to why it is that this reasonableness

1 inquiry is producing such skewed results as to
2 plaintiffs and defendants? Because as a logical matter,
3 you would think it shouldn't, that -- that there --
4 there wouldn't be this skew.

5 MR. SMITH: I mean --

6 JUSTICE KAGAN: Unless you really think the
7 defendants are taking so many more unreasonable
8 litigating positions. And I -- I guess that could be.
9 But is there any other explanation or any, you know,
10 thoughts you have about that?

11 MR. SMITH: Part -- part of it is the
12 default judgments where fees are routinely awarded
13 because there is nobody there to oppose them in -- in
14 very small amounts.

15 But I -- I think the other thing is, as the
16 government points out in their brief, plaintiffs decide
17 when to bring cases, defendants don't decide when to be
18 defendants, and there are a lot of intentional
19 infringers of copyrights out there in the world that we
20 have now. And so people -- it would be bizarre in a way
21 if plaintiffs didn't have a higher percentage of claims
22 that were reasonable, because they decide what case to
23 bring, and they know that they're going to be spending
24 money, and this is -- they're going to invest in this
25 case, and they -- they decide to go ahead. Whereas

1 defendants are simply often just caught. You know,
2 they -- they were hoping to just slide under the radar
3 screen and put these infringing photographs up on their
4 website or whatever it may be.

5 And so it -- it doesn't strike -- strike me
6 as surprising at all, actually, that we have this
7 disparity. It doesn't mean that the standard is unfair
8 or is -- is anything else less than even handed. It
9 simply means that the facts on the ground are leading to
10 a -- a difference in the outcome in percentages, which
11 we have a lot of different percentages here. But, you
12 know, a lot of defendants are getting fees too, even in
13 the Second Circuit, according to their own statistics,
14 half the time. So it's not like it's entirely
15 one-sided.

16 If the Court has no more questions.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Goldenberg.

19 ORAL ARGUMENT OF ELAINE J. GOLDENBERG

20 FOR UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE RESPONDENT

22 MS. GOLDENBERG: Mr. Chief Justice, and may
23 it please the Court:

24 I'd like to start by picking up on this
25 point that's gotten a fair bit of discussion about what

1 the statistics are in the Second Circuit under the
2 Matthew Bender standard which says that objective
3 reasonableness should be given substantial weight.

4 Looking at hundreds and hundreds of cases in
5 the Second Circuit, in the district courts, I think that
6 there is a lot of discretion that one can exercise in
7 deciding whether to include cases in your count or not
8 include cases in your count, whether you include default
9 judgments, whether you include declaratory judgment
10 situations, whether you include situations where the
11 Court says as a technical matter, you can't get fees
12 because your motion was late. But in the alternative,
13 if I were to consider it, I would go on to award or not
14 award you fees, anyway.

15 So I think that there is some ground to
16 quibble with some of the statistics, and I can tell you
17 what statistics I came up when I did this look, which
18 are a little bit different, and I think show that there
19 is not this vast disparity. And the statistics -- this
20 is in the district courts in the Second Circuit from
21 Matthew Bender on -- show that including default
22 judgments in the count, 77 percent of the time when
23 plaintiffs ask for fees and it was decided on the merits
24 in a reported decision, they got fees, and 53 percent of
25 the time when defendants asked for fees.

1 But if you drop out those default judgments,
2 which, as Mr. Smith indicated, are situations where the
3 fee motion is effectively unopposed, where I think the
4 defendant often looks very unreasonable by not having
5 shown up to defend the case, and where the fee amount is
6 quite small by necessity because not much has happened
7 in the case, then the numbers start to look more
8 similar, 59.7 percent for plaintiffs, 53 percent for
9 defendants.

10 So there is not this huge gulf between the
11 percentages of time when plaintiffs and defendants are
12 getting fees, at least by my count. And as I say, I
13 recognize there are different ways to do this count.
14 And so I think you have to take all of these numbers
15 with a little bit of a grain of salt.

16 But I don't think any standard in the world
17 would give you equal numbers of plaintiffs and
18 defendants getting attorneys' fees.

19 The Matthew Bender test is neutral. It's
20 even-handed on its face. It says very clearly that
21 plaintiffs and defendants should be treated in the same
22 way. And if the Court thought that that somehow weren't
23 being carried out properly in the Second Circuit, I
24 think the Court could emphasize that, and it wouldn't be
25 a reason to reject the Second Circuit's test.

1 With respect to giving objective
2 reasonableness substantial weight, I would like to point
3 out that that is the approach that this Court took in
4 the Martin decision, which was a case about removal and
5 remand and which involved --

6 JUSTICE SOTOMAYOR: I'm sorry. Which case?

7 MS. GOLDENBERG: Martin v. Franklin, which
8 was a case that involved the statute that, much like the
9 statute here, just gave broad discretion to district
10 courts without a lot of standards to guide them.

11 And what the Court said in that case is
12 discretion isn't whim. In order for like cases to be
13 treated alike, district court's discretion should be
14 guided in certain ways so that there can be
15 predictability and so that there can be -- that
16 principle of justice can be upheld, even in the absence
17 of expressed statutory restriction.

18 CHIEF JUSTICE ROBERTS: You didn't have the
19 sort of situation you have here, where you're concerned
20 about encouraging people to move for remand or
21 discouraging people from filing for fees under remand.
22 It was -- the policy sort of pushed all one way in
23 Martin.

24 MS. GOLDENBERG: Well, it's true that only
25 one side in Martin could get fees. That's true that --

1 that -- it's the -- when the case is remanded, so the
2 person has been unsuccessful in removing, that's when
3 fees are awarded.

4 But nevertheless, like any fee-shifting
5 statute, it is taking into account incentives on both
6 sides, whether you should try to remove the case,
7 whether you should move to remand the case if you're on
8 the other side. And what happens in the copyright world
9 because of this Court's Fogerty decision is that those
10 incentives are judged as to plaintiffs and defendants
11 because both of them can get fees, but I don't think the
12 underlying policies are different.

13 In Martin, the Court wasn't looking at
14 anything that was specific to that statute, as to its
15 history, or to any policy that was specific to that
16 statute at all. But what the Court said was that
17 objective reasonableness was the touchstone. And, yes,
18 it may be true that in some cases where the losing party
19 has been objectively reasonable, fees are appropriate,
20 in any event, because this is an equitable matter, and
21 we don't want to restrict the district court's
22 discretion, and it's hard to imagine every single case
23 that could possibly come up in the future. And that is
24 equivalent to what the Second Circuit has done here.

25 So it's very consistent with the approach

1 that the Court has taken to other fee-shifting statutes
2 where there is broad discretion.

3 JUSTICE KAGAN: Mr. Smith suggested that he
4 thought the times in which the reasonableness inquiry
5 would be outweighed is if you see real litigation
6 misconduct. Is that your sense too, or is there
7 anything else that actually is capable of outweighing
8 it?

9 MS. GOLDENBERG: My sense is that that is
10 probably going to be the most frequent circumstance in
11 which it would be outweighed, and there are, as
12 Mr. Smith pointed out, some cases in the Second Circuit
13 like that, be the Video, Zalewski cases, where even
14 though the losing party was objectively reasonable, the
15 Court said there has been some misconduct here and so
16 awarded fees may be appropriate, or the district court
17 should go back and see if there was misconduct here.

18 JUSTICE BREYER: Maybe --

19 MS. GOLDENBERG: So there are other examples
20 as well that I'd like to point out beyond that. And one
21 example comes from the -- the Sixth Circuit, and their
22 case is called WB Music and Bridgeport Music, and that
23 was a situation where plaintiffs indiscriminately
24 brought hundreds and hundreds of claims, some of which
25 were objectively reasonable, and some of which were not

1 objectively reasonably.

2 And what the Court said there was, yes, it's
3 true that your claim was objectively reasonable, even
4 though you didn't succeed, but you've proceeded in this
5 unreasonable fashion. And so there's a strong
6 deterrence factor that's playing in here. We don't want
7 people to do this. We want to stop people from doing
8 this in the future. And so we're going to award
9 attorneys' fees in that situation.

10 That is related, I think, to litigation
11 misconduct, but it's not exactly the same thing. And it
12 is a deterrence. It's focusing on the deterrence factor
13 in the Fogerty footnote.

14 There is another example from the district
15 courts in the Second Circuit. It's a case called Tips
16 Exports. It's a Eastern District of New York case, and
17 that's a case where the defendant lost.

18 And what the court said again was that there
19 is the deterrence factor that comes in here. The
20 defendant was reasonable -- objectively reasonable in
21 its position in its -- on the facts and the law, but it
22 appears that the defendant is going to take this just as
23 a cost of doing business and keep on engaging in
24 infringing conduct about because the award of fees isn't
25 enough -- I'm sorry -- the award of damages is not

1 enough to stop it. So in that situation, again,
2 deterrence will override the fact that the losing party
3 was objectively reasonable. So I do think it --

4 CHIEF JUSTICE ROBERTS: Counsel, it -- is it
5 pertinent, in the government's view, whether or not the
6 party seeking fees was represented by pro bono counsel?

7 MS. GOLDENBERG: I think it would be
8 pertinent if you were to adopt an approach like
9 Petitioner's approach where you took financial condition
10 of the parties into account. If you are going to do
11 that, then I think you would certainly need to look to
12 see whether somebody who appeared to be an impecunious
13 party was actually represented pro bono, was not
14 responsible for their fees.

15 But I take some issue with what Petitioner's
16 counsel said, that -- that the financial condition of
17 the parties is something that courts look to when
18 they're deciding whether to make a fee award in the
19 first incidence. I'm not aware of any other
20 circumstance where the courts look to the financial
21 condition of the parties under a fee-shifting statute to
22 decide whether to award fees on a granular level; in
23 other words, they look to the specific finances of the
24 specific party before them.

25 They certainly look at it when it comes time

1 to decide what the amount of a fee award should be, if
2 they've already decided that they are going to award
3 fees, and that, I think, is perfectly appropriate. And
4 you'll see district courts in the Second Circuit, under
5 the Matthew Bender standard, doing exactly that.

6 If they have a very unreasonable pro se
7 plaintiff, for instance, they will say that a fee award
8 may still be appropriate if that party loses, but
9 perhaps the amount should be set lower, it will still be
10 a deterrent to that person, but it won't be financially
11 crushing to them.

12 JUSTICE BREYER: Fogerty says -- it adds,
13 "The need in particular circumstances to advance
14 considerations of compensation and deterrence."

15 MS. GOLDENBERG: Yes.

16 JUSTICE BREYER: It lists the reasonable
17 fact -- you know, reasonable position is one among four.
18 It says there could be others. Why? Why not stop right
19 there?

20 MS. GOLDENBERG: First --

21 JUSTICE BREYER: Maybe Marbury was a poor
22 man. Maybe he didn't even want the job. Maybe he was
23 just trying to try to create a situation where this
24 country would have a structure of judicial review. I
25 mean, can they take things like that? Why not?

1 MS. GOLDENBERG: Well, it --

2 JUSTICE BREYER: I mean, I -- I don't know.
3 It has to be consistent with the Act.

4 MS. GOLDENBERG: I --

5 JUSTICE BREYER: Why are we suddenly picking
6 this one thing out of what could be a bunch of things?

7 MS. GOLDENBERG: For a number of reasons.
8 First of all, if you look at the factors that are
9 mentioned in Fogerty, they actually, many of them,
10 center around objective reasonableness: Frivolousness,
11 deterrence, motivation. All of those are kind of
12 circling around this concept of objective
13 reasonableness, which, as I pointed out, is pretty
14 common to the Court's approach to other fee-shifting
15 statutes, not only in Martin, but also as Mr. Smith
16 explained, in Octane. So that -- that's one example.
17 There's another example -- another reason,
18 though, that's very grounded in the Copyright Act
19 itself, and that is the history of the Copyright Act and
20 the ratification that Congress engaged in in 1976 when
21 it chose to readopt essentially the same language from
22 the 1909 Copyright Act as to which courts have, through
23 exercise of their discretion over many years, worn a
24 groove that said, generally, when the losing party is
25 reasonable, fees are not going to be appropriate.

1 That's equivalent to the Second Circuit's standard.

2 Congress had every reason to know that that
3 was the law under the existing language because Congress
4 was presented, by experts, by the register of
5 copyrights, whose job it is to advise Congress on
6 copyright policy, by the Brown Study, which was an
7 expert Copyright Office study that Congress had
8 commissioned. All these authorities said that, and so
9 Congress had good reason to know that it was true.

10 JUSTICE KAGAN: If you were thinking of this
11 solely as a policy matter, if you didn't think that that
12 evidence was all that overwhelming, why is it that this
13 factor should be first among equals?

14 MS. GOLDENBERG: For the -- I think a lot of
15 the reasons that Mr. Smith explained with respect to
16 incentives. When you make that factor important, you're
17 encouraging reasonable arguments, you're discouraging
18 unreasonable arguments, you're increasing the chances
19 that close cases where both sides are reasonable are
20 going to actually get litigated to their conclusion, and
21 therefore, the law of copyright will be clarified, which
22 is what this Court called for in its Fogerty decision.

23 If, on the other hand, you adopt something
24 like the standard that Petitioner at least set forth in
25 his brief, where you privilege the precedent-setting

1 nature of the decision, then you have the tremendous
2 unpredictability, tremendous uncertainty, and
3 risk-averse parties are going to be deterred, and they
4 won't litigate those close cases to the end, and the law
5 will not be clarified.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Five minutes, Mr. Rosenkranz.

8 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

9 ON BEHALF OF THE PETITIONER

10 MR. ROSENKRANZ: Thank you, Your Honor.

11 So Justice Ginsburg's question, which got
12 picked up through the course of the argument, I think
13 really gets to the nub of the matter. The magic
14 language in Mr. Smith's presentation is that the Second
15 Circuit has adopted the Patent Act standard.

16 The Patent Act standard is different. And
17 if Octane means anything, it is we read the words that
18 Congress actually wrote. "Exceptional circumstances"
19 this Court defined in exactly the way that the
20 government and Wiley are defining this standard. We
21 have to take Congress at its word that it meant
22 something different.

23 JUSTICE GINSBURG: But it does mean
24 something different in practice because, as we were just
25 told, it's unusual. There are not many fee awards made

1 in patent cases, much higher number in copyright cases.

2 MR. ROSENKRANZ: Yes, Your Honor. The --
3 and -- and that's because in every circuit but the
4 Second Circuit, the -- the district courts apply a
5 different standard from the Second Circuit standard.
6 That's why you have --

7 JUSTICE GINSBURG: We have the -- the Second
8 Circuit, and what was it, 50 percent of the defendants
9 and 70 something percent, whatever, it's a much higher
10 percentage than in -- than in patent cases.

11 MR. ROSENKRANZ: Agreed, Your Honor. And
12 it's important to understand why. Our numbers are 44
13 percent and 85 percent. One can quibble about the
14 numbers. But I have to emphasize, neither Mr. Smith nor
15 the government has come forward with a single case in
16 which a defendant got fees where the plaintiff was not
17 being reasonable. In every single one of their cases in
18 the Second Circuit, when a defendant got fees, it's
19 because the plaintiff's position was illegal -- or was
20 unreasonable or the plaintiff took unreasonable
21 positions within the litigation. There is not a single
22 case in the Second Circuit where anything other than
23 unreasonableness carried the day.

24 I want to make -- I want to say a word about
25 history because there's been a lot of suggestion that

1 the history before 1976 and the Copyright Act was an
2 exceptional-circumstances standard. It wasn't. There
3 is not a single case that the government or -- or Wiley
4 has cited, not one case that adopts the Matthew Bender
5 standard across the board. So sure -- that is pre-1976
6 I'm talking about.

7 So sure, there were a lot of cases where
8 unreasonable plaintiffs or defendants were hit with
9 fees. There were cases where the reasonableness of a
10 position for the district court carried the day, but not
11 one case that ever said, here's how we should figure
12 this out.

13 All of the studies that the government has
14 referred to are studies that admitted that there was
15 actually no one standard. This Court has quoted the --
16 I'm sorry -- this Court in Fogerty underscored that
17 there was no standard that predated 1976. And even the
18 cases that Wiley cites, half of them are cases where one
19 of the parties was unreasonable. That leaves only four
20 cases, and those are all cases that are consistent with
21 what we're saying the rule was.

22 Final point: If we're talking about
23 incentives, the difference between my position and Mr.
24 Smith's position is that he wants a rule that decides up
25 front for all district courts that this is the weight

1 you will put on something, and I want a rule, consistent
2 with Congress's language and the use of the word "may,"
3 that trusts district courts to figure out what the right
4 incentives and disincentives are, and to figure out what
5 the value is to put on reasonableness.

6 JUSTICE ALITO: That's an awfully hard task
7 for district judges to perform, whether -- you know,
8 what is -- what will further the purposes of the
9 Copyright Act or what is the most faithful to the
10 Copyright Act. District court judges are going to see
11 that very differently, and there won't be any
12 consistency if that's what they are required to do or
13 authorized to do.

14 MR. ROSENKRANZ: Your Honor, what will
15 emerge is what's emerged in the Ninth Circuit, a common
16 law of equity where courts are following each other's
17 decisions. And, yes, there will be some variability,
18 but the variability is invited by Congress in the word
19 "may."

20 Unreasonable litigants will always be hit
21 with attorneys' fees, not because there is any
22 particular weight put on it by a court of appeals, but
23 because that's what district courts will do. But
24 reasonable positions should be hit with attorneys' fees
25 or not depending upon whether the Court believes that

1 the public was benefitted by the litigation position.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MR. ROSENKRANZ: If there are no further
4 questions.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. ROSENKRANZ: Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: The case is
8 submitted.

9 (Whereupon, at 11:00 a.m., the case in the
10 above-entitled matter was submitted.)

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