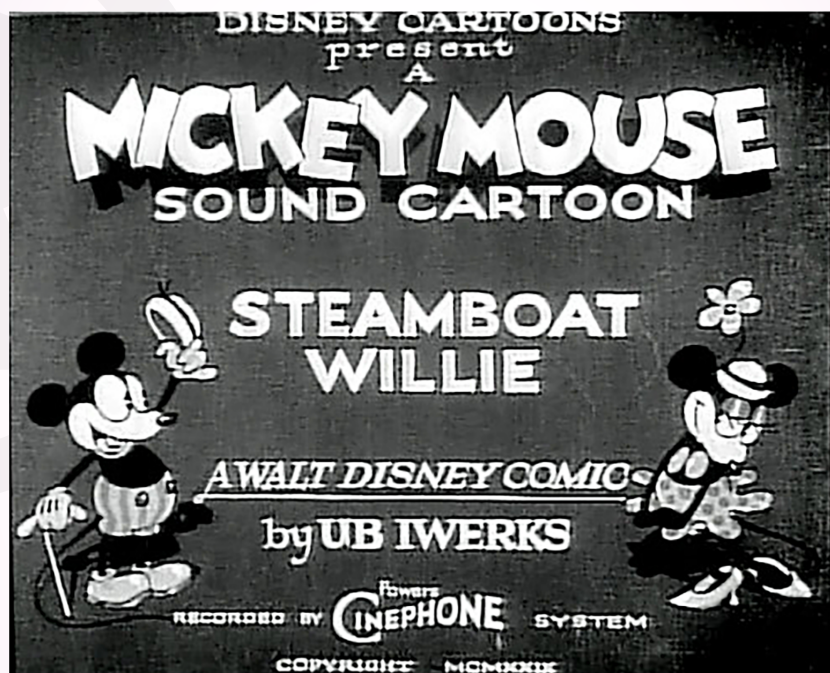


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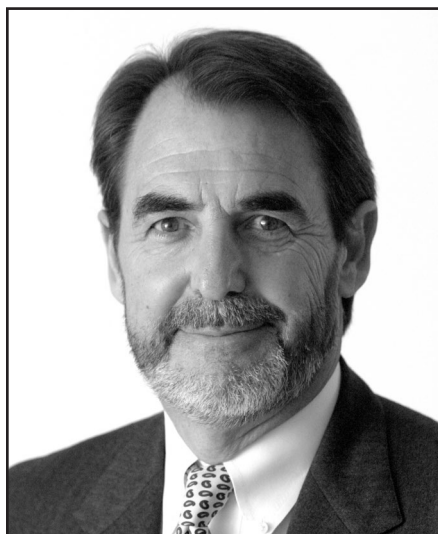
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The Licensing Corner



JAMES C. ROBERTS III
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THE YEAR OF THE RED MONKEY

WE ARE NOW SEVERAL WEEKS INTO the Year of the Red Monkey (or of the Red Fire Monkey), under the Chinese calendar. The monkey is a “smart, naughty, wily and vigilant animal.” So what mischief can we expect this year? I’ll focus on data privacy and some bloopers from the last year for you to avoid thereby outwitting our wily friend. The legal opinions regarding some of those bloopers make for good reading.



Data Everywhere—Along with Liability

The Year of the Red Monkey *should* start with a new data privacy agreement between the European Union and the United States,

if the promises of the negotiating teams are to be believed. The procedures are likely to be similar to those under the old “Safe Harbor” agreement, with at least one major change, namely, that the EU itself has begun to consolidate data privacy law and enforcement at the EU (Commission) level. In the meantime, companies have created work-arounds, primarily by reducing the need for transoceanic data transfer.

US companies establish all of their data processing of EU user data in the EU, with the transfer to the US only of data anonymized in an adequate manner (e.g., tokenization). Others are using alternatives to the safe harbor agreement that was ruled invalid, such as the contractual terms, although, as of the start of 2016, there was still uncertainty as to their validity.

As for data privacy in the US, we will see the continuation of two trends: expanded federal and state level data privacy enforcement and greater focus on data security *breaches*.

New Federal Actors

First, the decision in 2015 that the Federal Communications Commission would regulate ISPs means that the FCC would join the Federal Trade Commission in regulating data privacy. Indeed, the two agencies signed an MOU to coordinate their efforts.² It is likely that the federal efforts will continue with the FTC approach of using the FTC authority regarding truthfulness in advertising and unfair practices. Put simply: Do what your privacy policy says you will do. However, we can expect that the FCC and the FTC will together examine, for example, the use of personal information on mobile devices (e.g., a contact database) collected by apps to be used for other purposes, such as targeted advertising.

Data Breaches Are the New Black

With the spate of data breaches in 2014 and 2015, federal and state governments have gotten into the act. Almost every state (and the District of Columbia) now has a data breach statute—far more than the handful that have data privacy statutes. In essence, at both levels the laws mandate specific notice procedures—from the type of information to include in a notice to the timing of the notice. Companies that do not put in place reasonable data security procedures and prepare for the notification procedure will be at risk should a breach occur.

States Add More Protection to Children Online

Some states have gone deeper into data privacy, with California leading the way last year with what is known as the “Eraser Law,” which requires certain sites to create a mechanism for users under 17 to remove collected information. The act also prohibits the marketing of certain products and services (from guns to alcohol to tattoos) to

those users. In January of this year a similar law, DOPPA, took effect in Delaware.³

Given the federal law, Children's Online Privacy Protection Act (COPPA), many companies with privacy policies have a fair amount of experience with compliance. These two state laws might create a few more headaches. First, COPPA applies to information from (and marketing to) users under the age of 13. The California and Delaware statutes apply to users under 17. Second, these laws apply not only to companies *in* those states but to any companies that collect certain data of users *from* those states. Either or both such laws might be subject to constitutional challenge but for now they are applicable law and few companies are complying with their requirements.

Big Data Beware: A New Civil Rights Arena?

Big Data has been the topic of several columns in the last few years. Did it ever occur to you that Big Data might involve civil rights? The FTC published another of its well-written and useful reports regarding Big Data and sensitive information, *Big Data: A Tool for Inclusion or Exclusion?*⁴ Given the widespread use of Big Data analytics this link is now very real.

The report may be the first one widely distributed to technology companies that points out a broad range of federal laws that could apply to the use of Big Data analytic results used in areas covered by such laws. In other words, technology companies need to pay attention to far more than FTC enforcement actions. The Fair Credit Reporting Act is one. The Equal Credit Opportunity Act is another. So also is the Genetic Information Nondiscrimination Act.

The report includes, for example, the following questions:

If you use big data analytics in a way that might adversely affect people in their ability to obtain credit, housing, or employment:

- ▶ *Are you treating people differently based on a prohibited basis, such as race or national origin?*
- ▶ *Do your policies, practices, or decisions have an adverse effect or impact on a member of a protected class, and if they do, are they justified by a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact?*⁵

In a sense, one of the messages from the FTC report is that Big Data now expands the notion of sensitive data, which could lead to violations of federal law regarding civil rights. For example, genetic information about a user does not have to be collected to infer the presence of certain disabilities. That could be done by mapping behavioral characteristics such as visits to certain doctors with prescription purchasing patterns and family history.

Bloopers: Hot Rods and Fighter Plane Makers—Part 1: Indemnification

A late 2015 California Court of Appeals opinion raised a few eyebrows regarding two clauses in a contract—the admissibility of

extrinsic evidence when contract terms were being litigated and an indemnification provision (*Hot Rods v. Northrop Grumman Systems Corp.*)⁶ As interesting as the case is, we will not examine its facts or the holdings, just the lessons to be learned for drafting agreements. We do recommend that you read the opinion, as it is an object lesson on how judges interpret contracts.

The indemnification provision boiled down to Northrop indemnifying Hot Rods (and Hot Rods' bankers) from pretty much everything that arose out of environmental claims in property owned by Northrop (and probably polluted) that Hot Rods was buying. In other words, the indemnification obligation did not limit Northrop's obligation to costs (etc.,) arising only from third party claims. And why? Because the language did not include such a limit.

Here is the relevant language. Northrop is the Seller and Hot Rods the Buyer (italics added):

[...] Seller hereby agrees to indemnify, defend [...] and hold the Buyer and Buyer's lenders... harmless from and against *any claims* [etc.] arising out of (a) any Environmental Action(s) [...].⁷

It is a common misconception that indemnities are only for third party claims. With that misconception, lawyers sometimes do not pay close attention to the definition of a "claim." That appears to be the problem here: Northrop drafted itself into a position that it indemnified Hot Rods for all claims—including those from Hot Rods.

We don't mean to pick on Northrop. We don't know the circumstances when the parties negotiated the agreement. It's entirely possible that parties in a real estate acquisition want a direct indemnity where the property is obviously polluted. What we do know is that lawyers should pay very close attention to the definition of "claims" for purposes of indemnification.

Merely inserting "third party" in front of claims might not be enough. Who is the third party? What if the third party raising the claim is a foreign subsidiary, affiliate, client or strategic partner of the indemnitee?

From the indemnitee's point of view, it is insufficient to indemnify just the company. Normally, you would want to create a protected class, perhaps as the defined term "Indemnified Parties" that would include officers, directors, employees, advisors and subsidiaries.

True, in both suggestions above, one could take the negotiations to an absurd conclusion. But lawyers should think through just who is covered for claims by what group? It also depends on the likelihood of third party claims. In some situations, such claims are remote, in which case, very close scrutiny might not be necessary.

Bloopers: Hot Rods and Fighter Plane Makers—Part 2: Banning Extrinsic Evidence

The *Hot Rods* opinion raises another interesting point: the integration clause and extrinsic evidence—specifically, whether or not to include similar language in your agreements.

In that same agreement, Northrop and Hot Rods included the following sentence in the integration clause:

The Parties further intend that this Agreement constitutes the complete and exclusive statement of its terms and that no extrinsic evidence whatsoever may be introduced in any judicial proceedings involving this Agreement.⁸

Those of you raised on a diet of the Parole Evidence Rule might need to adjust your menu. It is clear from previous opinions that integration can mean that the rule does not apply, but most agreements have veered away from this kind of exclusionary language. Northrop and Hot Rods took the risk and accepted that language (and to the detriment of Northrop in its argument on the indemnification clause).

The court pretty much dismissed public policy arguments in favor of the rule, noting that no such policy issues arose as the following quote indicates:

It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths.... While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare.⁹

As such, the court was left to interpret the contract language within the four corners of the document, following well-established principles for analyzing contract language.¹⁰

It is an interesting drafting decision, with the temptation to include such a clause. Be careful: Excluding extrinsic evidence can hurt either or both parties. I would alter the exact language, making it clear that the parties agree and acknowledge, rather than merely intend. Beyond that, it is not clear to me that parties would accept such language—or even that my client should accept it, but *Hot Rods* suggests a re-think.

Remember Your Disclaimers or UsedSoft Carries On

In the US technology agreements have long included a disclaimer of the application of the United Nations Convention on Contracts for the International Sale of Goods. In the Netherlands, a court has reminded us just how important that one little sentence can make a difference. In simple terms, the court held that the convention applied because a transfer of used software was a sale and not a license (in spite of the language of the underlying license agreement). What is also interesting about this opinion is that it is yet another step forward (or backward, depending on your point of view) of European jurisprudence epitomized in the *UsedSoft v. Oracle* case regarding when a software license is not a license.¹¹

Paperwork Can Cost You under the DMCA

Anyone who has drafted a DMCA Takedown Notice provision knows full well that the statute is quite specific about the language required. But do those same drafters know that the DMCA agent listed in that notice must also be the *exact same* agent listed in the Copyright Office? In *BWP Media USA Inc. v. Hollywood Fan Sites LLC*, the defendant listed an agent in the takedown provision online *but* then submitted the requisite paperwork to the Copyright Office with the *parent company* as the agent.¹² Oops.

As far as the Copyright Office was concerned, the takedown notice agent did not exist, which pretty much obviates one of the main purposes of having the list in that office. Those seeking the proper agent aren't supposed to be corporate lawyers:

It is implausible that parties attempting to find a provider's DMCA agent designation, using the database [of the US Copyright Office], are expected to have independent knowledge of the corporate structure of a particular service provider.¹³

And so the year of our wily simian friend begins, with all of us armed with some drafting lessons. ◀◀

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Endnotes

1. At <http://www.chinesefortunecalendar.com/2016/>, accessed January 24, 2016.
2. At <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-fcc-sign-memorandum-understanding-continued-cooperation>, accessed January 24, 2016.
3. The "California Eraser Law" can be found at Business & Professions Code Sections 22580 *et seq.* The Delaware Online and Delaware Online Privacy Protection Act, or DOPPA, can be found at 6 Del. C. § 1201C *et seq.*
4. At <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>, accessed January 20, 2016.
5. *Id.* at 24.

LICENSING CORNER continued on page 40

Choudhury additionally argued that the Sequence was copyrightable as a compilation, an argument which the Ninth Circuit noted the district court correctly rejected. While compilations are properly the subject of copyright protection, the elements of Section 102 of the Copyright Act must be satisfied. In other words, “[t]he availability of copyright protection for compilations, therefore, does not eliminate Section 102’s categorical bar on copyright protection for ideas.”¹⁷

CONCLUSION

Speaking about the case, Drost commented “[t]his was the main reason we fought. It goes against everything we teach in yoga. It’s morally wrong. Yoga is for everyone. It’s been in the public domain for thousands of years.”¹⁸ And so, yoga instructors can now feel free to teach Choudhury’s Sequence without fear of copyright infringement. ◀◀

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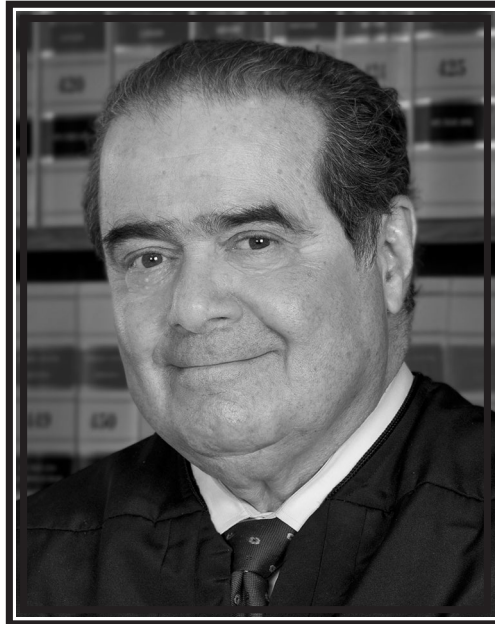
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Endnotes

1. *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015).
 2. *What Is Bikram Yoga?*, <http://www.bikramyoga.com/what-is-bikram-yoga/> (last visited January 24, 2016).
 3. *Bikram’s Yoga*, 803 F.3d 1032 at 1035.
 4. *Id.*
 5. *Id.*
 6. *Id.* at 1035–36.
 7. *Id.* at 1036.
 8. *Id.*
 9. *About Evolution*, <https://www.evolutionyoga.com/about-evolution/> (last visited January 24, 2016).
 10. *Bikram’s Yoga*, 803 F.3d 1032 at 1036.
 11. *Id.*
 12. *Id.* at 1034.
 13. *Id.* at 1038.
 14. *Id.*
 15. *Id.* at 1039.
 16. *Id.* at 1040.
 17. *Id.* at 1041.
 18. Jennifer D’Angelo Friedman, *What the Bikram Copyright Rejection Means for Yoga*, *Yoga Journal* (October 16, 2015), available at <http://www.yogajournal.com/yoga-101/rejection-bikram-copyright-upheld-means-future-yoga/>.
6. *Hot Rods, LLC v. Northrop Grumman Systems Corporation*, No. G049953 (Cal. Ct. App. Dec. 7, 2015).
 7. *Id.* at 12.
 8. *Id.* at 9.
 9. *Id.* at 11 quoting *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838–839.
 10. *See, e.g.*, at 10 “Ordinarily, even in an integrated contract, extrinsic evidence can be admitted to explain the meaning of the contractual language at issue, although it cannot be used to contradict it or offer an inconsistent meaning. The language, in such a case, must be “reasonably susceptible” to the proposed meaning. (*Thrifty, supra*, 185 Cal.App.4th at p. 1061.) But by attempting to introduce any extrinsic evidence here, *Hot Rods* is trying to do an end run around the integration clause itself. The sentence “no extrinsic evidence whatsoever may be introduced in any judicial proceedings involving this Agreement” permits no other interpretation. The expressed intent of the parties was to bypass the general rule that consistent extrinsic evidence is admissible to explain the meaning of a contractual provision. Contracts must mean what they say, or the entire exercise of negotiating and executing them defeats the purpose of contract law—predictability and stability.”
 11. *UsedSoft GmbH v. Oracle International Corp*, 2012 C.M.L.R.3 44, 2012 E.C.D.R. 19 (2012).
 12. *BWP Media USA Inc. v. Hollywood Fan Sites LLC*, No. CV 05-4753 (AHM) (S.D.N.Y. June 30, 2015).
 13. *Id.* at 9.

In Memoriam:
Supreme Court Justice
ANTONIN SCALIA
1936 – 2016



**JUSTICE SCALIA REMEMBERED: THE NOW-HAZY
HALCYON DAYS WITH PROFESSOR SCALIA**

JAMES C. ROBERTS III
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WHILE PORING OVER THE DIGITAL VERSIONS of mounds of encumbrances for Antonin Scalia I was struck by one of my few memories of him as *Professor Scalia*: Judge Six-pack.

With this dim memory in hand I reached out to a few of my University of Chicago classmates for their recollections. No one knew if Scalia created that imaginary jurist but everyone recalled that he often used the humble metaphor. Scalia was trying to get us to start our legal analysis at the quotidian base that makes up our lives: not every judge is a Marshall, Holmes, or Jackson. Judges are usually pretty straightforward people.

My own recollection was that Judge Six-pack was described this way: he would come home from work, kiss his wife and kids, have

dinner, and settle in to watch the hockey game and have a few brews. One of my classmates recounted this story about our humble judge:

Professor Scalia would go through a set of facts and then call on a student: “Ms. Smith, you are Judge Six-pack. How would you rule?”

I have no doubt that the legal point escaped us as we were all too busy imagining “Ms. Smith” having six beers or even *watching* hockey, for that matter. But our simple judge was an instructive technique for Scalia to use. (Judge Six-pack’s occasional appearance in class did not improve my view of hockey.)

Judge Six-pack was the “everyman,” a model for us to remember that every judge is a human being, and is a model that affects—and should affect—the opinions at the foundation of *stare decisis*. The Judge Six-pack that I remember went a bit further as Scalia’s heuristic tool: law serves every human being, not just the holy order of well-trained lawyers with a pen armed with ready *bons-mots*.

Notwithstanding Scalia's assertions of an unchanging constitution, he would probably concede that as times changed, so also did his sports-loving beer-guzzling *guy*. Whether or not Scalia would have liked it, Judge Six-pack is now just as likely to be *Judge Everyperson*—someone of any gender pouring a glass of pinot noir or a home-brewed artisanal beer. Six drinks these days would put the judge in a rehab program and who watches hockey, now, anyway? No, probably *Masterpiece Theater*. Maybe *Master Chef*. Or *Judge Judy*. But the purpose of the avatar should still remain. Unchanged.

Another classmate wrote me that Scalia was “was very charming and could be extremely funny—possibly the most entertaining teacher I had at any level.” This, too, I remember—a man approachable in the hallways who always had a smirk or a smile for you and a few good words. He was the kind of person with whom you would be glad to have a beer. But only one. OK, maybe two.

One classmate emailed me about Scalia's tendency to sing while walking the halls—opera, if my memory serves. As another classmate (not fond of opera) pointed out, it sounded more like injured house pets. One classmate jokingly asked if the IP lawyers among us could find a copyright infringement in our professor's love of those arias.

Intellectual Property and Justice Scalia

While Scalia will continue to be lionized or vilified for the more controversial and better known cases, what about intellectual property matters before him in his three decades with the Supremes? (After all, the *Intellectual Property Law Section* publishes *New Matter*.)

The number of opinions and dissents he wrote in this area is small. In some significant cases he simply joined the majority, for example *Stanford University v. Roche Molecular Systems, Inc.*, 563 U.S. ____ (2011). In *Bilski v. Kappos*, 561 U.S. 593 (2010) Scalia joined the majority and the second part of the concurrence by Justice Brennan.¹ In *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) he filed a one hundred and forty five word dissenting opinion in which he took issue with whether the Respondent ‘performed the claimed act’.² Accordingly, divining his intellectual property “first principles,” as one could do with his other writings, is somewhat more challenging. If commentators are correct, his IP jurisprudence is not so clearly a fortress of what passes today for conservatism. It seems that he recognized the “property” in intellectual property but not in so rigid a manner as to use the principle as a sledgehammer for or against a free market. Professor Laura Larrimore Ouliette, one of the authors of the blog, *Written Description*,³ seems to have gotten it right when she recently posted the following:

I am not going to claim that Justice Scalia had a coherent theory of IP; each of the opinions described [in this post] could be attributed more to a strong dislike of bad logic than to a first-principles skepticism of IP rights as government interference in the marketplace. But these opinions also suggest that at some level, Justice Scalia did believe that allowing IP rights to be recognized too eas-

ily or asserted too broadly could harm competition, consumers, and innovation.

Scalia conceded that patent cases were not his strong suit. They served, it seems, as a bridge across ideological lines, as he explained that he followed the lead of his personal friend, Ruth Bader Ginsburg.⁴

To sum it all up: from Antonin Scalia's devotees and critics we know much—perhaps *too* much—of his jurisprudence, his biting rhetorical flourishes, and his *un*-nuanced stand in what should be the dying skirmishes of the culture wars. But I think that my classmates and I will also remember him as a “good guy” with wit, charm, intelligence and humor—and, for me, the guy who lodged in my brain the image of the jurist as the guy next door (and, in spite of judicial rancor, now the *person* next door). I'll invite that person to drop by. Perhaps for a pinot. Better yet, a petit syrah. We'll talk about Scalia and his opinions and hoist a few to fine memories of how the law is shaped. ◀◀

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Endnotes

1. In which Justice Brennan stated “it is my view that, in reemphasizing that the ‘machine-or-transformation’ test is not necessarily the sole test of patentability, the Court intends neither to de-emphasize the test's usefulness nor to suggest that many patentable processes lie beyond its reach.”
2. In which Justice Scalia stated “[t]his case is the latest skirmish in the long-running copyright battle over the delivery of television programming. Petitioners, a collection of television networks and affiliates (Networks), broadcast copyrighted programs on the public airwaves for all to see. **Aereo**, respondent, operates an automated system that allows subscribers to receive, on Internet-connected devices, programs that they select, including the Networks' copyrighted programs. The Networks sued **Aereo** for several forms of copyright infringement, but we are here concerned with a single claim: that **Aereo** violates the Networks' “exclusive righ[t]” to “perform” their programs [2512] “publicly.” 17 U. S. C. § 106(4). That claim fails at the very outset because **Aereo** does not “perform” at all. The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard (“looks-like-cable-TV”) that will sow confusion for years to come,” *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).
3. <http://writtendescription.blogspot.com/>.
4. See for example, <http://www.latimes.com/nation/la-na-court-odd-couple-20150622-story.html>.