evident what the right thing to do is. I think it would be useful if counsel have in mind and consider an approach along these lines. Taking the starting point as in the gospel according to Chief Justice Rehnquist in the Fogerty case, I guess it's at 527 of 510 U.S., a paragraph which seems to me at least textually to fit this case very closely, to fit the Viacom case very closely. I'll read it into the record so you can check its application as you hear it.

"Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claimants of infringement."

This is still Chief Justice Rehnquist speaking of the Fogerty case. "In the case before us, the successful defense of The Old Man Down the Road increased public exposure to a musical work that could, as a result, lead to further creative pieces. Thus, a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright."

Certainly the issues on which this case were decided

demarcated a boundary of copyright law. It seems obvious to me, speaking as a representative of ignorant and innocent outsiders, that if the plaintiffs had won, they would be steaming into court asking for their attorney's fees. Under Chief Judge Rehnquist's approach, that is because the case on its own justifies an award of fees, and it justifies it equally for defendants as to plaintiff.

If that is so, it would follow as a matter of logic that the defendants are entitled to fees. But it does not follow, to my mind, that they are entitled to fees for the whole defense. All that the motion disposed of was a question of law about the type of notice to which the defendants were entitled. It carefully eschewed any determination on the boiling mass of questions of fact which were also presented and were not ruled on. Therefore, it would take a lot of heart to claim that they should get fees for the work done with respect to those undetermined issues.

That would bring us to an award to defendants of the fees for that work allocable to the determination of the meaning of that section of the Digital Millennium Copyright Act. That might be hard or easy to determine arithmetically. From Mr. Schapiro's answer about the other incidents to which he referred, I get the idea that it might be quite feasible. But all of that can await exploration when we are advised by the Court of Appeals of whether the decision is affirmed or

reversed and the tenor and detail of the Court of Appeals' approach to the various issues presented. We can do it much better at that time.

I think you raised your hand first. Mr. Schapiro will hear you.

MR. SIMS: I understand that the Court has given us food for thought, and I appreciate that. I do think there is an immediate distinction that might be worth the Court thinking about and the parties thinking about, too. In the example that Chief Justice Rehnquist gave, the issue in typical copyright cases such as he is referring to is whether a particular work ought to be available to the public or not, whether the attempt to suppress it or the attempt to copy it into the world is acceptable.

But in this case, where the immunity was at issue, the Court did not hold that these works weren't infringed or that it wouldn't have been entirely proper for these plaintiffs to sue the infringers. It simply held that this particular defendant was not the right defendant in those suits.

I'm not at all certain that the policy issues raised by Chief Justice Rehnquist, in light of what Section 505 says, are applicable in a case like this, where the only question is whether you have sued the right defendant, not whether the works in fact shouldn't be suppressed or enjoined precisely because they are infringing. So, I do think there is arguably

a distinction along those lines.

THE COURT: It may be arguable. I'll certainly think of it. It seems to me to take the question by the wrong end, which is whether the issue had to do with the demarcation of a boundary that would be useful in other copyright litigation to other litigants, and hence served a public purpose, rather than the structure or the application of particular words.

But I certainly will think of it. We will all have time to think, and much better than other thoughts that may occur to any of us. I mean better than mine, I don't mean better than yours.

MR. SHAPIRO: Your Honor, one matter that is really of a housekeeping nature. Rule 37(a)(2), as the cases that we have looked at interpret it -- sorry -- 37(c)(2), suggest that if we were going to be moving for fees on the basis of a failure to admit requests for admission, we can't take an unreasonable amount of time before doing so.

THE COURT: Read us the language. I don't have the book in front of me, as I should have. If you read that clause in, everybody will know exactly the words you are talking about.

MR. SHAPIRO: Sure. I would just like to get on the record that there won't be a claim later that we should have fought that out now. It's Federal Rule of Civil Procedure 37 small (c)(2). It is entitled "Failure to Admit."

"If a party fails to admit what is requested under Rule 36," that's request for admission, "and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof.

"The court must so order unless (a) the request was held objectionable under Rule 36(a), (b) the admission sought was of no substantial importance, (c) the party failing to admit had a reasonable ground to believe that it might prevail on the matter, or (d) there was other good reason for the failure to admit."

THE COURT: You were raising a point about the timing.

MR. SHAPIRO: Yes. There is nothing in the rule about the timing.

THE COURT: Oh.

MR. SHAPIRO: But we checked. We looked into the cases because we wanted to make sure, with regard to the issue of waiting until after the appeal, that we weren't losing our ability to move under 37(a)(2). The most recent cases all suggest that it can be done at some point after the entry of judgment as long as there is no unreasonable delay.

We just want to have some statement from the other side on the record, or from your Honor, either a statement from the other side on the record that they will not come back if we

are back before your Honor a year from now, after the appeal, and say we unreasonably delayed in moving under Rule 37 or for some other reason we would be barred, because that would be a good reason for us instead to press ahead now.

Frankly, that is something that I think won't be affected by the appeal. If their answers to the RFA's were false, they were false, and we had to expend resources to uncover the falsity. Ms. Kohlmann said a few minutes ago that she doesn't recall the answers to the RFA the way we described them.

We have them here. They are Exhibit D to our first letter in which request for admission number 19 says, "Admit that one or more of the accused clips were uploaded by you to the YouTube.com service." Then the answer, "Viacom denies this RFA as to the clips in suit. Viacom further denies that it uploaded any of the clips listed by URL in Attachment A." That's false. We proved it was false. We can show it again in our motion.

Similarly, our request for admission number 21 said, "Individually, for each accused clip, admit that the accused clip was uploaded to YouTube by you or by a third party with your authorization." The answer was, "Viacom denies this RFA as to the clips in suit. Viacom further denies that it uploaded any of the clips," the same answer as before.

That is our request.

They also dismissed with prejudice, of course, many of the clips on the eve of trial, as your Honor knows from our letter and from the litigation, clips that it turned out we were able to show they had uploaded. But there were still a number left in the case, as shown in their responses to our statements of undisputed fact.

THE COURT: All the matters in the correspondence form a legitimate part of the agenda for this conference. The adjournment of the balance of this conference saves all those matters which are currently in abeyance while the matter is adjourned.

Any argument that they were waived or overlooked or there was laches, or so forth, after the mandate comes down would have no effect. And I doubt that it would be made. But if it were made, it would have no effect. These are matters before us, and we are postponing the addressing of them in more detail or afresh until after the mandate.

MS. KOHLMANN: If I could clarify, your Honor? That seems right to me. But essentially what is happening is those issues are being put on ice.

THE COURT: Yes.

MS. KOHLMANN: We are not agreeing. We could make those arguments later, and we certainly can't argue that the fact that everything has been deferred is a waiver, but we may have good and sufficient arguments to suggest for some reason

that it is untimely. We are not giving those up by your Honor's statements. I just wanted to clarify that.

THE COURT: Be clear of what you are not giving up.

MS. KOHLMANN: In other words, if, for example, there may be an argument, and I haven't looked at the cases that Mr. Schapiro refers to, that it is untimely to have made it now, today --

THE COURT: That it was untimely as of the time it was put in the letter.

MS. KOHLMANN: Correct.

THE COURT: That would not be waived, because it could be waived now.

MS. KOHLMANN: Correct. I just wanted to clarify that. Everything is on ice essentially to be resumed.

THE COURT: I think you have gone right to the heart of it.

MS. KOHLMANN: Thank you, your Honor.

THE COURT: Anything else?

MR. SHAPIRO: Nothing here, your Honor.

MS. KOHLMANN: Nothing, your Honor.

THE COURT: Thank you all. I will await the remand. It's been a nice case.

(Adjourned)

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