ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN C. FOGERTY, Petitioner v. FANTASY, INC.

CASE NO: 92-1750

PLACE: Washington, D.C.

DATE: Wednesday, December 8, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN C. FOGERTY, :

Petitioner :

v. : No. 92-1750

FANTASY, INC. :

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Washington, D.C.

Wednesday, December 8, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

KENNETH I. SIDLE, ESQ., Los Angeles, California; on behalf of the Petitioner.

LAWRENCE S. ROBBINS, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 92-1750, John C. Fogerty v. Fantasy, Inc.

Mr. Sidle.

ORAL ARGUMENT OF KENNETH I. SIDLE

ON BEHALF OF THE PETITIONER

MR. SIDLE: Mr. Chief Justice and may it please the Court:

The application of the dual standard for the award of attorney's fees to petitioner Fogerty in this case results in a perversion of the policies of the Copyright Act. The Ninth Circuit standard is based upon an implicit assumption about the nature of the parties to a Copyright Act, to wit, that the plaintiff is a copyright author who is seeking to sue a business enterprise that has copied his work, but in this case, we have only one author. That's John Fogerty.

He had a copyright, a work that he said was an original creation, that was not copied. He has vindicated that copyright by being the prevailing party in a copyright case. He applied for his attorney's fees, as was authorized in section 505, and the court denied those fees. They denied the fees because he was a defendant.

There is no policy in the Copyright Act that

justifies the distinction against this author based upon his status as a defendant. What possible policy could there be under the copyright laws that the plaintiff in the case, a copyright owner, had Fantasy won the case, would be awarded its fees, but Fogerty, the author in the case, would not be awarded his fees even though he had done exactly what the copyright laws asked him to do, which is create a new original work?

QUESTION: Mr. Sidle, of course, this Court has to face up the Christiansburg case, where virtually identical language on attorney's fees was interpreted to suggest that we don't grant attorney's fees under it as respondents --

MR. SIDLE: But the Christiansburg --

QUESTION: -- so I think really we need to face up to what differences there are that would compel a different result here.

MR. SIDLE: Well, I think there's dramatic differences between civil rights cases and copyright cases. We have different types of cases, different issues, different types of parties, and different policies. We also have a dramatically different legislative history. The legislative history in connection with the civil rights statute show a clear recognition on the part of Congress to a dual standard.

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The legislative history of this act is virtually silent as to the intention of Congress --

QUESTION: Well, do you think Christiansburg was correctly decided?

MR. SIDLE: Christiansburg was correctly decided in the civil rights context, but I don't think this Court can carry over from the civil rights context to the commercial context of the copyright law area.

QUESTION: Well, you say civil rights context. What does that mean? Does that mean that civil rights statutes are considered something special?

MR. SIDLE: I think they are special. I think they're --

QUESTION: What's your authority for that?

MR. SIDLE: I think just a general principle that Congress --

QUESTION: What's your authority from this Court?

MR. SIDLE: Well, I don't know that I can say there's any particular authority from this Court because it hasn't faced that issue. I think this case faces that issue.

What this Court has in the copyright area has a clean slate, virtually. It's got a one-sentence statement in the 1976 Copyright Act authorizing the award of

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attorney's fees. It then has a whole line of cases in the civil rights area, but the civil rights area is a concept of a private attorney general bringing an action for remedying social problems and class-wide problems.

The copyright area is typically a dispute between two owners of property. The typical copyright case is two copyright proprietors, one trying to stop the other from marketing their product, and that kind of property dispute should not use the analogy from a civil rights case where you're invoking principles of class discrimination and concepts of private attorney generals. There's no concept of a private attorney general.

QUESTION: Mr. Sidle, will you remind us where the language showed up first, because it is identical language?

MR. SIDLE: The language showed up first in the Copyright Act. I believe the first Civil Rights Act was a '64 act, and then this Court had its Alyeska decision, and then there was the '76 Civil Rights Attorney's Fee Act that Congress enacted in response to that.

It's only in the very recent past that there's been any suggestion from even the courts that have the dual standard, and I think they're just make-weight, drawing an analogy to the civil rights statute. There's no indication in the courts that they were viewing the

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plaintiffs in a copyright case as being like private attorney generals.

And I can just point to cases -- and there's also a happenstance nature to this. Who happens to be the plaintiff in a copyright case can be any one of a number of parties. This Court has had cases before it -- for example, Mills Music. You had -- a party who received music copyright royalties interpleaded the funds. The contesting parties were both defendants in an interpleader action. How do you decide who's the plaintiff if they prevail and there's a dispute there over whether the termination of a copyright under the '76 act terminated the music publishing company's right to royalties?

You also had the statute case, Community of Non-Violence v. Reid, which was a declaratory relief action. It was a question of who owned the statue, and it involved the question of a work for hire. Either of those parties could have filed that action.

QUESTION: Mr. Sidle, isn't it true that in 190 -- this statute was enacted in 1909. Isn't that when the language got in?

MR. SIDLE: Yes.

QUESTION: And at that time, isn't it fair to assume that the typical case Congress was thinking about was sort of a garden variety infringement suit, or

something?

MR. SIDLE: I think if we're looking back to 1909, the proper thing -- the proper motive to project on Congress was that it was adopting the British Rule. We have an American Rule that parties bear their own fees, and every first-year lawyer knows that the alternative to that is the British Rule. At that time it was somewhat unusual to have statutes awarding attorney's fees. Congress decided --

QUESTION: But to argue for the British Rule, that statute has been on the books for 87 years, or whatever it is, and nobody's ever adopted the British Rule.

MR. SIDLE: When you say, nobody's ever adopted the British Rule, we cite the Lewys case in our brief which says that that's what Congress did, and that's one of the pre-1976 act cases that Fantasy relies upon as authority that there was a dual standard. I mean, in fact, there are judges who interpreted Congress as doing that.

QUESTION: One judge.

MR. SIDLE: One judge.

QUESTION: Well, Mr. --

QUESTION: If they -- I'm sorry.

QUESTION: Mr. Sidle, now, the British Rule

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generally awards attorney's fees as costs just as a matter of course to the prevailing party. Now, I think we have some other circuits, do we not, that would say there is no presumption of the award of attorney's fees to a prevailing party?

MR. SIDLE: What the Ninth --

QUESTION: The Third, maybe, and the Fourth Circuit, they consider a variety of factors. What is it, do you think --

MR. SIDLE: Well --

QUESTION: -- Congress adopted here?

MR. SIDLE: I think that what the Ninth Circuit and the Second Circuit do with respect to plaintiffs is what Congress intended, and they just have not done it with respect to defendants. They've adopted a different standard in this case for defendants.

We have in the Lanham Act and the Patent Act language that says -- and those are the closest analogies we have to the Copyright Act. We have Congress saying in exceptional circumstances --

QUESTION: Well, excuse me, what I'm trying to pursue is whether you take the position that we should have just as a matter of course a policy that the prevailing party gets the fees --

MR. SIDLE: Well, when you say, as a matter of

course, the British Rule --

QUESTION: -- or do you approach it without any such presumption?

MR. SIDLE: I believe that as a matter of general course -- there would be exceptions, but generally the prevailing party should be awarded their fees. I believe that's what Congress intended. I believe that's consistent with the policy of the Copyright Act. I think --

QUESTION: If that was the intention of Congress in 1909, why did it use such neutrally permissive language?

MR. SIDLE: Well, I think that's --

QUESTION: I mean, the British Rule is a lot stronger than "may also award."

MR. SIDLE: Well, I think that when we talk about generally award, or usually award, it's a bit slippery. We're not talking about an open --

QUESTION: Well, it's less slippery than leaving it in an entirely permissive posture.

MR. SIDLE: Well, but that's also in the context of granting an authority where there's very few statutes that give that authority.

QUESTION: Which would seem to me to counsel somewhat greater precision, if that's what they intended

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to do.

MR. SIDLE: Well, I think that what this -- this Court is writing on a clean slate as far as what it should do in guiding the lower district courts, and I think --

QUESTION: Mr. Sidle, in addition to the "may" language, it's a double -- it's in its discretion. If you just had "may," then your argument of the British Rule might be stronger, but "the Court in its discretion may" --

MR. SIDLE: Well then, what's the rationale for the Ninth Circuit adopting the British Rule with respect to plaintiffs? I submit to you that Congress, in looking at the Lanham Act and the Patent Act, where it says, "under exceptional circumstances the court may award fees," intended that to be the standard there.

What has happened in the Ninth Circuit is, it's done two things. With respect to plaintiffs they have adopted the British Rule, and with respect to defendants they've adopted the Lanham Act and the Patent Act standard for defendants.

QUESTION: Well, maybe you have a strong argument that whatever rule they adopted ought to be -- it ought to be even-handed, but I don't see how you have an argument that it ought to be the British Rule.

MR. SIDLE: I think -- I think that the

strongest argument for that comes from the language in the Strauss Report that was submitted to Congress, and I believe it's cited in our reply brief.

There were only really two reports given to Congress, the Brown Report and the Strauss Report, and what they say about attorney's fees is very limited, but if the Court reads that language on page 17, I think you come away with basically an idea that at least what was presented to Congress was to award -- a rule that was an economic award of making the prevailing party whole.

QUESTION: But suppose I agree with you that what's sauce for the goose is sauce for the gander, but I don't agree with you that the British Rule was necessarily adopted, I just think that Congress meant to leave it to the trial judge, and the trial judge had a lot of discretion, but he shouldn't load it for one side rather than the other? How do I dispose of this case then?

MR. SIDLE: Well, I think that you should maybe do a bit more than that and enlighten the district court judges that they should look to the policies of the Copyright Act in determining how to exercise their discretion.

QUESTION: No, but assume -- assume that the only thing I think that the court of appeals has done wrong is to apply a different standard to defendants than

it applies to plaintiffs. How do I decide this case?

MR. SIDLE: Well, you reverse this case --

QUESTION: Why? They -- I don't know which standard -- they should apply to both. I just -- why don't I just affirm and say but, you know, but in the future be sure that you treat plaintiffs and defendants alike? I'm not sure they've treated you wrong. The only thing I'm sure about is that they shouldn't treat you differently from plaintiffs.

MR. SIDLE: Well, I think that then the Court will have cases in the future that -- they're all over the place, and I think that you would --

QUESTION: Well, that's how the statute reads -- in its discretion. I think the statute meant to leave it to the judge to decide.

MR. SIDLE: Yes, in the context of a Copyright Act that has policies that it's trying to promote. I think that in the case where you have a def --

QUESTION: Well, is your point that the district judge did not exercise discretion because the district judge didn't believe that he had discretion with respect to a successful defendant?

MR. SIDLE: Correct.

QUESTION: So -- but -- am I correct in understanding that at one time the patent fee-shifting

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statute had identical words, and then Congress added the qualification, "in exceptional cases"?

MR. SIDLE: That I don't know.

QUESTION: Of course, the --

QUESTION: In any event, the Lanham Act and the Patent Act are the same except for the addition of the words, "in exceptional cases."

MR. SIDLE: Correct, and the Lanham Act also has the additional gloss that they put -- shift the burden -- normally they award fees to defendants, and not to plaintiffs, so they have a somewhat dual standard.

QUESTION: Of course, the argument is made that even under the present dispensation in the Ninth Circuit, what's sauce for the goose is sauce for the gander, because each of the awards rests upon a fault theory.

MR. SIDLE: That's --

QUESTION: Why is that unsound? I mean, your argu -- your response to that, as I understand it, is well, there may indeed be a fault justifying the award in each of the two sets of circumstances, but that rule should be avoided here because a defendant like my defendant is basically conveying a benefit upon society, but I take it you don't find anything analytically wrong with the theory that there is fault justifying both the plaintiff rule and the defendant rule.

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MR. SIDLE: Well, the existing Ninth Circuit standard has a different standard of fault, if you want to look at it that way. If you're a defendant, the fault that you've got to show is either frivolousness or bad faith. That's a very heavy standard. Plaintiff essentially just has to win. That's all the fault he has to show.

QUESTION: Because if the plaintiff wins, the plaintiff has shown that there is a violation of a Federal statutory policy. That's the fault.

MR. SIDLE: Yes, but I think that again gets off into the concept of wrongdoing in a business statute. The statute -- in the copyright area you have defendants --

QUESTION: Well, they're not saying that you're -- you know, that you're morally reprehensible, or that you're going to be dammed for eternity. They're simply saying that the -- that the defendant who loses has violated a statutory policy, and that's important. It's just as important as avoiding frivolity by plaintiffs.

MR. SIDLE: Okay, I accept all that, but then that finding of civil liability is a sufficient finding of wrongdoing to award fees to a prevailing plaintiff.

You posited some degree of fault. All he has to do is win, whereas the defendant, who may be promoting policies that this Court has recognized, the value of

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having works in the public domain -- I dare say that over the last 20 years, every new technology case that has come before this Court, this Court has allowed the new technology to go forward rather than finding a copyright monopoly.

Now, are all of those defendants -- they've done a public benefit. They're creating works, they're prevailing parties, they should be entitled to their fees on the same standards as the plaintiffs, not based on a disbalanced fault scale, which is what happens right now in the Ninth Circuit.

We would suggest that this Court advise the district courts that in exercising their discretion they should look to the policies of the Copyright Act, and it's not a question of wrongdoing. This is not a question of finding particular fault, but it's a question of whether the party involved has promoted the purposes of the Copyright Act, and a defendant author has promoted the purposes of the Copyright Act. He's created an original work, an original writing, he's increased the access of the public to goods.

There may be other cases where other factors might come in where you don't have a defendant author, where the defendant is a restaurant owner who's broadcast radio signals, or something like that, but in this type of

a case you have the exact kind of a person who the copyright laws have tried to encourage to create new and original works, and he has done exactly that. He has created a new and original work, and he's prevailed in a trial that raised that very issue.

QUESTION: May I ask you if you -- what standard you would apply if the -- as I understand it there are counterclaims in this case back and forth --

MR. SIDLE: Yes.

QUESTION: -- and there are some fairly important issues on which your client lost.

MR. SIDLE: Well, I dare say in every case there are motions and things -- people don't win everything in a lawsuit.

QUESTION: No, but supposing you had a counterclaim and you lost on a lot of -- they spent a lot of time and attorney's fees on that. Would the judge have had discretion to award fees against you on the portions of the case that they prevailed on?

MR. SIDLE: Well, I think there are several open issues on how the judge will go about determining the amount of fees in this case, and that may well be an appropriate thing for the judge to determine the amount of fees, what time --

QUESTION: They can reduce your fees on issues

you were not prevailing on, but my question is whether -- supposing that they -- even though on the bottom line you won in this case, that in some other cross-claims or counterclaims, they were successful on those, and there was much more attorney time and effort spent on those. Could the net recovery go the other way?

MR. SIDLE: No, I don't believe so. I believe that we're the prevailing party in this case entitled to our fees, and the fact that there may have been some motions or other things that they prevailed on along the way does not turn them into a prevailing party.

QUESTION: Suppose that one of our concerns is to avoid an interpretation that would generate excessive fees. Suppose that we are concerned that fee statutes seem to create an incentive to increase attorney's fees. Which interpretation should we adopt, yours or the respondent's?

MR. SIDLE: Well, I believe that an even-handed approach will have a dampening effect on litigation. I mean, I think that's the general consensus of economists, but you can find an economist who can create a model for almost any view in this area, as you read those, but I think that's kind of the general consensus.

I think the argument in this case is that the Ninth Circuit statute results in encouraging more lawsuits

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being filed, and we're saying that's not really a proper copyright statute policy, to foment more lawsuits. A proper copyright policy is to have serious copyright issues litigated and determined, and that is best done with an even-handed standard.

If there are no further questions, I'll reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Sidle.

Mr. Robbins, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS

ON BEHALF OF THE RESPONDENT

MR. ROBBINS: Thank you, Mr. Chief Justice, and may it please the Court:

Petitioner asks the wrong question in this case and provides two competing but I think equally mistaken solutions. The question presented in this case is not whether the standard for prevailing defendants and prevailing plaintiffs ought to be the same, even-handed, or different -- dual.

QUESTION: Well, that's the question we granted certiorari on, Mr. Robbins.

MR. ROBBINS: Well, I think, Your Honor, that the way the question was formulated was, should there be a dual standard and should the defendant receive its fees pursuant to a standard that says, do you get fees only

when they're objectively unreasonable?

It is the last prong of that question, however it may have been formulated, that was in fact what the lower court decided. The lower court did not decide this case by virtue of a rule that says, the standards have to be different, because there isn't a prevailing plaintiff in this case. The ques --

QUESTION: Certainly, the Ninth Circuit opinion gives one the impression that they thought that's what they were doing -- "with regard to Fogerty's argument that the existing Ninth Circuit standard should be abandoned in favor of the approach of the Third and Eleventh Circuits, this panel is bound by the existing circuit rule" -- and then the preceding paragraph, they say there was no bad faith, therefore no attorney's fees.

MR. ROBBINS: Yes. Mr. Chief Justice, the latter half of what Your Honor just quoted from the opinion is in fact the theory, the argument, the rationale of the lower court opinion. That is to say, the Ninth Circuit decided this case against petitioner because it found, I think correctly, that plaintiff, although unsuccessful at trial, brought neither an objectively unreasonable lawsuit nor litigated in bad faith. That's why we won the fee-shifting issue.

Whether -- whether we would have won fees if we

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had been the prevailing party under the Ninth Circuit's standard for prevailing plaintiffs is, I think, a question not presented. Now, it's true, Your Honor --

QUESTION: Well, that's the question we granted certiorari on, that we took the case to decide.

MR. ROBBINS: Well, Your Honor, I'm prepared and happy to address the question of what standard should apply to prevailing plaintiffs. All I'm suggesting, Your Honor, is that the piece of the question presented, that in fact constitutes the rationale for the decision below, is in my judgment the only question that is really before the Court.

In other words, Your Honor can -- this Court can affirm --

QUESTION: Mr. Robbins --

MR. ROBBINS: -- I'm sorry.

QUESTION: -- this Court is concerned with disparity among the circuits, and it has the civil rights legislation, and it has the Lanham Act and the Patent Act, and if the question is, as the one on which the Court granted cert, which of these models is the appropriate one for the Copyright Act -- now, we have statutes using similar language. Why should this case -- why should the Copyright Act be bracketed with the civil rights legislation rather than with the trademark and patent

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legislation?

MR. ROBBINS: Well, Your Honor, I don't actually think you have to make -- bracket it with one or the other. It seems to me that -- first of all the Lanham Act -- and let me go back to a question you asked my adversary. In fact, it is the case that the Patent Act was amended to incorporate the language, "exceptional circumstances."

QUESTION: Before that, it was identical to the Copyright --

MR. ROBBINS: It was indeed.

QUESTION: And was it interpreted, when it was identical to the copyright language, with a tilt toward prevailing plaintiffs?

MR. ROBBINS: It was interpreted with, I think, no tilt at all, but interpreted with respect to prevailing defendants the same way -- the same way that the Ninth Circuit interpreted this statute and so that, had this been a Patent Act case adjudicated under the prior version of the patent law, this case with respect to the prevailing defendant would have come out in exactly the same way.

QUESTION: Then why did Congress add, in exceptional cases, just to conform the law to what the courts were doing?

MR. ROBBINS: Exactly, and they said so in exactly those words, Justice Ginsburg. They said, we want you to know that the courts have been getting it right. We want you to know that the courts have correctly construed the statute, and that even though the words, "exceptional circumstances," have not previously appeared in the statutes, the courts have been getting it right.

QUESTION: What year was that changed?

MR. ROBBINS: I believe it was the amendment of either '46 or '52.

QUESTION: Then, when Congress redid the Copyright Act and left it without the qualification, wouldn't the implication be, it wanted to have a standard that would be equal on both sides, but not limited to exceptional cases?

MR. ROBBINS: I think not, Your Honor. I think in fact the presumption is exactly the opposite, and let me turn to that argument in particular.

The present version of section 505 is essentially unchanged from the version that appeared in the 1909 act with respect to the attorney's fees. The language has been -- they changed some dependant -- the order of some dependant clauses, but basically the text is identical, unchanged, and prior to 1976, that language with respect to prevailing defendants, which is what Mr.

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Fogerty is this morning, that language was construed in dozens of cases.

Case after case, circuit after circuit, the courts grappled with what that language meant, and in every single case of a prevailing defendant, without exception, a prevailing defendant got his attorney's fees if, but only if, the plaintiff's case was objectively unreasonable, and that is the standard that the Ninth Circuit applied to petitioner, and that's why petitioner is here today asking for his attorney's fees.

QUESTION: Mr. Robbins, can I interrupt? I just want to ask you if your -- you said there was no change in the language in '76.

MR. ROBBINS: That's correct, Your Honor.

QUESTION: Is it not true that before '76 costs were awarded as a matter of course, but after '76 it was within the discretion of the trial court?

MR. ROBBINS: That's exactly right.

QUESTION: And is it not true that attorney's fees are now a part of costs?

MR. ROBBINS: And were even before that.

QUESTION: But doesn't -- if they were awarded automatically before, and now as a part of a discretionary award, isn't that perhaps of significance?

MR. ROBBINS: No, I think actually it isn't,

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Justice Stevens. Attorney's fees were always discretionary, even when costs were mandatory, so the earlier version, the precursor to which Your Honor adverts, the 1909 section 40 and later section 116 of the 1909 act, said that you get your fees -- you get your costs automatically if you prevail, and you may get your attorney's fees as part of costs -- you may. The costs --

QUESTION: But now the whole package is, it may.

MR. ROBBINS: All of it is discretionary, but what I think that tells you is that the doctrine, the presumption of ratification -- this goes back, Justice Ginsburg, to your question. The presumption of ratification is as compelling as you can imagine, because in contrast to many of the Court's other ratification cases -- and they're as recent as last year's opinion for the Court in the Keene case, where the presumption that Congress knows of and ratifies a prevailing construction of identical language when it reenacts that language, that presumption has special force, I suggest, in this case, because here, the 1976 act was a dramatic overhaul of the Copyright Act, top to bottom.

In fact, they even amended, Justice Stevens, the piece of the cost and fee provisions that dealt with costs, but what they left alone was the one and only part of the statute that is before the Court this morning, and

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they left it alone in the face of --

QUESTION: But if you say they were ratifying the rule that existed before, one rule was that the parties were not -- plaintiffs and defendants had the same standard and another rule was they didn't have the same standard. Which of the two were they ratifying?

MR. ROBBINS: Well, unless I'm misunderstanding your question, Justice Stevens, no court to my knowledge ever said, under the fee provision of the 1909 act, the attorney's fee provision, no court had ever said plaintiffs -- prevailing plaintiffs and prevailing defendants get them on the same terms.

QUESTION: But that's what the Register of Copyrights said when she talked about this issue in 1976. She used precisely the same standard to talk about both. It's on page 49 of your brief.

MR. ROBBINS: Well, I think if you're adverting, Justice Stevens, to the six --

QUESTION: "Courts have generally denied fees of -- awards of attorney's fees where the losing party had solid grounds for litigating his claim or defense."

MR. ROBBINS: That's correct.

QUESTION: Which certainly applies the same standard for both.

MR. ROBBINS: I think it does, but again, I

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don't want to beg the question that has been formulated by petitioner --

QUESTION: I know you don't want us to answer whether there's a different rule or not, because you think you win anyway --

MR. ROBBINS: But what -- but --

(Laughter.)

QUESTION: -- but we are interested in whether there's a difference --

MR. ROBBINS: I understand. I understand, and I'd like to make a defense for -- and I propose to make a defense for prevailing plaintiffs this morning as well, which we've been a prevailing plaintiff.

QUESTION: But I take it if you were prevailing plaintiff and the same standard applied, you would not get fees --

MR. ROBBINS: If --

QUESTION: -- in this very case.

MR. ROBBINS: If the standard for prevailing plaintiffs, Justice Ginsburg, were that prevailing plaintiffs, like prevailing defendants, get their fees only when the opposing side's arguments were merit -- were objectively unreasonable, I suspect we would have had a hard time getting our attorney's fees.

Let me also say that that is in fact not the

standard for prevailing plaintiffs even in the most generous pro-plaintiff circuits, so that the premise of the British Rule that petitioner asked for this morning in fact rests on a false premise even about what's true for prevailing plaintiffs.

But Justice Stevens, to get back to the Register's report, what the Register of Copyrights said in '61 is that the courts have generally denied award of attorney's fees where the losing party had solid grounds for litigating his claim or defense, and that is a correct statement of the law as to prevailing defendants, and my submission on ratification is simply this, that that was the state of the law not just in most cases, but I defy -- I defy my colleague to find a single exception to that doctrine. It sure isn't Lewys v. O'Neill.

QUESTION: Mr. Robbins, in the sentence before, you suggest that the Register is talking only about the awarding of fees to the defense, but in the preceding sentence, she says the discretionary power of the courts to require the losing party to pay a reasonable -- is intended to discourage unfounded suits and frivolous defenses. It sounds like she's talking about both plaintiffs and defendants.

MR. ROBBINS: I think that's quite correct, Mr. Chief Justice, she is, and I think that --

QUESTION: It really can't have been ratifying. I mean, her view was -- if her view is accepted, Congress certainly did not ratify the view that you say obtained before 1976, that only plaintiffs got their law -- got their attorney's fees.

MR. ROBBINS: Well, in fact, Mr. Chief Justice, that's actually not my position on plaintiffs at all. I mean, defendants got attorney's fees before '76, and plaintiffs did. They tended to get them under different circumstances, and I think my reliance on what the Register said goes only to the question whether the Ninth Circuit standard that was applied in this case for prevailing defendants is correct.

Now, it's true that the Register also made a statement summarizing what she took to be the law for prevailing plaintiffs as well. I would respectfully suggest that her assessment of the state of the law as to prevailing plaintiffs was not correct.

QUESTION: Well, you shouldn't have quoted so much of her report, then.

MR. ROBBINS: Well, I --

QUESTION: But isn't that same assessment made by Professor Brown in his 1960 study, when he said, or if the losing defendant raised real issues of fact or law --

MR. ROBBINS: I --

QUESTION: If losing defendant raises real issues of fact or law, then he doesn't pay the plaintiff's counsel fees. That's quite a different standard from the one in Christiansburg.

MR. ROBBINS: Again, that statement is in the Brown report, and it may well be that there were cases with respect to prevailing plaintiffs that had a somewhat less generous standard than any sort of presumptive award for prevailing plaintiffs, and I don't want to overly resist the question that I know the Court is interested in, but I suggest that whatever the rule for prevailing plaintiffs may ultimately be, the same as defendants or different from defendants, or marginally different from defendants, this defendant, the petitioner, is still going to lose, because --

QUESTION: Well, Mr. Robbins, maybe that's so, but as others have suggested here, we are concerned with the rule, and there are at least some members of this Court that think the text of the statute is where you start and where you look, and it's a little hard to read a dual standard into that text --

MR. ROBBINS: Let me --

QUESTION: -- and maybe it's time we reiterated that to a Congress --

MR. ROBBINS: Well --

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QUESTION: -- that is concerned with writing these things, and if a dual standard isn't set forth, why should we strain to find one --

MR. ROBBINS: Well --

QUESTION: -- particularly in a context like this statute, where there can be policies on either side that as a public matter need supporting?

MR. ROBBINS: Well, let me address that directly, Justice O'Connor. It seems to me, first of all, that whatever -- even if it's an even-handed standard, and I dislike the metaphor, because it suggests that the other view is a somehow underhanded -- underhanded standard, and one certainly doesn't want to be called not even-handed -- I actually believe -- and this harkens back, Justice Souter, to a point that you made earlier.

I actually believe that what is called a dual standard, or what I would prefer to call a standard that says, in essence, that the plaintiff will generally receive its fees unless certain factors are met, whereas a prevailing defendant gets its fees only when the plaintiff's lawsuit is objectively unreasonable or litigated in bad faith, is in fact even-handed in the sense that matters, and let me turn to what I take to be, I submit this morning, the controlling decision of this Court after which one needs, I think, to look no further,

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and that is this Court's decision in Zipes.

Zipes is a case in which you have a prevailing civil rights plaintiff, a plaintiff that by petitioner's view this morning is advancing a public policy of surpassing, almost unequalled importance. Nevertheless, that prevailing plaintiff did not get its attorney's fees. It didn't get it's attorney's fees because the losing intervenor in that case was held not to have commit -- be a wrongdoer within the required sense of fee-shifting provisions.

What the Court said in Zipes is that the rule for a fee-shifting should respect -- and I'm quoting now from the Court's language -- "the crucial connection between liability for violation of Federal law and liability for attorney's fees under Federal fee-shifting statutes." I think that is a rule that decides this case.

When a defendant loses a copyright infringement case, that constitutes a finding that the defendant violated statutory law, not that he's a bad person, and that gets -- deals with the quibble in the reply brief that unconscious copying doesn't make you a bad -- a wrongdoer. I don't mean that, you know, literally someone, you know, who's -- this is not sort of a moral -- a sense of blameworthiness in that sense. It is someone who has violated the law, someone who ought to be assessed

attorney's fees.

Conversely, when a plaintiff acts unreasonably, or litigates in bad faith, or brings a frivolous lawsuit, he, too, is abusing the machinery of the copyright system.

QUESTION: Mr. Robbins, that would be a far more impressive argument if that were the rule with respect to patents and trademark, but you concede it isn't, and what I find so difficult to understand is why the regimes for patent and trademark are not the ones that we should look to.

MR. ROBBINS: Well, with respect to trademark, I'd like to suggest, Justice Ginsburg, that this Court's discussion in footnote 19 of the Sony case in which the Court said that the trademark law lacks the necessary kinship with the copyright law to be a workable analogue --

QUESTION: Then let's go to the patent law, where you told me that before the change for exceptional cases it was identical and it was interpreted the same way for prevailing plaintiffs and prevailing defendants.

MR. ROBBINS: Right.

QUESTION: So why isn't that the closest model for us?

MR. ROBBINS: Well, I think the answer is that with respect to the patent law, it may not -- I guess I

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can define some policies in the patent area, for example, the greater ease with which you might innocently infringe on a patent, and so there's a fear that, you know, fee-shifting too readily would sweep up innocent --

QUESTION: Why is that so?

MR. ROBBINS: -- defendants.

QUESTION: I'm sorry, I have difficulty following that. It seems in this very case we're talking about the same composer, and a question of whether there was an infringement of something that he himself created. That would be -- I can't imagine anything that's more difficult than that, to determine whether you've been careful enough not to copy yourself too much.

MR. ROBBINS: Well, I'm not suggesting this wasn't -- you know, a case without its difficulties.

QUESTION: But is there anything to support your notion that as a general matter it's easier to infringe a patent than a copyright?

MR. ROBBINS: Well, I mean, I don't -- I'm not insisting on those differences. I mean, obviously in the copyright area there is the notion of copying, which obviously has a notion of deliberateness to it, and I think -- I suspect that there is less reason to believe, in the copyright area -- though this may not ultimately be true if you looked at every individual litigation, I

suspect there may be a sense in which, in the copyright area, you are less likely to sweep within your net defendants who have acted completely by happenstance and just happened upon the exact same text, or the exact same song.

But I think, Justice Ginsburg -- and I really do need to recur to this basic point. In the patent area as well, the standard for prevailing defendants is the same as the standard that was applied to Mr. Fogerty. It's the same.

Patent defendants do not get their fees unless the patent claimed by the plaintiff was objectively unreasonable or frivolous, or litigated in bad faith, and that's the standard on which this case was decided, and that's the standard on which we win, and if anything, the patent law, I think, is good for the piece of the case that I believe is truly before the Court.

At the end of the day, it may be that the analogue to the patent cases suggests a closer harmony between plaintiffs and defendants.

QUESTION: That really is hemming in the discretion. If you just looked at the statute that says may in its discretion, what you've just said, there really isn't any discretion. It has to be an extreme case, even though -- and this statute doesn't use the word, in

exceptional cases, as the Patent Act does.

MR. ROBBINS: That's true, Justice Ginsburg, but truly that was equally the case in the Zipes -- in Zipes as well, where the fee-shifting provision of title VII was -- on its face conferred significant discretion and in fact this Court -- the opinion --

QUESTION: Mr. Robbins, wouldn't you say that it may be not the typical, but in a large number of copyright cases the standard would be met, because it's perfectly obvious there was copying and they just didn't expect to get caught, or something?

Aren't there a lot of very small-time suits in this area where there really isn't a defense, and there has to be a motive, but the amount involved isn't enough to justify the recovery unless the copyright owner brings a fee -- gets fees, so that even -- you could say even in a large number of ordinary cases, fees are appropriate in this area for the plaintiff?

MR. ROBBINS: Yes. I mean, I think -- I mean, I think that's right.

QUESTION: That's why it seems to me you might have a different language than you would in the patent case, and the standard could still be the same.

MR. ROBBINS: I think that's correct. I think ultimately the circuits that have distinguished between

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plaintiffs and defendants have focused on the need to create the requisite --

QUESTION: But there might be more of a question about whether the item was copyrightable in the first place, because isn't there a rather more stringent test that a patent has to pass than a copyright has to pass?

MR. ROBBINS: I believe that to be the case, but I don't want to overstate my --

QUESTION: So it's one thing --

MR. ROBBINS: -- knowledge of patent law.

I think the point, Justice Stevens, that you get to, is that the greater readiness of some circuits to shift fees towards prevailing plaintiffs reflects a view that is sort of a matter of economic reality. That incentive is needed to provide -- to encourage the plaintiff to bring the lawsuit to litigate his claim and to enforce and therefore effectuate the purposes and policies of the Copyright Act as a whole, so let me turn --

QUESTION: How about the purpose of the Copyright Act of not allowing the copyright holder to extend that exclusivity too far?

MR. ROBBINS: Well, I think -- I don't dispute that there is some public purpose served --

QUESTION: Some of them written right into the

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statute, like the fair use defense?

MR. ROBBINS: I think that's right, and if a defendant has a fair use defense, the fair use text will make --

QUESTION: Wouldn't that be vindicating a public policy? The defendant who was saying, this is fair use and this is what Congress says is good for the public?

MR. ROBBINS: I think that's right. I think when a defendant vindicates a fair use he is serving a purpose that is plainly written into section 107 of the act.

But I also think, Justice Ginsburg -- I also think that the Ninth Circuit standard allows sufficient adversarial play in the system for just exactly the reasons that this Court in Christiansburg Garment thought the fee-shifting provision of title VII gave defendants a robust -- a sufficient incentive to litigate their legitimate claims.

The fact of the matter is that a defendant in a copyright infringement action within the Ninth Circuit standard has all the incentive in the world to do a really good job, and this lawsuit is ample proof of that. After all --

QUESTION: That's true of defendants generally, right?

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MR. ROBBINS: I think it is true of defendants generally, but I also think that where you have a fee-shifting provision that allows the defendant -- in the event that he shows the plaintiff's case to be objectively unreasonable, that gives him the incentive to fight that much harder to make the requisite showing.

I think there's very little evidence that any defendants in copyright infringement cases are hiding their light under a bushel on the ground that they may not have exactly the same fee-shifting standard that prevailing plaintiffs do, and surely that is not true of this petitioner.

The fact is that a defendant has the same incentive that this Court thought in Christiansburg Garment was sufficient to warrant the construction of the identical language in section 706(k) of title VII that this Court in Christiansburg Garment construed to have the same standard that the Ninth Circuit applied for prevailing defendants under section 505.

Let me just recur again to this Court's admonition that similarly worded fee-shifting provisions ought to be similarly construed, and the most similar fee-shifting provision that this Court has construed is the fee-shifting provision in title VII.

QUESTION: Yes, but of course, we didn't

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construe it till long after the copyright fee-shifting statute was drafted, so Congress could -- you cannot say Congress could have predicted we would have construed the Civil Rights Act in the future the way we did.

MR. ROBBINS: On the other hand, at the time that the Copyright Act was enacted, they also enacted section 1988, the same Congress, and both of those -- and 1988 has also been construed by this Court to have the same standard for prevailing defendants.

QUESTION: But not until after it was passed.

MR. ROBBINS: I'm sorry, Your Honor?

QUESTION: But not until after it was enacted.

MR. ROBBINS: Well, I think that's right, but I also think that the policies and purposes that this Court identified in Christiansburg Garment, and that explained why that identical language was given exactly the construction that the Ninth Circuit applied to section 505 for prevailing defendants, those policies are ones that I suggest transcend the particular statutory provision in which the fee-shifting statute happens to be embedded.

QUESTION: Oh, I don't know, we spoke in Zipes and we spoke in a number of civil rights cases of private attorneys general. I don't think anybody had that notion in 1909 and frankly I don't consider the suing copyright holder as being in any sense a private attorney general

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vindicating the public, not the way we regard civil rights plaintiffs.

MR. ROBBINS: No, I think that's correct, Justice Scalia, and I don't want to overstate the similarities, but I also don't have to, because Christiansburg Garment turns not simply on the metaphor of private attorneys general, although to be -- not to put too fine a point on it --

QUESTION: You're going to do it anyway.

MR. ROBBINS: I'm going to do it anyway.

(Laughter.)

MR. ROBBINS: I think, in fact, this Court's copyright jurisprudence makes the central point that copyright plaintiffs are suing not only, and for that matter not even merely in their own interests, though surely that's what they do, but also, and more importantly, to advance a larger --

QUESTION: Mr. Robbins, do you attribute any significance to -- the image of the civil rights plaintiff is the individual alone against the Government, against the corporation, but that doesn't translate in the copyright and patent area, where, as in this very case, the plaintiff is a corporation, and the defendant is an individual, so the two don't fit together very neatly, do they?

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MR. ROBBINS: In fact, Justice Ginsburg, respectfully, I do not attribute much significance to that distinction, and let's step out of the title VII context and turn to 1988.

1988, which also has the same language, and also gets construed exactly the way the Ninth Circuit construed section 505 for prevailing defendants -- 1988 is the attorney's fee provision that allows 1983 prevailing plaintiffs to get their attorney's fees, and as Your Honor knows, 1983 has been the engine for recovery for a number of plaintiffs who don't look anything like the typical civil rights individual struggling against the wealthy corporation.

Golden State, you know, the Virginia Hospital Association, these are wealthy corporate plaintiffs who had the wherewithal to bring that lawsuit. They won it under 1988 -- 1983, and in some cases have gotten their attorney's fees, and I don't think that the metaphor translates very well, nor do I think that 505 should be specially carved out for one type of plaintiff, another type of defendant. The statute I think deserves the kind of categorical construction that the analogies in similarly worded fee-shifting provisions warrant.

QUESTION: Thank you --

MR. ROBBINS: If there are no further

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questions --

QUESTION: -- Mr. Robbins.

MR. ROBBINS: Thank you.

QUESTION: Mr. Sidle, you have 10 minutes remaining.

REBUTTAL ARGUMENT OF KENNETH I. SIDLE

ON BEHALF OF THE PETITIONER

MR. SIDLE: Thank you, Your Honor. I would like to respond to a couple of points.

The Zipes case is somewhat difficult to conceptualize as a copyright case, but if we did, I think it would be fairly easy to see that that's a good case that illustrates what the rule should be in copyright cases versus what the rule is in civil rights cases, and I submit that because there's a dual standard in civil rights cases, this Court had its problems in Zipes.

If you had had an even-handed standard, it wouldn't have been that difficult, but if we have an intervenor, let's say, in a copyright case that comes in and says, hey, but I have a copyright, and that keeps the plaintiff from bringing this case, and the plaintiff prevails against that, on an even-handed standard he would get his fees.

The problem in Zipes was, you in effect had two people that were in the category of the favored plaintiff

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in a civil rights case, and maybe Justice Blackmun's dissent was correct that the defendant TWA should have won the costs. That at least would have been consistent with the policy. But I think that the Zipes case is a strong argument for why, in the copyright area, where you just have businesses fighting over control of literary properties, that there should be an even-handed standard.

Now, opposing counsel says that from the patent area we have the law applied that was applied to the defendant in this case, and that's correct. The only difference is that in the patent law it expressly says that it will only be under exceptional circumstances that fees are awarded, whereas in the copyright law, it just says the court may, without any requirement of exceptional circumstances.

QUESTION: Well, how was it interpreted before that language was adopted?

MR. SIDLE: The patent cases?

QUESTION: Yes.

MR. SIDLE: It's even-handed, and that's what we're asking for, is an even-handed standard, and I think Justice Ginsburg's point is well-taken, that Congress decided to change the patent law to make it only exceptional circumstances. It did not make that decision when it passed the 1976 Copyright Act. It did not put

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exceptional circumstances --

QUESTION: No, but they argued it had been so construed up until -- I mean, even before the language went in the statute.

MR. SIDLE: But that, I submit, is -- and I also submit, despite the analogy of patent law being closer to copyright than civil rights cases, I think there are also some unique considerations in copyright cases. The simple fact is that prior to 1976, the cases were all over the board. You couldn't say that there was certainly any dual standard that was clear.

I would point out, the Senate report on the Civil Rights Attorney's Fee Award Act in 1976, which we cite in footnote 16 of our reply brief, the Senate report goes on and recites the history of the '64 Civil Rights Act, the Alyeska case, and then the dual standard, and then it goes on to say that there are other statutes where a similar dual standard has been interpreted by the courts, and it cites the Water Pollution Control Act and the Marine Protection Act as other places where there's a dual standard.

It doesn't mention the Copyright Act, and that was enacted the same year as the Copyright Act, so I don't see how you can imply that Congress had in mind that there was a dual standard that they were ratifying by enacting

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the 1976 Copyright Act.

There is an argument that defendants have sufficient incentives to litigate cases, and an example is given that Fogerty defended this case. Well, I dare say that plaintiffs have a sufficient interest to litigate cases whether they get preferential treatment in attorney's fees or not.

Typically, plaintiffs in copyright cases are trying to reap a substantial reward that the defendant is reaping. If there's any common denominator in copyright cases, it is that the defendant has been successful. Plaintiffs don't bother suing an unsuccessful writer, or author, or songwriter, and they are looking at their pot of gold, and you can make the same -- just turn the mirror around and say the same things to plaintiffs.

Congress has seen fit in certain circumstances to put its thumb on the scales. In the copyright laws we have statutory damage provisions, which they say to plaintiffs, well, maybe there's not enough money here to bring a suit, so we'll specifically enact statutory damages that you can enact, and that gives a further incentive to the plaintiff.

So here we have Congress saying we're going to put the thumb on the scales here, and maybe there's other provisions where we extend the duration of copyright, and

we do various things to favor copyright owners, but when it comes to attorney's fees, it doesn't do that. It doesn't put its thumb on the scales, it simply says the court may award to the prevailing party, and that's what the court should require be done in this case.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sidle. The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Mari Federico

(REPORTER)