

# CRASS ACTION

## Confessions of an Internet Avenger

By Irvin Muchnick

**OK, WORLD WIDE WEB ROYALTIES** for authors aren't the same as negligent environmental catastrophes that destroy people's health and lives. And I lack certain of Julia Roberts' ... assets.

But from late 1997 until early 2001 I made a living playing Erin Brockovich's copyright-obsessed second cousin in San Francisco federal courts. This followed most of a year working what must have been 80 hours a week as a National Writers Union volunteer, trying to get the union to hire me; another nine months working what must have been 60 hours a week as a union half-time employee, trying to get hired full-time; an only marginally saner two-plus years at 40 hours a week as the NWU's assistant director for public relations and membership development, and director of licensing. Striking out on my own, I saw my income continue to rise improbably in inverse relation to the amount of dirt under my fingernails, until finally just about the only discrete task remaining was the surreal and recursive exercise of preparing a monthly invoice.

"Well, you always said you wanted to write fiction," a friend told me. He was referring to the invoices.

Yes, my fellow lazy workaholics, there is a Zen to success. This is about the little unlicensed lawyer fighting to get out from inside all of us. (Oh. You mean it's just me?) It's also about how a life was empowered, maybe even saved, by the personal computer and the Internet – not because of any of the futuristic babble you've read about, mind you, but simply because those tools provided a platform for the quirky form of political activism in which I was specializing and for which I discovered a marketable gift.

The big deal in the new economy is "branding," the signature stamp of one's product or service. It took me a while to figure out what to call myself at a cocktail party in three words or less. Then it hit me: I was a "copyright litigation consultant." And, man, it was a wild ride. My first case settled for more than seven million bucks. The second was poised to make even more money for certain folks (including an additional relative chump change for your humble narrator), as well as to slam-dunk an important area of new law, before the United States Supreme Court stepped in with its *other* outrageous writ of certiorari of November 2000. The Supremes ultimately ruled in favor of authors' electronic rights, and that's very good news. But the union, and not an independent

consultant, will properly be playing point on future litigation. I'm back full-time in the lucrative field of freelance writing.

Over the course of seven years I can honestly say that I was never once shaken in my belief that I was on the side of the angels in the legal and policy dispute over how creators should share in the spoils of new technologies.

Having efficiently rationalized an array of envelope-pushing tactics, I proceeded to deploy them, one by one. I had no master plan, only an unfathomable faith that every time the Lord closed one door He opened another. But I wasn't the only worthy resourcefully playing the cards fate dealt him. Nor, after the standard-issue jokes, should we forget that behind virtual lawyers must be real ones, good ones, without whom a lot of sensible ideas, whether public-spirited or self-aggrandizing, never achieve liftoff.

Welcome, then, to the sausage factory of complex litigation, which also involves elements of Kabuki dance. The prelude is negotiation. Next comes the act of being rejected or ignored. Whereupon, backed by entrepreneurial legal teams who agree that I haven't taken a vow of chastity and poverty and that ethics aren't a suicide pact, I load and fire proverbial smoking guns and pray that they will register in the olfactory glands of the judicial system.

At the end of the day – an attorney *manque* never misses an opportunity to drop in an "at the end of the day" – a consultant is just someone who helps you screw up with confidence. Pull up a chair while I share some other tricks of the trade.

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**DESPERATE TIMES CALL FOR DESPERATE** measures, and in January 1994 I was broke and broken. A few months earlier my wife had moved out, leaving me most of the time with our two sons, ages 3 and 5. (We later reconciled and added a third child, a daughter.) I sat besieged in the basement office of our rented house on Vine Street in Berkeley, which had flooded, soaking voluminous disorderly notes and files, including backup for several years' worth of delinquent tax returns.

My desktop computer at the time was a Korean-made IBM clone, Leading Edge, with a harshly flickering, slate-tinged black-and-white monitor with yellowish squared-off characters, a primitive 286 chip, a full megabyte of RAM, a mammoth 30-megabyte hard drive, and – what seemed like magic at the time – a 2400 baud modem. Using the latter, I logged onto my brand-new account with an Internet service provider called Netcom, activated telnet (an early text-only server), and did what any self-respecting narcissist would do: I looked for myself in cyberspace.

What I found was an injustice.

Articles I had written for *People*, *Lingua Franca*, *The Washington Monthly*, *Mother Jones*, and other magazines were being offered for sale online on full-text databases. I'm not talking about free informational links or about interested researchers who used the ease of copying on computers to pass stuff around. I'm not even talking about an amalgamated file-sharing system such as the one Napster would develop for musical works. I'm talking about huge for-profit corporations in the specific business of pirating previously published material. The basic algorithm was that the computer user typed in a credit-card number, clicked a button, and got the article, in the form of either "ASCII" text or a facsimile image. The database company forwarded a portion of the fee to the magazine publisher. But not a dime went to the writer, who wasn't even asked for permission to retransmit his work in this fashion.

This perhaps not terribly surprising manifestation of the screwing of a small population of powerless independent contractors happens to matter, for reasons both micro and macro. In the small sense, the fight over electronic rights is just an update of an old turf war with huge economic implications for freelance journalists and their brethren hacks. Reselling articles on standalone CD-ROMs or via broadly accessible web interfaces doesn't differ qualitatively from syndicating, anthologizing, or any of a number of other secondary uses by which poorly compensated freelancers have always paid their rent. In the Copyright Act of 1976, writers, photographers, and graphic artists won an important principle on this score: absent contractual arrangements to the contrary, the law recognized that a non-employee's contribution to a "collective work," such as a magazine, belongs to the individual creator, with the publisher merely licensing the right to use the work one time.

Overlaying this historical battleground of author-publishers relations is the new phenomenon of the computer's revolutionary democratizing potential. A noble ideal, for sure, but it collides with a companion phenomenon of rapid conglomeration in the publishing industry, which now combines telecommunications, computers, and multimedia information and entertainment. "Content" is being privatized on the back of a national information infrastructure subsidized by taxpayers. What we're witnessing is a sequel to the story of the railroads and the robber barons. Publishers would have you believe that their interests and those of independent creators are identical and that the enemies are consumers who want to freeload. But the truth is that the diversity and vitality of journalism, literature, and the arts stand to suffer if intellectual property consolidates in the hands of the AOL Time Warners of the brave new digital world.

The solution isn't some mystical withering away of the very concept of copyright – an impossibility under capitalism. More realistic goals are things like the expansion of "fair use," which will be brought about by the same kinds of multilateral negotiations that nurtured public libraries. At this moment in history writers should be elbowing their way to a place at that great bargaining table. We need a royalty system like the one set up after the invention of audio recording by the American Society of Composers, Authors and Publishers – but it should be a kinder, gentler ASCAP that doesn't scorch the earth in search of payment for every bit and byte.

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**A MONTH BEFORE MY MAIDEN** Internet voyage, the National Writers Union had taken the lead in the fight for electronic rights by supporting *Tasini v. Times*, a landmark copyright case by a group of writers, led by union president Jonathan Tasini, against *The New York Times*, Lexis-Nexis, and other print publishers and database operators. I agreed with Tasini that this was the writers union's "wedge" issue of the 21st century – one of the keys to the conundrum of mobilizing our new kind of labor force, which is not bonded by a common physical workplace. Puttering around online, I found that something like a third of our Bay Area Local members were, like me, being knocked off by for-profit database companies. What the Tasini lawsuit needed, I felt, was some complementary organizing muscle.

We called the campaign "Operation Magazine Index" (OMI), after one of the products of our first target, Information Access Company of Foster City, which was in the process of being sold by Ziff-Davis to the Thomson Corporation for \$580 million. The way it worked was that I'd print out a writer's database "hits," explain the problem, and invite him or her to join the union and/or the campaign and make a small contribution toward some PR shots across the bow. The response was unprecedentedly favorable and included the participation of all our local heavy hitters: Isabel Allende, Todd Gitlin, Alice Walker, Ben Bagdikian, Jessica Mitford. OMI's biggest booster was Nicholson Baker, the bestselling novelist then living in Berkeley. In October 1994 Nick penned a *New York Times* op-ed piece, "Infohighwaymen," that put us on the map across the country and, with the help of Internet listserv and newsgroup postings, literally around the world. (The Baker essay can be viewed here: <http://muchnick.net/nicholsonbaker.pdf>.)

Information Access Company wasn't listening. But another company was not only listening but courting. It was called UnCover and it had been started by the Denver-based CARL Corporation, a for-profit spinoff of the Colorado Alliance of Research Libraries, which marketed library automation services. CARL's chairman Ward Shaw and president Rebecca Lenzini made immediate overtures to the writers union to establish a royalty system at UnCover, which provided fax copies of articles ordered from an Internet index of material from 17,000 popular magazines and academic journals – the largest such database in existence.

On closer inspection it was no mystery why UnCover was so eager to make a deal. Unlike companies that delivered online text to the mass market, UnCover wasn't a true database but a kind of self-appointed private extension of the interlibrary loan system. It had few solid arrangements with publishers, whom it was ripping off as insouciantly as it did writers. One of the company's practices was to send a modest "royalty" check to the publisher after the fact, theorizing that the subsequent deposit of that check, perhaps by an office flunky, was tantamount to a license. As Becky Lenzini acknowledged in a letter during our negotiations, this was a "technical violation of prior permission." A royalty scheme in association with the National Writers Union wouldn't change all of these facts on the ground, but it could theoretically inoculate UnCover somewhat from infringement claims.

At fewer than 1,000 orders a day, many from obscure journals and all via a non-cutting-edge technology, UnCover was a boutique in the exploding information industry. Still, it held the promise of eventual expansion into online full text, and Knight Ridder Information (owner of the classic Dialog network of databases) was about to buy it. Above all, UnCover offered a positive model for a marketplace solution to the e-rights puzzle. I argued to the writers union board that we had to take yes for an answer and prove that creators were willing to accept some responsibility for making copyright compliance convenient. The board agreed, largely because no one could figure out what the hell else to tell me. An activist in New York, Russell Miller, perhaps resonating to the echoes of the People's Republic of China, sucked his thumb and came up with the name Publication Rights Clearinghouse (PRC).

PRC was launched amidst great fanfare in 1996. I became a spokesperson for the cause at those new tech crystal ball symposia that flourish in places like the Bay Area. One was a conference entitled "Digital Content: New Products and New Business Models," sponsored by the Berkeley Center for Law & Technology at the University of California's Boalt Hall School of Law. The keynote speaker, former Grateful Dead lyricist John Perry Barlow, did his hippie-cyberlibertarian shtick in which he argued, as best I can tell, that as soon as we all stop worrying so much about getting paid for our work we'll start getting paid for something else. At my panel I meekly demurred. "Before there's an information superhighway," I said, "there has to be a donkey trail of rights and dignity." The center's director, Robert Merges, the Wilson Sonsini Goodrich & Rosati Distinguished Professor of Law and Technology, then grabbed the microphone and said, "I think Irv Muchnick is right and John Perry Barlow is wrong." It was a Kodak moment, captured on videotape, but I was never able to get a promised copy. In fact, Rob Merges would never again return a single phone call of mine, leading me to suspect that he decided that his center's backers, Silicon Valley law firms, would appreciate it if he stopped consorting with pinkos.

I would like to take this opportunity to tell the WSG&R DP of L and T that he is full of BS.

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**BY 1997 THERE WAS ONLY** one thing wrong with Publication Rights Clearinghouse: it wasn't working. We had enrollees – more than 1,000 writers from outside as well as inside the union. Unfortunately we also had competition from the Authors Registry, a copycat venture of the union's friends at the Authors Guild and the American Society of Journalists and Authors. You'd have to be an even bigger nerd than me to want to untangle all the petty rivalries of the various alphabet-soup writers' organizations. Let it suffice to say that the existence of both PRC and the Registry sowed confusion.

To make matters worse, the PRC-UnCover relationship was going nowhere fast. The monthly royalty checks amounted to a trickle, not a torrent. I'd struck up a friendship with Ward Shaw and Becky Lenzini, who on one trip through town treated my wife and me to dinner at Chez Panisse (downstairs!). But when the writers union pressed for the substantive expansion of our royalty system into products other than UnCover, Ward and Becky opted, instead, to play footsies with me

over a job opportunity. When we sought a “dialogue with Dialog,” Knight Ridder Information did what every other potential second licensee did – it played us off against the Authors Registry.

The biggest obstacle to PRC’s progress, however, was the twin shadow of Tasini and *Tasini*. Originally, Jonathan was not one of PRC’s biggest fans. In my view, he was foolishly threatened by the possibility that our organizing success and our fledgling agency would steal some of the thunder from his lawsuit, when in fact they all reinforced each other. But as the suit stalled in court for years, Jonathan came to embrace PRC enthusiastically. Too enthusiastically, I thought. Writers, preoccupied with immediate issues like what they were being paid for *primary* rights, mostly stood on the sidelines scratching their heads over what they saw as technical mumbo-jumbo. PRC hype was veering dangerously close to what is known as “vaporware,” and everyone involved in e-rights was waiting to see what the courts would say in *Tasini*.

Jonathan and I were switching positions. Just as he had at first praised PRC publicly but denigrated it privately, I felt deep down that *Tasini v. Times* was a pig in a poke. Instead of surgically using investigative resources to establish an open-and-shut record of willful infringement, Jonathan opted for a “kitchen sink” approach to naming defendants. Causes of action were defined in the broadest and most theoretical terms; rather than driving a strategic wedge between print and electronic publishers, *Tasini* joined them – and their return legal firepower – at the hip and played to the grandstands. All of our litigation eggs were in a single basket. And we were being represented by a labor lawyer with a small office, Emily Bass, up alone against the New York Times Company’s outside counsel, Debevoise & Plimpton. That was like sending my ear into the ring for 15 rounds against Mike Tyson.

Above all I was puzzled by the failure to structure *Tasini v. Times* as a class action; Emily Bass was working on behalf of only Jonathan and his handful of co-plaintiffs, not the thousands of similarly-situated writers. Class action, a staple of product liability, securities fraud, and racial and sexual discrimination cases, had never been used in an American court in a copyright case, but that didn’t mean it *couldn’t* be. Indeed, I thought the distribution of potential damages – pennies in individual instances, millions in the aggregate – cried out for this technique. Moreover, class action held the promise of enticing a large and powerful law firm to handle the matter on contingency in return for the opportunity to score huge at the back end. All you had to do was get out there and hustle to find one. It was a vacuum waiting to be filled, and UnCover, which was no longer executing our agreement in good faith, was a ripe target.

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**I CALLED AN OLD COLLEGE** buddy from New Jersey, David Brooks. “Dave,” I said in one breath, “I want to test-market something. I need you to front for a mail campaign in which a dozen well-known authors and authors’ estates are asked if they’re interested in participating in a class-action copyright suit. You’ll sign the letters and they’ll get pre-printed postcards for return to your home address and I don’t think there’s a problem with any of this though I suppose there’s a small chance it could land you in jail.”

Dave, bless his heart, took about half a second to reply, “Make sure you have stamps on all the envelopes and postcards and show me where to sign.”

The mailing got a good response. Well, Camille Paglia’s assistant did scrawl on her postcard that we should stick our solicitations where the sun don’t shine. Another respondent, the literary executor for the late Nobel Prize-winning poet Joseph Brodsky, left a string of messages on Dave’s answering machine pleading for more details. I coolly instructed Dave that we weren’t animal-rights activists – guinea pigs didn’t get return calls.

Discreetly, I shopped the UnCover case to my contacts in the Bay Area legal community. No one was biting. One friendly lawyer said to me: “The case is worthy. But after the defendants’ law firm is finished denuding the Amazonian forest and conducting on-the-job training for \$100,000 first-year associates, is it a good business proposition?”

Thanks to Terry Francke of the California First Amendment Coalition in Sacramento, I got lucky. On Terry’s referral I was called by a sole practitioner, Dan Reidy, who had an office near San Francisco’s South Park. Dan represented clients in the restaurant, broadcasting, and music industries, and he was eager for a bust-out copyright case. He was uniquely clear on the concept, picking my brain with interest and reciprocating the education.

Knowing he couldn’t finance such an expensive case himself, Dan arranged meetings with John Shuff, the managing partner of the San Francisco office of the Minneapolis-based Robins, Kaplan, Miller & Ciresi. Dan had been working on some matters with Robins, Kaplan through one of its associates, A.J. De Bartolomeo, who had been a classmate of Dan’s at the University of San Francisco Law School. Robins, Kaplan’s extensive class- and mass-action experience included cases involving the disastrous chemical plant fire in Bhopal, India, and the defective Dalkon Shield intrauterine device, and most famously, litigation against the tobacco industry on behalf of the state of Minnesota and Blue Cross, for which the firm pocketed fees of more than half a billion dollars.

Robins, Kaplan offered me a consultant agreement and I resigned from the writers union. I quickly hooked up the attorneys with five plaintiffs who were being infringed by UnCover: Joan Ryan, *San Francisco Chronicle* columnist and book author (based on an article she’d written years earlier for *Women’s Sports and Fitness* magazine); Arlie Russell Hochschild, University of California sociologist (based on an excerpt of her book *The Time Bind*, which had run in *The Nation*); Jim Tunney, former National Football League referee (based on an excerpt of his book *Impartial Judgment*, which had run in *Referee* magazine); and Lyn Hejinian and Ron Silliman (poets and two of the co-authors of a book, *Leningrad*, which was excerpted in *Socialist Review*).

On October 22, 1997, Dan Reidy and I wedged into my ’86 Toyota Tercel for a drive to the Philip Burton Federal Building in San Francisco, where Dan filed the first papers for *Ryan v. CARL*.

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**A LAY EXPERT FACES A** couple of fundamental laws of human physics when he works with attorneys armed to translate his information and knowledge into results. I call the first law the Duck Dodgers Dilemma – named for the Warner Brothers animated short, *Duck Dodgers in the 24-1/2 Century*. In that Chuck Jones classic, Daffy Duck’s assistant, Porky Pig, is the first to recognize the easiest path to Planet X – you just follow Planets A, B, C et al. until you get to X. “Why, that’s the stupidest idea I ever heard!” Daffy splutters before a light bulb goes off in his head and he regurgitates the exact same solution – all the while, of course, claiming personal credit for it. “How do I think of these things?” Daffy muses imperiously. Porky replies, “I-I-I-I-I don’t know, boss.”

And so it is in the hierarchy of a legal team, where all good ideas are equal but some are more equal than others. I lived and breathed digital text piracy and formulated the theories and investigative practices for combating it in painstaking memos and hands-on demonstrations. Most of my time as a consultant was spent restating what for me were commonplaces. The unfocused Esquires sensed that I was onto something but didn’t quite get it and, moreover, preferred to cover their lack of comprehension in mystification and power-tripping. At a typical strategy meeting, lead counsel John Shuff would snap at me whenever I tried to contribute anything more substantial than someone’s phone number. While the group sat around reviewing how UnCover didn’t have a leg to stand on and why, Shuff noodled on a notepad. A short while later he interrupted us to display his graphic illustrating Section 201(c)’s unbundling of the divisible secondary rights to contributions to collective works. Eureka!

At \$50 an hour such nonsense beat listening to writers union conventions prattle on about uniting the workers of the world behind resistance to kill-fee clauses. Though no intellectual, and for my taste an overly baroque strategist, Shuff was a superb trial lawyer. His indispensable role (aside from signing off on my bills) was to parachute in for court hearings at which he distilled the plaintiffs’ best arguments and calibrated his debating temperament to the style of the judge, who in our case was Reagan appointee Fern M. Smith.

Judge Smith started every hearing with off-the-cuff observations from her painfully cursory first reading of the briefs. Having a Republican judge wasn’t in and of itself terrible – after all, we were talking about intellectual *property* rights – but for some reason this one didn’t like our case. In the courtroom one saw hints of undue deference to the defendants’ lead counsel, Michael Traynor of Cooley Godward, the son of a late California Supreme Court justice. She granted summary judgment for us on the key issue, interpretation of the relevant section of the Copyright Act, but reading the opinion you could just see her holding her nose. At different times the judge blew off our preliminary injunction and temporary restraining order motions, in which we proved, first, that the plaintiffs’ articles were still available for delivery by UnCover despite having been putatively “blocked” and, second, that UnCover routinely stored every article it ever delivered on a master disk despite explicit representations to the contrary.



“Where’s the harm?” Her Honor kept asking, as if this was about her personal assessment of how to balance the “equities,” when the law clearly stated that a finding of infringement drove a presumption of “irreparable harm,” the threshold for injunctive relief. Later, when the defendants got the Ninth Circuit Court of Appeals to hear an appeal of the summary judgment ruling, Judge Smith seemed all too eager to grant a stay of the proceedings pending the appeal.

But John Shuff plugged away, slowly accumulating credibility. His finest hour was the hearing on our motion for class certification in November 1998. Class cert, of course, was the critical element distinguishing *Ryan v. CARL* from *Tasini v. Times*.

Judge Smith opened things up with characteristic evenhandedness. “I am concerned about the fact that this lawsuit was basically by a man who is not an injured party, but who, in fact, is using this as a vehicle to make a name for himself as a litigation consultant,” she said.

Had I been standing at the bar rather than sitting in the gallery, I might have taken a lunge at the old girl. But when it was his turn, Shuff calmly strode to the lectern and said he would endeavor “to dig out of the hole that I find myself in.” And in a brilliant presentation that could be a clinic at any law school in the land, he did just that, walking the judge through the intricacies of Section 23 of the Federal Rules of Civil Procedure, which sets the standards for class cert. “I think you’ll find that they fit like a glove here,” he concluded. The case, John added, was not about me, whom he generously described as “an authors’ rights advocate for his entire adult life.” I’d had nothing to do “with designing, testing, constructing, or profiting from the [defendants’] scheme of copyright infringement. It’s akin to the soda machine in the lunchroom. You put in your coins and out comes an illegal copy.”

The 1998 holiday season was long and cold. But in January 1999 an order came down from Judge Smith: class certification! Victory was at hand, though not without numerous further twists, mostly because of CARL and UnCover’s checkered corporate history and the difficulty of pinning down the right insurance carrier to take the hit.

Late in 1997, shortly after the filing of our suit, Knight Ridder, the newspaper chain, had sold Knight Ridder Information, CARL/UnCover’s parent, to a British company, M.A.I.D., which renamed the combined new entity the Dialog Corporation. Dialog wanted to unload CARL/UnCover but potential liabilities from our litigation made that difficult, and early in 1999 Dialog effectively gave up, dumping CARL/UnCover back on founder Ward Shaw of Denver for a pittance – \$2.25 million, including a measly million in cash. (Barely three years earlier Knight Ridder had bought the companies from Shaw, Lenzini, and the other original partners for a combined \$14 million.) In turn, Shaw last year separately sold CARL (to the Library Corporation) and UnCover (to another British company called ingenta).

By then a settlement had been reached in our case, virtually on the eve of oral arguments before the Ninth Circuit on the defendants’ appeal of Judge Smith’s summary judgment order. The breakthrough came when Reidy pressed Knight Ridder, which had owned UnCover from 1995 to

1997 – most of the statutory period covered by the alleged copyright infringements – to agree to pick up \$6.5 million of the \$7.25 million settlement tab. UnCover, seemingly, was worth more dead than alive.

In the meantime our case was overshadowed by a stunning new development in the National Writers Union-backed *Tasini v. Times*. A few weeks before I left the union in '97, a judge in New York, Sonia Sotomayor, had ruled in favor of the publishers – apparently confirming the low view I held of the plaintiffs' shoddy record in that case and of the mismatch in the two sides' legal talent. In October 1999, however, the Second Circuit Court of Appeals reversed Sotomayor and found for the writers – vindicating the vision of Jonathan Tasini and the hard work of his David-vs.-Goliath legal team.

Taken together, our class certification success and the sweepingly positive copyright law precedent in *Tasini* created a dream scenario. If Shuff and Reidy could persuade the Robins, Kaplan home office to reinvest the anticipated recovery from *Ryan v. CARL*, then they stood in the best possible position to pounce on a second action I had long been proposing against another target with even deeper pockets.

By the same token, if Shuff and Reidy didn't pounce, then some other vulture from the class-action aviary surely would.

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**WHICH LED TO A MORE** pragmatic problem than the Duck Dodgers Dilemma – what I call the Curly Corollary. Remember the Three Stooges episode in which the boys, in a tough spot, reenact Three Musketeers solidarity? “One for all,” Moe trumpets, thrusting his hand forward for a team grip. “All for one,” Larry seconds. “And every man for himself,” Curly adds with impish prescience.

Shocking to report, but there was a fault line running between the plaintiffs' lawyers and their beloved consultant/mascot – guaranteed money. All along I understood and accepted that the ethical rules prevented a layman from having an equity interest in a case. (Why, that would be ambulance chasing!) As the first case showed every sign of working out the way it had been drawn up on the chalkboard, all I expected was the security of a new contract, along with a modest raise reflecting that I was no longer an entry-level consultant. Alternatively, I wanted a straightforward concession by Shuff and Reidy that they weren't interested in pursuing a second case, freeing me to look elsewhere. Instead, when my contract expired in September 1998, I was allowed to twist in the wind from month to month. Robins, Kaplan was a big enough organization that my invoices could fly in under the radar for a while. But when discussion of a new contract continued to drag even after the class cert victory, I had a legitimate concern that someone else would beat us to the punch and profit from a new multimillion-dollar field that I'd been just a little bit instrumental in creating and sustaining. The road to plaintiffs still ran through me, and people who know how to package class-action suits don't grow on trees.

Openly exasperated by my insistence on negotiations, Dan Reidy tried several tacks with me. The first was to assert that almost everything rattling between my ears constituted privileged and confidential attorney work product yadda yadda yadda. After a point even he seemed to realize that this flunked the defecate-or-get-off-the-potty test.

Another angle by Dan during all this wheel-spinning was to suggest that I would be best served by shutting up and keeping my lips in close proximity to John Shuff's buttocks. As convincingly as a snake oil salesman, Dan hinted that there might be a bonus for me at the conclusion of the case. He never got around to explaining how this squared with one of his other pet themes, that he'd personally be lucky to clear a nickel on UnCover. I'd endured too many raw deals as a writer to fall for the old Hollywood percentage-of-the-net gimmick. And, anyway, wasn't the whole point of our arrangement supposed to be that I was compensated non-contingently and that the lawyers, and only the lawyers, took the risks and collected the big bucks?

For his last gambit, Dan turned to career counseling. He said I was playing this whole thing wrong. "You want to be getting yourself into position to become a consultant who can command \$200 an hour advising publishers on how to avoid infringement exposure," he said. Given my personality, background, and history as a union official, this prospect was approximately as likely as the election of Benjamin Netanyahu as the next mayor of Berkeley.

Shuff, for his part, was concentrating on preserving his own future at Robins, Kaplan, Miller & Ciresi, which early in 1999 closed its San Francisco office. With all the hundreds of millions from the tobacco case, you might think the firm could afford to maintain a presence in what at the time was the country's hottest market – but then you wouldn't know a lot about the poisoning effect of big money. Instead of expanding, the firm's partners were retiring, downsizing, and bickering over how to divide the tobacco pie (or, in the case of the lead counsel in the tobacco case, Michael Ciresi, running unsuccessfully for the Senate in Minnesota). Shuff himself would retire shortly after the UnCover settlement.

Two years earlier my cute copyright cases had been too small for the powers-that-be to waste energy stopping Shuff from pursuing them. Now, with the tobacco fees flowing and the attendant dysfunction, the cases looked too chintzy to bother backing at all.

Still, control of a prospective bonanza is everything, so when I let it be known that I was talking with other firms, Shuff agreed to meet with me. He called the expiration of my contract six months earlier an "oversight" and sent me a letter affirming that our agreement had rolled over for another year on the same terms and inviting me to alert him in the fall so the oversight wouldn't be repeated. This bought another six months for all of us to maneuver with our now-splintering agendas. With the UnCover settlement basically stalled through all of 1999, Reidy, in between doing heavy elbow work on the violin about how the case was destroying him financially, bought a truck and a house in Mill Valley and moved his office to Sausalito. (The plaintiffs' attorneys would eventually share fees totaling \$2.9 million.) I spent most of July with my family in Paris and, thanks to the magic of e-mail, no one was the wiser.

In September my contract expired again. This time Shuff didn't even make the effort to return my calls; through Reidy, he simply conveyed the message that I should be counting my blessings. What made the dynamic odd was that Dan himself seemed to be finding a second wind for launching a new action, especially after the October appeals court reversal in *Tasini* injected fresh urgency into the equation. But with each unfulfilled vow to get our team reassembled and moving forward, Dan came off as more and more shrill, blustery, and unreliable. In December I saw him in Sausalito. Dan made a big show out of circling the date in his calendar on which he intended to file the second complaint, and of calling a Robins, Kaplan associate on speakerphone in my presence to prod him to turn around the draft of the complaint. In addition, Dan authorized me to start contacting plaintiffs for the next suit, which I thought was a step in the use of my services that was not to be taken lightly. And, indeed, after I promptly got a couple of more plaintiffs into the picture, this latest drop-dead date for the second action came and went.

Now I felt my credibility with writer-friends was on the line. I commenced billing Robins, Kaplan at closer to the weekly maximum than the minimum under the terms of my expired contract. Shuff retaliated by, for the first time, knocking a few hundred dollars off one of my invoices before forwarding it to Minneapolis. Things were getting ugly.

Since late summer a prominent San Francisco litigator, Spencer Hosie, had been expressing interest in taking over and confidence that Robins, Kaplan could be persuaded to bow out gracefully. Spencer advised me to ask Reidy to meet with him whenever Dan decided he'd had it with Shuff. Early in 2000 Dan negotiated a co-counsel agreement with Hosie Frost Large & McArthur.

Dan later had second thoughts and either reneged on his deal with Spencer or backed out of it in a timely fashion, depending on whose version you choose to believe. What mattered to me was that in late February Dan had told me to come to terms myself with Hosie Frost for the second case and to so inform John. I did. John had been invited to speak at a March conference at his alma mater, the University of Akron Law School; at his request I ghosted his speech and also continued to advise Shuff-Reidy on cost-effective ways to publicize notice of the UnCover settlement by using the web and soliciting the cooperation of authors' organizations. (The lawyers would cherry-pick some of my suggestions before paying Arthur Andersen, the huge accounting firm, more than \$500,000 to set up a fancy website and administer class notice – tasks I would gladly have handled far more skillfully at a fraction of the price. For more on this aspect of the story, click <http://arthurandersen.pdf>.)

In late March, Dan, who had refused to let me sit in on any of his meetings with the Hosie Frost people, unilaterally decided to ditch them. The UnCover settlement was finally on paper, which gave him and Shuff something substantial enough to persuade the Robins, Kaplan board to approve the next case. Dan and John cobbled together a new team including another Bay Area-based Robins, Kaplan partner, who was about to go on maternity leave, and the

San Francisco office of McCutchen, Doyle, Brown & Enersen. In full snake-oil mode, Dan left a series of voice and e-mail messages inviting me to come home – with, of course, no guarantees for me and no plan for making amends with Hosie Frost, which was already paying me. The phrase “a day late and a dollar short” comes to mind.

I checked with Hosie Frost to see what they wanted me to do. They said screw Reidy. I won’t pretend I disagreed. And I knew just what to do.

I called Joan Ryan and Arlie Hochschild, name plaintiffs in the first case who were eligible to serve the same role in the second one, and explained that I was no longer under contract to Robins, Kaplan. I suggested that my friends might want to stand clear of this particular micturating contest. Within a matter of days I also found Hosie Frost three new plaintiffs: New York-based bestselling author Gerald Posner and California freelancers Michael Castleman and Jay Feldman.

A Robins, Kaplan partner sent me a letter, with garbled facts and shaky literacy, accusing me of violating my expired “consultanting” agreement and demanding that I cure the breach or face legal action. This bit of saber-rattling was disavowed by Shuff when he returned from an Italian vacation.

Reidy fired a final e-mail salvo, calling me a double-crosser with bad “kharma.”

\* \* \*

**AFTER ALL THIS ADRENALINE IT** would be nice to be able to say that the second action chugged inexorably toward a nine-figure recovery that funded a multimedia licensing system operated by an industry-wide consortium of content providers and creator and library groups. Oh, and did I forget to mention the \$2 million bonus check payable to yours truly?

Alas, life isn’t as tidy as *Erin Brockovich*. Spencer Hosie has a reputation for being a first-rate plaintiffs’ lawyer – smart, aggressive, thorough. He made his name representing the governor of Alaska in a price-fixing case against oil companies, and he’s in the middle of handling a similar case, to the tune of several billion dollars, on behalf of the governor of Hawaii. But after Shuff and Reidy were history, it turned out that Spencer really didn’t have the time or resources to do my case. So he had his partner George Frost take the elevator up three floors in their building, the Spear Street Tower, and bring in another co-counsel, Brobeck, Phleger & Harrison. Brobeck had always specialized in corporate defense, but a group there, headed by Gary Fergus, was looking to take on innovative plaintiff work.

Brobeck spent months reinventing the wheel. I was rarely asked for advice, and they took their sweet time answering my questions. In July it was determined that we needed another plaintiff to cover the infringements of one of the defendants, so I immediately lined up Bob Treuhaft of Oakland, on behalf of the estate of his late wife, Jessica Mitford. (Mr. Treuhaft, a wonderful gentleman, himself recently died at age 89.)

“My” second case, *Posner et al. v. Gale Group et al.*, was filed in San Francisco on August 14, 2000. You could read all about it the next day in the *Wall Street Journal*. Gale Group, formerly known as Information Access Company, was the original target of my Operation Magazine Index campaign at the writers union in 1994.

The next day a nearly identical class-action suit was filed in New York by a group of plaintiffs including the Authors Guild.

The next week yet another “me too” suit was filed in Delaware. The plaintiffs’ co-counsel was Girard & Green, a San Francisco class-action factory. One of Girard’s attorneys was A.J. De Bartolomeo, a former Robins, Kaplan associate and Dan Reidy’s old law school friend.

Needing to position themselves as lead counsel in complicated multidistrict litigation consolidation, our lawyers amended our complaint, refiled it in New York, and added the National Writers Union as a plaintiff and the general counsel of the union’s parent United Auto Workers as a co-counsel.

So let’s go over this one more time. In ’97 I’d become a consultant because I was tired of working for the union and because the litigation I had in mind was ahead of the curve. Three years later the union was calling the shots in my second case in association with a corporate defense firm. Folks, this wasn’t strange bedfellows. This was Armistead Maupin on steroids.

Then, on November 6, the U.S. Supreme Court delivered what might have been a crushing blow to the authors’ rights juggernaut by agreeing to hear an appeal from the publishers in *Tasini v. Times*. This new class-action industry ground to a halt. But as we saw confirmed seven months later, the granting of certiorari doesn’t determine the merits. The justices merely sought to put their imprimatur on an important and novel issue, and when they examined the plain language of the statute, the legislative history, and the policy arguments, they agreed with the Second Circuit and the authors by a 7-to-2 vote. When you have Ruth Bader Ginsburg and Antonin Scalia both on your side, you must be living right. Jonathan Tasini won his case across the board. The lawyers didn’t need my great facts any more. And their road to plaintiffs no longer ran through me.

Without a whimper and to their credit, Hosie Frost Large & McArthur paid off my consulting fees through February 2001 even before the good news from the Supremes. For the record, that agreement guaranteed me 20 hours a week of billings at \$75 per hour. Across 52 weeks this amounted to about one percent of the recovery in my first case and an even tinier fraction of the probable recovery in the next one. Or to put it another way, my fees equaled the cost of a couple of paralegals standing around staring at boxes of documents.

What was a transforming professional experience for me was nothing more than a drop in the bucket of shark-infested waters.