

Wait, There's More Breaking News: SCOTUS Clarifies What Costs Are Recoverable in Copyright Infringement Cases

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The Supreme Court was busy yesterday issuing opinions involving copyright law (see the TMCA's post yesterday on *Fourth Estate vs. Wallstreet.com* concerning the need to obtain a copyright registration before initiating an infringement suit).

In a second important decision, *Rimini Street, Inc. v. Oracle, Inc.*, the Court resolved a circuit split over the definition of "full costs" in Section 505 of the Copyright Act. Some lower courts interpreted that provision as only including costs that are available under 28 U.S.C. §§ 1821 and 1920 (such as filing fees, deposition transcription costs, and the like). Other Courts (like the 9th Circuit in *Rimini Street*) interpreted "full costs" to mean **all** costs incurred in the suit, including e-discovery costs, expert witness fees, and other big ticket items that are routinely incurred in copyright cases.

In an opinion written by Justice Kavanaugh, the Court reversed the 9th Circuit, holding that litigation costs in copyright cases are limited to the six categories specified in §§ 1821 and 1920. He further stated that Congress may authorize awards of expenses beyond these categories and expressly provide for fees, such as attorneys' fees, which § 505 does, but it does not allow a court to award litigation costs generally beyond those in the six specific categories.

Justice Kavanaugh dismissed Oracle's arguments that the use of the phrase "full costs" was meant to modify the types of costs that could be awarded because other statutes use only the word "costs." He stated that the word "full" in §§ 1821 and 1920 means exactly "as it operates in other common phrases," and does not modify the word "costs." Since §§ 1821 and 1920 govern the award of costs in any civil cases, a prevailing party in a copyright matter may only receive the "full" amount of the defined "costs" that are allowed by §§ 1821 and 1920. A subject-matter specific statute, such as costs under § 505 of the Copyright Act, does not modify what a cost is merely because the words "full" and "costs" are used together. Justice Kavanaugh, perhaps intentionally alluding to his prior controversial purchase of Washington Nationals season tickets, said that the word

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“full” simply means “full” as it would be used commonly, and cannot change any other term, using examples such as a “full season ticket plan” meaning tickets, not hot dogs, and that a “full moon” means the moon, not Mars. After reciting some historical background on the use of the term “full costs” (and disagreeing that historically or in prior cases that it was clear that anything beyond defined costs could be allowed), the Court held that the award must still fall under the definition of “full” in §§ 1821 and 1920, which only has 6 categories and applies unless expressly stated in a statute allowing for such costs.

The Supreme Court therefore has laid out a clear rule – “A statute awarding ‘costs’ will not be construed as authorizing an award of litigation expenses beyond the six categories listed in §§1821 and 1920, absent an explicit statutory instruction to that effect.”

The decision could have a deterrent effect on the initiation of copyright suits likely to involve expert testimony and extensive e-discovery expenses, when brought by plaintiffs who lack the means to cover them. These expenses will not be reimbursed, even if such a plaintiff were to prevail. Indeed, absent amendment of the Copyright Act, defendants found liable for copyright infringement will no longer have to reimburse plaintiffs for expert witness and e-discovery fees.