

Flash of Genius: Perspectives from Patent Prosecution and Litigation Attorneys

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The following is not a movie review in the traditional sense. The biopic-movie *Flash of Genius* (the phrase is taken from *Cuno Engineering, v. Automatic Devices*, 314 U.S. 84 (1941) came out in the fall, and was gone from theaters within a few weeks. Judging from the box office receipts (\$4,442,377), you probably did not see it. Are there lessons to be learned from the life and legal wrangling of Professor Robert Kearns? A patent prosecutor **Jeff Kuester**, a partner at *Thomas | Kayden*, and **Scott Creasman**, an IP litigator at *Taylor English* provide two perspectives.

The Patent Prosecutor's Perspective:

The line between justice and obsession is often blurry. Obsession is defined as "an unreasonable, compulsive preoccupation." *Flash of Genius*, starring Greg Kinnear and Lauren Graham, could easily have been titled *That's My Idea: Obsession for Justice*. The movie is based on the true life story of Bob Kearns, inventor of the intermittent windshield wiper, and his battle against Ford Motor Company for stealing his idea. While the movie ends somewhat happily, the true story is more tragedy than triumph.

Flash of Genius was advertised as a "feel good" David & Goliath story, but it also provides a glimpse into an all too common destructive obsession. Fans of the *American Idol* television show may also remember the short-lived reality television show, *American Inventor*. While most contestants told true stories of spending amazing sums of money on zany product ideas, the lottery-ticket mentality driving their "idea obsessions" is nothing new to most patent attorneys. Unfortunately, patent attorneys are often fighting uphill battles against friends and neighbors, and referring attorneys, who unintentionally enable their destructive obsessions. And like the television show,

the human results are often very tragic.

When does "David v. Goliath" become "Captain Ahab v. Moby Dick"? Kinnear's character ignored many warning signs, including losing his job, losing his wife, and even losing his sanity. While the acting was realistic and genuine, it is that realism that makes watching the movie difficult.

So, what can we do to ensure that people are not getting trapped by their idea obsessions, risking the loss of money and relationships? First, we should recognize that idea obsessions are similar to other addictions and will not die easily, so we should not fear criticizing the ideas. If an idea for a new product is not likely to make it on the market for any reason, such as high production costs or the existence of acceptable available substitutes, we should say so, and in no uncertain terms. Second, we should encourage people to set realistic budgets and logical milestones that must be reached to avoid "heat of the moment" decision making. Finally, we should advise people to carefully monitor the continuing reactions of their friends and family members as good indications of whether they are becoming obsessed. The line between "David" and "Ahab" rarely appears in the mirror, but good friends and advisors can often see it quite clearly.

The Litigator's Perspective:

A political science professor of mine described the American system as Roman, not Greek. The point was the "order" of the Roman Empire, as opposed to Greek/Athenian goal of "truth." It seems to aptly describe at least the civil side of the U.S. legal system. Is the ultimate goal an orderly handling of disputes? There is certainly truth seeking but the law is simply too blunt an instrument to provide for "pure" justice. Turning to the movie, I enjoyed the acting and the look and feel is right; the 1960's American engineers wore short sleeve white shirts and tie clips.

Alan Alda drops into the film as distinguished trial lawyer Greg Lawson, with dapper suits and an eye towards "solving" Professor Kearns' problems. Lawson negotiates a large cash settlement from Ford. In a pivotal dinner scene, Lawson

and Kearns discuss the settlement. Lawson knows Kearns is too much of a true believer to take the money and run. He is confronted by the clearly wronged inventor who refuses to budge until Ford admits they stole Kearns' invention, something Ford is unwilling to do. Lawson explains the reality of litigation; Ford will bury you in irrelevant documents and your hair will turn gray. Kearns tells Lawson that it is about more than the money. Lawson asks rhetorically whether Kearns thought that "God put you here to sue the Ford Motor Company."

Kearns refuses to budge. Believing that he is standing up for himself and independent inventors everywhere, and in part advised by his elementary school-aged daughter, he turns down the Ford settlement. Eventually Kearns gets judgments against Ford and a settlement from Chrysler, cumulatively around \$30,000,000, but at what cost? His hair does go gray. His marriage disintegrates because his wife could not handle being married to a lawsuit. Kearns' children join the family business, not making intermittent wiper assemblies, but patent litigation. There was a brief period of hospitalization, and Ford did bury him in paper.

Back to the Greeks and Romans; was it just a Pyrrhic victory? Was the blunt edge of our "Roman" system too focused on "order" to validate Bob Kearns' truth? Maybe lawyers cannot answer these questions, but there are lessons. We have to be candid about the costs of litigation, not just dollars, but in the human costs (e.g. engineers spend time in depositions rather than working on new inventions). Bob Kearns spent years with his kids drafting discovery motions, not watching them on ball fields and in school plays.

I often tell clients at the start of a case that no matter how well the case goes, even if the judge and jury give us everything we want, the opponent does not get tied to a post in the town square where we throw rotten fruit at him. Bob Kearns might be the guy who simply had to "have his day in court," but remember the cost and counsel your clients wisely as to their "true" objectives in litigation. ■