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## Fake Fartman Found Failing

by [Michael Young](#)

From the [IPADR](#) blog of Victoria Pynchon, Les J. Weinstein, Eric Van Ginkel, Michael D. Young and John L. Wagner

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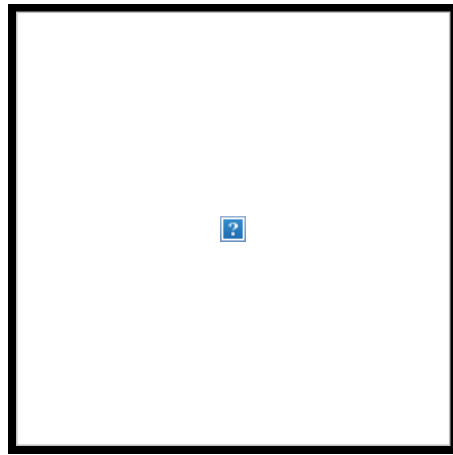
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Sometimes you've got to wonder whether anyone really cares about intellectual property at all. Or class and culture for that matter.



Take the case of the [Pull-My-Finger Fred](#) doll versus Fartman, the epic battle of the farting plush dolls. Now I'm not that far removed from teaching my boys about the incredible magical powers of the pulled finger not to understand how a Pull-My-Finger Fred doll could enjoy a certain amount of commercial success. (In fact I have a brother who probably rushed out to buy the first one.)

But is a "white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants" who farts "when one squeezes [his] extended finger on his right hand," and "makes somewhat crude, somewhat funny statements about the bodily noises he emits, such as 'Did somebody step on a duck?' or 'Silent but deadly'" really worthy of emulation?

Our thanks for this bit of IP whimsy to Judge Diane P. Wood of the Seventh Circuit Court of Appeals for the fine description in her [March 2007 opinion](#).)

Apparently Novelty Inc. thought so. It created Fartman, described by the Court as (and this may sound familiar to you):

*a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fartman (as his name suggests) also farts when one squeezes his extended finger; he too cracks jokes about the bodily function. Two of Fartman's seven jokes are the same as two of the 10 spoken by Fred.*

Does the world really need two white, middle-aged, overweight, balding, flatulating, wise-cracking male plush dolls? But that's not the point.

The point is, what was Novelty Inc. thinking? Why blatantly infringe on someone else's copyright? If you really must have a gas passing plush doll to fill out your product line, why not create one with a full head of blond hair, or standing with a green shirt, or ... a woman! (You women know you do it. Don't deny it. I think Judge Diane Wood might have been feigning innocence when she wrote:

*Somewhat to our surprise, it turns out that there is a niche market for farting*

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dolls, and it is quite lucrative.

O.k., that's not the point either. Nor is it to critique the legal issues raised by this case, including the ever fascinating and difficult idea/expression distinction. That has been done admirably and more timely by others, including [William Patry in his post Fartman Appeal Fizzles](#).

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Rather, my point is this:

### Dispute resolution in the IP field comes in all shapes and sizes.

One of the best means of dispute resolution is to avoid the dispute in the first place.

Call it pre-dispute resolution.

In this case, [Novelty Inc.](#), is now liable for nearly a million dollars in infringement damages, more than half of which were the plaintiff's attorneys fees. Clearly, Novelty could have used a little pre-dispute IP counseling. With professional guidance, it could have avoided a case that stunk from the start. (Come on, you knew it was coming eventually.)



## Biography

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**Michael D. Young** is a mediator with Judicate West in Southern California, focusing on the resolution of intellectual property, employment, and other complex business and commercial disputes. He is also an intellectual property and employment litigator with the national law firm of Alston & Bird, a Distinguished Fellow with the International Academy of Mediators, and has been an adjunct professor of negotiation and mediation at the University of Southern California Law School. Mr. Young has co-authored a blog on intellectual property ADR issues at [www.ipadrblog.com](http://www.ipadrblog.com), and employment issues at <http://www.alston.com/laborandemploymentblog/>.

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