

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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