

I LICENSED NIMMER

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I started law school at UCLA in the fall of 1972. No one in my family had been a lawyer or had anything to do with the law, so I had no idea what to expect. The first day of class, I had quite a surprise: The professor at the front of the class looked very familiar and, on closer inspection, I recognized him as Edgar “Ted” Jones, the judge on the 1960s TV show, *Day in Court* — an early and much tamer version of Judge Judy and Judge Wapner.

Was I jazzed! A law school with celebrities as teachers. I knew I’d made the right decision in picking the school



MELVILLE B. NIMMER

Photo by Hon. Alex Kozinski

* Judge (formerly Chief Judge), U.S. Circuit Court of Appeals for the Ninth Circuit, Pasadena, California. Reprinted by permission of the author from 60 J. COPYRIGHT Soc’y U.S.A. 201 (2013). For further information, see the Editor-in-Chief’s introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

closest to Hollywood. It was also the only one that didn't reject me, but I took credit for that too in strategically blowing a few key classes as an undergrad. The professors that first quarter were all showmen of one type or another, the way law professors tend to be. Some did it by strutting across the classroom and gesticulating with dramatic flair. Others did it by presenting deep paradoxes or anomalies in the law, and asking us to ponder the mysterious and nonlinear way in which the law developed. Still others did it by creative use of the Socratic method, always managing to manipulate students into making contradictory arguments and then telling them they were beginning to think like lawyers. And one did it by lampooning my accent, which got a big laugh.

There was one class that was a bit different, and that was Contracts. The professor was a neatly dressed, quiet, balding man with a mustache. He always wore a suit, a tie, and a shirt with French cuffs. He would walk into class, sit at the desk on the dais facing the class and, at the stroke of nine, start lecturing. He didn't move the entire period, except to turn pages in the book or recognize a student by pointing.

The entire lecture consisted of words, spoken softly but clearly, as he deftly peeled back the mysteries of consideration, meeting of the minds, parol evidence, and mutual mistake of fact. His explanations were simple and to the point; his Socratic dialogue was always calculated to illuminate, never to shock and awe.

Only once during the two quarters he taught us Contracts did Nimmer get up from his desk. I remember it vividly because it was such an event. He was in the midst of explaining a particularly tricky concept when some student (probably me) asked a convoluted, off-the-wall question. Nimmer paused a few seconds and then, as if making up his mind to do something distasteful but necessary, he pushed back his chair and stood up. He then buttoned his coat and started to turn towards the blackboard. As he did, he turned back to us and, in a tone that was half explanation and half apology, said, "I'll have to approach the . . . the . . . board." The last word came out muffled, as if it was not a term to be used in mixed company. We all cracked up.

With a few strokes of the chalk, he drew a diagram that untangled the questioner's conundrum, and quick as a bunny he was back at his desk, wiping chalk from his fingers with a monogrammed handkerchief. His

look of relief at having survived the ordeal told us he'd never do it again, and he never did.

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While Nimmer was always soft-spoken and polite in class, we found out he had used the F-word before the Supreme Court. One of my classmates had heard a rumor to that effect and we were all wondering whether inside the mild-mannered Professor Nimmer was a Lenny Bruce trying to break free.

So, at the beginning of class, one student (probably me again) asked him about his representation of Paul Robert Cohen in the Supreme Court: "Is it true that the Chief Justice wouldn't let you quote what was written on Cohen's jacket?"

"Well, he tried," Nimmer answered. "When I started speaking, the Chief Justice said: 'Mr. Nimmer, the Court is familiar with the facts of your case so there is no need to state them.'" Nimmer continued, "I felt that if I let him censor what I said in the Supreme Court I'd be conceding that the word was taboo in other courtrooms as well. So I responded, 'I think I can summarize the facts very briefly, Mr. Chief Justice,' and I did."

The class was silent as we waited for Nimmer to quote that summary, but he never did. I guess he thought that kind of language wasn't appropriate for the classroom.

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One day he assigned an opinion with which I disagreed completely. I tried to make the point in class, but I didn't manage to persuade anybody, least of all the professor. Why didn't this case have a dissent? A dissent would surely have explained to everyone's satisfaction that the majority was out to lunch.

So I decided to write a dissent of my own, and when I was done I dropped by Nimmer's office and handed it to him.

"What is this?" he asked.

"It's a dissent to the Smith case," I explained. "If you'll just read it, you'll see how wrong the opinion is."

I left it with him and waited for a week or two, hoping he'd buttonhole me after class — or, dream of dreams, during class — and tell me how brilliant the dissent was and how wrong the Smith case had been, but he never did.

After a couple of weeks, I could stand it no longer. So I went to his office and asked him what he thought of my dissent.

“It was very good,” he said. “You ought to write more of them.” Little did either of us know that one day writing dissents would be my life.

“But were you persuaded?” I asked impatiently.

“It had its points,” Nimmer said, his voice trailing off.

After a few moments of silence, I completed his thought: “But you weren’t persuaded, right?”

He shook his head. There was nothing left to say, so I turned to leave. As I did, it occurred to me that I hadn’t kept a copy so I asked him for it back. He looked a bit perplexed and then he said, “Um, I filed it,” pointing to the trash can. So my first dissent persuaded no one and wound up in the round file.

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Near the end of the school year, I got it in my head to take pictures of my various professors. I had a state-of-the-art Nikon F, and I loaded it up with a roll of Kodak Gold 100 ASA film. I stopped my various professors wherever I could find them — after class, in the corridor, coming out of the bathroom.

I found Nimmer in his office, sitting at his desk, of course. He was dressed, as usual, in a blue shirt with gold cufflinks and a conservative pattern tie. He looked pretty much as he did in class, except his suit jacket was off. When he learned my business he demurred, but I would have none of it. Realizing he wasn’t going to get rid of me without a fuss, he resignedly took off his glasses and leaned slightly on his right elbow. I had about five seconds to take my best shot, and I fired off exactly one.

Those being the days of film, I had to wait till the roll was full and the film was developed to see the results. By and large, they were a mixed bag, but the picture of Nimmer was pretty much perfect. Surrounded by books, illuminated by daylight streaming into his office, neat and kempt like a model from a Brooks Brothers ad — that was the Nimmer we all knew and loved. I had a copy of the picture printed and dropped it off at his office. He looked at it, gave me a slight smile and thanked me. As I left, I wondered if the picture would get filed, like my dissent, in the round file.

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It was a few weeks later, just as finals were starting. I was walking down the main hall of the law school carrying a large cardboard box with my books and notes, pretty much oblivious to everything around me. Suddenly, I heard a voice calling behind me: “Mr. Kozinski, Mr. Kozinski, may I have a word with you?”

It was Professor Nimmer. Contracts had ended weeks ago and I had no idea what he could possibly want with me. Maybe — my heart leapt at the thought — he had found my dissent under a stack of books, re-read it and decided I was right after all. Could it be?

“I don’t quite know how to say this,” he said, “but I may have . . . um . . . infringed your copyright.”

Say what? Had he published my dissent without my permission? But he was pointing to a poster on the bulletin board right next to where we were standing. It was an announcement for a lecture he was going to give a few days later, and right there, under the title and description, was a picture of the speaker. And not just any picture. My picture.

“They asked me for a picture to include in the announcement for this lecture,” Nimmer was saying. “And the only picture I could find was the one you gave me.” His voice trailed off. Finally he added, “I neglected to ask your permission.”

When I finally got it, I put down my box, thrust out my hand and spoke words that I’m sure many a copyright scholar would be pleased to have been able to speak: “Professor Nimmer, I grant you a copyright license!”

He took my hand and we shook on it. Little did I know that years later, in a case involving a gustatory melodrama, I would hold that a transfer of copyright had to be in writing, but a non-exclusive license could be oral: “The leading treatise on copyright law states that ‘[a] nonexclusive license may be granted orally, or may even be implied from conduct.’” *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.03[A], at 10-36 (1989)).

I’m sure this was the right answer, but I’ve always wondered just how it got into the treatise. Do you think Nimmer put it there to make sure the license I gave him orally, on the spur of the moment, would hold up in court?

Nah. To quote Elvis, “we can’t build our dreams on suspicious minds.” I’m sure Nimmer knew very well that an oral license was sufficient, and when I offered it, he was happy to accept, knowing it would stand up if it

was ever challenged. And now I'm happy to grant a written license to the Copyright Society of the same picture, to be run as part of their Nimmer Treatise Commemorative Issue. I'm honored to contribute to a Festschrift celebrating the finest copyright treatise of our generation.

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