

## *Ten Questions to a Media Lawyer*

### **Rick Kurnit**

*Rick Kurnit is a partner at Frankfurt Kurnit in New York City. If you'd like to participate in this ongoing series, let us know - [medialaw@medialaw.org](mailto:medialaw@medialaw.org).*

#### **How'd you get into media law? What was your first job?**

My father was a prominent “mad man” in the 60’s and owner of an ad agency that was known for its outlandish and creative work. The agency created weekly ads that appeared in the Sunday Times Magazine for Talon Zippers (making a generic product into a brand). One



Sunday the ad was a picture of the Statue of Liberty with a talon zipper down her back and the headline: “American women do’nt know what is going on behind their backs”. It produced an outraged response from the Daughters of the American Revolution. I learned the glory of the First Amendment (as well as some copyright law) as a nine-year-old, and I resolved to become a First Amendment lawyer.

My first real job (dishwasher at a summer camp does not really count) was as a door-to-door encyclopedia salesman. Following my arrest on the third day on the job, for peddling without a permit, my second job was working in ad agency. Knowing I would someday be a media lawyer, I paid particular attention to the rampant copyright infringement that is standard operating procedure in an ad agency, and I was fascinated by the creative

process. Realizing that I had neither the talent nor inclination to compete with my famous father, I concluded that a legal career, helping the creative talents to accomplish their visions, was the way to go.

In law school, I pursued intellectual property and First Amendment courses, Paul Freund’s Seminar on the First Amendment, and wrote a Note on “Enforcing the forgotten half of the

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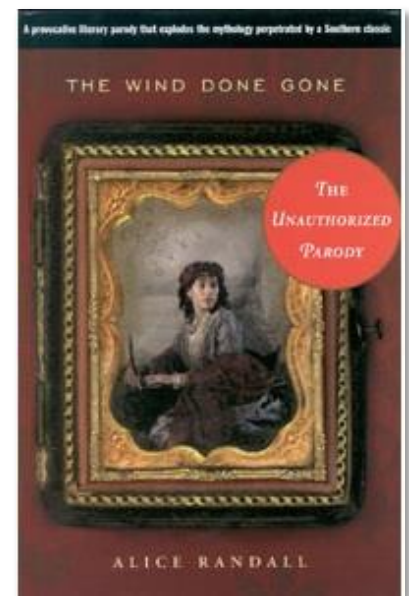
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Fairness Doctrine”, which I am pretty sure is the last attempt to save the obligation of the media to present accurate information on issues of public importance.

After clerking in the Southern District, it was possible to choose among the best law firms (who were all interested in bringing on former law clerks), so I was able to work a deal with Paul Weiss that I would be assigned to handling litigation for The New York Post. It turned out to be a great deal of defending libel claims by reputed mobsters who would sue every time the paper identified them, but never pursue their claims. I mastered the motion to dismiss for failure to prosecute, but after several months, I lost the client. Paul Weiss did not blame me -- someone from Australia purchased the paper from Paul Weiss’ client and changed law firms. After that, I had first call on media litigation. Paul Weiss represented Warner Communications, so there was no shortage, and when Lew Kaplan (now Judge Kaplan) was allowed as an associate to take on the defense of a libel claim, I was offered the opportunity of a lifetime to work with him as the only associate assistance.

In addition, I sought refuge in representing the ad agency client that Paul Weiss represented, to fill out my time and avoid subject matter that was not media related. On my first visit to the agency, to defend the deposition of the agency in a copyright case, I was introduced to the owner. I will never forget his first words to me: “I just want you to know that, as far as I am concerned, if the lawyers are uncomfortable with it, it must be a good ad.” I responded: “I am the son of a creative director, so I already know that I don’t get to judge the creative. I’ll tell you how uncomfortable I am, and you’ll tell me how good an ad it is.” He shot back: “Who’s your father?” When I responded, Shep Kurnit, he smiled. My father was the inspiration for his own claim to fame: turning a generic product into a brand: Perdue chickens. After that, any time he got flak for something outrageous he wanted to do, he would say, “Get me Kurnit’s kid,” and I became the lead lawyer handling the day-to-day work for the agency.

And so I joined Frankfurt Garbus Klein & Selz, a law firm with a small advertising practice, that needed a publishing lawyer to handle its newly acquired client, Viking Press. (In the karma of all things, Viking Press had just been acquired by a British company which decided to change law firm). The client came with a number of legal issues and a recent setback in a case of libel by fiction, *Springer v. Viking*, which I appealed to the First Department and then to the



**Kurnit argued about the scope of the parody defense on behalf of “Gone With the Wind” in the Eleventh Circuit.**

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New York Court of Appeals, establishing the law in New York protecting authors of fiction from libel claims and resulting in further success in dismissing subsequent claims against Nelson Demille and Terry Mcmillan, among others. In addition, Viking was the recipient of many libel claims from distinguished plaintiffs, such a Judge Dominic Rinaldi, and Governor William Janklow of South Dakota and the FBI over Peter Matthiessen’s book “In the Spirit of Crazy Horse.” Through representing Viking I had the opportunity to become involved in the MLRC.

**What do you like most about your job? What do you like least?**

The ability to assist authors and creative people to create content and communications that they envision. The constant changes in the media business models and the technology and the problems they pose in applying intellectual property law to new and different media mean that the problems we address are always new and different. The negative is the inefficiency and cost of litigation.

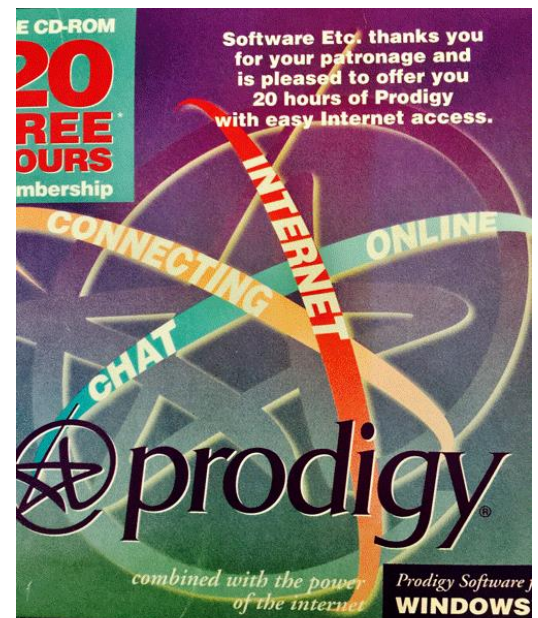
**What's the biggest blunder you've committed on the job?**

When I tried to convince five judges in the Appellate Division that a New York Supreme Court Justice was libel proof. In my defense, I did limit it the circumstance of the republication of the same charge of corruption by the same author who made the charge repeatedly over many years, including in the same book that was now being relitigated as technically not within the single publication rule (*Rinaldi v. Viking Press*).

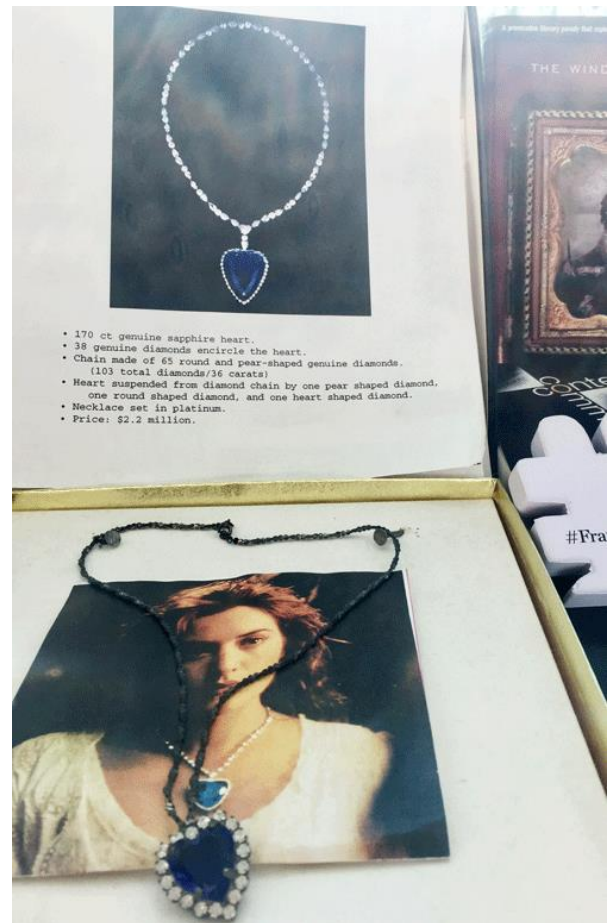
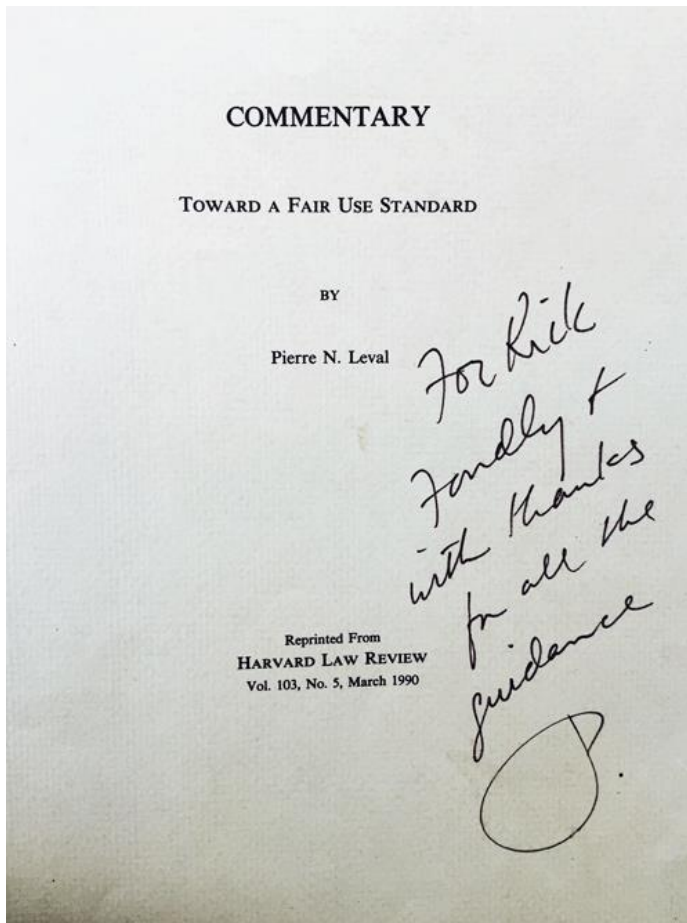
**Highest court you've argued in or most high profile case?**

That’s hard to define. In addition to Springer v. Viking in the New York Court of Appeals mentioned above, I argued on behalf of John Deere the scope of trademark infringement in comparative advertising in the Second Circuit. I also argued the scope of the parody defense to a copyright claim on behalf of “Gone With the Wind” in the Eleventh Circuit.

But the case of Jackie Onassis against a look alike in an ad, which I argued in the Appellate Division First Department (on behalf of the look alike), may be the most notorious – at least until the movie Wolf of Wall Street brought back memories of Stratton Oakmont (his firm) against Prodigy (the first of the ISP’s) where I defended Prodigy...which lead to Section 230 of the CDA. (The Onassis case led to my representation of a Woody Allen look alike at trial in the



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Surprising objects in Kurnit's office. At left, Pierre Leval's law review article enunciating transformative use for fair use inscribed "with thanks for all the guidance." At right, The Blue Heart shaped necklace Kurnit defended in the Second Circuit from the challenge mounted by Twentieth Century Fox to the advertising campaign that offered it for sale as a low cost alternative to a replica of the necklace featured in the movie "Titanic."

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Southern District and the advertising agency at trial in Los Angeles District Court in the Vanna White case...but both of those settled at trial).

### **What's a surprising object in your office?**

The Blue Heart shaped necklace that I defended in the Second Circuit from the challenge mounted by Twentieth Century Fox to the advertising campaign that offered it for sale as a low cost alternative to the replica of the necklace featured in the movie "Titanic." It's the necklace the makers of the movie Titanic do not want you have. But my most treasured is the autographed reprint of Pierre Leval's seminal law review article enunciating transformative use for fair use which was adopted by the Supreme Court.

### **What's the first website you check in the morning?**

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[Rebecca Tushnet's 43\(B\) blog](#). It is truly amazing how brilliantly she covers so much of the developments in intellectual property...and posts it in the middle of the night

**It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?**

Your career is a balance of fortune, fame, fulfillment, and fun. If you are not putting money first on your priorities, and you cannot make it as a rock star, you should take stock of your talents and innate abilities—what are you best suited to doing with your life that will afford you the satisfaction that comes from a job well done and helping people. The satisfaction in being a lawyer is most importantly in helping others to cope with the world (which lawyers have made so difficult and frustrating). If you can do that, and find fulfillment in doing it well, become a lawyer. The most fun you can have as a lawyer, and the best people you will work with, will be found in media law. The ever changing business of media and technology of communications means it will be easy to have fun.

**One piece of advice for someone looking to get into media law?**

Embrace all of the new technologies of communication. The application of existing law and legal principles to new technologies and the new consumers of information and entertainment will be the challenge you will face. Judges and legislators will continue for some time to be trying to fit square precedents, based on square business models into round problems. You will need to be able to see the world of intellectual property and information as differently as it is.

**What would you have done if you hadn't been a lawyer?**

A psychotherapist. The greatest satisfaction comes from helping people to cope.

**What issue keeps you up at night?**

My client's problems. Long ago a wise attorney told me that as lawyers, we are nothing but paid worriers. A client has a problem that is keeping her up at night. (perhaps because the law or lawyers have made the problem more complicated than it has any reason to be). So every client is a person with a problem that they need to have someone take on and worry about better than they can. They need to know that they can stop worrying and rely on me to tell them when they need to think about it again...hopefully in the context of a solution. I assure them that "I will worry about your problem better than you can..." And now the client can sleep at night... and I will be up at night worrying about their problem.