

**In The
Supreme Court of the United States**

LEO PELIZZO,

Petitioner,

v.

MALIBU MEDIA, LLC,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

**EMERGENCY MOTION TO VACATE ORDER DENYING
PETITION FOR CERTIORARI**

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No. 15-429

IN THE SUPREME COURT OF THE UNITED STATES

LEO PELIZZO, Petitioner,

v.

MALIBU MEDIA, LLC, Respondent.

EMERGENCY MOTION TO VACATE ORDER DENYING PETITION
FOR CERTIORARI

Petitioner, Leo Pelizzo, respectfully moves this Court for an order vacating its denial of certiorari in *Pelizzo v. Malibu Media, LLC*, No. 15-429, to the Eleventh Circuit Court of Appeals.¹ As set forth more fully below, this relief is warranted in light of the Court’s decision to grant certiorari in *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-375, to determine “What constitutes the appropriate standard for awarding attorneys’ fees to a prevailing party under section 505 of the Copyright Act.”

1. On August 21, 2015, Pelizzo applied for, and was granted, additional time to file a petition seeking review of the standard used by the lower court to evaluate prevailing party fee awards under 17 U.S.C. §505 of the Copyright Act. (App A.) Pelizzo noted that:

“[T]he Eleventh Circuit’s opinion stands at odds with the principles articulated by this Court in *Fogerty* and, more recently and explicitly, in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.* [and] is in conflict – if not a complete

¹ The filing of this Court’s order denying certiorari with the Clerk of the District Court on December 15, 2015 operated, as a matter of law, to dissolve the stay of the mandate that entered with the filing of a notice of appeal in the underlying action on April 23, 2014. Sup. Ct. R. Rule 45.3.

inversion of – the standard employed by the Seventh Circuit in these same determinations.” (App. A, p. 3-5).

On October 2, 2015, Pelizzo timely filed a petition for writ of certiorari fleshing each of these points out in more detail. (App. B) Pelizzo’s petition, like his preceding application, pointed to the same circuit split and presented the following question:

In *Fogerty v. Fantasy*, 510 U.S. 517 (1994), this Court agreed that judges could rely on several non-exhaustive factors to guide their equitable discretion in awarding prevailing party fees under the Copyright Act, 17 U.S.C. §505, including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” The Court set two parameters around this discretionary authority: the factors used to guide this discretion must be “faithful to the purposes of the Copyright Act and . . . applied to prevailing plaintiffs and defendants in an evenhanded manner.”

The Court of Appeals has adopted a bright-line rule indicating that considerations of compensation and deterrence in deciding whether to award fees under §505 are “inextricably intertwined” with the reasonableness and frivolity of a plaintiff’s claims.

DO CIRCUIT COURTS HAVE THE FREEDOM TO LIMIT THE “CONSIDERATIONS OF COMPENSATION AND DETERRENCE” THAT 17 U.S.C. §505 AWARDS MAY BE USED TO ADVANCE IN THEIR CIRCUIT?²

2. On December 14, 2015, Pelizzo’s petition was summarily denied by this Court. On January 15, 2016, this Court granted certiorari in *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-375 (review sought Sept. 24, 2015) to determine “the appropriate standard for awarding attorneys’ fees to a prevailing party under section 505 of the Copyright Act.” The

²(App. B, p. i-ii)

intervening grant of certiorari to decide this question is an extraordinary and rare change of circumstances warranting reconsideration of Pelizzo’s petition. Specifically, the opinion below (and question presented in Pelizzo’s petition) falls squarely within the scope of question this Court has committed to deciding. *See* Rule 14.1. Like *Kirtsaeng*, Pelizzo is a (1) defendant that (2) prevailed on the merits in a copyright action and (3) met all the statutory preconditions required to obtain relief under Section 505.³ In both cases, the lower court might (or might not) have erred in declining to award fees to a prevailing defendant based on a lop-sided interpretation of a legal standard that may (or may not) have been improper. Moreover, every reason cited in *Kirtsaeng*’s petition and reply brief for granting certiorari was clearly presented before this Court when it denied Pelizzo’s petition a month earlier. Therefore, the reasons for granting certiorari in *Kirtsaeng* apply, *mutatis mutandis*, to the lower court’s judgment.

3. Ordinarily, a party seeking to recall and/or stay a court of appeal’s mandate must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (U.S. 2010); *see also Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers)(applying the same standard to determine whether to recall and stay a mandate.) However, since the Court would not have committed to re-visiting this legal standard unless there was a “fair prospect” of reversal, the only remaining question is whether vacating the order would

³ Since it is undisputed that both defendants prevailed on the merits, this Court’s prior interaction with the merits of the claim in *Kirtsaeng* does not it any better a vehicle for deciding this question.

prevent irreparable injury to Pelizzo and benefit the interests of the public. The answer to both these questions is yes.

4. This Court has taken the opportunity to review the Second Circuit's judgment in order to resolve a circuit split and, presumably, establish a nationally uniform standard for evaluating Section 505. However, this Court's decision to intervene came only weeks after it declined to review an opinion from the Eleventh Circuit applying the identical legal standard to identical legal effect. Thus, even if the Court finds in favor of *Kirtsaeng*, the timing of its actions creates uncertainty as to whether the legal framework applied below remains precedential in weighing factually analogous scenarios. While the denial of certiorari is not intended to suggest a view of the merits, it is also presumed that the Court has sound reasons for proceeding one way rather than the other. Accordingly, since the petitions were simultaneously pending before this Court, the disparate treatment afforded to Pelizzo's petition will likely be perceived as the result of an unspoken distinction drawn by this Court on the merits. Accordingly, due to the timing of this Court's denial of Pelizzo's petition, it is unlikely that the lower court would find it was required or, even, permitted to vacate its opinion. Put another way, by leaving the lower court's judgment intact, the Court has drawn a line in the sand without providing any explanation for doing so. As a result, future parties will fill this void by speculating and interpreting these motivations to further their own agendas.

5. By leaving behind an opinion of which no final review is possible, this Court would undermine the very objectives it is hoping to achieve. As discussed in Pelizzo's petition, Malibu Media is the most litigious plaintiff in the United States. Since January 2009, Malibu Media has filed over 4,332 lawsuits, all of which rest on the same legal

allegations and technological basis asserted against Pelizzo. See Jeff Stone, *Copyright Owner Malibu Media Is Most Litigious Plaintiff In The US*, International Business Times (Aug. 14, 2015).⁴ Even if the Second Circuit's opinion is overturned, Malibu Media will argue that the framework employed by the lower court remains precedential in any action in which it is a party. Specifically, if trial courts are instructed that they should award fees based on a "case-by-case exercise of their discretion", the lower court's opinion would likely be cemented as the definitive framework used to guide this discretion in evaluating the question of fees in any digital piracy case where a defendant prevails. Indeed, only a week after this Court denied certiorari, Malibu Media filed a motion with a district court in the Seventh Circuit citing this Court's denial of certiorari to support the contention that "the Eleventh Circuit has acknowledged that Plaintiff's lawsuits 'serve the purposes of the Copyright Act: compensation and deterrence.'" *Malibu Media, LLC v. Tashiro*, Case 1:13-cv-00205, Doc. 272, p. 6, (S.D. Ind., filed 12/22/15). This leaves behind a kernel of doubt of the very type that led to this confusion in the first place.⁵ Resolving any ambiguities now, rather than later, will eliminate this uncertainty and clear a path for courts and litigants to apply the law properly.

6. Although this request is filed after the expiration of the time prescribed in Rule 44.2, the grounds upon which it is based arose after that time. The *Kirtsaeng* and *Pelizzo* petitions were filed within a week of each other and, therefore, the relationship between these cases escaped the parties' (and even this Court's) attention. Moreover, since certiorari

⁴ <http://www.ibtimes.com/dont-download-x-art-porrtorrents-copyright-owner-malibu-media-most-litigious-2054499>

⁵ [App. B, p. 2-3] (citing 5 Nimmer on Copyright §14.10[2][b] (2015) (noting the *Fogerty* language "comes in a context in which that light has been filtered out from its source").

was granted in *Kirtsaeng* a month after the order denying Pelizzo's petition, the undersigned's opportunity to bring this matter to the Court's attention arose just outside the twenty-five (25) day window for requesting a re-hearing.

7. Furthermore, since Pelizzo's petition was timely filed,⁶ this time limit is "not jurisdictional and can be relaxed by the Court in the exercise of its discretion" *See Bowles v. Russell*, 551 U.S. 205, 211-12 (U.S. 2007) (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970)).⁷ Instead, the Court's jurisdictional authority to review the lower court's opinion is governed by 28 U.S.C. § 1254(1), which "confers unqualified power on this Court to grant certiorari 'upon the petition of any party...before or after rendition of judgment or decree.'" *Camreta v. Greene*, 563 U.S. 692 (U.S. 2011) (internal citations omitted); *see also Forsyth v. Hammond*, 166 U.S. 506, 513 (U.S. 1897) (contending that this provision "was intended to vest in this court a comprehensive and unlimited power.") The Court has previously exercised this broad authority to consider issues *sua sponte* that were "intimately bound up with [and] easily subsumed within the question on which we granted certiorari." *See Kolstad v. American Dental Association.*, 527 U.S. 526, 540 (1999) (deciding an agency issue falling within the question presented, namely 'in what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act'). Indeed, the Court has even considered an issue set forth in a pending petition for certiorari that was never briefed on the merits but deemed critical to the question at hand. *United States v. Feola*, 420 U.S. 671, 676 (1975)(contending that the "the very

⁶ Compare Rule 13.2, which cites § 2101(c), directs the Clerk not to "file *any* petition for a writ of certiorari that is *jurisdictionally* out of time" with Rule 44.4, which provides that the Clerk will not file "petitions that are out of time *under this Rule*"

⁷ *See also* Comments accompanying the July 1, 2013 revisions (providing that the deadline set forth in Rule 44.4 "reflects the current practice of not extending the time to file a petition for rehearing.")

considerations of symmetry urged by the Government suggest that we first turn our attention to [this issue].”); *see also Chessman v. Teets*, 354 U.S. 156, 165 n.13 (1957) (providing that the Supreme Court’s previous denials of certiorari do not foreclose it from granting appropriate relief.)

8. Moreover, in similar circumstances, this Court has held that strict adherence to these rules would be unfair and undermine interests of justice. *See United States v. Ohio Power Co.*, 353 U.S. 98 (1957) (granting certiorari out-of-time so that the “case might be disposed of consistently with companion cases”); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27 (1965) (finding “intervening circumstances” merited grant of certiorari after deadline to file for rehearing); *Foster v. Texas*, 563 U.S. 931 (U.S. 2011)(granting motion for leave to file a petition for rehearing); *Melson v. Allen*, 561 U.S. 1001 (2010)(vacating an order denying a petition entered shortly before granting certiorari to decide a similar question in *Holland v. Florida*, 560 U.S. 631 (2010).)

9. Entertaining the merits of Pelizzo’s case will allow this Court to consider factual issues that are distinct from, and have vastly wider implications than, the issues presented in *Kirtsaeng*. Rather than dealing in hypotheticals, the Court would be considering policy questions relative to a digital piracy case that was properly teed up and fully briefed in the record and ensure the guidance in its opinion is properly calibrated to guide trial judges in resolving any tensions between the Copyright Act’s objectives and the sweeping enforcement measures taken by parties relying on technical data. This opportunity for refinement is the very reason why this Court allows issues to percolate in lower courts and, therefore, a reason to grant Pelizzo’s petition, not deny it. *See, e.g., Trest v. Cain*, 522 U.S.

87, 92 (1997)(“often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home.”) Given the foregoing, justice would be served by vacating the lower court’s opinion and consolidating the cases (or ordering them argued in tandem.) This would be in keeping with the Court’s practice of hearing closely related cases simultaneously. *See, e.g., Hanlon v. Berger*, 525 U.S. 981 (1998) (No. 97-1927)(on writ of certiorari to the Ninth Circuit) *consolidated with Wilson v. Layne*, 525 U.S. 981 (1998) (No. 98-83)(on writ of certiorari to the Fourth Circuit). Alternatively, the certiorari papers should be recalled and held by the Court pending its ruling in *Kirtsaeng*.

10. Moreover, vacating the order in this case will serve the interests of finality. Unless this case is vacated and decided through the judicial process, Pelizzo will have no practical way to reverse the lower court’s ruling. If the *Kirtsaeng* decision is reversed, Pelizzo’s only recourse will be to raise the identical arguments that were denied certiorari by this Court after being overruled by the lower courts. *See, e.g., Estate of Whitlock v Commissioner*, 547 F2d 506, 509 (10th Cir. 1976) (declining to revisit a challenge pending the disposition of a similar case on merits because the “arguments are essentially the same as those which we rejected. . . and became final when the Supreme Court denied certiorari.”)

11. The clarification and insight needed to resolve this uncertainty can only be supplied by this Court. Since “the relief is not available from any other court or judge,”⁸ and the legal effect of the lower court’s order is immediate and irreparable, this matter is immediately reviewable by this Court. *See, e.g., Federal Power Comm’n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 330-331 (U.S. 1976); *see also*

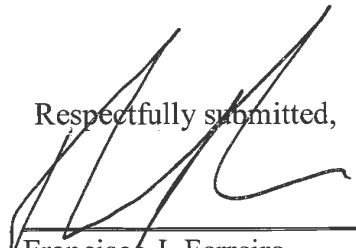
⁸ Sup. Ct. R. 23

Heckler v. Turner, 468 U.S. 1305, 1308-09 (1984) (Rehnquist, J., in chambers)(finding “an application directly to this Court is not improper” in such circumstances.)

12. Granting this relief would also not disrupt any interests that this Court should regard as legitimate. Under the question presented, the standard applied by the lower court is already subject to review. Additionally, Malibu Media waived its right to respond to Pelizzo’s petition and, therefore, expressly declined an opportunity to defend the lower court’s opinion or legal challenges presented herein. Indeed, but for Malibu Media’s waiver, Pelizzo’s petition would have been considered together with *Kirtsaeng*. Malibu Media will suffer no prejudice from the reinstatement of a case involving issues that were timely challenged and that this Court has determined are worthy of its consideration. Similarly, there is no reason to allow Malibu Media to enjoy the windfall of a legal framework that may be improper. Moreover, since the instant motion has been filed within seven (7) business days of the Court’s January 16th order granting certiorari, vacating this order would simply put the parties back in the position they were in for 21 months before the denial of Pelizzo’s petition on December 15th. Due to this short time-frame, the parties would also be prepared to brief the merits on the same schedule established in *Kirtsaeng*, should the cases be consolidated

For the foregoing reasons, Pelizzo respectfully requests that the Court issue an order vacating its denial of the petition for certiorari and granting leave for briefing on the merits.

Respectfully submitted,



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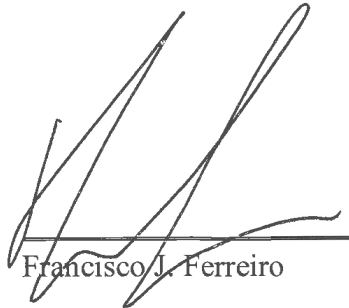
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on **January 27, 2015**, a copy of this motion was sent via First

Class Mail to Respondent at the following address:

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App. A

App. No. ____

In the
Supreme Court of the United States

Leo Pelizzo,
Petitioner,

v.

Malibu Media, LLC,
Respondent.

**ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

**PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A
PETITION FOR A WRIT CERTIORARI**

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August 21, 2015

App. No. ____

In the
Supreme Court of the United States

Leo Pelizzo,
Petitioner,

v.

Malibu Media, LLC,
Respondent.

**PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Clarence Thomas., as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Petitioner, Leo Pelizzo, respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended by thirty (30) days to, and including, October 2, 2015. The Court of Appeals issued its opinion on March 26, 2015 (App A., *infra*) and, on June 4, 2015, denied a petition for rehearing *en banc* (App. B). Absent an extension of time, the Petition would therefore be due on September 2, 2015. Petitioner has filed this Application at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. §1254(1).

BACKGROUND

The issue to be raised in the Petition relates to the standard governing prevailing party fee awards under 17 U.S.C. §505 of the Copyright Act. The Respondent, Malibu

Media, LLC (“Respondent”), is the most litigious copyright plaintiff in the United States today. Last year, *the New Yorker* calculated that it had single-handedly accounted for 40% of the copyright infringement lawsuits filed in the U.S. in the preceding year. The case at hand arose after the Petitioner was sued by the Respondent based on an Internet Protocol (IP) investigation erroneously linking his internet account to a series of infringing activities.

Eight months after filing suit, Respondent conceded that Petitioner had been misidentified due to an error during the IP Address investigation. Respondent offered to dismiss the action if Petitioner would agree to bear his own fees. When Petitioner asked to be reimbursed for his defense, the Respondent responded by threatening to “bankrupt” the Petitioner and pushing forward with the action despite knowing the claim was baseless. Respondent ultimately voluntarily dismissed the action following mediation and Petitioner’s failure to capitulate. Petitioner, thereafter, moved for prevailing-party fees under the Copyright Act, 17 U.S.C. § 505 and vexatious-litigation fees under 28 U.S.C. § 1927.

In *Fogerty v. Fantasy*, this Court explained that “[t]here is no precise rule or formula for making [§ 505] determinations,’ but instead equitable discretion should be exercised” in making these determinations. 510 U.S. 517, 534 (U.S. 1994)(internal citation omitted). While agreeing that various non-exclusive factors could be used to guide these determinations, the Court set two parameters around this discretionary authority. These require that the framework used to guide the determination be (1) faithful to the purposes of the Copyright Act; and (2) applied to prevailing plaintiffs and defendants “in an evenhanded manner.” *Id.* at 534-535 (U.S. 1994).

Following the approach taken by other courts in the Southern District of Florida, the lower court's §505 analysis asked solely to whether the plaintiff's claims were reasonable or frivolous. The Court of Appeals affirmed, noting that: "[a]s for considerations of compensation and deterrence, we evaluate those factors as 'inextricably intertwined' with the reasonableness and frivolity of Malibu's claims." (App A., 5) In addition to focusing solely on the Respondent's conduct, the lower court's §505 analysis was limited to a discrete portion of the litigation, namely, the time period preceding the moment Petitioner was able to provide evidence Respondent was pursuing its claim in bad faith. The Court of Appeals limited the scope of its review to this same discrete window, finding "no abuse discretion in the district court's conclusion that Malibu, up to a point, acted in an objectively reasonable manner . . . We say 'up to a point' because the district court evaluated Malibu's liability for vexatious-litigation fees under 28 U.S.C. § 1927 beginning after the 'knee-jerk' email sent by Malibu's counsel." App. 5, p 5 and n.2.

REASONS FOR GRANTING AN EXTENSION OF TIME

The requested thirty (30) extension of the time to file a Petition for a Writ of Certiorari should be granted for the following reasons:

1. Petitioner, Leo Pelizzo, is a Venezuelan citizen that resides in South America. In addition to living and working outside of the United States, Petitioner speaks very little English and depends on the undersigned to translate and communicate any legal developments into Spanish.

2. Due to the fact Petitioner was traveling, the undersigned was unable to communicate the news and implications of the Court of Appeals' decision to the Petitioner until mid-July. As a result of this delay, the decision to move forward with a Petition for

Certiorari was reached less than a month ago. The undersigned has since filed an application seeking admission to this Court, which is currently pending review. While the undersigned has been equally diligent in beginning to prepare a Petition for consideration by this Court, the abbreviated window of time – coupled with obligations in several other matters – make it necessary to request additional time to complete this task.

3. The circumstances at issue in his case create a substantial prospect that this Court will grant certiorari in this action. First, in endorsing a framework that fails to consider the totality of the circumstances, the Eleventh Circuit's opinion stands at odds with the principles articulated by this Court in *Fogerty* and, more recently and explicitly, in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

4. The Court of Appeals' framework is also in conflict – if not a complete inversion of-- the standard employed by the Seventh Circuit in these same determinations. Whereas the Eleventh Circuit's approach is "inextricably intertwined" with the reasonableness and frivolousness of a plaintiff's claims, the Seventh Circuit's inquiry centers on two different overriding considerations, namely, the strength of the prevailing party's case and the amount of damages the prevailing party obtained. See *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 791 (7th Cir. 2014). The Seventh Circuit has also created a "strong presumption" favoring fee awards in cases where a defendant prevails. *Woodhaven Homes v. Hotz*, 396 F.3d 822 (7th Cir. 2005). The rule, which is "designed to ensure that an infringement defendant does not abandon a meritorious defense in situations in which 'the cost of vindication exceeds the private benefit to the party'", was recently reaffirmed by the Seventh Circuit in *DeliverMed Holdings, LLC v.*

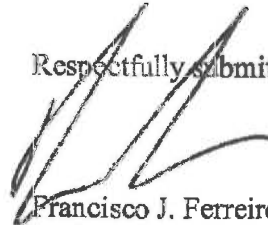
Schaltenbrand, 734 F.3d 616, 625-26 (7th Cir. 2013); *see also* *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 791 (7th Cir. 2014)

5. The Seventh Circuit's carved out its own path after deeming the *Fogerty* factors "arguably dictum, and in need of simplification". *Assessment Technologies v. Wireddata, Inc.*, 361 F.3d 434 (7th Cir. 2004). This lack of clarity has also now led the Eleventh Circuit to create its own refinement of the *Fogerty* factors to contrary effect. Two other circuits, namely the 2nd Circuit and 9th Circuit, have expressly declined to adopt the 7th Circuit's presumption in cases involving prevailing defendants. *See Lava Records, LLC v. Amurao*, 354 F. App'x 461, 463 (2d Cir. 2009); *Marshall & Swift/Boeckh, LLC v. Dewberry & Davis LLC*, 586 Fed. Appx. 448, 449-450 (9th Cir. Cal. 2014)("Unlike the Seventh Circuit, we have continued to apply the factors outlined in *Fogerty* without a presumption."). And, at least one district court has contended Seventh Circuit's "refinement of the *Fogerty* standard . . . appears to conflict with the Supreme Court's holding in *Fogerty*." *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 820 F. Supp. 2d 569, 575 (S.D.N.Y. 2011).

6. The consequences of the Court of Appeal's decision also extend far beyond the Petitioner's narrow interests. Since January 2009, the Respondent has filed 4,332 lawsuits, all of which rest on the same legal allegations and technological basis asserted against the Petitioner. The fact this case is one of thousands brought by the same plaintiff whose methods and technology will inevitably sweep up other innocent parties makes it an ideal vehicle for addressing the uncertainty and lack of uniformity surrounding §505 determinations.

For the above-referenced reasons, Petitioner respectfully requests that the Court grant an additional 30 days, to and including October 2, 2015, within which to file a petition for certiorari.

Respectfully submitted,



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August 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, a copy of this motion was sent via First Class Mail to Respondent at the following address:

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Francisco J. Ferreiro

App. B

No. 15-429

10/2/15

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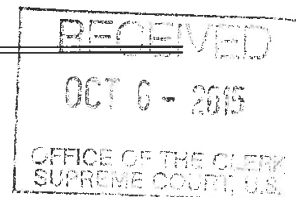
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Fogerty v. Fantasy*, 510 U.S. 517 (1994), this Court agreed that judges could rely on several non-exhaustive factors to guide their equitable discretion in awarding prevailing party fees under the Copyright Act, 17 U.S.C. §505, including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” The Court set two parameters around this discretionary authority: the factors used to guide this discretion must be “faithful to the purposes of the Copyright Act and . . . applied to prevailing plaintiffs and defendants in an evenhanded manner.”

The Court of Appeals has adopted a bright-line rule indicating that considerations of compensation and deterrence in deciding whether to award fees under §505 are “inextricably intertwined” with the reasonableness and frivolity of a plaintiff’s claims.

1. DO CIRCUIT COURTS HAVE THE FREEDOM TO LIMIT THE “CONSIDERATIONS OF COMPENSATION AND DETERRENCE” THAT 17 U.S.C. §505 AWARDS MAY BE USED TO ADVANCE IN THEIR CIRCUIT?

In exercising its discretion in this case, the district court decided to bifurcate its consideration of the evidentiary record between two statutes, namely, 17 U.S.C. §505 and 28 U.S.C. §1927. In assessing

QUESTIONS PRESENTED – Continued

“frivolousness, motivation, and objective unreasonableness,” it discounted any portions of the record considered in imposing sanctions under §1927. On appeal, the Eleventh Circuit narrowly limited its review within the contours chosen by the district court and found no abuse of discretion in the determination that “Malibu, *up to a point*, acted in an objectively reasonable manner.”

- 2. WHETHER A COURT OF APPEALS MUST CONSIDER THE TOTALITY-OF-THE-CIRCUMSTANCES AND REVIEW ALL ASPECTS OF A TRIAL COURT’S DECISION TO ENSURE THAT ITS CONSIDERATIONS ARE EVEN-HANDED AND FAITHFUL TO THE PURPOSES OF THE COPYRIGHT ACT.**

PARTIES TO THE PROCEEDING

Respondent, Malibu Media, LLC, is an adult film provider recognized as the most litigious copyright plaintiff in the United States today.

Petitioner, Leo Pelizzo, was sued for copyright infringement after being mistakenly linked to a series of infringing activities through a flawed Internet Protocol (IP) investigation.

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OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's opinion (App. 1), which affirmed the District Court's denial of Petitioner's 17 U.S.C. §505 fee petition for fees, was handed down on March 26, 2015, and is reported at 604 F. App'x 879 (11th Cir. 2015). The order denying the Petition for Rehearing *en Banc* (App. 37) was entered on June 4, 2015, and is unreported. The United States District Court for the Southern District of Florida's (App. 7) order, which adopted the Magistrate's Report and Recommendation (App. 16) in its entirety, was entered on March 28, 2014 and is unreported.



STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment in this case on March 26, 2015 and, on June 4, 2015, denied a petition for rehearing *en Banc*. This Court has jurisdiction over the judgment pursuant to 28 U.S.C. §1254(1).



STATUTORY PROVISION INVOLVED

The Copyright Act, 17 U.S.C. §505, provides that:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title,

the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.



STATEMENT OF THE CASE

Statutory Background

The issue raised in this Petition concerns the standard governing prevailing party fee awards under 17 U.S.C. §505 of the Copyright Act. *Fogerty* resolved a split amongst circuit courts regarding the proper interpretation of §505. In doing so, the Court explained that “[t]here is no precise rule or formula for making [§505] determinations, but instead equitable discretion should be exercised” in making these determinations. *Fogerty v. Fantasy*, 510 U.S. 517, 534 (1994) (internal citation omitted). While agreeing that various non-exclusive factors could be used to guide these determinations, the Court set two parameters around this discretionary authority: the framework used to guide the determination must be (1) faithful to the purposes of the Copyright Act; and (2) applied to prevailing plaintiffs and defendants “in an even-handed manner.” *Id.* at 534-35.

In the two decades since *Fogerty*, the judicial landscape is once again divided. Part of the problem is rooted in the fact that courts have latched on to the “non-exclusive” factors approved of by the Court, rather than the underlying principle that “equitable discretion should be exercised ‘in light of

the considerations we have identified.” Some commentators suggest this is due to the ambiguity surrounding the considerations “identified.” *See* 5 Nimmer on Copyright §14.10[2][b] (2015) (noting the phrase sheds little light and “comes in a context in which that light has been filtered out from its source”). Thus, rather than exercising their discretion equitably, most courts have treated “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence” as a fixed rule. The result has led to inconsistent and poorly reasoned decisions reciting the same factors and rhetoric verbatim and then applying the law to contrary effect.

Over a decade ago, the Seventh Circuit carved out its own path after deeming the *Fogerty* factors “non-exclusive arguably dictum, and in need of simplification.” *See Assessment Technologies v. Wiredata, Inc.*, 361 F.3d 434 (7th Cir. 2004). Accordingly, in the Seventh Circuit, the inquiry centers around the strength of the prevailing party’s case and the amount of damages the prevailing party obtained. *See Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 791 (7th Cir. 2014). This lack of clarity has now led the Eleventh Circuit to create its own refinement of the *Fogerty* factors to contrary effect, which limits “considerations of compensation and deterrence” around the reasonableness and frivolity of a plaintiff’s claims. Absent further guidance from the Supreme Court, these diverging interpretations regarding the

standard used to award fees under §505 will not only linger, but continue to grow.

The issues in these particular circumstances have significant implications for the future of copyright litigation in the United States. Since January 2009, Malibu Media has filed 4,332 lawsuits, all of which rest on the same legal allegations and technological basis asserted against Pelizzo. *See* Jeff Stone, *Copyright Owner Malibu Media Is Most Litigious Plaintiff In The US*, International Business Times (Aug. 14, 2015), <http://www.ibtimes.com/dont-download-x-art-porn-torrents-copyright-owner-malibu-media-most-litigious-2054499>. The fact this case is one of thousands brought by the same plaintiff using tactics that will inevitably sweep up other innocent parties makes it an ideal vehicle for addressing and resolving an important question. Due to these developments, §505's ability to function effectively as an equitable stopgap is a matter of critical importance that desperately calls for clarification.

Factual Background

Under the Federal rules, a copyright plaintiff seeking to identify an anonymous internet user may proceed by filing a complaint against an anonymous "John Doe" and, thereafter, seeking permission to serve a subpoena on the Internet Service Provider.¹

¹ Fed. R. Civ. P. 26(d)(1).

This case, however, began in county court. On February 15, 2012, Malibu Media obtained a bill of discovery order from a Miami-Dade county judge compelling various internet service providers to identify 347 anonymous internet users [DE#13-1]. It was, thereafter, provided with Pelizzo's name, email address, mailing address, and phone number. Malibu waited nearly six (6) months before filing a federal complaint. In that time, it declined to send any written communications to Pelizzo advising him of the claims; but, instead, used the time to continue tracking the on-going infringement linked to the IP address in question. On July 27, 2012, Malibu Media filed a complaint in the Southern District of Florida alleging that Pelizzo had infringed fourteen (14) films.² The Complaint asserted that "Defendant is the only person who can be identified as the infringer at this time." [DE#1, ¶24].

On August 20, 2012, Pelizzo received his first notice of the claims when he was served with the complaint. Upon learning of the suit, he contacted his internet service provider to determine the IP address assigned to his account. [DE#7-1, p. 9-11]. Pursuant to the internet service provider's instructions, he used an online tool, "www.whatismyip.com," to identify the IP address currently associated with his internet account. *Id.* This investigation confirmed that his account was *not* assigned to the IP address referenced

² [DE#1].

in Plaintiff's complaint. *Id.* Pelizzo filed a motion to dismiss, which was accompanied by (1) documents showing the results of this IP investigation; and (2) passport and visa documentation showing he had been in South America when the infringement occurred. [DE#7-1]. Malibu Media opposed the motion.

The district court determined these factual matters were not cognizable at the motion to dismiss stage; but, "might pave the way for an early summary judgment motion" or a "Rule 11 motion, depending on the circumstances." *Malibu Media, LLC v. Pelizzo*, 2012 U.S. Dist. LEXIS 180980, 11, n.5 (S.D. Fla. Dec. 20, 2012). The factual background set forth in the Order denying the motion to dismiss was "derived from Plaintiff's Complaint and the exhibits accompanying it, as the Court must accept all factual allegations as true and construe them in the light most favorable to the Plaintiff." *Id.* 1-2, n.1. The litigation proceeded for another seven months. In that time, Malibu Media never requested a second subpoena. Instead, following a series of delays, Malibu deposed Pelizzo's Internet Service Provider pursuant to Rule 30(b)(6) "(a) to ascertain if and how the correlation error occurred; and (b) to determine if it would be possible to identify the infringer." [DE#47-6, at ¶9.]

After finally conceding Pelizzo had been misidentified, Malibu Media indicated it would be willing to voluntarily dismiss the action if Pelizzo would agree to a mutual release requiring him to bear his own fees and expenses. When Pelizzo declined to absorb these costs, Malibu Media threatened to bankrupt

him and ramped up its litigation efforts. Following a mediation and fruitless negotiations, Malibu eventually dismissed its action with prejudice over a month later.

Following dismissal, Pelizzo moved for prevailing-party fees under the Copyright Act, 17 U.S.C. §505, and vexatious-litigation fees under 28 U.S.C. §1927. The magistrate judge issued a report recommending that sanctions be entered against Malibu's counsel under §1927 in the amount of \$6,815.50; but denying Pelizzo's prevailing-party fee request under the Copyright Act. (App. 16). In assessing 17 U.S.C. §505, the magistrate judge discounted any portions of the record already evaluated under its §1927 analysis. (App. 28). The court also based its finding on the factual background set forth in the district court's motion to dismiss which, in turn, had been based on Malibu Media's pleading. Following the approach taken by other courts in the Southern District of Florida, the consideration driving the §505 analysis focused solely on whether the plaintiff's claims were reasonable or frivolous. (App. 29). The discussion of each *Fogerty* factor centered on Pelizzo's failure to meet an evidentiary burden. For instance, the district court noted that "Defendant cites no authority for the proposition that the pursuit of this lawsuit became objectively unreasonable the moment Defendant came forward with potentially exculpatory evidence" (App. 27) and "Defendant has not done anything to disprove Plaintiff's stated motivation for filing suit." (App. 24). The district court declined to consider

evidence regarding Malibu Media's practices in other cases, stating that, "Defendant's reliance on and citation to acts and practices in other unrelated cases does not aid the Court's analysis here." (App. 24, n.3). The court also declined to consider the effects of Malibu's delays or circumvention of Federal procedure. As the court put it, "[t]he Plaintiff need not avail itself of every form of communication, telephone, electronic mail, certified mail and others, to be regarded as having attempted a pre-suit resolution of the dispute." (App. 11). The district court ultimately held the factors weighed against a prevailing party award despite the "debateable social value" of Malibu Media's works. (App. 12).

The Court of Appeals affirmed, noting that: "[a]s for considerations of compensation and deterrence, we evaluate those factors as 'inextricably intertwined' with the reasonableness and frivolity of Malibu's claims." (App. 5). The scope of appellate review was confined to the same discrete window chosen by the district court. In doing so, the Eleventh Circuit found "no abuse of discretion in the district court's conclusion that Malibu, up to a point, acted in an objectively reasonable manner We say 'up to a point' because the district court evaluated Malibu's liability for vexatious-litigation fees under 28 U.S.C. §1927 beginning after the 'knee-jerk' email sent by Malibu's counsel." The opinion included no independent citations to or discussions of the factual record.



REASONS FOR GRANTING THE WRIT

Legal discretion is defined as the “privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of the law.”³ The role of a judge exercising their equitable discretion is akin to a tailor working with a large piece of fabric that must be hemmed to fit the shape and proportions of the job required. Rather than letting judges exercise their discretion in tailoring this relief, the Court of Appeals has lopped off a small patch of fabric defining the contours of judicial discretion. As with a tailor running short on cloth, the relief fashioned by these judges promises to be ill-fitting. This Court recently acknowledged the important – and distinct – equitable role played by restitutional remedies, such as Section 505. *See Petrella v. MGM*, 134 S. Ct. 1962, 1967 (2014) (noting that a plaintiff’s “delay in commencing suit [is] a factor in determining the contours of relief” at the remedial stage.). The policy decisions shaping the future of the Copyright Act must be rooted in principles that are permanent and timeless, rather than a function of passing trends or procedural maneuvers. When the consequences of these delays are unfair, these “discrete wrongs” should be brought to bear in determining appropriate relief under Section 505. *See id.* at 986, n.1. Moreover, this Court has recently lent

³ BLACK’S LAW DICTIONARY 467 (6th ed. 1991).

clarity to the Patent Act’s analogous prevailing party provision by clarifying that an appellate court should review *all* aspects of a district court’s §285 determination for abuse of discretion, *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1749 (2014), and that trial courts should award fees based on a “case-by-case exercise of their discretion, considering the totality of the circumstances.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). To ensure that §505’s objectives are achieved, a similar clarification is needed here.

I. THE ELEVENTH CIRCUIT’S NARROW CONSTRUCTION OF 17 U.S.C. §505 INTRUDES ON CONGRESSIONAL AUTHORITY AND INHIBITS TRIAL COURTS FROM EXERCISING THEIR EQUITABLE DISCRETION IN THE MANNER NEEDED TO ACHIEVE THE STATUTE’S LEGISLATIVE OBJECTIVES

A. The Bright-Line Rule Adopted Renders §505 Superfluous.

American courts have long followed a general rule requiring parties to litigation to pay their own lawyers, win or lose, unless a statute or contract provides otherwise. Under this default rule, a prevailing defendant is always out of pocket for its fees. In addition to failing to provide a prevailing litigant complete justice, the financial burdens imposed under this default rule may discourage (or make it impossible for) litigants with a meritorious claim or defense

to vindicate their rights. Due to the important policy considerations at stake in copyright law, Congress has counteracted these imbalances by creating a statutory fee award to ensure litigants with meritorious claims or defenses are not deprived of access to the courts.

Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action . . . if that had been the intent of Congress, no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith.

Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 419 (1978).

Under this framework, copyright claims will be encouraged and frivolous lawsuits will be discouraged. However, the Copyright Act *already* compensates copyright owners that pursue meritorious claims by allowing them to recover actual damages or statutory damages. Similarly, frivolous and vexatious behavior is already deterred by other rules. This directly conflicts with the guiding principles recently discussed in *Octane Fitness*, which rejected an inflexible framework that would render the prevailing patent fee statute largely superfluous by focusing on behavior already addressed by other rules. *Octane*

Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1758 (2014); *United States v. Jicarilla Apache Nation*, 564 U.S. ___, ___, 131 S. Ct. 2313, 180 L. Ed. 2d 187, 207 (2011) (“‘As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law’”) (quoting *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988)).

The Supreme Court has consistently held that provisions promulgated by Congress and Federal regulatory agencies require a “contextual inquiry” and “cannot be reduced to a bright-line rule.” See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (the 17 U.S.C. §107 analysis cannot “be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”). Last year, this Court reiterated this principle in unanimously rejecting a Federal Circuit rule requiring defendants seeking a prevailing fee award under the Patent Act⁴ to establish that “the litigation [was] both brought in subjective bad faith and objectively baseless.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), *abrogating Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378 (Fed. Cir. 2005).

⁴ 35 U.S.C. §285 provides that a “court in exceptional cases may award reasonable attorney fees to the prevailing party.”

Moreover, while judges have been given various tools to manage litigation, they do not have unbridled authority to decide how these are used. The only statutory preconditions to a §505 award is a requirement that the party receiving the fee be the ‘prevailing party’ and that the fee be reasonable. Neither the meaning of “equitable relief” nor the Copyright Act’s objectives fluctuate from circuit to circuit. This Court has previously observed that “courts are not free to fashion drastic new rules with respect to the allowance of attorneys’ fees to the prevailing party [based] upon the courts’ assessment of the importance of the public policies involved in particular cases.” *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975).

B. The Rule Disrupts the Coherence of the Copyright Act by Preventing §505 From Functioning as an Equitable Remedy.

“Legal systems contain doctrines that help courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances.” *Petrella v. MGM*, 134 S. Ct. 1962, 1979 (2014) (Breyer, J., dissenting). The relief authorized under Section 505 falls within this equitable domain. *See id.* at 1967, n.1. Rather than allowing sharply defined rules and procedural advantages to dictate the outcome of these decisions, judges must be free to rely on their common-sense and innate sense of justice. In *Octane*, this court clarified that civil

litigants are required to establish facts by a preponderance of the evidence unless Congress says otherwise. In cases involving questions of policy and equity, this is particularly important to ensure that “both parties to ‘share the risk of error in roughly equal fashion,’” *Octane*, 134 S. Ct. at 1758 (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)). These determinations should be based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence. This is consistent with principles of equity, which provide that “in the absence of relations or conditions requiring a different result, equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences.” C.J.S., Equity, p. 517, §109.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GIVE FRESH, EVEN-HANDED CONSIDERATION TO THE TOTALITY-OF-THE-CIRCUMSTANCES

Rather than weighing totality-of-the-circumstances, the district court bifurcated the record between two statutes, applying §505 solely to the portion of the litigation immediately preceding the evidence of bad faith. The Court of Appeals narrowly limited the scope of its appellate review within the confines chosen by the district court and satisfied itself with a finding that “Malibu, up to a point, acted in an

objectively reasonable manner We say ‘up to a point’ because the district court evaluated Malibu’s liability for vexatious-litigation fees under 28 U.S.C. §1927 beginning after the ‘knee-jerk’ email sent by Malibu’s counsel.” (App. 5). Petitioner challenged both the district court’s legal application of the *Fogerty* standard and its incomplete assessment of the factual record. The court limited its consideration “time period where Plaintiff threatened continued litigation of this matter is *more properly addressed* under the 28 U.S.C. §1927 analysis.” (App. 105, n.5). A court must decide whether an award is merited and, if so, how much should be awarded. These are two separate inquiries involving distinct considerations. Moreover, “[u]nder the Copyright Act, the question is whether a successful defense of the action furthered the purposes of the Act, not whether a fee award would do so.” *Mattel, Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003). “The district court appears to have decided that the fee award itself would not further the purposes of the act. Instead of denying fees outright, the court should have reduced the amount of the requested fee, if appropriate.” *Id.* The district court’s conclusion regarding the interplay between Section 1927 and Section 505 was accepted without review.

This Court recently held that “an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court’s §285 determination.” *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1749 (2014). In this case

the contours of appellate discretion were dictated by the district court's own interpretation of the record. Under this standard, a decision is insulated from any meaningful appellate review so long as the district court correctly stated the legal standard or criteria. Consequently, a rigid interpretation that is inconsistent with the Copyright Act's objectives is rendered virtually unreviewable on appeal.

III. THIS COURT'S GUIDANCE IS NEEDED TO RESOLVE THE UNCERTAINTY AND INCONSISTENCY SURROUNDING PREVAILING FEE AWARDS UNDER 17 U.S.C. §505 OF THE COPYRIGHT ACT

"A presumption is a deduction which the law expressly directs to be made from particular facts." 21B CHARLES A. WRIGHT ET AL., FED. PRAC. & PROC. EVID. §5124 (2d ed. 2012). In the Eleventh Circuit the basic fact is that a plaintiff is the prevailing party in a copyright case, the presumed fact is that the plaintiff is entitled to a fee award. In this case, Pelizzo was unable to recover an award despite his actual innocence. By contrast, Malibu Media routinely obtains Section 505 awards following the entry of a default judgment against defendants whose substantive guilt (let alone motivations) are unknown. *See, e.g., Malibu Media, LLC v. Danford*, 2015 U.S. Dist. LEXIS 62022 (M.D. Fla. May 12, 2015) ("Since the Copyright Act seeks to stimulate artistic creativity for the general public good and discourage infringement, awarding attorney's fees addresses these goals In light of Danford's failure

to participate in this litigation, the Court finds awarding attorney’s fees is appropriate in this circumstance.”).⁵ Rather than relying on logic and an intuitive sense of justice, a judge’s role in this process is reduced to reinforcing procedural advantages lacking any relation to the Copyright Act’s objectives or substance of a claim. This holds a defendant hostage to procedure while, counterintuitively, rewarding plaintiffs whose tactical maneuvers have created and kept these residual informational asymmetries and ambiguities in place.

The burdens allocated under the Court of Appeal’s framework are directly at odds with the presumptions conferred in other courts of appeals. In the Fifth Circuit, prevailing party awards under the Copyright Act are “the rule rather than the exception and should be awarded routinely.” *See, e.g., Macro Niche Software, Inc. v. Imaging Solutions of Austl.*, 603 F. App’x 351, 353 (5th Cir. 2015) (quoting *Virgin Records Am. Inc. v. Thompson*, 512 F.3d 724 (5th Cir. 2008)). While the presumptive entitlement afforded to prevailing parties pre-dates *Fogerty*, the Fifth Circuit later harmonized the rule with the Supreme Court’s opinion by reasoning that it does not inhibit judicial discretion. *See Hogan Sys., Inc. v. Cybresource Int’l, Inc.*, 158 F.3d 319, 325 (5th Cir. 1998) (“The language

⁵ *See also Malibu Media, LLC v. Griggs*, 2015 U.S. Dist. LEXIS 79904 (S.D. Ohio June 19, 2015) (granting prevailing party fees following default); *Malibu Media, LLC v. Caswell*, 2015 U.S. Dist. LEXIS 79922 (S.D. Ohio June 19, 2015) (same).

of *Fogerty* clearly allows for judicial discretion in determining whether attorney's fees should be awarded. So does the *McGaughey* rule.”).

In 2002, the Seventh Circuit concluded the *Fogerty* factors were “nonexclusive, arguably dictum, and in need of simplification” *Assessment Technologies v. Wireddata, Inc.*, 361 F.3d 434 (7th Cir. 2004) (citing *Gonzales v. Transfer Technologies, Inc.*, 301 F.3d 608 (7th Cir. 2002)). Rather than the frivolousness and reasonableness of a plaintiff's claims, however, the Seventh Circuit has carved out two different overriding considerations: the strength of the *prevailing* party's case and the amount of damages the prevailing party obtained. See *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 791 (7th Cir. 2014). Accordingly, where a plaintiff prevails “the smaller the damages . . . the stronger the case for an award of attorney's fees.” *Gonzales v. Transfer Technologies, Inc.*, 301 F.3d 608 (7th Cir. 2002). Since defendants receive no award, the Seventh Circuit has created a “very strong presumption” favoring a fee award when a copyright defendant prevails. See *Woodhaven Homes v. Hotz*, 396 F.3d 822 (7th Cir. 2005). In the Seventh Circuit's words, this “very strong presumption . . . is designed to ensure that an infringement defendant does not abandon a meritorious defense in situations in which ‘the cost of vindication exceeds the private benefit to the party.’” *DeliverMed Holdings, LLC v. Schaltenbrand*, 734 F.3d 616, 625-26 (7th Cir. 2013). This has become an entrenched rule warranting reversal on appeal. See, e.g., *Mostly*

Memories, Inc. v. For Your Ease Only, Inc., 526 F.3d 1093, 1095 (7th Cir. 2008) (“The district court’s summary ruling reflects no consideration of these principles.”); *Riviera Distributors, Inc. v. Jones*, 517 F.3d 926, 929 (7th Cir. 2008); *Eagle Services Corp. v. H2O Industrial Services, Inc.*, 532 F.3d 620, 625 (7th Cir. 2008). One district court acknowledged the influence of this presumption as follows:

While [defendant] is correct that an award of fees remains discretionary, she fails to apprehend the strength of the current presumption in this Circuit that prevailing Defendants are entitled to an award of fees. She cites cases from the Ninth, Fifth, Second, First, and Sixth Circuits [however] this is a hierarchical system, and this Court is bound by the controlling precedent of the Seventh Circuit.

Bosch v. Ball-Kell, 2007 U.S. Dist. LEXIS 79207 at *13-14 (C.D. Ill. 2007) (“finding that under the current state of the law in the Seventh Circuit, Defendants are entitled to an award of fees.”).

At least two circuits, the Courts of Appeals for the Second Circuit and the Ninth Circuit, have acknowledged and expressly declined to adopt the Seventh Circuit’s “presumption.” *Lava Records, LLC v. Amurao*, 354 F. App’x 461, 463 (2d Cir. 2009); *Marshall & Swift/Boeckh, LLC v. Dewberry & Davis LLC*, 586 F. App’x 448, 449-50 (9th Cir. Cal. 2014) (“Unlike the Seventh Circuit, we have continued to apply the factors outlined in *Fogerty* without a presumption.”).

One district court has suggested that the Seventh Circuit’s “refinement of the Fogerty standard . . . appears to conflict with the Supreme Court’s holding in *Fogerty*.” *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 820 F. Supp. 2d 569, 575 (S.D.N.Y. 2011); *see also Klein & Heuchan, Inc. v. Costar Realty Info., Inc.*, 2011 U.S. Dist. LEXIS 141246, 16-17 (M.D. Fla. Dec. 7, 2011) (noting that “the 7th Circuit presumption in favor of awarding fees to a prevailing defendant is non-binding authority.”); *ZilYen, Inc. v. Rubber Mfrs. Ass’n*, 958 F. Supp. 2d 215, 219 (D.D.C. 2013) (“While the considerations underlying the presumptive entitlement set forth by the Seventh Circuit are certainly relevant to a court’s consideration of the appropriateness of a fee award under §505, the Court declines to adopt the presumption employed in the Seventh Circuit.”). That is certainly true of the standard employed here.

◆

CONCLUSION

While the technical process used to track internet infringers may be complex, the issues pertaining to copyright law are not. Upon learning of the claim, Pelizzo provided the district court and Malibu Media with the documentary evidence needed to settle this point and draw the litigation to a close. It was Malibu Media’s delays, and its circumvention of federal procedures, that cornered Pelizzo in the litigation for another seven months. But for his defense, many of the ambiguities and flaws of Malibu Media’s model would remain in the dark. Vigorously litigated

disputes are necessary to develop legal doctrine. As Benjamin Cardozo observed: “[t]he sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped.”⁶ For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
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⁶ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 35 (Yale 1921).