Seventh Annual Sir Hugh Laddie Lecture
24th June 2015, University College London

IP and Advocacy

Judge Alex Kozinski
Former Chief Judge of the United States, Court of Appeals
for the Ninth Circuit

Chairs: Professor Dame Hazel Genn DBE QC (Welcome), Daniel Alexander QC (Introduction), Professor Sir Robin Jacob (Vote of Thanks)

1. Welcome and Introductory Remarks 131
2. Lecture 134
3. Audience Questions and Vote of Thanks 148

1. WELCOME AND INTRODUCTORY REMARKS

Professor Dame Hazel Genn Good evening, everybody. I am Dean of the Faculty of Laws. Welcome, everyone, to the seventh annual Professor Sir Hugh Laddie lecture in intellectual property law. As always, we have a very full house this evening and it is wonderful to welcome you all here. As many of you will know, the annual Sir Hugh Laddie lecture was established in 2009 after the untimely death of Sir Hugh. In fact, I realised this evening that it was the first year that I was Dean of the Faculty and the Chair of Intellectual Property Law, which is now held by Professor Sir Robin Jacob, who, unfortunately, is not here at the moment but is hoping to join us later on; he has had to go to a funeral today. The Chair that Robin Jacob now holds was established in Hugh's name by virtue of generous donations from alumni, family, friends, others interested in intellectual property and sponsors of IBIL. I am delighted again this evening to welcome Lady Laddie and James, and I think Jo is coming later on. I also welcome Judith, Hugh's sister; it is lovely to see you here this evening. I also welcome Simon Cohen from Taylor Wessing, who generously contributed towards the Chair but also specifically sponsor this series of annual lectures in Hugh's name.

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In the Chair this evening is Daniel Alexander QC. He is going to introduce our distinguished speaker this evening, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. Welcome this evening. We are much looking forward to your lecture. I would also like to welcome this evening Judge Kozinski's wife, Marcy Tiffany, who is here in the front row. It is wonderful that you are here.

We have many strong supporters of IBIL. IBIL is the institute that was established by Hugh, which has gone from strength to strength since Hugh established it in 2008. I want to thank Matt Fisher, who is here this evening, and Ilanah Simon Fhima, who have carried on the work of IBIL so very well, and, of course, Robin Jacob, when he turns up later on. I do not want to say any more by way of background.

I would like to introduce Daniel Alexander. He will be known to most or many of you. He is a barrister at 8 New Square, Lincoln's Inn, and has also been a Deputy High Court Judge since 2006. As you will know, he is a leading intellectual property Silk called to the Bar in 1998 and became a QC in 2003. I have been provided with the most extraordinarily long and detailed biography of Daniel. He has prohibited me from reading it out to you. So, with that, I will hand over to Daniel, who is going to be your Chair for this evening. I am sure we are in for a huge treat. Thank you very much. *(Applause)*

Daniel Alexander Thank you very much, Hazel. As you will gather, I am the substitute for Sir Robin Jacob, who had to attend a funeral of a much-loved colleague from Chambers. He asked me to say a few words of introduction to this lecture and welcome our speaker Judge Kozinski from the Ninth Circuit.

The Ninth Circuit is, of course, commonly referred to, and I think possibly originally referred to by Judge Kozinski, as the 'Hollywood Circuit'. Increasingly, it is the 'Internet Circuit' and certainly the 'Fun Circuit' because it covers California up to Seattle and I think even Hawaii and points west. It is an extraordinarily powerful appellate jurisdiction. The population of the Ninth Circuit is about the same population as the United Kingdom, and Judge Kozinski was Chief Judge of that circuit and sits as a judge now. He was Chief Judge for seven years until last year.

Judge Kozinski has an extraordinary background, and I think you may find some points of connection both with the current incumbent of the Sir Hugh Laddie Chair and indeed Sir Hugh Laddie himself. I will come to that in a moment. Judge Kozinski was born in Bucharest in 1950 and came to the United States in 1962. His father ran a grocery store in California. He graduated from UCLA with an AB and then took a law degree at the UCLA School of Law in 1975 and went on to clerk for Judge Anthony Kennedy, who many of you will know as

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one of the Supreme Court Justices, but who was then sitting on the Ninth Circuit. He then clerked for the Chief Justice of the United States, Warren Burger, in the late 1970s. In the early 1980s, he accepted an appointment as the first US Special Counsel and shortly after that commenced a judicial career.

According to the press – and perhaps he will correct this report if it is inaccurate – what is said is that, riding the Washington Metro one morning, he read an article about a new US Claims Court which was slated to hear cases against the Government involving federal contracts and tax refunds. He is reported as having said, 'Shazam! That is my job' and called some friends in the Administration. He said, 'How about me for Chief Judge?' They laughed, and he waited a few days, and pretty soon, he said, 'They forgot about the fact that the idea had come from me'. He was duly appointed as Chief Judge of that court at the age of 32.

He was then appointed to the Ninth Circuit – which, as I have said, is the most extraordinarily powerful appeal court in the US, although one that has had its own run-ins with the US Supreme Court, as many of you will know, on a whole range of issues – at the age of 35, the youngest appointment since William Howard Taft. Alex Kozinski, as well as being a very popular and outspoken judge on a number of areas, not just intellectual property, is an author, someone who takes particular care about the language in which he expresses his opinions and has great connection with academia. It is also recorded that he wrote an article – you may think possibly now or possibly after you have heard him – on an interesting subject of, let us call it, legal literature on the subject of chutzpah called *Lawsuit, Shmawsuit*,[1] the theme of which was to try to identify why it was that there was so much use of the term 'chutzpah' in legal opinions by judges. He and his colleague debated whether it was because in fact there was an increasing amount of chutzpah in the United States or whether it was actually a matter of the replacement of Latin with Yiddish to spice up judgments.

He is a judge who has had a close association with teaching in academia and once said, 'How important do I think case books are? So important that once in a while I write an opinion precisely for the purpose of getting into one'. We are very fortunate in having him as our lecturer this evening for the Sir Hugh Laddie lecture. He has had a very strong association with intellectual property for many years. The first article that he wrote was on patent law, and just a few weeks ago he gave what one could describe as a blistering dissent in the case of *Garcia v Google*[2] and the request to take down an allegedly copyright infringing work. Without further ado, may I welcome Judge Kozinski. *(Applause)*

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[1] Judge Alex Kozinski and Eugene Volokh, 'Lawsuit, Shmawsuit' 103 *Yale Law Journal* 463 (1993).

[2] *Garcia v Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

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2. LECTURE

Thank you, Daniel. It is a great honour for me to be here. I am surprised and pleased that so many of you have come out on a weekday evening to hear a lecture on intellectual property, on something really dull, about the stuff that judges talk about. I cannot deny anything that Daniel has told you. I will take the fifth, as we say, in America.

As Daniel said, we have a very large court. We have a territory the size of India – 60 million people. We go from Montana and Idaho in the east all the way to Guam and Saipan in the west, and we go from Alaska in the north to Arizona and Nevada in the south, so we cover a lot of territory and a lot of subjects. One subject that is really important is intellectual property.

As you have heard, our Court has been referred to as the Court of Appeals for the 'Hollywood Circuit', and much of the internet and mobile disputes we hear are in fact related to intellectual property. Our prominence in intellectual property is largely a consequence of geography. The beautiful Pasadena court house, where I have my chambers, is a short way from the big movie studios in Los Angeles where hordes of talented and not-so-talented actors, producers, screen writers and film editors line up, so there is no shortage of stolen-plot claims or right-of-publicity claims from disgruntled celebrities.

Just south of our San Francisco court house is Silicon Valley, the high-tech home for companies like Google and Facebook. As a home to celebrity and technology, it is not surprising that the Ninth Circuit sees a large number of IP cases and thus has a large role in shaping the area. Intellectual property in general is growing and becoming increasingly important with the advent of new technologies.

In law firms, intellectual property has grown from a remote specialty to the bread and butter of most large and medium-sized firms, at least in the United States. Patent lawyers who were once thought of as geeks and weirdos now call the shots because they control some of the most lucrative cases. Mind you, they are still considered to be geeks and weirdos, but they are now very powerful geeks and weirdos.

For judges, intellectual property cases have always been challenging and exciting, but nowadays they are also the cases with the greatest visibility. Take just one example from the past couple of years. I wrote an opinion in a case involving Facebook, with Mark Zuckerberg, its alleged founder, in one corner, and the Winkelvoss brothers, who claimed to be the real founders, in the other.[3] You have probably heard about the controversy. I am told it was the subject of a well-attended movie. *(Laughter)*

[3] *Facebook, Inc. v Pacific Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011).

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One of my former clerks, whom I was served by for a long time, has Westlaw and sends me articles whenever my name gets mentioned or one of my pieces, articles or opinions gets cited. Most of the time when I write an opinion, I get two or three cites or maybe no cites at all, but in the Facebook case the clippings came in by the dozens – by the scores. I got print-outs that were a foot high. I was quoted in *Der Spiegel* in German, *Le Monde* in French and in *Corriere Della Sera* in Italian. I even got one or two clippings in Romanian, which made me hope that my grade-school classmates were eating their heart outs. *(Laughter)*

Take another one of my IP cases, a case by the name of *Mattel v MGA Entertainment*,[4] which dealt with the earth-shaking issue of who owns the right to a family of dolls called BRATZ. Mind you, I had never heard of BRATZ, which proves I have been living under a rock for some years, but it appears that BRATZ was challenging BARBIE for supremacy in the pre-teen doll market, so Mattel claimed it owned BRATZ and MGA had stolen it. The legal issues were fairly mundane: questions of contract law, trade mark, copyright infringement, constructive trust, you know, the very dull stuff, but the case garnered worldwide publicity for weeks and months on end.

The public claim to care about the other things that I and my colleagues do, like whether forests get cut down or we build electrical plants and despoil the environment, whether somebody is executed or lives. They pretend to care about those things, but blogs and tweets speak far more loudly than hollow sentiments and they show that intellectual property cases touch people in a way that other cases do not. Not only is IP law a growing and important field of law, but it is also one where good advocacy can make a difference.

I would like to use IP cases to illustrate some lessons in effective advocacy. I will start with what is perhaps the most basic point: simplify, simplify, simplify. I do not think that most lawyers fully realise just how difficult it can be for non-specialists to grasp some of the most subtle concepts floating around in complex, cutting-edge cases, particularly when technology is involved. I consider myself a little more than average in terms of being knowledgeable when it comes to technology and yet it happens with surprising regularity that I will have trouble wrapping my mind around a legal concept or how it applies to a case because I do not understand the technology. I just do not understand how it works.

As I tell my new law clerks every year, the easiest path to understanding is with concrete examples. The more abstract a point or particular argument is, the more difficult it is for the mind to grasp and be persuaded. If the argument stays on an abstract level for a very long time, the mind tends to wander, and

[4] *Mattel, Inc., et al v MGA Entertainment, Inc., et al*, No. 11-56357 (9th Cir. 2013).

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you start thinking about, you know, you have a backache, or maybe the guy in the supermarket parking lot who stole your parking spot, or maybe you are a little bit hungry, or was that your email that just beeped? Pretty soon you are still reading along, but you are not thinking about or understanding anything that is on the page.

The problem of keeping the reader's attention applies to all briefs, but it is especially acute in IP cases because they frequently deal with the technological advances that make it difficult to understand how vague and abstract concepts like infringement, fair use and obviousness apply. The more you can frame your problem by analogy to existing technology, the more likely you are to get the juries to understand and be persuaded. But talk is cheap, so let me give you an example using a real case that came to our court about 20 years ago.[5]

Some of you here may remember the original Nintendo game system, otherwise known as the NES. They had it in England and worldwide. Many of you – I am looking around – were probably in high school or junior high school or maybe in diapers when this first came out, but, as some of you may recall, every game for the NES came in a cartridge that was inserted into the game deck and you played the game by the rules set out by the manufacturer. You had to overcome certain challenges. For example, Mario had three lives, and when he lost those three lives he had to go back and start from the beginning. This was fine for some players, but others got stuck at a particular level and just could not get past that level because they were too young, unskilled or impatient.

Many found the games frustrating, so along came a company by the name of Galoob and it created something called the GAME GENIE. Does anybody here remember the GAME GENIE? In the United States about half the room, mostly guys, raise their hands. The GAME GENIE allowed players to change the rules of the game, so you could give Mario nine lives or make him shoot fireballs or have new and different kinds of weapons. Not surprisingly, the GAME GENIE sold like hot cakes. Nintendo, instead of welcoming this as an aid to its system, sued for copyright infringement and said that this item infringed its copyright. Remember, this would have been over 20 years ago, and the three judges had probably never heard of Nintendo, much less ever played a game on one of these things. If you are the counsel for Galoob and you are trying to get the judges to understand how this operates and decide whether it is an infringement or not, how do you go about doing it?

Fortunately, Galoob had a very talented lawyer by the name of Jerry Falk of San Francisco. He is still there. I think he no longer practises law, but he is

[5] *Lewis Galoob Toys, Inc. v Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992), cert. denied, 507 U.S. 985 (1993).

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an extraordinarily fine lawyer. Jerry started with this – and here it is on screen – as the first thing you see on opening the brief, before the table of contents and before anything else. I will not have you strain your eyes. I will read you a little bit of how the brief starts:

> It is Saturday afternoon somewhere in Los Angeles. Lying on her bed, Debra, age 11, picks up the book she has checked out of the school library, *Charlotte's Web*. Although she has only read through page 61, this morning she finds herself wondering how it ends. Furtively, she flips through the book and glances at the last two pages. Relieved to discover that Wilbur has not been made into bacon, she returns to page 61.
>
> Later in the morning, Debra comes down the stairs to find an empty living room. Her older brothers, both in high school, are at the beach. Debra slips a video-cassette of her favorite movie, 'Casablanca', into the family VCR …

That dates it right there; how many people here remember the VCR?

> … and starts the tape. As Rick and Elsa embrace, Debra frowns and hits fast forward until more suitable action appears on the screen.
>
> Suddenly, Debra notices the ordinarily occupied Nintendo game sitting temptingly on the coffee table in front of the television. Seizing the opportunity, Debra turns off the movie and slips the game cartridge for 'Super Mario Bros 3' into the control deck: on reflection, she removes it, attaches the GAME GENIE video game enhancer, and reinserts the cartridge. She keys in the code 'AEKPTZGE', which, according to the instructions, will give Mario nine lives instead of the usual three. That, Debra thinks to herself, will make up for her inexperience at the game her brothers have managed to monopolize. She also keys in the code that will start Mario in 'world four' rather than at the beginning. In previous attempts, Debra has never gotten past 'world three'. Pushing the 'start' button, Debra begins to play 'Super Mario Bros 3'.
>
> At the end of the game, she turns off the television set and the Nintendo control deck. The game cartridge is as it was before she played, unaltered in any respect. She has made no copy of the mysterious software in the cartridge, nor has she recorded in any form the game she played or the video displays that entertained her.
>
> Has Debra infringed the copyright to 'Casablanca'? The book author's copyright? And, as Nintendo asserts in this case and the District Court seems to have found, has she infringed Nintendo's copyright in 'Super Mario Bros 3'?

Now, the genius of this approach is that it starts with things the judges know about and understand how they work. They understand that, if you buy or rent a movie video, you are entitled to skip to the end. You do not have to watch every scene. That is part of your right as a viewer. The same is true of a book. Nobody will come along and sue you for infringement for skipping to the last page and reading the ending, even though the author might really hate the fact that you did so. You bought the book and the movie, you own them, and you are entitled

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to fast forward. That is the analogy that Falk wanted to create so he could argue: 'This video game is just like the book and the movie. This is a way of enjoying the product you bought and paid for – to skip forward, not to read the book, view the movie or play the game by the rules imposed by the author'. There was a great deal more to the argument, and if you read the remaining 50 or 60 pages of the briefs, there was all that stuff there, which you can imagine, about infringement, but this set the stage and, eventually, was successful. Nintendo wound up having to pay quite a bit of money.

A closely related point to being concrete is using exhibits and other demonstrative evidence. Words are abstractions, and even the most concrete and vivid words are one or two levels removed from reality. Lawyers are far too reluctant to depart from words and the occasional diagram in their briefs and arguments. I will illustrate this using an example of a copyright case by the name of *Fisher v Dees*.[6] Marvin Fisher was the copyright holder and author of a song called 'When Sunny Gets Blue', made famous by Johnny Mathis. If you are at all familiar with Mathis' music, you will realise it is a romantic song on the saccharine side. Rick Dees was, and I think still is, a disc jockey in Los Angeles, a sort of early shock-jock. He made a broadcast of a song he called 'When Sunny Sniffs Glue'. Fisher was highly offended by this and sued for infringement and the case came down to the question of whether or not Mr Dees' song was a parody of the original.

The briefs were chockful of arguments citing cases and they had the sheet music there, and they had expert affidavits explaining why this was, and was not, a parody. So, we heard the argument, and afterwards we went back to our conference room to discuss the case and we just could not quite decide. It was very close, and we just could not get a handle on it. A little bit later in the afternoon the other two judges came to visit and we started talking about the case and said, 'Let's pull out the sheet music and hum a few bars and see if we can figure it out', and then it dawned on me: what good is it being a federal judge if you have to hum your own music? *(Laughter)* I picked up the phone, called the clerk's office and said, 'Tell those lawyers to get us copies of those songs here now'. Two hours later we had the songs on cassette tape, yes, I admit it *(Laughter)*, and we all gathered around and had the law clerks and even the secretaries come in and we listened to it. Here is the Johnny Mathis version. *[The song was played]* Here is the other version. *[The song was played] (Laughter)* That was our reaction. We all looked at each other and said, 'Of course it is a parody. There is no doubt about it. Why were we even in doubt?' It was like a lightbulb came on. Of course, then we had to send the law clerk off to explain why it was a parody, but writing judgments is easy once you know what the result is. *(Laughter)*

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6 *Fisher v Dees*, 794 F.2d 432 (9th Cir. 1986).

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The *Fisher* case points out another aspect of intellectual property and that is that it is intensely personal in moral dimension. To some extent, all property is an extension of ourselves: our house, our car, our clothing and household possessions, but all sorts of inventors and holders of other kinds of intellectual property feel an especially strong kinship to the thing that is the subject of the lawsuit. They feel quite understandably that the infringement is an affront to their dignity. What could Marvin Fisher possibly have hoped to get from Rick Dees by bringing that particular lawsuit? There was not really very much at stake in terms of money and certainly not enough to justify the cost of bringing a lawsuit. From reading the briefs, it was quite clear that what Fisher was after was vindication against somebody who he believed had despoiled his creation, the song about Sunny, and that he wanted us to spank the guy really. That is what he was after. *(Laughter)*

It is not just individuals who feel that way. Corporations and institutions are just as bad. I could give many examples, but the case that most readily comes to mind is the case of *Mattel v MCA*.[7] That case also involved BARBIE. For a supposedly friendly girl, Barbie sues a lot! *(Laughter)* Mattel claimed trade mark infringement based on a song by the name of 'Barbie Girl', by the then little-known Danish/Norwegian pop group Aqua. The song suggested that Barbie was a bit of a bimbo with round heels, if you can even understand the words, which is not so easy. *[The song was played]* There are any number of ways in which Mattel could have dealt with this song. One possibility was they could have bought a very large bottle of Dom Perignon and sent it over with a 'thank you' note. After all, this was appealing to the same demographic group that was buying the BARBIE dolls and keeping the BARBIE name alive, right? They could have just been grateful.

The other possibilities: they could have just sent a team of people out there to buy up every CD – this was in the days of CDs – that were on the shelves. There were not that many, and they could have bought them up for far less than it cost to bring the lawsuit. Or they could have just gone to Aqua and bought the darn song from them and then pulled it off the shelves themselves. But, no, they decided that the best thing to do was to sue. So, they brought this big lawsuit and there were claims and counterclaims. The whole Megillah, as we say. It was really terrible. When they came to our court, we wrote an opinion and resolved all the claims, and both sides basically lost pretty badly on appeal. At the very end of the opinion, we tried to give them a piece of advice. *[A slide appeared on screen]* *(Laughter)* 'The parties are advised to chill.'

7 *Mattel Inc. v MCA Records Inc.*, 296 F.3d 894 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003).

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That was good advice. At that point nobody had yet heard about Aqua or the song, but Mattel did not take the advice. Instead, Mattel filed a cert. petition in the US Supreme Court. That got picked up by the national press, and suddenly people started thinking and talking about and listening to 'Barbie Girl', and this little song that nobody had ever heard and this little group that had not sold more than a dozen records in the United States, all of a sudden became quite popular and sold a lot of records. It had sort of a second resurrection. Now, of course, Mattel did not get cert. and all that happened was they gave more publicity to this song, the very thing they did not want to do.

There is a postscript to the story. The litigation of 'Barbie Girl' finally came to an end in 2003 and a few short years later Mattel came out with a new BARBIE commercial. Are you ready for this? *[The commercial featuring the song 'Barbie Girl' was shown]*[8] Why could they not have done this to begin with *(Laughter)*, saving themselves a lot of money and saving us a great deal of trouble? The reason I think is that IP rights holders tend to be total control freaks and not terribly objective about their interests.

Professor Lemley of Stanford recently wrote a short article called 'Is the Sky Falling on the Content Industries?'[9] It is a question he answers in the negative. This is an article I recommend. It is a very quick read and well worth taking a look at. Along the way he recounts how rights holders have opposed every technological advance since Gutenberg. They have opposed photography, the player piano, the gramophone, the radio, over-the-air television, cable and photocopying. My favourite is the VCR. Remember the VCR? The Betamax was the first widely used videocassette recorder. Hollywood saw the Betamax, some of you might remember, as a menace. Their theory on what would happen was that people would get one of these infernal machines, and, when movies would be shown on television, they would copy the movies and then pass them around and others would make copies of the copies, and nobody would ever go to a theatre again because they could stay home and watch video cassettes. So, the movie studios brought a lawsuit that made it all the way to the US Supreme Court. It was the *Sony Betamax v Universal City Studios* case.[10] They came within one vote in the US Supreme Court: four justices of the nine would have held that by making and marketing this device, Sony became a contributory infringer and that would have killed that technology.

Soon after that, Hollywood discovered that the video rental market and the home video market it produced was a goldmine for them. They wound up making more

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8 Available at: <www.youtube.com/watch?v=hwu6NrxVVFk>.

9 Mark A. Lemley, 'Is the Sky Falling in on the Content Industries?' 9 *J. on Telecomm. & High Tech. L.* 125 (2011).

10 *Sony Corp. of America v Universal City Studios, Inc.*, 464 U.S. 417 (1984).

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money on most movies on home videos, which eventually evolved CDs and all the distribution methods we have now. It is a far bigger market than the theatre market. This is something they could not foresee and would not understand because they saw the new technology as a threat. With their tunnel vision they almost killed the goose that would eventually lay many golden eggs for them.

In fact, disaster almost never happens. I saw this first-hand some years back in a case involving the movie *Platoon* by Oliver Stone.[11] In that case, the producers of *Platoon* had got their funding from a company by the name of Vestron and it turns out that Vestron had gotten the rights to home distribution in exchange. By that time Hollywood had figured out that there was good money to be made in home distribution, so they made this deal with Vestron, and Vestron put up the money to get the rights to distribute the movie to buyers of videos for home viewing.

The movie turned out to be vastly more popular than anybody expected and at that point the studio decided, 'Wait a minute. Why go with a small company by the name of Vestron when we can get HBO to distribute it and make a lot more money on it?' So, they, for no reason whatsoever, other than they could, decided not to let Vestron have the movie, gave it to HBO and HBO was about to issue it in cassette format when they came to us and sought an injunction. HBO said, 'No, do not issue the injunction because, if you do, the entire market for the movie will be destroyed and then there will be no money to divide up, no matter who is the winner. Let us go ahead and distribute the movie and we can then figure out who is entitled to the money'. We thought about that pretty hard, but in the end, we decided that what is intended by having a right is having the leverage to exercise it and that if we denied that to Vestron we really were denying them essential right of a copyright holder. So, we went ahead and stopped distribution. We stopped distribution right before Christmas and they told us if we did that the market would be destroyed because all these people who were going to stuff their stockings with *Platoon* were now going to use it for something else and *Platoon* would never sell again.

The argument was plausible, and I sort of believed it, but was not really sure. We left the injunction in place for two or three months. Eventually the parties reached a settlement and asked that we lift the injunction, so we did. I wanted to figure out whether we really destroyed the market after the home video was released.

There is a publication in Hollywood called *Variety*, which some of you may have heard of, and in those days, it was not available online, so I went down to the local 7-Eleven on the morning it came out and looked for the story about this

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[11] *Vestron, Inc. v Home Box Office Inc.*, 839 F.2d 1380 (9th Cir. 1988).

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movie and what happened. It turns out that, lo and behold, nothing happened. As a matter of fact, if you dig into the story, there was some suggestion that there was pent-up demand and they were going to sell more movies now because we had delayed the release.

Cases involving injunctions force us to weigh the hardships each party would face as a result of granting or denying the injunction. The parties often make Doomsday predictions, but our role is to keep them in perspective, to weigh them against each other. Nowhere was this phenomenon more apparent than in the case that you heard about, *Garcia v Google*, which involved the now infamous film trailer *Innocence of Muslims*. I did not want to put up any images here, so I just put up the script to the film. Once it came out, it set off a rage throughout the Middle East. An Egyptian cleric issued a fatwa against Cindy Garcia, who incidentally was duped into doing the video, and her lines were actually dubbed over. She said one thing and it was dubbed over with something quite offensive. She had nothing do with it.

Now, she sued for copyright infringement. The video was put on YouTube and she sued to have the video taken down. Her claim was that she had a copyright in her performance in the movie and that she had given a licence for the performance to be shown but she did not give a licence for the performance to be changed radically by putting words in her mouth, words very different from those she had spoken. It is a claim that we thought plausible and we were swayed by the fact that her life was threatened. So, we pulled the video off YouTube and there it was for 13 months.[12] The case went en banc, and, as you also have heard, the en banc court lifted the injunction.[13]

Now you can view this video to your heart's content on YouTube. I, personally, have never watched it, but it is now available. You know what – the claim on the one side was that Garcia would get killed if we did not pull it down. Google told us that we would be destroying copyright and destroying the internet. After having pulled the video off for 13 months, the internet still stands, copyright is still alive and so is Cindy Garcia. Maybe all claims of doom and gloom are worth being sceptical about.

When we speak of intellectual property, we generally think of the three great subject areas: patent, trade mark and copyright. In fact, however, the field of intellectual property is much broader and there are certain rights that sometimes conflict with each other. Take, for example, something that was homespun in California but now exists in the law of many other states, and that is the right to publicity. This is a right created by state law, unlike patent, copyright and trade mark law, which are creatures of federal law.

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12 *Garcia v Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014).
13 *Garcia v Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

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Daniel mentioned that I sometimes write opinions to get in case books. One of those was my dissent in a case by the name of *Vanna White v Samsung*,[14] which I wrote for the purpose of getting into case books because I like to get to those law students before the professors get to them. *(Laughter)* I get a few of them. I wrote this with the intention of getting in a case book and it is now in most intellectual property and many regular property case books in the United States, so thousands of young lawyers have read it.

The plaintiff in that case – this is the case of *White v Samsung* – was Vanna White, whose claim to fame, as best I can tell, is that she turns the letters on the game show *Wheel of Fortune* while wearing high heels and a fancy dress. These days, the letters turn themselves, so all Vanna gets to do is stand there and look luscious. Anyway, Samsung ran a series of ads in the 1980s that had impossibly far-away, future dates. This one showed a VCR and had the game board for what is obviously the *Wheel of Fortune* and it suggested that, long after Vanna would be replaced by a robot, the VCR that Samsung made would still be working. Nobody asked the question who cares whether the VCRs are still working in 2012 because nobody imagined there would be anything else. That became the subject of a lawsuit.

Vanna White did not own any copyright because she did not own the show and she did not write the show. All she had was a personal right to publicity. My colleagues said she gets to sue, and she did in fact sue and recover about $400,000. I dissented on a number of grounds and one was that this really is not Vanna; the only reason one thinks of Vanna is because of the game board in which she owns no rights. The only reason you think that is Vanna – and if this were, let us say, a monkey in a dress or anything else, you would also think Vanna White – is because of the game board. I thought there was a conflict between the right of publicity, which is a creature of state law, and federal law, and indeed the conflict was not slow in coming.

In a case by the name of *Wendt v Host International*,[15] actors George Wendt and John Ratzenberger, who played Norm and Cliff – I am sorry *[pointing to the screen]*, there is Vanna the robot, see, remarkable resemblance *(Laughter)* – in *Cheers*, sued a company that ran *Cheers*-themed bars in airports. These bars had animatronic figures that sat at the end of the bar moving and holding a glass of beer in front of them, so they claimed that this infringed their right to publicity. The difference with the Vanna White case is that these bars were actually licensed. Hosts International actually got a copyright licence from the people who make *Cheers*, so what was happening here is that the right to publicity was

14 *White v Samsung Electronics America, Inc. and David Deutsch Associates, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

15 *Wendt v Host International Inc.*, 197 F.3d 1284 (9th Cir. 1999).

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undermining the right of the copyright holder to license the story. Once again, the case was held in favour of the two actors.

Years later I stopped by Kansas City Airport during a layover and visited the *Cheers* bar there and the two animatronic figures were still sitting at the end of the bar looking nothing like Norm and Cliff. It occurred to me that, if the lawyer had had the wherewithal to just bring them into court and show them, maybe nobody would have thought it was them, but that is theoretical. If you do not see the faces, if you just hear 'animatronic figures', if you do not see them next to each other, it does not quite have the same effect.

The latest case in this genre again involves, as you might guess, BARBIE. Mattel obtained a copyright licence for the producers of a TV show *The Beverly Hillbillies*. Has anybody here heard of *The Beverly Hillbillies*? It was very popular in the United States. They got the licence for a doll called 'Elly May Barbie' and this is based on a show that went off the air in 1971. *[Video shown]* Donna Douglas, who is Elly May, is the young woman in the top left-hand corner and there she is today. A remarkable resemblance! Anyway, she sued to enjoin the release of the Elly May Barbie. You will be happy to know that they settled out of court and you can now buy the Elly May Barbie.

One point I made in my *White* and *Wendt* dissents is that one of the things that intellectual property, copyright and right of publicity cases do control is speech, and sometimes they try to control thought as well. In right of publicity cases the plaintiffs are trying to get people to pay money for just being prompted to think about them, to remember them. I thought that, in reality, much of intellectual property law is about controlling speech and, to some extent, thought because you really cannot control speech without controlling thought as well. Thus, there is some tension – maybe considerable tension – between the values of a robust copyright or trade mark law and the values of a free society.

The case that brought this to mind early in my time on the Ninth Circuit was called *San Francisco Arts and Athletics Inc. v US Olympic Committee*,[16] otherwise known as 'The Gay Olympics' case, which was the original gay rights case. The plaintiff in that case was the United States Olympic Committee and it sued an organisation in San Francisco that put on a series of games and called itself the Gay Olympics. The Gay Olympics were open to gay and lesbian athletes. The idea was to promote the concept that being gay is consistent with being healthy, athletic and sportsmanlike – all the values the Olympics have come to represent going back to 1100 BC. The US Olympic Committee did not see it that way. They believed that they owned all rights in the word 'Olympic', and in fact there is a statute in the United States that gives them ownership over the word 'Olympic'.

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[16] *San Francisco Arts and Athletics Inc. v US Olympic Committee*, 483 U.S. 522 (1987).

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My court said that is fine and sustained and injunction against the use of the word Olympic. I dissented. It was quite clear to me what was going on, that the US Olympic Committee was using its control over the word 'Olympic' to control thought. It had no problem licensing or allowing without licence, but permitting, the use of the word 'Olympic' in connection with police games or Special Olympics for handicapped athletes, and they even had Dog Olympics, but the concept of Gay Olympics was anathema to them. It suggested the kind of association they did not want to have, and they were, essentially, using their control of the word 'Olympic' to control how the concept of being gay would be talked about.

This was precisely, of course, what the plaintiffs in this lawsuit were trying to combat by promoting the Gay Olympics. The case went to the Supreme Court and they affirmed. They did not agree with me. I still think they were wrong. *[Video shown]* The Gay Games still go on. The name has not changed. I would like to think that if the case came today it would come out differently, but it is still part of our law.

What may be my single greatest contribution to IP law came about 20 years ago in a case by the name of *New Kids On The Block*.[17] Does anybody here remember the New Kids On The Block? What happened is that two newspapers – and this is before there were websites – ran surveys asking some very important questions: Which one of the New Kids is the most popular? Which one of the New Kids On The Block would you most like to move next door? Perhaps the most important was: Which Kid is the sexiest? People would call in their answers and were charged a dollar every time they called in. The question was whether this was an infringement of the trade mark of the New Kids. It was not a copyright case. Copyright, of course, has exceptions for parody and fair use, but there are no exceptions, at least in the United States, for fair use in trade mark law.

We got the case and it seemed perfectly clear to us – or at least to me – that really what was going on here was the name was not being used as a trade mark. The name was being used in a way as to get people to think about the New Kids so that they could be on topic, but this really was not any kind of endorsement or any kind of trade mark use of it. But there was not a doctrine in our law to deal with it. So, I was talking to my law clerk, trying to figure out how we were going to make this case come out right and I said, 'We need a new doctrine here. We need something new'. He said, 'You could just make it up.' I asked what we should call it and he said, 'How about nominative fair use'. I said, 'Sounds good to me', so we wrote an opinion and the other two judges signed on. None of the parties had suggested it, nobody had told us we should come up with a new doctrine, but we just put it out there and forgot about it.

[17] *The New Kids On The Block et al. v News America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1992).

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I came back to the doctrine 20 years later when I got another case that raised similar issues and was amazed to learn that in the intervening two decades, a whole body of case law had encrusted around it. There were majority and minority views, there were conflicts in cases, people had commentary and law review articles and treatises talked about the nominative fair use doctrine – like it was well established and universally accepted as the law. Yet, when it came down to it, we just sort of made it up because, hey, we could. *(Laughter)*

Finally, I want to spend the rest of my time, which will not be too much longer, talking about the limits of the legal system in terms of solving disputes, particularly the disputes involving intellectual property. You may have a case of clear infringement yet no way to find or serve the infringement and no way to collect a judgment or enforce an injunction if you do win in court, but it can get even worse. Bringing the lawsuit may do more harm than good, as Mattel found out when it decided to file a cert. petition in the 'Barbie Girl' case only causing itself vastly more damage.

Take the case of Hansen Beverage, a manufacturer of the major national brand called MONSTER drinks. They sued a small local brewery in Vermont for making VERMONSTER beer. So, there is MONSTER brand drinks and VERMONSTER beer. Is VERMONSTER in Vermont, an infringement of the trade mark of MONSTER? We will never know because the husband and wife team who brewed VERMONSTER beer decided to take their case to a different court altogether – the court of public opinion. They recorded a video. *[Video shown]*[18] After the video was launched on YouTube and there was a campaign on Facebook and Twitter, there was a Facebook group called 'Vermonsters and Craft Beer Drinkers Against MONSTER', which had 17,000 members and over 100,000 people watched the clip. Eventually MONSTER just caved. They decided the case created too much bad publicity for them, so they dropped it. VERMONSTER beer is still being brewed and enjoyed in Vermont.

YouTube and social media sites can be powerful weapons. Electronic pebbles in the hands of modern-day Davids taking aim at corporate Goliaths. Nestlé found out the hard way when confronting a video calling attention to the use of palm oil in the candy KITKAT. This is the one video that is not for the squeamish. If you are squeamish about blood, you might want to cover your eyes. *[Video shown]*[19] Fewer than 1,000 people had seen this video when Nestlé wrote to YouTube and asked them to take down the video for copyright infringement. By now, of course, you can guess what happened. The video popped back up

18 Available at: <www.youtube.com/watch?v=kbG_woqXTeg>.

19 Available at: <www.youtube.com/watch?v=VaJjPRwExO8>.

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immediately somewhere else and went viral. Facebook users even started posting altered Nestlé logos on the company's fan website as 'Killer' instead of KITKAT. Within a couple of months, it was all over. Nestlé agreed to stop buying palm oil from high-risk plantations in Indonesia. Bam! It was done.

We see this phenomenon of legal action backfiring repeatedly to the point where it now has a name. It is called the 'Streisand Effect' after the famous chanteuse who took umbrage at having her house, which overlooks the Pacific Ocean, photographed from an aeroplane and shown online, and here it is. Oh, no actually, that is my house! *[Laughter]* You are all welcome to come and stay with us. This is Barbra's house that I want to show you. I think it is much too gaudy. Anyway, what happens is this. If you have a house on the coastline in California, even on a bluff – her house is on a bluff and my house is on a bluff – there is an aeroplane that flies by about once every one or two years and takes high-resolution pictures of the entire coastline. If you know where to go, you can get very close-up pictures of these properties. I always try not to do one of my famous nude sunbathes on the patio when the plane goes by. It is so hard to find these pictures, but Barbra sued, trying to get the website to take down her picture, and she claimed invasion of privacy. Immediately copies of the pictures popped up all over the internet. Barbra may have won or might have lost – I think she eventually gave up the lawsuit – but the fact of just bringing the lawsuit increased interest in the property and you can now find her house plastered all over the internet by just putting in her name, whereas earlier finding it would have been very difficult.

The reason the Streisand Effect is so powerful brings us full circle to how I began this talk, by emphasising the concrete examples, and particularly concrete images and sound, which often persuade in a way that abstract legal arguments do not. Earlier I discussed how that is true for generalist judges sitting in courts like mine, but it is every bit as true in the court of public opinion where the stakes are often higher.

My final example will show how powerful images can produce a public judgment as to IP rights that matters more than anything decided in a court room. Nadia Plesner is a Danish art student with a message. She wanted to call attention to the gap between the celebrity culture upon which our media focus so heavily and serious issues like poverty that go unnoticed. She designed a T-shirt with this image. As you can see, that is a famous-brand bag. I think it is a Louis Vuitton bag that starving African child are carrying. Louis Vuitton was none too happy about this T-shirt, which, again, few people had seen or knew anything about. They filed a copyright infringement against Plesner seeking $20,000 a day for each day of her continued use of this image. What happened? The Streisand Effect. Within two months of Louis Vuitton filing suit, Plesner received more than 4,000 orders for her T-shirt. Plesner also prevailed in court when a judge

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in The Hague dismissed Louis Vuitton's suit.[20] The real verdict in the case had been in the court of public opinion: whatever Louis Vuitton's legal rights were, insisting on them turned out to be foolish. The company could have embraced Plesner's message and got the publicity to work in their favour instead of spending money on a losing cause and getting a black eye to boot.

Consider the different approach taken by United Colours of Benetton, who actually use their ads as a way of promoting highly controversial social media messages. They tend to use the Streisand Effect in their favour. Most companies, most copyright holders and most rights holders are not wise enough to take advantage of this, and this is part of your job as lawyers. Part of your job as lawyers and lawyers for intellectual property clients is to persuade them that suing, even if they prevail, is not necessarily in their best interests and they may be far better off accepting the infringement or what they think is infringement or an affront to their dignity and move on or make the best of it.

Just as Plesner's powerful image effectively defeated Louis Vuitton's legal claims before those were ever decided by a judge, when you do go into advocacy, try to use concrete examples and do not keep things on a theoretical level for too long. Do not make us hum our own music. Do not make us try to understand abstract arguments. Send us a song, show us the shirt and help us to understand, or take a lesson from that fabled communication expert Eliza Doolittle. *[Video of 'Show Me' from* My Fair Lady*]* I will leave you with that. Thank you very much. *(Applause)*

3. AUDIENCE QUESTIONS AND VOTE OF THANKS

Daniel Alexander Boy was that a lecture from the Hollywood Circuit! *(Laughter)* I am just the copy, and some people would say I am the infringing copy. The real thing has arrived, so I am going to ask him to take over.

Professor Sir Robin Jacob Wow! I am going to assume all the stuff I missed was at least as good but probably better. I was reminded of a story you will like. We had a newscaster – quite a glamorous lady – in the 1970s called Angela Rippon. One day a solicitor rang me up and said, 'Angela Rippon has consulted me. There is a pop band that want to call themselves "Angela Rippon's bum" What can we do?' I said, 'Absolutely nothing', and you have never heard of that pop band before, have you? *(Laughter)*

It was a brilliant idea by Ilanah Simon to ask that Alex should come, and I am so glad she had that bright idea. To some of you English judges who sometimes are

[20] *Nadia Plesner Joensen v Louis Vuitton Malletier SA*, Case 389526/KG ZA 11-294 (2011) ECLI: NL:RBSGR:2011:BQ3525.

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asked to give talks, this is the standard you have to get to! *(Laughter)* Alex has agreed to answer some questions. They had better be funny, or at least preferably funny. Anybody who wants to ask any, fire away.

Audience Member Good evening. As a judge, how do you decide on questions of morality within the context of IP? Like in the EU, we have patent law where there is an exception for morality. In copyright, there are issues of obscenity and morality issues. I want to know your opinion on such issues and how judges deal with them, and whether they are comfortable deciding on morality, because it is so subjective.

Judge Kozinski Morality is not part of our legal equation – we apply law – but morality undergirds everything we do. We are moral beings. We have a code. We understand right from wrong. It would be foolish to suggest that the justice of a situation does not influence how we come out in close cases. A lot of the cases are close. Take the *Garcia v Google* case. There were three judges on that panel. One dissented, so I can speak only for myself, not for my colleague who joined my opinion. But, to me, the fact that she had been duped – actually she was not duped – or rather had delivered lines that were perfectly unobjectionable and then the film maker had changed the lines to have her say something that was highly offensive, blasphemous to many people, had a certain unfairness about it, or it seemed offensive.

The case was also brought against the producer, but the producer was not at play in the part of the lawsuit that we were looking at because the question was whether YouTube should be required to take down the video. In my own mind – again, this is not part of the legal equation, but it is the way I weighed it in my mind – it seemed that to some extent YouTube was abetting first of all a deception, which had happened between the producer and Garcia. They were also abetting something that was highly offensive to people. There were groups of people that were highly aroused and offended by the message, and YouTube was making money off it. Nowhere in the actual analysis of the issues do any of those considerations come into play, but they certainly were things that went through my mind.

The most important thing to me was that I thought there was some real chance that her life was in danger and to some extent by pulling the video – she had hired bodyguards, had gotten threats and was under siege – I thought we could help. That was something that influenced my thinking as well, not really part of the copyright analysis. Copyright is a very dry issue, but how we wound up weighing it and discussing it was very much, at least for me, driven by the rightness and wrongness.

You have all probably heard of the battles we have had in the United States with the appointment and confirmation of federal judges and a lot of it has to do with the fact that much of what judges do happens under the radar. The legal issues

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are the legal issues and people can agree or disagree about them, but very often, in close cases – the cases that are not close are controlled by authority and there is nothing you can do about it – you have no place else to turn in making a decision than your own moral judgments.

Professor Sir Robin Jacob There is another one there.

Audience Member This goes back to the beginning of your talk. I was wondering what the Latin for chutzpah is. *(Laughter)*

Judge Kozinski You know, I went to a yeshiva, not to a seminary, so you will have to rely on somebody else, but there must be a term. The Latins were pretty inventive.

Professor Sir Robin Jacob Just a little puzzle for you all, and you can go and think about it. How would the *Garcia* case play out under English copyright or other law – I have ideas – where you dissented in the *Garcia* case?

Judge Kozinski Nobody agreed with me.

Professor Sir Robin Jacob We might have found a way of fixing it.

Judge Kozinski Maybe the Privy Council should seize jurisdiction. We were, after all, a colony at one point!

Audience Member Is the right of publicity in the US a bit over-hyped? Is the scope for application a bit too wide?

Judge Kozinski I do not know. It is hard to say. Some of the cases seem over-hyped to me, but it is quite powerful. Most states now accept it, and some states and some federal circuits take it much further than I think they should.

Professor Sir Robin Jacob Do we have any more? We will take one more, as I see it is half-past now.

Audience Member I was fascinated to hear about the controversial cases in which you have been involved. Are there any opinions where, looking back, you think maybe you got that one wrong, maybe you would have decided it differently with hindsight?

Judge Kozinski Just one. *(Laughter)* Oh, you want to know which it is! No, I am not going to tell you. *(Laughter)* It is hard to say. When you are writing cases, they are you and you say exactly what you want to say, exactly what is on your mind, but then, once they are frozen on paper on the day they get filed, they stand still, and you change. I seldom go back to a case of mine, read it and decide that I would have done it exactly the same way, because you change. There are one or two cases that I have doubts about, that I had doubts about at the time and maybe, with time, knowing more, I might have come out differently, but not necessarily intellectual property cases.

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The other reality and actually more relevant reality is that five years down the road I cannot tell my cases from other people's cases. People suspect that maybe I did not write my own opinions because I will be in court and they will say, 'Well, Judge Kozinski, as you said …' *(Laughter)* That was me five years ago, you know. I think lawyers think they are flattering you by saying it is your opinion, but it is not my opinion; it is the court's opinion. If I now disagree with it, I am as bound by it as every other member of my court and I find it a little obsequious for people to be attributing to me some wisdom for having written an opinion. It is what I get paid to do. Once in a while I want to decide against both sides. I want to make both sides lose. I am still working on that. I came pretty close a couple of times, but it is hard to do. I am still working on it.

Audience Member In particular, because the area – even geographically – you work in is dominated by these huge brands with massive budgets, and you spoke at the end about the court of public opinion, do you not worry that when you take things out of the court room a bit like that, or even in judges' own minds when they are coming to opinions, the incredible marketing budgets behind the Silicon Valley giants and Hollywood could lead to perceptions and outcomes that might not be within the letter of the law? I know it is probably not something you sound too worried about a lot of the time if justice is served, but I thought it might be a consideration.

Judge Kozinski It is always a worry that people with money and resources are going to get better advocates and get their position represented better in court than other people. We try to lean against it. We work very hard to try to figure out if there is a disparity in the advocacy of the parties. We try to examine the other side and so become advocates for them, trying to figure out what the better arguments are, but there is no doubt about it, I think, in law as in everything else in life, that having more money will get you better justice. There is no doubt about it. It does not mean every time and it does not mean as a matter of course, but if you are in the business of litigating a lot and you have a big litigation budget, you are going to be more successful than somebody who does not.

We are aware of it and try to lean against it, but, ultimately, this is a societal question, the question of how one wants to allocate resources for providing legal services. In the United States, we take the position that that is something that is done by individual resources to some extent. Criminal defendants get lawyers and they get pretty good lawyers, but there is no doubt about it that, if you have lots of money – if you are OJ Simpson – and get the dream team working for you, you are going to get a better shake than somebody else who does not, who has to rely on a very good, and they are usually highly professional, public defender but who does not have all these resources. I do not see any solution.

I had a case – it is now 25 years ago – where I had to sentence somebody. I was sitting as a trial judge and he was convicted of possession for distributing

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a certain amount of cocaine. Because he had some prior convictions, a mandatory minimum sentence kicked in and I wound up having to sentence the guy for 20 years, which I thought was vastly excessive. I said so in court. I said, 'This is too much, wholly unnecessary, wholly unjustified and a bad idea for a number of reasons'. I had to think about what to do about it. I guess I could have said, 'No, I am not going to handle the case', but the consequence would not have been that he would have gotten off. They would not have let him go home. Some other judge would have taken the job and done the same thing. There was no choice in the law, so I sentenced him to 20 years. I actually had the experience of seeing him come out a different human being, much diminished, cut off from his family and a shadow of his former self.

Sometimes you just have to do things in the law that are not what you prefer. It is not the part of the job they tell you about when they tell you what a great thing it is to be a judge, but they are definitely part of the job and, if you cannot do it, you should do something else.

Professor Sir Robin Jacob We are going to do something else now. We are going to go across the road. Before we do, let us thank Alex for coming all the way from California. *(Applause)*

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