

Copyrights and Costs: A Tale of Two Statutes

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On January 14, 2019, the Supreme Court is set to hear oral argument in the copyright dispute Oracle USA Inc. v. Rimini Street, Inc. The Court will provide guidance on the proper definition of "full costs" under the Copyright Act. While this may not be the juiciest of copyright issues the Court has grappled with as of late, it is one that calls for clarification given the circuit split on the issue.

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In a copyright case, there are potentially two "costs" statutes in play. There is the general "taxable costs" statute embodied in 28 U.S.C. § 1920. It authorizes the trial court to award costs to the prevailing party related to such things as clerk fees, deposition transcription fees, and similar administrative expenditures incurred during the litigation. The Copyright Act has its own provision related to costs embodied in 17 U.S.C. § 505. It provides, in relevant part, that "[i]n 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" (emphasis supplied). Some courts have interpreted "full costs" under the Copyright Act to simply mean "taxable costs" under 28 U.S.C. § 1920. Other courts have held that "full costs" under the Copyright Act means essentially all costs incurred during the litigation by the prevailing party, which brings us to the case that the Supreme Court will review.

In *Oracle v. Rimini*, the trial court imposed a hefty damage award against Rimini for its infringement of Oracle's copyrights. The trial court also awarded Oracle approximately \$12 million in "full costs" under 17 U.S.C. § 505. This included expert witness fees, consultant fees, e-discovery costs and other various expenses, none of which are recoverable under the general "taxable costs" statute. The 9th Circuit affirmed the trial court's decision. This sets up a circuit split over the definition of "full costs" as the 8th and 11th Circuits have previously ruled that "full costs" simply means taxable costs and other expenses expressly allowed for under federal law.

It is interesting that the Supreme Court took this narrow issue, but it could have large implications for the strength of a copyright plaintiff's enforcement campaign. If a plaintiff can recover its "full costs" for litigating, it may increase the pursuit of copyright infringers by also threatening to recover costs, along with experts who specialize in the field and e-discovery vendors. Of course, § 505 would still be moderated by a court's discretion (as Oracle argues), but plaintiffs who feel that their case is strong may be more willing to litigate heavily. This also likely means that willful copyright infringers may have even more to fear than they did before. It will be interesting to hear how the Court considers large requests for expert witness fees, e-discovery, etc., and whether the justices comment on the expense of modern-day copyright infringement litigation.