TYL In Focus: PopLaw
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By Carol Robertson

Carol Robertson has been a practicing attorney for over 25 years with major Bay Area law firms and companies and currently is a practicing corporate counsel. Her book, The Little Book of Movie Law, was published by the American Bar Association.

Note: This article was excerpted from The Little Book of Movie Law, by Carol Robertson, available in the ABA webstore.


You think that because I'm a movie star I don't have feelings. Well you're wrong. I'm an actress. I've got all of them!

—Goldie Hawn as Elise in First Wives Club (1996)

After the De Havilland case and the Paramount decision, actors had a growing amount of power and influence over the types of roles they would play and the way they were treated on the set. By the 1980s, many had followed the lead of innovators such as Bette Davis and later Warren Beatty and had established their own production companies in order to take control of their careers. The terms of their engagement for a film performance were covered in detailed contracts with the studios and the actors’ production companies.

One thing that did not change since the early days of the cinema was the fickleness of movie producers and directors and their ability since before the Goudal case was decided\(^1\) to terminate contracts of stars they found to be too demanding. And once they had done so, they did not hesitate to respond to any breach of contract claim made by the star by blaming her and branding her as “difficult.” Hollywood is also replete with tales—both in screenplays and real life—of aging stars who are replaced by ambitious younger ones. All About Eve (1950) tells the story of a mature Broadway star, played by the redoubtable Bette Davis (who also in real life was branded as one of those difficult ones), who is befriended, and ultimately finds herself upstaged by, a younger actress, played in the film by Anne Baxter.
And for a true chronicle, there is the story of Raquel Welch, an aging star trying to prove her worth in serious films, and Debra Winger, a new face in the movie business, eager to claim bigger and better dramatic parts. In this case, unlike the film All About Eve, neither star appeared to bear animosity toward the other until decisions were made that brought them into competition with each other through no actions of their own, but rather because of manipulation and hardball tactics of the studio.

By 1980, Raquel Welch had appeared in approximately thirty films. In her first motion pictures, such as One Million Years BC (1966), where she appeared as a scantily clad buxom prehistoric woman, she was generally typecast as a sex symbol. This was the case even in films where she received good reviews, such as The Wild Party (1975) and Kansas City Bomber (1972). She won a Golden Globe for her performance in The Three Musketeers: The Queen’s Diamonds (1973), playing a sexy lady-in-waiting to the French queen. At forty years old, she was seeking to break out as a serious actress, but had a reputation as a strong-willed professional who sometimes clashed with directors.

Debra Winger was a talented young actress who, in 1980, had just completed her first break-through performance in the role of Sissy, John Travolta’s wife, in Urban Cowboy (1980). She would later move into memorable roles in films such as An Officer and a Gentleman (1982), opposite Richard Gere, and Terms of Endearment (1983), a Best Picture winner. In the early 1980s, she was a sought-after actress. She also gained a reputation for being demanding, although this would not have been as evident in 1980 when she was first being introduced to a broader movie-going public.

In early 1980, successful Academy Award winners Michael Phillips and David Ward, developed a film package based on John Steinbeck’s two novellas about life in California’s Monterey Bay, Cannery Row, and Sweet Thursday. Ward had written the screenplay and planned to direct the film; Phillips was to be the movie’s producer. They selected Nick Nolte to portray the leading male character and were seeking a strong actress to play the lead female role, that of Suzy, the prostitute. Various well-known actresses were considered for the part, including both Raquel Welch and Debra Winger.

Welch was eager for the opportunity and made several important concessions to get it. She even agreed to audition for the part, something that was not usually required of an established actress. She was cast in the role and in October 1980, her production company, Raquel Welch Productions, signed a contract with Metro-Goldwyn-Mayer (MGM)—which had accepted the Ward-Phillips project and agreed to finance it—to provide Welch’s services for the movie. Under the standard “play-or-pay” clause in her contract, the studio had the right to terminate her from the film at any time but her fee was a guaranteed $250,000 (with payments to be divided into weekly increments during filming), which the studio was obliged to pay in full unless she failed to fulfill her obligations under the agreement. Welch agreed to be available for rehearsals and wardrobe fittings for the two-week period before shooting began.

But Welch for her part had negotiated several concessions from the studio. The studio was required to provide her with a fully equipped “star-type” trailer on the set for makeup purposes. She also was to have her choice of hairdresser and makeup artist, on first call to her, as well as a wardrobe assistant. And she requested additional consideration in morning call times. In general, the other actors had a morning call time at 7:00 or 7:30 a.m., and set calls at 8:00 or 8:30 a.m., whereas Welch had requested
and was allowed two hours for makeup and hair, but she had a preparation routine that included an additional hour for yoga and exercise. Accordingly, she had a makeup call time at 6:30 or 7:00 a.m., with a set time three hours later.

Welch was initially provided a trailer that was too small, leaving insufficient room for makeup in front of a mirror. She was then provided a larger trailer with a makeup mirror and chair but this still did not meet her needs because it was too narrow and became overcrowded when her assistants were preparing her for her set calls. Her makeup artist could not move around without climbing over either Welch or the television set. The TV was eventually removed at Welch’s request. She also asked for and received a small empty trailer for her daily yoga exercises.

Principal photography began on December 1, 1980, and Welch was first called for filming on Thursday, December 4, when the movie was already behind schedule and $84,000 over budget. Those first days, even though Welch arrived on time at 7:00 a.m. for her makeup call, she generally was not used until after lunch and sometimes late in the afternoon. The crowded conditions in her trailer remained a problem for her. Eventually, she requested and received permission to make up at her home until the trailer situation could be sorted out. The film’s production manager delivered an MGM makeup mirror to her house for her use. Neither the producer, Phillips, nor the director, Ward, raised any objections to this new arrangement (although in testimony later in the trial, the production manager claimed that he had delivered the makeup mirror to her home not to allow her to do her makeup there but only to allow her to “get a head start on her makeup”).

However, Phillips and Ward were not happy about Welch’s making up at home and claimed to have agreed to it only to avoid a confrontation with her. They were also unhappy about her later set calls, because these required the director to begin filming each morning on scenes that did not require her presence, and this usually meant that the filming of her scenes would have to take place later in the day, which in turn cut down on the number of takes he could make of her scenes. The producer, Phillips, thought that three hours for makeup was extravagant and he believed that her late availability for shooting would cause problems when filming of her major scenes began. However, no one told Welch that she couldn’t make up at home and the daily call sheets continued to allow her three hours for makeup. She was always on the set in time for her first call even though the director did not use her at the time. And Phillips even called Welch at home to compliment her on how good she looked in the dailies.

In the meantime, the production crew was experiencing significant cost overruns. In particular, several scenes in which Welch was not involved went greatly over budget. On Thursday, December 18, MGM studio heads met with Phillips to express their dissatisfaction with the dailies that he had provided (none of which involved Welch) and also with the fact that the film was over budget so early in shooting. They raised concerns about the experience level of first-time director Ward and wondered if this was causing the cost overruns. Phillips deflected criticism of Ward by blaming Welch, claiming that she was causing the production delays, which in turn were causing the costs to increase. He noted her unusual three-hour makeup period and the fact that she was making up at home (while failing to note that this had been a temporary arrangement for the prior three days while they located an adequate makeup trailer for Welch).
The studio heads became alarmed by Phillips's assertions, worrying that both Phillips and Ward were intimidated by Welch. It was against studio policy to allow an actress to make up at home both because it was an advantage for the production to have her available for rehearsal during the makeup period and because of the increased liability risks incurred when studio staff had to travel to her home to work. Phillips later claimed that at the time of his meeting with the studio executives, they told him to let Welch know that MGM intended to send her a letter notifying her that she was in breach of her contract unless she agreed to come to the studio the next morning for makeup. The meeting with studio heads had occurred on a Thursday. Phillips later claimed that he was also advised that this matter would not wait until the following Monday, but that Welch had to be notified that same day. The executives later testified to the contrary—that there had been no discussion at that time of sending any such “breach letter” to Welch and that Phillips had requested the meeting in the first place.

On that Thursday evening, after his meeting at MGM, Phillips claimed he called Welch and told her that studio executives believed that she was responsible for the production delays and that they would be sending her a notice that she was in breach of her contract. He informed her that the letter was being sent out that evening. He also claimed that he told her that she had to be at the studio the next morning for makeup. Welch later asserted that she had not received the message and was surprised the next day (Friday, December 19) when her makeup artist and hairdresser did not arrive at her home. Her husband drove her to the studio and she arrived one hour earlier than her set call and without any delay. She performed as requested throughout the day.

In the meantime, Phillips reported to MGM management that Welch had disobeyed his instruction to make up at the studio that morning. He also called Welch’s agent, Michael Levy, to tell him that the studio was sending his client a notice of breach. This was the studio’s first contact with Levy, even though the usual first step in resolving a serious problem with a movie star would be to call her agent. Phillips told Levy that the studio was pressuring him even though Welch had caused no delays. At the request of studio management, MGM’s general counsel sent a letter to Welch that Friday morning, stating that Welch was in substantial breach of her obligations under her agreement with MGM, which also contained a threat to terminate its agreement with her.

Welch learned that the letter had gone out that day but continued working through that Friday afternoon. Her agent, Levy, called MGM’s President, David Begelman, and was told not to tell him how to run his business. Levy agreed that Welch would arrive at the studio at 6:30 a.m. on Monday morning for two hours of makeup. He thought that the problem had been resolved. At the end of the day’s filming, Welch was shown a long-unused studio makeup room that she accepted.

Phillips and Welch did not talk on Friday. Over the weekend, he left an urgent message on her answering machine. She asked her agent to return the call. Phillips and Levy had a series of conversations that weekend, during which Phillips asked to meet with Welch. She promised through her agent that she would meet with him at 9:00 a.m. on Monday morning. Phillips allegedly told others that he wanted Welch to be on edge because they would be shooting a tense scene on Monday.
On Sunday morning, studio executives informed MGM’s general counsel that neither Welch nor her agent had unequivocally committed to follow the studio’s orders. Phillips called the film’s director, Ward, and told him that the studio might replace Welch because she had failed to meet with Phillips that weekend. Ward was unhappy, as he had never suggested that Welch should be terminated. But, in fact, by Sunday afternoon, MGM President Begelman had decided to terminate Welch because she had disobeyed his order to make up at the studio on Friday morning and had refused to talk with Phillips over the weekend. Welch’s lawyer called Welch to give her the bad news. She was devastated. By this time, about 1/6 of her scenes had been shot.

On Monday, December 22, Welch received the letter from MGM informing her that the employment agreement was terminated due to her failure to comply with her contract obligations. She responded with a letter demanding payment from MGM of $194,444, which was the balance of the guaranteed fee that was owed pursuant to the agreement. MGM refused to pay and Welch sued.

Now, you may ask, why would a studio so precipitously terminate the contract of an actress in a film that was already running behind schedule and that was experiencing cost overruns, especially where it did not really appear that she was the cause of the film’s troubles? And even if she had caused delays, why would the studio terminate her after she had agreed, through her agent, to give up the special treatment—late call time, three hours for makeup—that allegedly was causing the delays. It did not seem to make sense; it appeared almost as if the studio was inventing problems just to fire her from the film. But why would the studio executives want to do that? This is where the plot thickens.

Welch was replaced by Debra Winger in the movie. Winger received $150,000 to play the role. It cost almost $200,000 to replace Welch with Winger and to reshoot the scenes in which Welch had appeared. How had the studio managed to bring Winger in so quickly after terminating Welch?

To understand this, we need to go back to that same fateful weekend when Phillips, Levy, and Welch’s attorney were negotiating the makeup situation and the supposed “breach letter.” During that same time period, as the evidence in the trial revealed, Phillips and MGM executives were also engaged in a series of secret meetings with representatives of Debra Winger. As early as the Thursday prior to Welch’s termination, David Chasman, a studio executive, had inquired of Winger’s personal manager whether Winger could be available to start a film on short notice and was informed that she was available.

During that weekend, when MGM President Begelman made the decision to terminate Welch, Chasman called Winger’s manager and told her that Welch had left the cast of Cannery Row and that the studio wanted Winger to return to Los Angeles (she was on vacation for the holidays) as soon as possible. Winger accepted the offer. On either Saturday or Sunday, Winger’s manager engaged her attorney to negotiate a deal with MGM for Winger to appear in the movie. The deal was negotiated that weekend and was signed that Monday. On that Sunday night, Winger called her agent to let him know that she was replacing Welch on the film. At the trial, all the MGM executives denied that there had been any discussions with Winger before they terminated Welch that Monday, but the evidence contradicted those denials.
Welch received numerous inquiries from the press once the news of her termination became public. Many people assumed that she had failed to show up for work, which was generally the reason why actresses are removed from a film. Industry newspapers reported that she had been fired. An article recounting the incident appeared in the April 2, 1981, issue of Rolling Stone, a magazine with a weekly circulation at the time of over 700,000, with a wide readership in the motion picture industry. According to the article, the film’s director, Ward, stated that Welch had been a “casting mistake” who was not necessarily a bad actress but who was not delivering a performance that he could live with. MGM President Begelman was quoted as saying that the studio “had a general feeling she had not lived up to her contract. We had no alternative. It is up to executives to tell people in this business we will not stand for that. The producer gave her appropriate directions and she failed to obey.” These were words that he later most certainly came to regret.

By the time Welch’s case came to trial, she had not made another movie and to date has not had a major role in any motion picture (although she has had small parts in films such as Legally Blonde (2001)). She had obtained a reputation in the industry as someone who was not dependable. In contrast, she had made six films between 1973 and 1980, with compensation ranging between $150,000 and $350,000.

In her lawsuit against MGM, Welch alleged that Phillips had conspired with the studio executives to interfere with MGM’s contract with Welch in order to replace her with another actress without having to pay her the guaranteed fee in her contract. She claimed that they tried to make it appear that she, rather than Phillips or Ward, was responsible for the picture’s budget problems. She sought $194,444 in actual damages (the amount of the guaranteed fee remaining to be paid under her contract at the time she was terminated) and $5 million in punitive damages for the contract interference. The jury voted in her favor, awarding her the balance of her fee, as well as $500,000 in punitive damages against Phillips and $3,750,000 in punitive damages against MGM. Ward was exonerated.

Welch also sued MGM for breach of the implied covenant of good faith and fair dealing—in other words, for bad faith dealing. For this count, the jury awarded her $400,000 in lost contract benefits, $1 million in lost promotional income, $750,000 for damage to reputation, and $3,750,000 in punitive damages. And Welch also sued for slander, based on Begelman’s statement to the Rolling Stone reporter. For this statement, the jury awarded $300,000 in compensatory damages against Begelman, $150,000 in punitive damages against Begelman, $500,000 in punitive damages against MGM, and $2,500 in punitive damages against Begelman.

MGM appealed.

On appeal, MGM argued first that Welch could not claim a conspiracy between Phillips and MGM because Phillips was acting as MGM’s agent and MGM could not interfere with its own contract. As a general rule, a party to a contract can be liable for interfering with that contract if he conspires with a third party to breach it. But Phillips argued that he could not be considered a third-party conspirator with MGM executives because he was the studio’s agent. Thus, his activities were “privileged.” In other words, he claimed to be entitled, with an impersonal or disinterested motive, to endeavor to protect the interests of his principal—that is, MGM—by counseling the breach of the contract with a third party that he reasonably believed to be harmful to his employer’s best interests. According to the court, this so-
called privilege applies when the agent acts solely in the principal's interest and does not apply when the agent acts solely in his or her own self-interest. MGM and Phillips argued that Phillips was acting with mixed motives. By acting as he did, he may have benefited himself, but he also helped MGM. These types of actions should also be privileged, they asserted.

The court disagreed. First, the court believed that Phillips was acting in his own self-interest: Welch’s evidence at trial, which the jury must have believed in order to render its verdict, suggested that Phillips was reacting to the threat of losing his own job and the resulting damage to his career by making Welch the scapegoat for the film’s budget problems. Even though others may have had their reasons for replacing Welch, this appeared to be Phillips’s main motivation. If the jury had believed that Phillips had provided MGM truthful information or that he had desired to benefit MGM, it would not have found him to be liable. The fact that they did shows that they believed that he acted in his own self-interest and his actions were therefore not privileged.

On the bad faith argument, the jury’s verdict also showed that they believed Welch’s version of events. When Welch filed her lawsuit, her attorney tacked on a request for punitive damages because, from the start, MGM had adopted a “stonewall,” “see you in court” attitude toward her. MGM complained about the punitive damage award. But the court pointed out that, as this was a bad faith discharge case, Welch was entitled to claim and to receive punitive damages. And it was clear to the court that the evidence presented at trial more than supported her case. Whatever the parties’ motivations—whether Phillips’s desire to protect himself from removal from the film because of its spiraling production costs, or MGM executives’ need to demonstrate their power in dealing with demanding film stars, or MGM’s “buyer’s remorse” over a bad casting decision and desire to put a different actress into the role—the result was a conspiracy to falsely blame Welch for the movie’s problems and to create a pretext for firing her so that MGM would not have to pay her the fee that was guaranteed under her contract.

As the court saw it, MGM’s bad faith was further evidenced by the numerous facts brought out at trial: the false statements by MGM witnesses about the timing of their negotiations with Debra Winger, which were contradicted by both Winger’s manager and her attorney; Phillips’s informing Welch and her lawyer on Thursday night that a breach letter was going out even though she had not yet disobeyed the studio’s makeup order for Friday morning; the failure to contact Welch’s agent, Levy, before threatening Welch, even when MGM’s expert testified that problems with a star were usually handled through the agent; Phillips’s insistence, contrary to Welch’s agent’s testimony, that he was never told that Welch had agreed to use the new makeup room on Monday; Phillips’s insisting that Welch refused to meet with him over the weekend when her agent had been in constant communication with him and Welch had agreed to a Monday morning meeting; and the abrupt firing on Sunday without waiting to see if she would fulfill her promises for Monday and at a time when most of the terms of Winger’s contract to replace her in the film had already been agreed to.

The court intimated that there seemed to be something more to the studio’s insistence that Welch make up at the studio that Friday morning rather than allowing her time to check out the new makeup room at the studio. This was especially troubling where she had been allowed to make up at home, had never been late for filming (which is what should have been important to the studio), was upset from Phillips’s
threat of a breach letter, and was facing her first major dialogue scene on that Monday. Although the court did not state it outright, there was an implication in its assessment of these facts that the studio executives had intentionally set Welch up so that they could replace her.

The court seemed equally perturbed by the slander evidence. To them, MGM President Begelman’s quote in Rolling Stone magazine was egregious.\(^3\) MGM dismissed it as merely an expression of Begelman’s opinion, maintaining that there was no evidence of malice. This latter was important because in order to prevail, because she was a public figure, Welch had to prove not only that Begelman had slandered her, that is, stated something false about her that would tend to cause injury to her reputation, but also, even if the statement were false, that it had been made with knowledge of its falsity or with reckless disregard for the truth.\(^4\)

The court found that, although Begelman’s statement included words that sounded like an expression of opinion (such as “we had a general feeling”), it also described facts (“she failed to obey”) that had been communicated to him, as the head of the studio, by the movie’s producer. Not only did the court believe it reasonable for the jury to conclude that Begelman was stating a fact that was false, but there also was, in the court’s view, sufficient evidence to support the jury’s finding of malice because Begelman knew that Welch had complied with her obligations and that he, in conjunction with other studio executives and with Phillips, had manufactured a pretext to fire her. Therefore, he must have known that his statement to the Rolling Stone reporter was false. It was a grandiose statement by a man trying to give an impression of strength and toughness in dealing with a star, and without caring about the damage that those words in a public interview might wreak on the actress’s future career prospects. These are the type of heedless statements that executives later come to regret and that make general counsels cringe.

MGM particularly objected to the various monetary awards, which when tallied up, came to close to $10 million. They disputed, for example, the $1 million award for loss of professional income in the bad faith count. MGM argued that Welch did not have a reasonably certain future as a serious film actress. The court disagreed, believing that the compensation was justified: Welch had received significant income as an actress prior to entering into her contract with MGM and she had received no film offers after her firing from Cannery Row. Based on the compensation that film stars were making at the time of the trial, $1 million was not unreasonable.

MGM also claimed that prior to signing her contract with the studio, Welch had been considered to be a difficult actress and therefore she suffered no damage by Begelman’s slander. But there again, the court disagreed. Even if she had been considered to be difficult prior to performing in Cannery Row, she was still considered to be a professional actress. After her dismissal, she became known as a contract breaker who had been fired from a film because she did not show up for work.

Finally, MGM objected to the $7 million in punitive damages. But the court pointed out that this amount was half what Welch had requested and amounted to only 3.6 percent of MGM’s net worth at the time of trial. The court acknowledged that MGM had lost money on the movie and that the $500,000 damage award levied against Phillips (for conspiracy to induce breach of contract), was $300,000 more than the $200,000 production fee that Phillips received from MGM. But the court had
no sympathy for any of the defendants, especially when balancing their “complete disregard of the like-
lihood that the unjustified firing would ruin Welch’s film career,” against “the relatively high actual
damages that she suffered” and the permanent damage to her reputation.

In the end, everyone lost out in this case. The court’s statement about Welch’s future film career
prospects proved to be prophetic. Even though the lawsuit vindicated her position that she had been set
up to take the fall for others’ mistakes, her reputation as a problematic star was cemented and her mul-
timillion dollar judgment against MGM did not help her. In fact, if anything it labeled her as trouble.
After the suit, she performed on stage, notably in Woman of the Year on Broadway, and in television
programs, but she did not achieve her desire to be considered as a serious film star.

Cannery Row opened in early 1982 to dismal reviews. The movie was a major box office failure and
MGM lost close to $16 million. The New York Times’ film critic commented that Welch should have felt
happy that she was fired from the film,5 although it is certain that Welch would never have seen it that
way.

There was no evidence that Debra Winger knew any of the circumstances surrounding Welch’s firing at
the time she was engaged to perform in Cannery Row. She would have had no reason to suspect the fals-
ity in MGM’s assertions that Welch had left the film. She appears to have been an innocent beneficiary
of MGM’s manipulation. But she was left to pick up the pieces of an expensive and already botched film
production. Fortunately, she was able to overcome the bad press from this flop and went on to star in
several more memorable films that brought her two Academy Award nominations—for Best Actress in

But her career petered out soon after. After performing in several unsuccessful films, she took a break
from film acting just when she was at the top of her career, and returned only intermittently afterwards.
She played the lead roles both in A Dangerous Woman and Shadowlands in 1993, receiving her third
Best Actress nomination for her performance in this latter film. More recently, she played the role of
Anne Hathaway’s mother in Rachel Getting Married (2008). Ironically, in her years in Hollywood,
Winger also gained a reputation as a “difficult” and “demanding” actress. From Goudal to de Havilland,
from Bette Davis to Raquel Welch and Debra Winger, Hollywood studios have always had problems try-
ing to rein in and control the talented actresses who have appeared in their films. When the motion pic-
ture is successful, the complaints are minor, but studio executives rush in to affix blame when the
movies fail.

End Notes

1. See Reel 6 (Little Book of Holiday Law, by Carol Robertson, published 2012 by the American Bar
2. For The Sting (1973).
3. “We had a general feeling she had not lived up to her contract ... we had no alternative.... The pro-
ducer gave her appropriate direction and she failed to obey.”
The Miscast Lawyer

By Jonathan Shapiro

Jonathan Shapiro is Of Counsel at Kirland & Ellis for entertainment litigation. He also serves as the Chairman of the California Commission on Government Oversight and Efficiency. His book, Lawyers, Liars, and the Art of Storytelling, was published by the American Bar Association and is available for purchase in the ABA webstore.

Note: This article is an excerpt from the book, Lawyers, Liars, and the Art of Storytelling, by Jonathan Shapiro. The book contains entertaining instruction in how lawyers can develop their storytelling skills to further their cases and careers. The book is available for purchase in the ABA webstore.

Once upon a time, Harvey Weinstein and I were sitting in a Town Car being driven through Manhattan. Weinstein is the greatest living movie impresario of our time. Ask him. He’s not shy. He will tell you himself.

“Sorry I’m late,” he said when we first shook hands, over breakfast at the Peninsula Hotel in Beverly Hills. He just flew in from the Super Bowl, he said, where he spent the whole time talking to former President W. Bush about Weinstein’s latest film, The King’s Speech.

Weinstein and another famous producer had an idea for a television series. I was hired to help sell the show to a network and then write the pilot script.

The details were fuzzy. Apparently, it was to be a one-hour drama based on a real person. He was a charismatic former law enforcement officer and bon vivant. I had not met him—or anyone like him—but I got the drift of what the show could be. It would be dark but funny, twisted but not too twisted. The hero would be handsome but not pretty, tough but not cruel, resourceful but no off-putting genius. He would be a modern-day knight errant, serving rich and famous patrons, in their world, you understand, but not of it, true to his working-class roots, street-savvy, but Protean in his ability to move in and out of the many tribes that make up modern-day America.
“But not Ray Donovan”—the Showtime hit series was already on the air at this point. “And our hero can’t be a lawyer,” Weinstein said.

“Got it,” I said. What I should have done instead is thanked him for the offer and politely declined. I was miscast to write this story and should have said so. I didn’t.

Now we were in New York trying to sell the show to a cable network. The early afternoon weather was cool and rainy. Dark skies and grey streets, yellow taxis and red brake lights smearing colors through the water-streaked car windows.

Several other Weinstein Company employees were with us. One had taken me to lunch at Nobu. She had been Weinstein’s assistant. Now she was the head of his nascent television production company. Weinstein had been going to join us for lunch but didn’t. Thanks to her previous position, she knew his to-go order.

A cell phone rang in the car. Madonna was on the line. She and Weinstein talked about the music for the final credits of a movie she had directed and he was producing: W.E.

Sitting in the white-hot center of show business should have been more fun. But something was wrong. I can’t remember what exactly I ate at Nobu. I had a lot of it, and quickly too, because we were running late. Now it disagreed with me. Violently.

My stomach churned and growled. Clammy sweat sprung from my forehead. It trickled down my sides, sticking to my shirt, and pasting my hair down on my head. I stared out of the fogged-up window.

Traffic was gridlock. Not even the greatest movie producer of our age can alter time or traffic. Despite our driver’s suicidal efforts, we were going to be late.

Nerves began to fray. The overheated interior of the car became suffocating. I tried to open my window. It was locked.

Suddenly, involuntarily, an internal valve in the area of my lower abdomen went into a titanic spasm. Something else, something bad and noticeable, erupted farther along my digestive tract. I wondered if Madonna heard. “Jesus,” Weinstein muttered, covering the cell phone and speaking to his assistants, “What the fuck did you let him eat?”

As the car careened down the street, I hoped for a crash, anything to stop the disaster ahead. Unfortunately, we got to the meeting safely. But we did not live happily ever after.

The End.

By “the end,” I mean of my career writing for Weinstein. It is a fine place to begin studying the mechanics of storytelling.
Aristotle taught that everything must have a telos, a purpose. But a story must not simply have a purpose. That purpose must be clear to the audience.

My purpose in telling the Weinstein story is to define what a story is, identify a few important story elements, and discuss some principles that apply to all stories. My goal is also to show that while all of us can be miscast as storytellers from time to time, there is always something we can do to make things better.

While writers and lawyers employ different terms when they discuss story elements, they can and should be used interchangeably.

Not because the terms and concepts are exactly alike. Save your carping; I know they are not exactly alike. The purpose of this book is to get lawyers more comfortable with storytelling. Whether they realize it or not, they already know a lot about the elements that make up stories, as well as the basic structure of stories themselves.

**Setting/Jurisdiction**

Every episode of the Weinstein series was to begin and end in a particular New York City restaurant, one that really exists. Famous for catering to the famous and infamous, the place would become a character unto itself.

The setting of a story gives the audience a point of reference, like a giant “You Are Here” arrow on a map. The more familiar the setting, the more likely it is that the audience will bring their own knowledge and understanding of the world where the story takes place and the rules that apply there. Even if the audience has never been to the famous New York restaurant, chances are they have seen or heard stories about places like that.

The lawyer’s term for setting is jurisdiction. In this, lawyers don’t enjoy the writer’s freedom. A case of patent infringement or murder has a limited number of potential settings. If you do get to choose, the questions to consider are: Who do you want to tell your story to? Where are you likely to get to tell the story the way you want to tell it, with as little interference and editing as possible?

In the early 1990s, when I was at the US Department of Justice, the odd folks across the hall made up the Child Exploitation & Obscenity Unit. Even though “child” was in their name, they tended to bring cases involving adults where no children were involved. And they always seemed to charge them in places like Utah, where the community standard of what constituted obscene material was different than New York or California. These were storytellers who understood the value of setting.

There is another aspect of setting evident in the Weinstein story. It is based on a true story. Strike that. It is a true story. Or as true as I remember it; though, in all fairness, I was unwell at the time and there was no court reporter present.
Claiming a story is true sets it in the real world, where the rules of physics and human nature apply. It also gives the story credibility, so long as we find the storyteller credible. Stories lawyers tell are always based on the truth. If they are not, the lawyer will soon no longer be a lawyer.

**Characters/Parties and Potential Witnesses**

It is inevitable that stories and cases about people involve people. It is a good thing, too. People are always the most interesting part of any story or case, particularly to other people.

People in a story are called characters. People in the real world of law can be characters and even character witnesses, but they are usually called something else—parties, clients, witnesses, etc. Again, for our purposes, we shall call them all characters. The job of the storyteller is to recognize, understand and use the characters to further the story. Because someone is a potential character does not mean they should be in the story. Not everyone who could be brought into the story should be.

Here are a few simple rules when dealing with characters: No character in a law case or story should be presented unless he or she is interesting. By definition, no one can be interesting in a case or story unless he or she is relevant. If the characters or witnesses are necessary to the story but seem uninteresting, the role of the writer and lawyer is to make them interesting.

In Storytelling for Lawyers, Philip N. Meyer analogizes lawyers to film directors. But I think an equally valid analogy is with executive producers such as Weinstein. He neither writes the script nor directs the action nor plays any role. Most of the components of the story he presents exist independent of him. They were there before he arrived and could have been developed by someone else.

Yet he has become the most important, influential force in modern filmmaking. He has won numerous Academy Awards and earned hundreds of millions of dollars. What does he do, exactly? How does he do it? What is the secret to success? It isn’t complicated. The man can spot a good story.

That’s it. That is his genius—to know the difference between what could be a sure-fire hit or a dismal, though well-intentioned, flop—and to invest his money, time, and energy accordingly.

It is the same talent that makes plaintiff’s lawyers rich, prosecutors undefeated, defense lawyers famous, the general counsel essential, and private equity lawyers worth every penny they get.

Enormous risk is involved in this kind of work. Pick the wrong story or case and the producer or lawyer can lose everything. Few Fortune 500 CEOs have Weinstein’s talent for grabbing a good story and running with it. Few can boast a more successful, influential, or recognizable brand. The closest I can think of are some of the nation’s best contingent fee attorneys.

As a character in a story, Weinstein is hard to beat. Gamblers and savants are always interesting.

**End Notes**

1. March 2011.

By Carol Robertson

Carol Robertson has been a practicing attorney for over 25 years with major Bay Area law firms and companies and currently is a practicing corporate counsel. Her book, The Little Book of Movie Law, was published by the American Bar Association.

Note: This article was excerpted from The Little Book of Movie Law, by Carol Robertson, available from the American Bar Association.


Sean Parker: Well, I founded an Internet company that let folks download and share music for free.

Amy: Kind of like Napster?

Sean Parker: Exactly like Napster.

—From The Social Network (2010)

Just when movie studios had grown comfortable with a technology that they had initially viewed as threatening—video recording and DVDs—something new was invented that posed an even greater threat to their bottom line: the innovative technologies that enabled the sharing of music and videos over the Internet. Using the capabilities of peer-to-peer networks (P2P), those who wanted to watch a movie without going to a theater or renting or buying a DVD were able to simply download the film from the Internet for free and watch it over their computers (or even burn it to a CD or DVD to watch on television).
P2P networks operate by means of computers communicating directly with each other, rather than through a central server. Their advantage over information networks is precisely this absence of a central computer server to manage the exchange of information or files among users. As a result, the high bandwidth communication capacity for a server is not necessary nor is there any need for costly server storage space. Since copies of a file may be available on many users’ computers, file requests and retrievals may occur faster than with networks, and because file exchanges do not have to travel through the intermediary of a server, communication can take place between any computers that are connected, without potential disruptions due to server shutdowns. Because of these potential benefits in security, cost, and efficiency, many universities, government agencies, corporations, and libraries, among others, have recognized the value of P2P systems.

However, the primary use of P2P networks in the late 1990s and early 2000s seemed to be for music and video downloads without authorization. Two companies in particular—Grokster and Streamcast—provoked the wrath of the studios, largely because they had a substantial and growing popularity that over time could seriously harm the studios’ business model. Both Grokster and Streamcast (through its Morpheus program) distributed free software that allowed computer users to share electronic files through P2P networks.

Grokster’s software employed what was known as “Fastrack” technology, while Streamcast distributed the Morpheus software that relied on what was known as Gnutella technology. Users of both Grokster and Morpheus utilized a comparable process: a user would send a file request directly to other computers; search results were sent back to the requesting computers, and the user could then download the desired file from a peer’s computer. Neither Grokster nor Streamcast were involved in this process. Neither had servers that could intercept the content of the search results.

A group of copyright holders consisting of movie studios and others, led by Metro-Goldwyn-Mayer (MGM), filed suit against Grokster and Streamcast in federal court in the Central District of California, requesting that the court order the two companies to stop distributing their free software, and seeking damages for the companies’ users’ copyright infringement, arguing that the two file-sharing businesses knowingly and intentionally distributed their software in order to enable users to infringe copyrighted works in violation of the Copyright Act.

While acknowledging that the users had directly infringed the studios’ copyrights, the district court granted summary judgment in favor of the two software distributors, based on the U.S. Supreme Court’s decision in Sony v. Universal City Studios, Inc. (the “Betamax decision”). The district court ruling was affirmed by the Ninth Circuit Court of Appeals because, under the Betamax decision, P2P software had legitimate and legal uses. Under this ruling, the distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor actually knew of specific instances of infringement and failed to act to stop the infringing practices. The Ninth Circuit also noted that the software distributors did not materially contribute to their users’ infringement because the users themselves searched for, retrieved, and stored the files of copyrighted materials, without any involvement by the distributors, other than their initial provision of
the software. And the Ninth Circuit held that the distributors could not be vicariously liable—another theory put forth by MGM—because they did not monitor or control the software’s use, had no right or ability to supervise the use, and had no duty to police the users’ activities.

MGM appealed to the U.S. Supreme Court. This was a closely watched case, aligning computer and Internet technology companies and trade associations on one side and the recording industry, the Motion Picture Association of America, and movie studios on the other.

Justice Souter wrote the majority opinion. From the first, he acknowledged the overwhelming evidence of copyright infringement presented by MGM—that nearly 90 percent of the files available for download on Grokster’s system were copyrighted works, and that billions of files were shared each month. Given this, “the probable scope of copyright infringement,” he concluded, was “staggering.” Grokster and Streamcast actually did not deny that users of their software employed it mainly to download copyrighted files. MGM had notified the companies that eight million copyrighted files could be obtained using the companies’ software.

Justice Souter also noted that neither Grokster nor Streamcast were “merely passive recipients of information about infringing uses.” He found the record to be “replete with evidence” that, from the moment Grokster and Streamcast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took “active steps to encourage infringement.” Justice Souter noted that after Napster was sued for facilitation of copyright infringement, Streamcast actively pursued Napster users, giving away a software program called “Open Nap” to distribute copies of the Morpheus software and to encourage users to adopt it. Grokster took similar steps. Grokster also sent users a newsletter promoting its ability to provide particular, popular, copyrighted materials.

Finally, Justice Souter observed that neither Grokster nor Streamcast received any revenue from users—they gave their software away free of charge. The source of income for both companies was advertising, and the price to advertisers depended on the number of Grokster or Morpheus users who utilized the program. He pointed out, “while there is doubtless some demand for free Shakespeare, the evidence [showed] that substantive volume is a function of free access to copyrighted work.” He admitted that there had to be a balance between protection for creative pursuits through copyright and promotion of technological innovation, by limiting copyright infringement liability. “The more artistic protection is favored,” he said, “the more technological innovation may be discouraged.” On the one hand, there is the fear “that digital distribution of copyrighted material threatens copyright holders as never before, copying is easy and many people (especially the young) use file-sharing software to download copyrighted works.” He worried that “the ease of copying songs or movies using software like Grokster’s or Napster’s is fostering disdain for copyright protection.” But these fears are “offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies.”
In this case, the Court saw the balance as needing to provide greater protection for copyright holders. However, while all members of the Court agreed that Grokster could be liable for contributory infringement because it intentionally induced or encouraged the users of its software to infringe on copyrighted works, they disagreed on whether this case was different from the Sony case.

Not that many years before, in Sony, the studios had claimed that Sony was contributarily liable for infringement that occurred when VCR owners taped copyrighted programs because the company supplied the equipment that was used to infringe and knew that infringement would occur. However, to the studios’ dismay, because a principal use of the VCR was “time-shifting”—taping a program for later viewing at a more convenient time—and because this was considered to be a noninfringing use, Sony was not held liable for the infringement that could take place by users of its equipment. In the Betamax decision, the Court held that because the VCR was “capable of commercially significant non-infringing uses,” the manufacturer could not be faulted simply because the machine could also be used to infringe.

MGM hoped that, in Grokster, the Court would overturn or at least substantially limit Sony, by eliminating the “safe harbor” for technologies capable of substantial noninfringing uses. But the majority of Justices did not see the need to go so far in Grokster. Because Grokster’s and Streamcast’s behaviors actively induced the infringement by the users of their software, they could be found to be liable without revisiting the holding of Sony. Justice Souter pointed out, for example, that Streamcast’s advertising was aimed at Napster users while the Napster case was in the courts. He also noted that neither company attempted to develop filtering tools or other mechanisms that would diminish the users’ infringing activities. He believed that “this evidence underscored Grokster’s and Streamcast’s intentional facilitation of their users’ infringement.” And finally, the companies’ advertising pricing model—where the more the software was used, the more ads went out and the greater the advertising revenue—buttressed the evidence that the companies were actively encouraging the infringing activities. Although, as the Court noted, “this evidence alone would not justify an inference of unlawful intent, when viewed in the context of the entire record, its import is clear.”

Based on this theory of active inducement, the case was sent back to the district court for a trial based on the principles set out in the decision. On November 7, 2005, as part of a settlement with MGM, Grokster announced that it would no longer offer its P2P file-sharing service. Settlement talks with Streamcast broke down and in further court proceedings, the district court ruled against Streamcast, granting MGM’s motion for summary judgment on September 27, 2006, finding instances of “massive” copyright infringement on its P2P network and “overwhelming evidence of unlawful intent.” On October 16, 2007, the court issued a permanent injunction, requiring Streamcast to use filtering technologies while “preserving its noninfringing uses as feasible.”

Even though MGM won this case, in many respects, the studios lost the larger battle. Even the decision was not what they had sought. They believed that the Supreme Court would be so shocked by the extent of the unauthorized file-sharing activity that the Justices would revisit Sony and perhaps even strike down the protection that this decision afforded to technologies with substantial noninfringing uses. But this was not to be. In fact, the studios were left in pretty much the same position after Grokster in their ability to challenge innovative technologies as they had been before.
In a sense, in this area, the studios seem to be playing a game of “whack-a-mole.” They were able to shut down Grokster and Streamcast, but other technologies have since replaced the software of these two companies—technologies that have proved to be more useful and less capable of detection than the earlier forms of P2P sharing. The most recent of these is “bittorrent” sharing, which debuted in 2001, but whose popularity took off in 2005, after the Grokster decision. Bittorrent sharing is a form of P2P sharing technology that is even more hated by the studios than Grokster and Morpheus were. “Bittorrents” (also known as “torrents”) work by downloading small bits of files from many different Web sources at the same time, so that no single file can be traced to a single computer. Bittorrent networking may be one of the most popular activities on the Internet at the present time, that is, until it is replaced, as it is sure to be, by a new and even more disruptive technology. It is fairly safe to state that the motion picture industry will have its hands full for years to come as studios confront the new technologies that will be developed and that will most certainly disrupt their economic model.

The structure of the movie business is changing and, much as movie studios might try to fight these developments, it will continue to do so. The studios can become participants in innovation trends—as they have done when they have licensed films to services such as Netflix to stream into homes—even though this has alienated theater owners, or they can be left behind.

Endnotes
3. 380 F. 3d 1154 (9th Cir. 2004).

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Becoming a Storyteller

By Jonathan Shapiro

Jonathan Shapiro is Of Counsel at Kirland & Ellis for entertainment litigation. He also serves as the Chairman of the California Commission on Government Oversight and Efficiency. His book, Lawyers, Liars, and the Art of Storytelling, was published by the American Bar Association and is available for purchase in the ABA webstore.

Note: This article is an excerpt from the book, Lawyers, Liars, and the Art of Storytelling by Jonathan Shapiro. The book contains entertaining instruction in how lawyers can develop their storytelling skills to further their cases and careers. The book is available for purchase in the ABA webstore.

Her name is Sandrine Chapon. She is an academic at the University of Grenoble, France. We have never met. But I love her.

One night while canal flipping, Chapon happened on an episode I wrote of the ABC television series Boston Legal involving Louisiana’s decision to execute a mentally disabled man accused of raping a child.

It was an unusual, even unprecedented episode.

Since the Supreme Court bans cameras, we wanted to show the American public a version of what actually happens there.

Comparing the show’s production calendar and broadcast schedule with the Court docket, we based the episode on a pending case, Kennedy v. Louisiana, with the hope that it would air the week before the actual argument was held.1

The question before the Court—and television version of the Court—was whether capital punishment for a crime in which no one died amounted to cruel and unusual punishment in violation of the 8th Amendment of the Constitution.

It was the easiest script I ever wrote because the appellate briefs provided the facts and law.

Writing the justices’ dialogue was easy, too.

The Supreme Court isn’t just the highest in the land—it is also the longest-running law show in history, with a rotating cast of regulars. You love them, you hate them, but most of all, you know them; how they think, how they talk, what they want.
You don’t have to guess what they would ask or how they would ask it. Putting words in their mouths was like lawyer fantasy camp.

Walking into casting sessions, however, was surreal. Who knew there were so many actresses in Hollywood who looked like Ruth Bader Ginsburg? The man we cast as Chief Justice John Roberts was so perfectly bland in appearance, so sneakily smart that he should make a career out of playing the role.

The only hard part was finding a credible Clarence Thomas. I don’t think we succeeded.

The script’s structure was also obvious. Supreme Court practice has its “got-to-have” scenes, including the inevitable mock argument, with all its own stresses. The arguments had already been written by the parties. The challenge was to boil them down in an accessible and entertaining way.

The Court’s interior was built on the production stage. Some license was taken. Denny Crane’s only interest in the case was a betting one. He wagered $10,000 that they could get the otherwise silent Justice Thomas to say something during the argument. He won the bet.

Stanford Law School professor Jeffrey Fisher, who argued the real child rape case on April 16, has seen and was impressed by the episode... “It was striking how closely the episode hewed to the real facts in Kennedy, down to the most minute detail, and (certain rants aside) to the real legal arguments the parties are advancing,” Fisher said in an article about the episode. “The producers obviously had studied our briefing quite closely.”

We had indeed. As Tony Mauro noted in the Legal Times article cited here, our research indicated that James Spader’s attorney character, Alan Shore, would never in a million years have said some of the things he said, such as when he attacks the “overtly and shamelessly pro-business” Court, and takes a sharp detour from the rape case to slam Justice Antonin Scalia for his seemingly likely support for ExxonMobil in the case—also argued recently—involving punitive damages awarded after the Exxon Valdez oil spill. “Nineteen years after the Valdez oil spill and the plaintiffs are still waiting to be fully compensated,” Shore says.

When the Scalia character interjects sharply, “You are getting so far off point,” Shore shoots back: “My point is, who are you people? You’ve transformed this court from being a governmental branch devoted to civil rights and liberties into a protector of discrimination, a guardian of government, a slave to moneyed interests and big business and today, hallelujah, you seek to kill a mentally disabled man.”

[Shore eventually] concludes, “If mercy truly lives within these walls, within your hearts as justices, as people, you cannot cause this man to be injected with chemicals for the purpose of killing him.”

Fisher told Mauro:
“I thought the episode did an admirable job of exploring one of the paradoxes of Supreme Court practice—namely, that lawyers represent clients who usually have personal goals, but the Court is much more interested in resolving legal issues than doing individualized justice ... Most Supreme Court advocates have been in the position, one way or another, of having to explain to a client that even though a certain result in a lower court is wrong and does an injustice, the Court will not care about that... There are good reasons for that reality, of course, but I do think it strikes some in the public as odd.”

Mauro noted that the “remarkable level of detail and accuracy in its portrayal of the Court—including references to little-known sculptures and customs at the Court—has given the episode a life of its own.”

Mauro also quoted Slate’s Supreme Court correspondent Dahlia Lithwick, who wrote: “I can’t recall another time I’ve seen anything as close to the real justices represented on prime-time television, or a moment in which someone in the popular culture... really took on the Roberts Court as a collection of political actors.”

The real life Court’s ruling would not come down for several months. When it did, it affirmed our show’s holding, striking down the Louisiana law as unconstitutional. And we managed to get it all done in less than one hour. Not that it counted.

Still, until the Court allows cameras to broadcast their arguments, the episode will be as close as most people will ever get to seeing what the Justices do and how they do it.

A few years after the Boston Legal episode, we took a family trip to Washington, DC. The highlight was a tour of the Supreme Court, arranged by a friend and former Court Clerk. One of the justice’s secretaries was kind enough to take us into the main chamber, conference rooms, offices, and basketball court where Justice Byron White enjoyed charging over clerks.

Walking down a stairwell toward the end of the tour, I turned to say something to the woman, tripped, and went tumbling head over heels down the entire length of the staircase.

As I lay flat on my back, searing pain running up my leg, the woman stared down at me.

“You can’t sue. The Court has immunity.”

Back in the hotel, I could not get my shoe off without two of the kids pulling. You can make fun of the Court all you want. But the Court gets the last word. Chapon turned the Boston Legal episode and others I wrote into a research article for one of France’s academic journals, providing a comparative study of how complicated legal issues are presented in the United States.
“TV series are not yet regarded in France as a serious source of information,” she explained to me via e-mail. “It is considered as a subculture whose only purpose is to entertain desperate housewives. The whole point of my dissertation is to prove the contrary.”

From “a didactic point of view,” she concluded, the episode “conveyed the highest amount of information about the law and legal culture in the shortest amount of time to the largest number of people.”

Furthermore, the specialized “discourse is highly accurate, being written by a lawyer, so it is a highly reliable source in order to increase the legal vocabulary of French law students” who are trying to understand basic American principles, as well as “language teachers who have no legal training.”

Storytelling, Chapon concluded, it a great way to teach law and to understand it. It is a shame American students are not taught how to do it.

Everyone who graduates law school almost immediately realizes how poorly law school prepared them for the actual practice of law.

Law students are taught how and when law developed, by whom, what the law is generally, and where they can find answers about it if they don’t know. In general, they are not taught how to convey information in a cogent, persuasive way to the client who needs the help; to opposing counsel, who has a different client and point of view; or to the decision-maker who has to make the final call.

Despite the fact that all law school graduates who practice law will have to write statements of facts for briefs, memos, and client letters, law schools don’t teach them how to marshal facts and law into coherent stories.

Instead, lawyers are taught to communicate with other lawyers or judges rather than simply learning how to communicate with people.

Storytelling is a creative process. But creativity is not just discouraged in law school—it is banned. Only “legal” writing can be taught, and it must be coupled with “research.” The emphasis is on the proper forms of citations rather than on the mechanics of how to tell a good story. Talking is strictly controlled. Students speak when called upon to do so in the context of being graded.

Professor Daube thought law schools don’t teach storytelling because of intellectual snobbery. Academics see the subject as unworthy of their time and effort. No one has received tenure for it. Law reviews don’t publish stories. Thus, storytelling has no place in the curriculum.

Even in the rare cases where law schools do teach storytelling, they treat it as a novelty, an elective, less important than, say, property law or civil procedure.

Others fall back into academic tropes, turning what should be of practical use into unhelpful theory. They twist storytelling into a pedantic exercise; agitprop only other academics could love.
Richard A. Posner calls it “legal narratology,” the tendency of some law professor to produce incomprehensible textual analysis and their own didactic stories.

In Law’s Stories: Narrative and Rhetoric in the Law, Professor Peter Brooks posed a reasonable question: “Why doesn’t the law pay more attention to narratives, to narrative analysis and even narrative theory? They would seem to be almost as relevant as economic or social theory to understanding how cases come to the law and are settled by the law.”

Dershowitz, as noted, rejected the notion that narrative has a place in legal cases. It is misleading, he says. Stories have logic, but cases are not logical; people often don’t behave rationally. Presenting cases like stories edits out the possibility that our eyes deceive us, that what appears to be true is really just a lie.

He makes a point. The rule in the US Attorney’s Office in Los Angeles was to never let a writer, actor, or director stay on a jury. They tend to want happy endings with plenty of twists and turns. As prosecutors, we wanted simple, easy to follow stories with unhappy endings. Justice is not sweet. At best it is bitter-sweet. Guilty verdicts are often warranted but almost never the cause of happiness.

To present a case as a story brings to it certain expectations. It suggests a logical resolution should be reached. But that is what makes storytelling so important. Dershowitz confuses dramatic narrative itself with badly crafted narratives. Stories that that fail to adhere to the rhetorical triangle aren’t usually worth listening to in or out of court, not just because they fail to reflect the actual experiences of the audience, but because they lack credibility.

“The life of the law is not logic: it has been experience,” Holmes said. The same is true of persuasive storytelling.

The illogical experiences of life are what make stories real. Failing to account for the illogical is bad storytelling.

As for the illogic of Alan Dershowitz criticizing lawyer storytelling, has anyone benefited more from storytelling, or been more responsible for blurring the lines between legal fact and fiction? The man wrote the book Chutzpah for a reason.

Ron Silver portrayed Dershowitz in the movie Reversal of Fortune, the story of how Dershowitz got his client Klaus von Bulow acquitted of murder through what can only be called extremely creative legal narrative.

We cast Silver to basically play Dershowitz again in an episode I cowrote of The Practice. Silver played attorney John Mockler, a tart-tongued, combative, media-savvy defense attorney with a love of confrontation.
A friend of mine visited the set during shooting. I was giving him a tour. Silver stormed up and said he wanted to change the name of the character.

Why?

“John Mockler is a stupid name,” Silver declared. “I mean, yeah, I get it,” Silver said sarcastically, rolling his eyes. “Mockler, like he’s mocking the law, oh, like the writer is being so clever.”

When he finished his rant, I introduced Silver to my friend—John Mockler—one of the moving forces behind the Supreme Court decision that struck down inequality in public school financing.

Silver muttered something and slinked away. Several years later, Silver died, presumably not of embarrassment.

Maybe law schools have a problem with storytelling because of misplaced ethical concerns. Storytelling carries a whiff of charlatanism. To create is to make-up, to imagine; to call someone a storyteller can be a gentle way of calling him or her a liar.

The issue is one of nomenclature rather than reality. No proponent of storytelling by lawyers advocates perjury. It is unethical, improper, and wrong to tell stories for the purpose of deceiving someone else.

Show business takes a more liberal view.

Law schools should add storytelling to the curriculum if, for no other reason, because nothing else seems to be working.

Law student enrollment continues to fall. New graduates are saddled with enormous debts and many are having a hard time finding a job to repay their loans.

Anything that has the potential to make law school more relevant (and enjoyable) cannot be bad. And anything that makes lawyers better communicators deserves at least some consideration.

Granted, storytelling is a less objective subject than others. It is not a science. It is a personal practice, filled with artistic choices and subjective decisions; it is a creative process, not a mechanical one. Spot ten writers a white whale and a one-legged sea captain and you will get ten different stories.

Lawyers, in contrast, like bright-line rules. Storytelling, for the most part, doesn’t have any. Norman Mailer described writing as a scary art for a reason.

But that doesn’t mean it isn’t serious. If you doubt it, get to know some writers. You won’t find a more thoughtful, neurotic, obsessed group of professionals anywhere.
Furthermore, there is a well-established, long-standing, highly serious, classical method available to law schools to teach the art of storytelling.

Why isn’t rhetoric taught as a first-year class? Instead of civil procedure or contracts, why not a course that teaches the best way to organize and advocate every conceivable type of information and to tell every single type of law story?

Those are rhetorical questions.

Had Professor Daube been the dean of the law school—the idea made him laugh—he would have added two subjects to the curriculum: poetry and rhetoric.

Poetry is a practical skill. To study poetry involves understanding the meaning of language and its capacity for representation. It is to learn how to convey information that invokes emotion. It involves parsing each word down to its basic part, interpreting the writer’s intention through syntax, word choice, and sentence structure. It is to become a craftsman of language.

Nothing could be more useful for lawyers, whether they are deciphering the terms and conditions of a contract, the meaning of the administrative order, or the purpose of a constitutional provision.

Rhetoric is of equal value. Daube wrote and lectured on its history, its development in Greece and Rome, its different schools, its basic tenets, and its influence on Talmudic exegesis, classical learning, the Renaissance, and the Enlightenment.

Daube was old, old school. But he did not harbor the illusion that the classical language of rhetoric was coming back. Nor did he think his students needed or cared much about what Aristotle had to say.

But he believed telling a persuasive story was at the heart of what lawyers do. And he felt strongly that the classical past offered relevant information on how to do it.

Aristotle’s rhetorical triangle, its elements and uses, remains the lawyer’s best tool for building persuasive and effective stories. Stories told by lawyers in the context of their work are most effective when they utilize all three parts of the rhetorical triangle. 12

Such stories establish the lawyer’s expertise as someone worth listening to. They utilize the facts and events in a reasoned way to support the lawyer’s arguments. And they move the audience to feel connected to the lawyer’s point of view.

Aristotle classified arguments into three separate categories:

• Ethos referred to a speech about credibility.
• Logos referred to speech using logic and reason.
• Pathos was an argument that relied on emotion.
Aristotle did not specifically describe these arguments in terms of storytelling. But they clearly apply to any and all storytelling that aims to persuade.

Nor did Aristotle teach these arguments in terms of a triangle. Rhetoricians and high school debate coaches did that. Pythagoras was the triangle man, not Aristotle. In truth, Aristotle might not have approved of the whole triangle concept. He treated each element as a separate argument unto itself, not necessarily as part of a whole.

Still, a triangle is a pleasing shape and has long been a handy pedagogical device, easy to portray, easier to imagine.

NBA Hall of Fame Coach Phil Jackson made a fetish of another type of triangle. But Coach Jackson never suggested that each leg was of equal importance. What made him a great coach—and a Zen master of the obvious—was to see that Michael Jordan was the most important leg of the triangle.

Of course, visuals can be misleading. Invariably in books on the subject, the three sides of the rhetorical triangle are depicted with equal lengths. Advocacy and storytelling don’t always have such pleasing symmetry. In the real world, the length of each leg of the rhetorical triangle depends on the circumstances of the case, the facts, the law, the people involved, and any number of other factors.

It is the lawyer’s job to tell the right story, to build the appropriate triangle for his or her client, to make subjective judgments based on the variables as to whether to spend more or less time on establishing ethos, displaying logos, or eliciting pathos.

Every triangle has three sides. But each triangle has its own unique shape and appearance. And while each leg of the triangle deserves its own consideration, it must never come at the expense of the whole.

Ethos without logos is a losing strategy. The age’s overreliance on pathos is almost always fatal. The triangle cannot stand if one of its legs is missing or too weak. The triangle is the strongest where two or three of the legs overlap.

Only the lawyer telling her story can know which leg is her strongest—ethos, logos or pathos—but she must never fail to have all three present in her story.

To be clear, merely invoking Aristotle’s triangle won’t suddenly make you a great storyteller. As we will see, storytelling takes thought, preparation, practice, talent and experience.

But all storytellers would benefit from understanding how the triangle works and how to build stories with the legs of the triangle in mind.

Coach Jackson’s triangle worked for the Chicago Bulls and the Los Angeles Lakers, too; not as smoothly, perhaps, but enough to win four championships.
The year after Professor Daube died, one of the legs of the Lakers' triangle, Shaquille O'Neal, began referring to himself as "The Big Aristotle."

Daube admired any practical application of classical learning to modern contexts.

He would have loved The Big Aristotle.

**End Notes**

1. Due to a network preemption, it ended up airing six days after the actual argument. See Tony Mauro, “David E. Kelley’s ‘Boston Legal’ Takes on the Roberts Court,” Legal Times, May 5, 2008.
2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid.
6. Ibid.
7. Ibid.
11. Ibid.
13. The triangle offense uses the three sides of the triangle, with the center at the low post, the forward at the wing, and the guard at the corner. Simple enough until you try to use it in your kid’s youth league.
SCOTUS recently heard oral arguments in *Elonis v. United States*, 134 S. Ct. 2819, the first case to evaluate whether violent images and threatening language in the form of rap lyrics constitute a “true threat” to others or whether they are protected speech under the First Amendment.

Anthony Elonis, a Pennsylvania man, was sentenced to forty-four months in federal prison for posting sadistic rants on Facebook against his estranged wife, coworkers, and others. Elonis argued that the postings were free speech and poetic therapy in the form of rap lyrics. His estranged wife disagreed and said she feared for her and her children’s safety. At the heart of this case is whether federal courts must consider the subjective intent of the speaker who made the threat or whether it is enough to show a reasonable person would regard the statement as threatening.

Several amicus briefs were filed in the case, including one by the Marion R. Brechner First Amendment Project. In the Brechner brief, two music scholars argue in favor of applying a subjective-intent element. The professors explain applying the reasonable-person test would not work because rap music is generally misunderstood and usually associated with negative racial stereotypes. The scholars describe rap’s history and how it is a way to tell stories and to compete verbally (not physically). The teachers also try to disabuse the Court of the stigma associated with rap music by reminding the Court of its 1971 decision, *Cohen v. California*, which found that “one person’s lyric may be another’s vulgarity.”

The fact that the rants were posted to social media seems to have complicated the case. Specifically, if the Court adopts the reasonable-person standard (rather than the subjective-intent standard), then is the “reasonable person” comprised of all Facebook readers or only those familiar with the context of the statements? Those arguing for the subjective-intent standard are concerned that the vast and immediate dissemination of speech on Facebook means that a majority of people who view the posts are likely unfamiliar with the context and may interpret the statements differently from what was intended by the speaker. In the seminal case of *Watts v. United States*, 394 U.S. 705 (1969), Watts told a crowd during a rally opposing the Vietnam War that, “I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” The crowd—who understood the context of the statement as political speech during an antiwar rally—laughed. Would the Court come to the same conclusion in 2014 had Watts posted those same words to his Facebook page? It should. If the Court declines to incorporate a subjective-intent element, then the reasonable person should not be all Facebook readers, but only those readers familiar with the context of the speech.

The Court’s decision in *Elonis* is likely to raise more questions than it answers about free speech in the digital age. But, I’m sure the Notorious R.B.G. will rally her crew and write an off-the-chain decision.
Madonna Doesn’t Need a License to “Vogue”

By Erin E. Rhinehart

Erin E. Rhinehart is a partner with the commercial litigation firm of Faruki Ireland & Cox P.L.L. in Dayton, Ohio.

A federal court in California ruled in favor of the Material Girl, finding that her 1990 hit “Vogue” does not contain an illegal sample. VMG Salsoul, LLC v. Madonna Louise Ciccone, Case No. CV 12-05967 (C.D. Cal. 2012). Last July, VGM Salsoul, the copyright owner of a decades-old composition called “Love Break,” filed suit against Madonna and her producer, Robert “Shep” Pettibone, among others, for copyright infringement. Why the wait to file suit? VMG Salsoul argued that it was only through new technology that the “deliberately hidden” sampling was detected.

The court did not agree with the plaintiff that Madonna’s use of “a single horn stab” (i.e., one chord) eleven times during her hit song, without first obtaining a license to do so, was in violation of copyright laws. The court found that the alleged appropriation was not subject to copyright protection as it lacked originality. And even if copyrightable, the alleged copying was de minimis.

VMG Salsoul is in stark contrast to the infamous 2006 decision by the Sixth Circuit in Bridgeport Music v. Dimension Films, 410 F.3d 792 (6th Cir. 2005). In Bridgeport, the Sixth Circuit reversed the trial court’s decision and found that the sampling of a two-second guitar chord in a N.W.A. rap song without a license was improper: “Get a license or do not sample.”

Copyright lawyers across the country were anxious to see whether the California court would follow in the Sixth Circuit’s footsteps. Judge Beverly O’Connell, however, declined to adopt a bright-line rule regarding sampling. Instead, VMG Salsoul stands for the somewhat unremarkable proposition that use of a single chord is “trivial” and insufficient to necessitate the need to obtain a license before the chord is used.

How (Not) to Defend a Deposition—Starring Justin Bieber

By Erin Rhinehart
Erin E. Rhinehart is a partner with the commercial litigation firm of Faruki Ireland & Cox P.L.L. in Dayton, Ohio.

In case you hadn’t heard or seen the infamous video, Justin Bieber was deposed earlier this year. Not only was his behavior deplorable but his attorney also provided us with a lesson in how not to prepare your client and defend a deposition.

Strategic planning is necessary for every deposition. Often, attorneys tasked with defending a deposition fail to take advantage of the deposition preparation session. A poor preparation session, or no preparation session, hinders your ability to prove or defend your client’s case. While the following list is not exhaustive, adhering to these fundamental guidelines will allow for a more successful deposition of your client.

Prep for the Prep Session

- Evaluate the strengths and weaknesses of your client as a witness. If your client has a short attention span and gets irritable easily, then make sure you remind your client that there are real consequences if such bad behavior is captured on the record.
- Think about what opposing counsel hopes to gain during the deposition of your client. If you know that uncomfortable or embarrassing topics will likely be broached during the deposition and are not completely left of field for the lawsuit, then prepare your client to answer so that a foundation is laid for you to object and, if appropriate, terminate the deposition pending judicial intervention.
- Identify potential “anchors” for your client (i.e., anything that will help your client refocus during the deposition and respond to difficult questions effectively).
- Evaluate what evidence you need from your client to prove or defend your case; defending a deposition is not merely a reactive exercise.

Review the Deposition Process

- Explain where the deposition will take place, the videotaping process if it is videotaped, what to wear to the deposition, who will be present, and how to behave.
- Explain that opposing counsel will ask questions, all answers are provided under oath, and, as appropriate, you will make objections. Remind your client to respect the process.
- Review with the witness how deposition exhibits are handled.

Review General Guidelines on How to Be a Good Witness

- Tell the truth.
- Think before you speak.
- Be professional and polite.
- “I don’t know” and “I don’t recall” are acceptable answers, if truthful. Storming out of a deposition is not permitted under any rule of civil procedure in response to opposing counsel simply asking a question you prefer not to answer.
Defending a deposition requires planning. Prepare yourself and your client so that the deposition is successful—and you don’t end up as another cautionary tale.

IP and the Comic Book Superhero

By James E. Daily, Brad M. Desnoyer, and Janet Fries

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As with many other modern media, the history of comic books is bound up in the history of intellectual property law. From early cases about the copyright eligibility of comic book characters to modern trademark disputes, comic books and the stories within them bring together a wide range of intellectual property issues. In this article, we examine recent developments and issues in the areas of patent law, the right of publicity, and copyright law through the lens of comic book characters and their real world owners and creators.

Batman, Wayne Enterprises, and the America Invents Act

James E. Daily

If someone mentions Batman, patent law is probably not the first thing to leap to mind, even in the legal context. But nonetheless, the Batman stories pose a significant patent problem for Wayne Enterprises, the multinational conglomerate that is the source of Bruce Wayne’s wealth and many of Batman’s famous gadgets. Batman often uses the products of Wayne Enterprises’ research and development.
department ("Applied Sciences" in the recent movies) to fight crime. In many cases, he uses products that have not yet been revealed publicly. To see why this may be a problem, we must look at the patent law doctrine of public use, which was recently changed by the America Invents Act of 2011 (AIA). We will then consider whether the AIA changed the result and whether a solution exists.

Public use is both a ground for denying a patent application and also for invalidating an issued patent. It is codified in 35 U.S.C. § 102, which deals with all kinds of prior art. Prior art, broadly speaking, includes many kinds of disclosures of the claimed invention that were made before the inventor filed for a patent, including disclosures made by the inventor or by someone working in concert with the inventor.

**Before the America Invents Act**

Under the pre-AIA law, the relevant section of the Patent Act read: “A person shall be entitled to a patent unless . . . the invention was . . . in public use . . . in this country, more than one year prior to the date of the application for patent in the United States.” That version of the law still applies to any patents or applications whose filing date predates March 16, 2013, which would presumably include most of the patents and applications owned by Wayne Enterprises.

There are three things to note about the old law, two of which we can see in the text. First, it provided a one-year grace period for any public use. Second, it was limited to public use in this country (i.e., the United States). For example, Batman’s use of gadgets in China in *The Dark Knight* wouldn’t trigger § 102(b). Third, it was very strict about what constituted public use. Any use of the invention in public counts—even a single use, and even if the invention is not actually visible to the public. A discarded gadget, security camera footage, or one of the Joker’s goons willing to testify could be enough to establish public use.

There is an experimental use exception to public use, but it almost certainly does not apply here. The exception requires that the experimentation be done by or at the direction of the inventor as part of the development and testing of the invention. The exception also requires that the use necessarily be in public. None of those requirements could plausibly be met in this case, even if someone from Wayne Enterprises (Lucius Fox, perhaps?) were willing to testify to a working relationship with Batman.

Under the old law, then, Wayne Enterprises would have one year from the day Batman first uses a new gadget in public before it must either file a patent application or abandon any right to do so. Why is this a problem? Why not file early and let Batman do as he wishes? That makes sense from the point of view of Wayne Enterprises and Bruce Wayne, who want Wayne Enterprises to make a lot of money. But it is a problem for Batman, who would prefer that Wayne Enterprises keep the technology a secret, yet somehow continue to make money from it. Batman’s gadgets are a major part of his advantage over criminals, and he must always have the latest and greatest in order to stay ahead. Technologies that would have been a marvel even 20 or 30 years ago are commonplace today. This tension between protected disclosure and trade secrecy is a common one for individual inventors and companies. But before we consider a possible solution, has the situation changed under the AIA?
After the America Invents Act

For patents and applications with an effective filing date on or after March 16, 2013,9 “[a] person shall be entitled to a patent unless . . . the claimed invention was . . . in public use . . . before the effective filing date of the claimed invention.”10 Note the elimination of the territorial limitation and the apparent elimination of the one-year grace period. In fact, the grace period has not been entirely eliminated but it is now quite different—and more complicated.

Under the new § 102(b)(1)(A), there is a one-year grace period for disclosures made by the inventor or by “another who obtained the subject matter disclosed directly or indirectly from the inventor.”11 Under the new § 102(b)(1)(B), there is a one-year grace period for disclosures made by anyone as long as the inventor or another who obtained it from the inventor disclosed it first. In other words, prior disclosure by the inventor or someone who obtained it from the inventor immunizes against later disclosure by unrelated persons.

At first glance, this suggests that the situation post-AIA is the same as it was before. Batman obtained the invention from the inventor (possibly indirectly), and thus his public use should trigger the one-year grace period.

The problem is that proving this involves either publicly acknowledging Batman’s relation with Wayne Enterprises or claiming that Batman stole the invention from Wayne Enterprises.12 Without that, Batman’s third-party use would act as an immediate public use bar, thus giving Wayne Enterprises a strong incentive to file first rather than risk being barred.13 In this regard, the AIA has increased the tension between Batman’s need for public use of a secret invention and Wayne Enterprises’ need to secure patent protection.

There is also some question as to whether a secret public use (e.g., corset steels or Batman’s armor) qualifies as a disclosure under § 102(b)(1)(A). The language of the statute suggests it might not, because such uses might not qualify as prior art under § 102(a)(1). Section 102(a)(1) refers to the invention being “in public use, on sale, or otherwise available to the public.” One interpretation holds that the residual clause modifies “in public use” and “on sale,” meaning that the public uses must not be merely in public but “available to the public.” Another interpretation holds that the clause stands alone, leaving the law of public use undisturbed.14 There is some postenactment legislative history supporting the second interpretation, and that is the interpretation adopted by the United States Patent and Trademark Office (USPTO).15 Ultimately, this will depend on a decision by the Federal Circuit or possibly the Supreme Court.

A Possible Solution

So if the problem exists both before and after the AIA, how can it be resolved? One possible solution that may come to mind is a nonpublication request.16 If granted, such a request prevents the USPTO from publishing the patent application, which it ordinarily does 18 months after the application is filed.17 There are two major catches. First, nonpublication is available only if the application “[is] not and will not be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication of applications 18 months after filing.”18 Wayne Enterprises
is a multinational company and would likely wish to seek patent protection abroad.\textsuperscript{19} Second, nonpublication applies only to the patent application. Although not specifically required by statute, all issued patents are published by the USPTO.\textsuperscript{20} What is needed is a way for Wayne Enterprises to file for a patent but somehow pause both publication and examination until the invention no longer represents the cutting-edge technology needed by Batman to fight crime.

I believe the answer is a secrecy order. Patent applications that include classified information are subject to a secrecy order, and as a result they are not published until either a set time period has expired or the secrecy order has been lifted.\textsuperscript{21} Applications subject to a secrecy order also have their examination put on hold. This would seem to be an ideal solution to the problem, and one that could likely apply to many inventions used by Batman.

Inventions subject to secrecy orders are often related to technology used by the military. Wayne Enterprises is a major military contractor, and Bruce Wayne is a politically influential billionaire. In exchange for military use of the technology—which Wayne Enterprises would likely be interested in pursuing anyway—the technology could be declared classified and any related patent applications subjected to a secrecy order.

**Celebrity, Justice, and the American Way: Alter Egos and the Right of Publicity**

**By Brad M. Desnoyer**

Imagine the consistently cash-strapped Spider-Man tweeting endorsements: “Just KO’d @GreenGoblin. Spidey-sense says he wet himself #pathetic. Now to relax w/ @DrPepper.” He might link to a *Daily Bugle* photo. Most important, he would get paid for capitalizing on his celebrity.

But like most resources, Spider-Man’s celebrity is exhaustible and can be diminished by unauthorized appropriations. While the right of publicity might be Spidey’s economic savior, localized standards and factually similar yet legally irreconcilable cases cast doubts on Spider-Man’s right. And just Spider-Man’s luck, he lives in New York, where the law could have been written by a comic book villain.

**With Great Power Must Come Great Endorsement Deals**

Celebrity is a commodity—one that often is exceedingly lucrative. Kim Kardashian reportedly earns up to $20,000 every time she tweets a product endorsement.\textsuperscript{22} Beyoncé Knowles contracted with Pepsi for a $50 million deal to push caffeine and sugar.\textsuperscript{23} And 50 Cent partnered with Vitaminwater, negotiating a stake in the company that earned him hundreds of millions.\textsuperscript{24}

Certainly superheroes are celebrities. And superhero-celebrities are worth their weightlifting powers in profits. Just ask the Walt Disney Company: In 2009, the world’s largest intellectual property owner\textsuperscript{25} bought Marvel Entertainment for over $4 billion.\textsuperscript{26} The acquisition put the X-Men, the Avengers, and—of course—Spider-Man under the roof of Mickey Mouse. The results have been spectacular.
In 2012, Marvel Entertainment earned $6 billion in retail sales. Thus, Marvel, independent of Disney, was the world’s fifth-largest intellectual property owner. Its companion in the fifth spot: Warner Brothers, owner of DC Comics, and by extension, Batman, Superman, and the rest of the DC pantheon. Even while comic book sales decline, superheroes fatten as licensing cash cows. They appear on lunchboxes, bubble baths, and apparel. They even have their own colognes.

Mirroring our reality, in comics, superheroes endorse fictional products and wear brand logos on their costumes. Much to Superman’s dismay, lesser-known superhero Booster Gold routinely shells for companies: “Sometimes even superheroes get thirsty,” Booster smiles as he displays a can of Soder Cola. Indeed, the Fantastic Four run a gift shop out of their headquarters.

But while superheroes possess vast commercial wealth in their extraordinary celebrity, whether superheroes would be entitled to enforce their right of publicity is a peculiar issue—one with important implications for a unique property right.

New York Does Not Heart Superheroes
At its most basic, the right of publicity protects a person’s identity and persona from unauthorized commercial appropriation. First recognized in 1953 by the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the “right of publicity” has since rapidly evolved and diversified. Twenty-eight states recognize a common law right of publicity, but only 19 provide statutory protection; further, only 12 states offer postmortem protection—a period that differs by state from 10–100 years.

At heart, however, the right of publicity is a property right, not a privacy right. Although the Second Circuit in *Haelan*—looking to New York state law—failed to explicitly label the right as property, it recognized the right as assignable. The court then reasoned that the right exists not to protect celebrities from “having their feelings bruised,” but from feeling “sorely deprived if they no longer received money for authorizing advertisements.”

The Supreme Court, in affirming the right at common law, compared the right of publicity to patent and copyright, stressing “the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.” And as stated by Professor J. Thomas McCarthy, “[A]n infringement of the right of publicity focuses upon injury to the pocketbook, while an invasion of ‘appropriation privacy’ focuses upon injury to the psyche.”

Just Spider-Man’s luck: It is in New York—where the Second Circuit birthed the right—that the law’s goals and purpose are most fundamentally misunderstood. The failure rests upon the New York state legislature—who codified the law as part of the state’s “right of privacy” statute—and upon New York’s highest court in *Stephano v. News Group Publications, Inc.*—where the court held that the legislature’s codification usurped the common law. Thus, New York limits protection to a person’s “name, portrait, picture, and voice,” but builds an arbitrary barrier against protecting “personas.”
This logic rejects the right of publicity as a property interest and discards previous New York opinions, which follow the majority of jurisdictions. Pre-Stephano, the Southern District of New York held that Julius Marx’s heirs possessed a right of publicity in Julius’s celebrity persona, “Groucho Marx.” Although Julius bore no real resemblance to his cartoonish counterpart Groucho, the court reasoned that Julius had cultivated celebrity in his assumed name and persona: “[T]he Marx Brothers’ fame arose as a direct result of their efforts to develop instantly recognizable and popular stage characters, having no relation to their real personalities.” Courts reached similar results with other celebrities possessing recognizable personas: Bela Lugosi’s persona “Count Dracula,” Stanley Laurel’s and Oliver Hardy’s onscreen personas “Laurel and Hardy,” and George McFarland’s persona “Spanky” of the Little Rascals. But by fashioning a villainous statute, New York eventually—and repeatedly—rejected this line of reasoning.

**Face It, Tiger, You Didn’t Hit the Jackpot**
Spider-Man, domiciled in New York, is gazing into defeat. His true identity is after all Peter Parker. “Spider-Man” is both an assumed name and a costumed persona. If a Broadway show attempted a haphazard play about his heroics, he could not recover—merely because the production never used Parker’s actual name, picture, portrait, or voice. Rather, theater productions, toy manufacturers, and other potential free riders would bypass the right of publicity because they naturally focused their sights on the money. As stated by New York’s Second District post-Stephano, the law does “not extend to fictitious characters adopted or created by celebrities”; the law does not protect a “costumed character” or the “property interest of the celebrity in his or her public identity.”

Lady Gaga should take notice. Indeed, Lady Gaga, aka Stefani Germanotta, is nearly a comic book character: As satirically reported in *The Onion*, “Supervillain Lady Gaga brazenly abducted Commissioner James Gordon from a charity fundraiser. . . .” Like Peter Parker, Germanotta was born and attended college in New York City, she adopted a costumed alter ego, and she might encounter trouble protecting her right of publicity. It may be strongly argued that Lady Gaga, Ziggy Stardust, KISS, and more are mere fictitious, costumed characters—accorded no more protection than Spider-Man. Although all have cultivated celebrity through the use of unique personas, they are vulnerable to misinterpreted law and defective policy.

Worse yet, for superheroes domiciled in New York, which is most superheroes, New York does not recognize the right as assignable or postmortem. Thus, the Fantastic Four—who do not have secret alter egos but operate publicly—still could not assign their rights of publicity to charity or to their heirs upon death. The only consolation may be that no one in comic books stays dead for long.

Generally, the right of publicity is robust. It safeguards earned property and keeps encroachers at bay. But all superheroes have a weakness. The right of publicity’s weakness is New York. According to the classic Spider-Man theme song, when it comes to “wealth and fame, he’s ignored.” The song got it half right.
Copyright and Comic Book Superheroes

By Janet Fries

In addition to patents and rights of publicity, comic book superheroes present a variety of copyright issues, including questions relating to the scope of copyrightable subject matter and the restriction of protection afforded to utilitarian works. Additionally, superheroes have been at the heart of a number of cases involving the termination of transfers of copyrights and the implementation of the complicated formalities relating to those rights.

Copyrightable Subject Matter
The Ninth Circuit recently addressed the question of whether or not the Batmobile constituted copyrightable subject matter. Copyright law protects certain specific categories of authorship, and sets forth certain exclusions to the scope of protection available. When interpreting these categories and exclusions, courts have long held that copyright protection does not extend to utilitarian works. This principle has been clearly expressed by the Copyright Office as follows: “A ‘useful article’ is an object that has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. Examples are clothing; automobile bodies; furniture; machinery, including household appliances; dinnerware; and lighting fixtures.”

It would seem that, as an automobile, the Batmobile might be categorically ineligible for protection. But then what about all those cool design features? Those Bat-fins don’t seem particularly useful. And if certain design features can be separated, then the analysis shifts. “Copyright may, however, protect any pictorial, graphic, or sculptural authorship that can be identified separately from the utilitarian aspects of an object. Thus a useful article can have both copyrightable and uncopyrightable features.”

In DC Comics v. Towle, the court recognized the design features of the Batmobile, was able to separate them from the functionality of the underlying auto, and determined that these features were protectable authorship. The court held that DC Comics had valid copyrights that could be asserted against custom carmaker Mark Towle.

The design elements of the two Batmobiles at issue here are conceptually separable from their underlying car . . . . The underlying vehicle would still be a car without the exaggerated bat features.

. . . .

All of the features that distinguish the Batmobile from any other car—the fantastical elements that feature bat design, such as the bat tailfin and the various gadgetry that identify the vehicle as the Batmobile—are protectable elements.

Costumes
Batman’s car can be protected by copyright law, but what about his Batsuit? Several courts have looked at whether or not costumes are copyrightable subject matter, with varying results.
Starting again with the prohibition against protecting useful articles, one might think that there was a
categorical ineligibility for copyright protection of costumes. Clothing after all is very useful!

Moreover, it is worth noting that there have been a number of unsuccessful attempts to provide copy-
right protection for fashion design. Numerous bills have been introduced, and were passed by the
House or the Senate, but to date, no protection for clothing of any kind has been enacted.55

In a case before the Second Circuit, a manufacturer of Halloween costumes sought to enforce copyright
protection to stop another company from copying its costume designs. The plaintiff, Whimsicality,
attempted to maneuver around the restriction against clothing by arguing that its costumes were enti-
tled to copyright protection as sculptural works.56 But the court did not buy that argument: “The
intended depiction is in fact recognizable only when the costume is worn by a person or is carefully laid
out on a flat surface to reveal that depiction. We conclude therefore that these costumes do not consti-
tute sculpture.”57 In this instance, the court held that Whimsicality had obtained its registrations of
copyrights by misrepresentation of its works to the Copyright Office. But one can’t help but wonder
whether the Batsuit, more substantial and armor-like, might be considered sculptural?

In a more recent New York case involving costumes, the plaintiffs fared much better.58 The owners of
rights in certain children’s TV characters prevailed in their lawsuit against the manufacturers of unauth-
ORIZED Barney and Bob the Builder costumes. (Apologies to anyone who takes offense at putting Bar-
ney in the same category as Batman! Barney is of course no superhero: I mention this case only because
it involves costumes.) The court ordered statutory damages, attorneys’ fees, and a permanent injunc-
tion, but the holding is based on the defendants’ infringing use of the plaintiffs’ trademarks, service
marks, logos, and trade dress, as well as their copyrights. It may be that the Batsuit and other superhero
garb could be better protected through trademark law.

One more costume case: The owner of the copyrights in the Power Rangers filed a lawsuit in California
against another manufacturer of Halloween costumes, asserting infringement of its registrations of
copyrights in the artwork and design of the Power Rangers’ uniforms.59 This case was settled and the
terms of that settlement are confidential, but it does appear that the rights in the uniforms were
enforceable.

Termination of Transfers

It has often been observed that many authors have little bargaining power in negotiating licenses for
their works, particularly if they are young and/or their works have no proven value in the marketplace.
But copyright law provides authors with a second bite of the apple.60 When it enacted the provisions
allowing authors to terminate certain transfers of copyrights, Congress intended to provide the antidote
for “unremunerative transfers . . . needed because of the unequal bargaining position of authors, result-
ing in part from the impossibility of determining a work’s value until it has been exploited.”61

It would seem that the termination of transfer provisions would offer a perfect resolution for comic
book artists who entered into less-than-fabulous agreements early in their careers. These termination
provisions have been tested, explored, and explained in numerous cases involving comic book super-
heroes including Superman, Captain America, and the Fantastic Four, all with little success for the artists who created the characters. Unfortunately for the artists, much of the work they created was determined to be work made for hire and therefore not eligible for termination rights.62

Moreover, these termination provisions require numerous formalities that have functioned as traps for the unwary. For example, written notice must be sent within a specified window63 and must include statutory reference, titles of works, and other elements.64

Most noteworthy is the long-running battle fought by the artists who created Superman—Jerry Siegel and Joe Shuster—to get more compensation for their authorship. Siegel and Schuster were in and out of court for decades, starting soon after their work was first published and continuing until their deaths, and their heirs continue to litigate, much like the parties in Jarnadyce v. Jarnadyce in Dickens’s Bleak House.65 But while their efforts have been largely unsuccessful, in large part due to the work made for hire exemption to rights of termination, their cases and others involving the rights in superheroes have served to clarify some of the procedural requirements for terminating transfers of copyrights.

For example, the Ninth Circuit recently held that a letter from a former attorney who had represented an heir of Siegel constituted acceptance of a settlement offer and therefore barred the heir’s attempt to assert a right of termination.66 On remand to the district court, it was found that the lawyer’s letter remained a binding agreement, fatally barring Larsen’s copyright claim, because there had been “no unequivocal rescission or termination.”67

Another formality addressed in the Superman litigation by the Siegel heirs is whether each work must be listed specifically on the notice of termination. In a rare ruling in favor of the plaintiffs, the court held that if every reasonable effort is made to list each work, then a catch-all phrase such as “and any other” could be used to capture any work that was inadvertently omitted: “Nevertheless, if any such work has been omitted, such omission is unintentional and involuntary, and this Notice also applies to each and every such omitted work.”68

The Shuster heirs have had no better luck than the Siegel heirs. The Ninth Circuit recently determined that Shuster’s sister, Jean Peavy, and his brother, Frank, were not entitled to exercise termination rights.69 The court held, by a 2–1 majority, that the notice of termination sent in 2003 was invalid. The court reasoned that by accepting lifetime annual payments of $25,000 for the sister and the payment of the brother’s debt, they had entered into a new agreement in 1992, leaving no pre-1978 agreement in place to be terminated. The court rejected the argument presented by the heirs, i.e., that the 1992 agreement was merely a pension agreement and did not cancel the original 1938 copyright agreement. The heirs also argued that they could not have entered into a revocation and re-grant prior to the passage of the Copyright Term Extension Act in 1998 and its creation of the termination right in 17 U.S.C. § 304, but they did not prevail on this point.

In another long-running battle, this one involving the attempt to exercise termination rights relating to superheroes including the X-Men, the Fantastic Four, and the Hulk, the Southern District of New York held that sending a notice of termination conferred personal jurisdiction on the sender:
The exercise of personal jurisdiction over the non-resident Defendants therefore “is triggered by [their] own action in projecting . . . [themselves] into New York.” And here, Defendants “knew or reasonably should have known that by sending the [Termination Notices] into New York, [they were] running the risk of suit in New York in connection with that activity.”

Fortunately, the Second Circuit recently overturned this extraordinary holding, stating:

We conclude that a communication from out-of-state, required for the exercise of rights conferred under a federal statute, cannot alone constitute a purposeful availment of “the benefits and protections of [New York’s] laws,” at least where the only connection to New York is that the recipient’s business headquarters has a New York address.

Looking at another recent case, although the comic book character Ghost Rider is immortal, the copyright renewal rights in the character were questioned. At the heart of the matter was an agreement that the court found to be “ambiguous on its face” as to whether it conveyed renewal rights to Marvel.

**Spider-Man on Stage**

Much of the litigation involving superheroes has been related to the huge profits generated by motion pictures. Comic books produce revenues, but nothing in comparison to the movies; it seems like every year there is a blockbuster film starring a superhero. But recently, there has been litigation for yet another sort of derivative work—musical theater. In March 2011, Julie Taymor, the Tony Award-winning director and costume designer of the Broadway hit musical *The Lion King*, was removed from her position as director, writer, and costume designer for the musical then in production called *Spider-Man: Turn Off the Dark*. In November 2011, Taymor filed suit for breach of contract and copyright infringement, asserting that the musical’s producers “continued to promote, use, change, and revise Taymor’s work . . . without her approval or authorization and in violation of their agreements with Taymor and Taymor’s intellectual property rights. . . . They have refused to pay Taymor her contractually guaranteed authorship royalties.”

Although the production was plagued with problems in preview performances, after certain changes were made the musical became a box office success, and sold out shows with average ticket prices over $100 a seat until its closing in January 2014. So Taymor wanted a share of the profits from the show that she argued was based largely on her authorship.

In April 2013, the parties reached a settlement. While we would never want to express regret that the parties were able to resolve their differences without a costly court battle, it would have been interesting to see how certain copyright issues, including what constitutes new and protectable authorship in a derivative work, were handled by the court. Taymor registered copyrights in her treatment and in other text, disclaiming rights in the underlying comic book characters but claiming authorship for elements including storyline and stage directions. Taymor asserted that the producers copied “entire scenes, dialogue blocks, themes, plot lines, narrative arcs, characters, and descriptions of stage activity” from her work. Because the settlement was confidential, we are left wondering whether Taymor’s compensation was fitting for a superhero.
Conclusion
The battles over rights involving comic book heroes continue and appear to be as perpetual as Superman’s “never ending battle for truth, justice, and the American way.” And of course, all of the litigation is fueled by the revenues generated from movies, plays, books, comic books, costumes, and more—as we feed our insatiable appetite for superheroes who seem to continually amaze, inspire, and entertain us.77

Endnotes
1. See, e.g., Detective Comics, Inc. v. Bruns Publ’ns, Inc., 111 F.2d 432 (2d Cir. 1940) (holding that the character of Superman was copyrightable); Ross D. Petty, The “Amazing Adventures” of Super Hero®, 100 TRADEMARK REP. 729 (2010) (describing the history of the ownership and disputes surrounding the SUPER HERO trademark).
2. Also known as Wayne Industries, among other names.
3. Examples from the recent Christopher Nolan movies include Batman’s armor and his vehicles, such as the Tumbler.
5. Egbert v. Lippman, 104 U.S. 333, 336 (1881) (the corset steels case).
7. Id.
8. He would also like to avoid disclosing the technology’s weakness. For example, his new armor in The Dark Knight gave him improved maneuverability at the expense of vulnerability to gunfire and knives.
9. The actual situation is slightly more complex than this, because the AIA refers to applications or patents containing one or more claims with an effective filing date on or after March 16, 2013, but that distinction will be relevant in relatively few cases.
11. Id. § 102(b)(1)(A). The statute includes joint inventors as well.
12. Although it is not clear whether “obtained” includes theft.
13. As a multinational company, Wayne Enterprises would also have an incentive to file early in order to avoid similar “absolute novelty” rules in other countries.
14. Most of the controversy actually surrounds secret sales or offers for sale, but the arguments apply equally to public uses.
17. Id. § 122(b)(1)(A).
18. Id. § 122(b)(2)(B)(1).
19. On the other hand, other countries may not offer a solution to the problem at hand, and so there may be no way to file abroad and maintain secrecy in every country in which patent protection is sought.
20. Strictly speaking, 35 U.S.C. § 153 only requires that an issued patent be “recorded in the Patent and Trademark Office” and says nothing about publication or public access. And while 35 U.S.C. § 6 empowers the director to publish patents, it states that the director “may” publish them, not that he or she must do so. However, there is no mechanism for requesting nonpublication of an issued patent, and it is arguable that an unpublished patent could not be infringed.


27. See Lisanti, supra note 25.

28. Id.


32. 202 F.2d 866, 868 (2d Cir. 1953).

33. David Leichtman et al., Transformative Use Comes of Age in Right of Publicity Litigation, 4:1 LANDSLIDE 28 (Sept/Oct 2011).

34. 202 F.2d at 868.

35. Id.


37. 1 MCCARTHY, supra note 31, § 5:60.


39. See supra text accompanying notes 35 and 40.
53. Id.
57. Id. at 456.
63. Id. §§ 203(a)(3), 304(c)(3).
64. Id. §§ 203(a)(4), 304(c)(4); 37 C.F.R. § 201.10(b).
65. “Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world.” CHARLES DICKENS, BLEAK HOUSE ch. 1 (1852).
71. Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 130 (2d Cir. 2013).
73. Id. at 314.
74. Amended Complaint at 2, Taymor v. 8 Legged Prods., LLC, No. 1:11-cv-08002-KBF (S.D.N.Y. July 9, 2012).
76. Amended Complaint, supra note 74, at 31.
Cali Pap-Slap Law Takes Effect

By Erin E. Rhinehart

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Love to know what Suri Cruise wore to school yesterday? Dying to see how Blue Ivy is growing? Better savor the pictures you have because California is tightening the reins on paparazzi. California has enacted a law that makes it difficult for paparazzi to photograph the children of celebrities and other public figures.

The privacy/anti-harassment law, which took effect January 1, 2014, makes it a misdemeanor to attempt to photograph or videotape a child in a harassing manner if the image is being taken because the child’s parent is a celebrity or a public official. The law also increases the penalty for harassment: Anyone who violates the law “shall be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both that fine and imprisonment.” Subsequent violations impose mandatory jail time.

Not surprisingly, Hollywood celebrities strongly support the law. Actresses including Jennifer Garner and Halle Berry testified before the California state legislature that when they take their children out in public, they are often hassased by paparazzi.

In light of how easily we declare someone a “celebrity,” perhaps other states should follow suit and enact similar laws. While many of us may want to see how the Gosselin sextuplets transition into their tweens, it wasn’t their choice to become “famous.” Laws such as the one in California may provide these children with an opportunity to grow up with some semblance of normalcy, make mistakes without the world shaming them, and—gasp—become productive members of society. But then again, how would we ever know what Brangelina’s kids bought while shopping at The Grove?
How the Sixth Circuit Took the Pep Out of a Former Cincinnati Ben-Gal Cheerleader

By Erin E. Rhinehart

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The Sixth Circuit recently considered whether the Communications Decency Act of 1996 (CDA) bars state-law defamation claims in Jones v. Dirty World Entertainment Recordings, LLC, Case No. 13-5946 (6th Cir. June 16, 2014). The court answered in the affirmative and adopted the “material contribution” test to evaluate the scope of immunity conferred by section 230 of the CDA.

Sarah Jones, a former teacher and Cincinnati Ben-Gal cheerleader, filed suit in the US District Court for the Eastern District of Kentucky against defendants-appellants, Nik Richie and Dirty World, LLC. Jones was the subject of several anonymous posts on a website, www.TheDirty.com, which is operated by the defendants-appellants. The website, which the court characterized as “a user-generated tabloid primarily targeting non-public figures,” enables users to post anonymous comments, photos, and video that Richie then selects and publishes with his own editorial comments.

Jones alleged state court claims of defamation, libel per se, false light, and intentional infliction of emotional distress. Richie and Dirty World argued that section 230(c)(1) of the CDA barred Jones’s claims.

The district court rejected the defendants’ arguments and denied leave to file an interlocutory appeal to resolve the issue. The case went to trial (twice), and a jury returned a verdict in favor of Jones—awarding more than $300,000 in damages. Richie and Dirty World appealed.

The Sixth Circuit found that the judgment in favor of Jones “cannot stand.” In determining the breadth of the immunity provided by section 230, the appellate court took a Goldilocks approach—cautious not to adopt an overly inclusive or overly exclusive test. The court focused on the statutory term “development” in section 230(f)(3). Disagreeing with the district court’s interpretation, the Sixth Circuit joined the Fourth and Tenth Circuits by adopting the “material contribution” test, which requires a defendant do more than merely display the allegedly illegal content.

The court found that the CDA bars Jones’s defamation claims. Specifically, the court relied on the facts that the defendants did not author the statements at issue, require users to post illegal or actionable content as a condition of use, or compensate users for the submission of unlawful content. The court also refused to find that the defendants’ decision not to remove the posts does not qualify as material contribution.
In fact, the court found that Richie’s comment on one of the posts, “Why are all high school teachers freaks in the sack,” did not materially contribute to the defamatory content. The court explained that, while the comment was “absurd” and “ludicrous,” “it would break the concepts of responsibility and material contribution to hold Richie responsible for the defamatory content of speech because he later comments on that speech.” Of course, it is important to note that, while Richie was undoubtedly the “information content provider” for his own comment, Jones never alleged that Richie’s comments were defamatory; nor did the district court find that Richie’s comments were themselves tortious.

While Jones is not likely to be grabbing her pom-poms to cheer on this decision, Dirty World is important because it preserves the freedoms conferred upon online publishers by the CDA.

Cheers! Skinnygirl Successfully Defends a Motion for Class Certification

By Erin E. Rhinehart

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A recent dispute involving former Real Housewives star and burgeoning mogul Bethenny Frankel didn’t amount to an exchange of insults among housewives, though it did land Frankel’s famous creation—the Skinnygirl Margarita—in the middle of a case in federal court.

Earlier this year, a federal district court in New York denied a motion for class certification against the owners of the Skinnygirl Margarita, Skinnygirl Cocktails, LLC, SGC Global, LLC, and Beam Global Spirits & Wine, Inc. (Frankel and her business partner sold the Skinnygirl Margarita trademark to Jim Beam in 2011.)

Well known as a natural-food chef and author of the best-selling book Naturally Thin, Frankel helped develop a line of all-natural Skinnygirl cocktails, starting with the margarita. The complaint alleged, however, that Skinnygirl Margaritas contain the preservative sodium benzoate, as well as other additives that challenge the all-natural claim. In particular, lead plaintiff Christopher Rapczynsky asserted claims under New York statutory law protecting consumers from deceptive acts (i.e., New York General Business Law and Agriculture and Markets Law), as well as state common law claims of promissory estoppel and breach of warranty.
Applying the requisite rigorous analysis, the court found that Rapczynsky was atypical of the putative class members. Rapczynsky testified that he bought the drink in Massachusetts for his wife because he “love[s] her” and wanted to “appease” her.

Under Rapczynsky’s New York statutory claims, the prohibited act must occur in New York. The court found that “having not purchased his products in the New York State, [he] is an atypical representative of the New York class he purports to represent.” Likewise, the court refused to certify Rapczynsky’s common-law claims because of his causation problems. “A baseline inquiry into Rapczynski’s [sic] belief revealed that he bought the product to thank his wife for all she does in the home,” not because it was purportedly an all-natural product.

While the decision is not groundbreaking, it is an excellent example of how a trial court should conduct its rigorous analysis. The decision includes an uncomplicated summary of a lead plaintiff’s burden at the class certification stage, as well as the trial court’s role when evaluating a motion for class certification. I’ll drink to that.


Skinnygirl® Margarita, Made with Silver Tequila, Triple Sec, Natural Flavor and Caramel Color, 12.7% Alc./Vol. ©201_ Skinnygirl Cocktails, Deerfield, IL (Per 1.5 oz – Average Analysis: Calories 37.3, Carbohydrates 1.7g, Protein 0g, Fat 0g)

For Lawyers Interested in the Entertainment and Sports Industries

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