Chapter 6

Applying Facts in Arguments

This chapter focuses on the most important technique for proving that a rule applies or should apply (or that it doesn't apply): using facts. You will weaken your clients' prospects if you simply pile legal authorities on judges and then assume that they will figure out why those authorities are applicable. Instead, draw on facts to compel a court to invoke (or reject) a particular line of cases.

Some of the major ways of achieving this goal appear below.

CHAPTER OVERVIEW

1. Remind readers of the applicable legal rule, so that they remember what your client needs to prove to clear the relevant legal hurdle; this reminder is especially important when the legal rule is complicated.
2. Remind readers of the pertinent details from your client's dispute — the background facts (with citations to the record) — to show that your case resembles in meaningful ways the favorable cases that govern the court's decision (or to show that the cases are distinguishable). Do not assume that judges will recall every fact that they read earlier in the brief. By page 40, few judges will recall a detail that appeared on page 3. Try, however, to avoid being repetitive; this chapter offers some tips on how to revisit the same facts without repeating them.
3. Use procedural details to advance your argument. Top lawyers are astoundingly creative at using record materials to show that an adversary failed to plead adequate facts to state a claim, contradicted itself, waived an argument, failed to record an objection to an evidentiary ruling, or stipulated a fact. All sorts of strategic advantages await the party that has a superior command of the case's procedural history.
4. Look for opportunities to point out that the other side has failed to present evidence; the absence of facts can be extremely persuasive.
5. Search for extrinsic facts to support your position, such as government reports, articles, surveys, industry manuals, an adversary's public statements or filings, and so on. Just be sure that you either get those materials into the case's record or that your judge can take judicial notice of them.
6. Don't be afraid to use multimedia tools — photographs, charts and graphs, videos, and the like — to establish or clarify a critical point.

Example 6.1

Takeaway point 6.1: To prevail on a critical legal issue, provide a detailed fact-based explanation of why your client satisfies the applicable legal standard.

You must prove that your client satisfies the relevant legal rule. That proof requires you to restate the legal standard and to show that the facts meet that standard.

To observe this technique, we return to the judge in West Virginia who refused to recuse himself even though the chairman of one of the litigants spent $3 million on the judge's campaign. The excerpted passage presents facts designed to meet the applicable rule, which requires recusal if "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Source: Brief arguing that Justice Benjamin was required to recuse himself, from *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (some citations omitted).

For at least five reasons, any reasonable observer would conclude that Mr. Blankenship's support for Justice Benjamin's campaign generated a constitutionally unacceptable probability that Justice Benjamin was biased in favor of Massey in this case.

First, the sheer volume of Mr. Blankenship's financial support for Justice Benjamin's campaign is truly staggering. West Virginia law imposes a $1,000 limit on contributions to judicial campaigns. W. Va. Code § 3-8-12(f). Through his donations to And For The Sake Of The Kids and direct expenditures on campaign advertising, Mr. Blankenship spent *3,000 times* that amount supporting Justice Benjamin. The $3 million that Mr. Blankenship spent is three times the amount spent by Justice Benjamin's own campaign committee (J.A. 288a) and $1 million more than the *total* amount spent by Justice Benjamin's committee and the committee of his opponent, Justice Warren McGraw. *See* Goldberg, *supra*, at 16. Indeed, the $2.5 million that Mr. Blankenship spent to fund And For The Sake Of The Kids' campaign to elect Justice Benjamin is more than any other individual or group contributed to a 527 organization involved in *any* 2004 judicial election campaign. The next largest donor gave $600,000 less than Mr. Blankenship. *Id.*

Second, the appearance of bias generated by the size of Mr. Blankenship's campaign expenditures is reinforced by the fact that his expenditures represent 60% of the *total* amount spent to support Justice Benjamin's campaign.[4] Thus, this is not a case where the expenditures in question — even though large in absolute terms — were matched by equally large donations from other parties that could conceivably have diminished the probability of judicial bias in favor of one specific donor.

Third, Mr. Blankenship did more than spend vast sums of money to support Justice Benjamin's campaign. He also actively campaigned for Justice Benjamin and solicited donations on his behalf. Most notably, he distributed letters urging doctors to "send $1,000 to Brent Benjamin" because "[i]f Warren McGraw gets re-elected to the West Virginia Supreme Court your insurance rates will almost certainly be higher for the next twelve years than they will be if Brent Benjamin gets elected." J.A. 181a. Mr. Blankenship's letters are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee.

4. A total of $4,986,711 was spent supporting Justice Benjamin's 2004 campaign: $3,623,500 by And For The Sake Of The Kids (Disqual. Mtn. Ex. 17), $845,504 by the Benjamin for Supreme Court Committee (J.A. 288a), and $517,707 by Mr. Blankenship through direct expenditures (*id.* at 186a, 200a).

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Fourth, the timing of Mr. Blankenship's campaign support strongly suggests that it was intended to influence the outcome of this $50 million appeal. Mr. Blankenship's campaign expenditures and fundraising efforts were made between August 2004 and November 2004 (J.A. 119a, 199a), when Mr. Blankenship was preparing to appeal this personally and professionally significant case to the court on which Justice Benjamin was seeking a seat. Indeed, after the jury returned its verdict against Massey in August 2002, Mr. Blankenship immediately made a public vow to appeal the verdict to that court. *Id*. at 115a. Although the appeal was delayed by Massey's post-trial motions, there was no doubt during the 2004 campaign that the case would ultimately be decided by the state supreme court and that, if elected, Justice Benjamin would have the opportunity to cast a vote in that appeal. E

Fifth, Justice Benjamin's decision to participate in Massey's appeal was not subject to review by the other members of his court. Where a judge's decision not to recuse himself is endorsed by the court's other members, the likelihood of judicial bias may be diminished because the allegations of bias have been examined — and rejected — by the judge's colleagues. In this case, not only were the other justices of the West Virginia Supreme Court of Appeals precluded by state law from considering petitioners' recusal motions, but three members of the court (two justices and a circuit judge appointed to replace one of the recused justices) expressed strong concerns about Justice Benjamin's participation in the case. *See* J.A. 633a n.16 (Albright, J., joined by Cookman, J., dissenting); *id*. at 462a (Starcher, J., recusing). His colleagues' discomfort with Justice Benjamin's refusal to recuse himself underscores the strong probability of bias generated by Mr. Blankenship's support for Justice Benjamin's campaign. F

A The topic sentence concisely restates the Rule and tells readers what will follow, namely, the evidence in the record that supports the relevant legal standard. Then it delivers on that promise. Mimic this approach.

B The term "3,000 times" sounds even more egregious than "$3 million." Relative numbers are often clearer and punchier than absolute numbers.

C To avoid repeating your Statement of Facts in your Argument, save a juicy quote for the Argument, as the lawyers do here. The Statement provided a more general description of Blankenship's letter: "[Blankenship] widely distributed letters exhorting doctors to donate to the campaign because electing Justice Benjamin would purportedly help to lower their malpractice premiums." The trick: even if you reiterate facts, rephrase or reframe them so that they don't *seem* repetitive.

D One sensible use for footnotes is to show your calculations: the text stays uncluttered, but readers can probe the footnotes to see how you reached your mathematical conclusions. Omitting this data could make readers doubt that the calculations are accurate.

E Lawyers need to exercise judgment about when to make obvious points, and this brief makes the right call: readers might intuit that Blankenship's huge contribution was intended to influence the $50 million appeal. But the brief makes this critical point explicitly lest readers miss it, and the phrase "strongly suggests" avoids overreaching..

F Example 1.3 showed how to repeat a strong point to emphasize it; here, the same brief expertly fuses two mediocre points to hide each one's frailty. Judges rarely review their colleagues' recusal decisions. Thus, it's no surprise that Justice Benjamin's colleagues were unable to force him to recuse himself and it's *legally* insignificant that his own colleagues thought he was biased. The points work better together than they would if made separately.

Example 6.2

Takeaway point 6.2: Master the record so that you can use facts and procedural details to advance a client's arguments.

Lawyers use a variety of record facts and procedural facts to explain why their clients should win. To illustrate how lawyers pluck evidence from public reports, trial transcripts, the other side's filings, and expert reports, we look at a case in which a private citizen wanted crime scene photographs of a White House lawyer (Vincent Foster) who had committed suicide. The brief had just discussed a case (*Ray*) which observed that "unsubstantiated allegations of governmental misconduct" should not enable citizens to acquire sensitive government records.

Source: U.S. government's brief in *Office of Independent Counsel v. Favish*, 541 U.S. 157 (2004).

This case is precisely what *Ray* warned against. Respondent wants the photographs of Foster at the scene of his death to satisfy himself that Foster was not murdered or to prove that he was. But six pathologists and numerous forensic scientists, law enforcement investigators (not only from the Park Police and the FBI, but also those retained by the Office of Independent Counsel), a committee of the United States Senate, Members of the House of Representatives, and two Independent Counsels already have studied the matter at length and have *unanimously* concluded that Foster committed suicide. And detailed reports of those investigations, explaining their conclusions, already have been released to the public. A

Respondent's personal interest in the "blowback" and "backspatter" of blood and other morbid matters (*see, e.g.*, Br. in Opp. 7-15) are all fully and comprehensively addressed in those prior investigations by persons who (unlike respondent) are trained experts in pathology and the forensics of murder and suicide. *See, e.g.*, J.A. 111 (retention of expert in bloodspatter). As the district court noted, moreover, each subsequent investigation was undertaken for the express purpose of addressing and resolving doubts that had been posited both about Foster's death and the predecessor inquiries. 3/9/98 Tr. 10 ("[T]here were just literally scores of people out there trying to prove your points; namely, something was amiss here, something was rotten, and none of them did."); *id.* at 6-7 ("[A]ll [the different investigators] were driven to find a negative aspect of things, not just Mr. Foster dispatching himself. And despite their demonstrated inclination, they didn't come up with anything."). The pictures that respondent wants to see to confirm or dispel his own doubts were fully examined by numerous investigators, without a single individual determining that they evidenced a murder. . . . And all of those investigations came *unequivocally* to the same conclusion: Vincent Foster committed suicide. B C

A Here, the brief uses a common technique — intentionally lengthening a sentence that lists evidence — so that the evidence seems overwhelming.

B The lawyers *try* to disgust readers here. The issue in the case was whether the risk of embarrassment or suffering to the Foster family could overcome a citizen's general right under the Freedom of Information Act to obtain government records. If the lawyers can cause readers to recoil, they help their cause: readers will find compelling the premise that Foster's family would be upset if the photos of his corpse became public. Manipulating readers' emotions is dangerous, but top lawyers manage to do so. Subtly.

C **The brief uses procedural facts, namely the transcript from trial–court proceedings, to corroborate its claims.**

Example 6.3

Takeaway point 6.3: Use your adversaries' own words against them when writing your Argument.

The best facts to use in your Argument often come from your adversary, as we see below. The energy corporation Enron engaged in bogus accounting in the late 1990s to make itself seem very profitable. When the company's cooked books were discovered, Enron collapsed, costing investors more than $60 billion. One of Enron's outside bankers, Bayly, allegedly helped Enron to manipulate its earnings. The federal government indicted him. At trial, the district court admitted into evidence an email that tied Bayly to the fraud, but this email contained inadmissible hearsay. Bayly was nevertheless convicted. On appeal, Bayly argued that the email was inadmissible. But *harmless* evidentiary blunders cannot vacate a conviction, so he needed to rebut the government's claim that admitting the email was inconsequential. Here, Bayly's lawyers use the prosecutors' own words to show that admitting the email into evidence was a turning point in the trial.

Source: Reply brief for Bayly in *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006).

C. The Government Has Failed To Show Harmless Error

Although the prosecutors repeatedly sought to move the Brown e-mail into evidence (*see* Op. Br. 42) — and relied heavily on the e-mail once it finally *was* admitted (*see id*. at 52-53) — the government now contends that the evidence was "harmless beyond any shadow of doubt and under any standard of review." (G.Br. 201.) This is the same evidence, it must be noted, that the government hailed at trial as "powerfully probative evidence" concerning the very "nub" of the case. (Tr. 2970.) This is the same evidence that the government described before trial as being "at the heart of the issues in this case." (Dkt. 285 (6/25/05 Hearing Tr.) at 77.) And this is the same evidence that the government paraded, at every turn, as critical evidence against Bayly.

The prosecutors who tried this case used exactly the right descriptions — the Brown e-mail was indeed the "nub" of the case against Bayly and at the "heart" of it. [T]he Brown e-mail was the *only* document cited by the government in its pretrial memorandum supposedly tying Bayly to the alleged conspiracy. (*See* Dkt. 420, at 24.) The government used the Brown e-mail to suggest to defense witness Katherine Zrike [a lawyer at Bayly's bank] that perhaps she should reconsider her favorable testimony about Bayly's honesty and integrity. (Tr. 4285-87.) The government argued in its opening summation that the Brown e-mail was "a critical document that you should focus on when you're back in the jury room deliberating." (*Id*. 6274.) The government invoked the e-mail against Bayly yet again in its rebuttal summation. (*Id*. 6508-09.) In short, as the government expressly told the district court at least three times at trial: The Brown e-mail is "powerfully probative." (*Id*. 2970, 2973, 2979.)

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A The government bears the burden of showing that improperly admitted evidence was *harmless*; it is not the defendant's duty to show that the admission was harmful. Pay attention to whether you need to prove something or whether you need to show that the other side has failed to prove something.

B The lawyers' repeated use of the phrase "this is the same evidence" creates momentum that pulls readers along with it.

C **We see more legal judo: the government's prior arguments now help the defendant show that the email affected the trial's outcome.**

D Bayly's lawyers introduce four separate helpful facts — in fewer than 100 words — and then end the paragraph with a memorable quotation. Presenting facts this concisely and clearly maximizes their persuasiveness.

Example 6.4

Takeaway point 6.4: When your adversaries fail to present evidence, point out to the court that the record does not corroborate their claims.

Just as an absence of authorities undermines an argument (*see* Example 5.4), an absence of facts can hobble your adversaries. The following example emphasizes the absence of facts in the other side's brief. In this dispute, a law school (Hastings) allowed any student group to apply to become a registered student organization (RSO). Only RSOs received school funds. One group, the Christian Legal Society (CLS), adopted bylaws requiring all members and officers to sign a "Statement of Faith" opposing homosexuality and premarital sex. The law school rejected CLS's application to become an RSO, concluding that the group's bylaws violated the law school's policy that all students can participate in all RSOs. CLS sued, claiming that Hastings' policy violated its First Amendment rights to speech, association, and religion.

Source: Brief of Hastings College of the Law in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010).

In this Court, petitioner devotes almost its entire argument to attacking a policy that has never existed at Hastings — one that selectively "targets solely those groups whose beliefs are based on 'religion' or that disapprove of a particular kind of sexual behavior," and leaves other student groups free to choose members based on their beliefs. Pet.Br.19; *see* Pet.Br.42. As its lead example petitioner says that, under Hastings' policy, a "political . . . group can insist that its leaders support its purposes and beliefs" whereas "a religious group cannot." Pet.Br.20.

The parties, however, jointly stipulated that Hastings' policy is that student groups must open their membership to "any student . . . regardless of their status or beliefs." JA-221 ¶ 18. Moreover, the parties specifically stipulated that a political student group like the Hastings Democratic Caucus is *not* free to close its doors to students who have different beliefs. *Id.* Petitioner apparently just refuses to accept the "joint" in "joint stipulation." Indeed, it says in one sentence that "*[r]espondents* maintain" that Hastings has an open-membership policy, but in the very next sentence admits that this policy is "described in *Joint* Stipulation No. 18." Pet.Br.47 (emphases added). . . .

A The government engages in viewpoint discrimination when it "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger,* B 515 U.S. at 829. An open-membership policy like Hastings', applicable to all student organizations without regard to their mission or viewpoint, is quintessentially viewpoint-neutral.

Petitioner eventually concedes at the tail-end of its brief that Hastings' open-membership policy is "nominally" viewpoint-neutral. Pet.Br.51. It is no less viewpoint-neutral in practice. Hastings' policy applies equally to every RSO. It does not target any particular viewpoint or make any distinction between religious and non-religious speech. Pet.App.35a-36a. To be eligible for RSO status, C Hastings Outlaw [a student organization that supports gay and lesbian rights] cannot exclude students who believe homosexuality is morally wrong any more than CLS is permitted to exclude students who believe it is not.

The record in this case — which petitioners repeatedly ignore — reveals "no evidence" of discriminatory motive or practice with respect to CLS or religious viewpoints generally. Pet.App.35a. A number of organizations that, like CLS, D

engage in worship, Christian fellowship, and Bible study have thrived at Hastings as RSOs — both before and after CLS refused to comply with the policy — including the Law Students' Christian Fellowship and Hastings Koinonia. And CLS's own predecessor group, HCF, was an RSO for a decade before this litigation (when it allowed any interested Hastings student to be a member). In short, the policy plainly does not exclude speech because of its "religious viewpoint." *Good News Club,* 533 U.S. at 111. Nor any other viewpoint. . . . E

Petitioner repeatedly suggests that the policy "requir[es] CLS to accept leaders who do not follow its moral teachings." Pet.Br.32; *see also* Pet.Br.2, 27. Again, the policy does not *force* CLS to do anything; it gives it a choice. Moreover, for those groups that accept RSO status, the policy obligates them only to permit members "to *seek* leadership positions." JA-221 ¶ 18 (emphasis added). The policy places no restrictions at all on the selection process. . . . By ensuring that all students who join RSOs are *eligible* for leadership positions, the policy simply ensures that students are admitted as full-fledged members — not second-class ones. F

Petitioner hypothesizes that if it chooses to honor the policy, it will be subject to "sabotage," or even a "hijack[ing]." Pet.Br.28-29 & n.4. But Hastings' open-membership policy is two decades old and there is not one shred of evidence in the record before this Court that any of the scores of RSOs at Hastings has ever been threatened with — much less subjected to — a takeover. [The Court may not] invalidate the policy on the basis of a hypothetical theory that has no support in the record and, indeed, virtually no support in the history of higher education in America. *Cf. Crawford v. Marion County Election Bd.,* 128 S. Ct. 1610, 1623 (2008). . . .

Though petitioner's opening brief promised that amici would provide "numerous examples" of sabotage and takeover (Pet.Br.29 n.4), petitioner's amici have failed to identify a *single* actual "takeover" — anywhere. G

A As reprinted, this paragraph omits authorities showing that litigants are bound by their stipulations. The reprinted text shows why this admission was so deadly to CLS.

B The brief discussed the applicable legal rule in greater detail earlier. Here, we see the importance of reminding readers of the law so that they know why the ensuing facts matter. And this standard shows why CLS's factual stipulation was so deadly: the entire legal standard turns on whether the government's policy is neutral or discriminatory. CLS had stipulated at trial that the policy did not discriminate against religious groups. If Hastings' lawyers had failed to inform the court of this procedural fact, they would have missed a huge strategic opportunity.

C Describing how a law or policy operates in practice is another sort of fact-based technique that lawyers use when building fact-centered arguments.

D **Citing facts that are in the record — or noting the conspicuous absence of facts, as Hastings does here — is another way to build a fact-based argument.**

E Past conduct and treatment of your adversary can also support your client's position.

F This sentence makes an overly broad claim: Hastings would almost certainly object if a student group prohibited gays and lesbians (or African Americans or women) from voting to select the leaders of a group. You need to balance persuasion and precision; here, the lawyers write too imprecisely.

G The lawyers use the absence of problems (at either Hastings or elsewhere) to advance their point. But the lawyers engage in dangerous writing here: although amici provided no examples, CLS itself (in the very footnote that Hastings cites) reported an incident in which College Republicans "at another university" hijacked the Young Democrats' election process.

Example 6.5

Takeaway point 6.5: Don't be afraid to use multimedia tools to help your client.

Including multimedia images such as photographs, charts, graphs, and video links in your Argument or Statement of Facts can help your clients in a wide array of cases. Explains Judge Richard Posner: "*Seeing* a case makes it come alive to judges." Suppose that your client was in a horrible car crash and received punitive damages. Including a photo of her — mangled and broken — after the accident might make an appellate court less likely to disturb the punitive damages award. Or suppose you allege that someone copied your client's logo. Including photos of the two logos will help to convince readers that the defendant infringed.

We see another situation below in which photos helped to build an argument. The passage comes from a Supreme Court case that addressed whether Texas could maintain a statue of the Ten Commandments outside its State Capitol. The brief reprinted below, which supported Texas, emphasized that the Ten Commandments appear on countless government buildings — including one that was especially important to this case.

Source: Amicus brief in *Van Orden v. Perry*, 545 U.S. 677 (2005) (formatting adjusted).

The Texas monument is neither unique nor isolated; to the contrary, the Decalogue motif has been incorporated time and again by the artists and architects responsible for designing the halls of American government. For example, in the Main Reading Room of the Library of Congress stands a large bronze statue of Moses holding the Ten Commandments [image omitted]. This prominent statue is on display for the one million people who visit the Library of Congress each year. A

Similarly, the recently completed Ronald Reagan International Trade Building features a very large statue with the Ten Commandments that is visible to all who pass along Pennsylvania Avenue [image omitted]. And the millions of visitors to the National Archives pass over a bronze plaque inscribed with the Decalogue tablets [image omitted]. B

Indeed, Decalogue imagery graces the homes of all three Branches of our federal government. Moses and the Ten Commandments appear on both the south frieze of the courtroom in which this Court sits [*see* fig. 1] and the pediment of the Court's building [*see* fig. 2]. . . .

Source: © Carrie Devorah. All Rights Reserved.

Figure 1 *God in the Temple of Government.*

Source: © Carrie Devorah. All Rights Reserved.

Figure 2 *God in the Temple of Government.*

This established practice of integrating the Ten Commandments and other religio-historical symbols into the fabric of our public institutions has been repeated over and over again in the multitudinous town halls, public parks, courthouses, educational institutions, and state capitals throughout this Nation. In statues, paintings, sculptures, friezes, murals, and the like, religious iconography has been part and parcel of American public architecture since the Founding. It is fair to say that the inclusion of such iconography is the norm rather than the exception.[3] . . .

Implementing the counter-historical regime that petitioner posits would require this Court . . . to remove the Decalogue emblem from the doors of this Court [*see* fig. 3].

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Source: © Carrie Devorah. All Rights Reserved.

Figure 3 *God in the Temple of Government.*

3. The images reproduced in this brief come from a photographic essay that vividly captures the prominence and prevalence of religious symbols in and around public buildings in the District of Columbia alone. *See* Carrie Devorah, *God in the Temples of Government*, Human Events, Nov. 24, 2003, at 14, & Dec. 22, 2003, at 20. . . . An illustrative, but by no means exhaustive, list of government properties outside of the District of Columbia that contain Ten Commandments monuments can be found in the appendix to the brief for the United States in the companion case.

A The brief does not explain this term. The lawyers reasoned that the Justices could infer from the context (and from the prefix "dec," meaning "ten") that "Decalogue" refers to the Ten Commandments.

B Notice that the lawyers build up to the most compelling photos. This approach deviates from the general rule that your best point should come first. Bravo. These lawyers correctly sense that brief's brevity (eight pages) would prevent the Justices from tuning out. And the buildup to the final photos helps the brief end with a bang.

C This example uses photographs to strong effect. As noted above, other visual tools can also be helpful to your clients. For instance, in the investigation and litigation about BP's role in 2010's Deepwater Horizon oil spill, the litigants prepared elaborate videos for the trial judge to explain how the massive spill occurred. (Example 7.4 provides some background about that dispute.)

Example 6.6

Takeaway point 6.6: Contrary to conventional wisdom, you do *not* need to include in your Statement every fact that appears in your Argument. And in complicated cases, you shouldn't.

Somewhere in the shadows of the past, a custom evolved that a Statement must include every fact that the motion or brief discusses. That can be a dangerous rule. It weakens many briefs badly by making them boring and slow, and by heaping facts on judges before they know why those facts are relevant. Disregard this "rule" if doing so will help your client. Instead, indicate in your Statement that further details will be discussed in the Argument.

This approach is reflected below. The Statement merely says "many professional content owners — including plaintiffs — routinely post their material on YouTube and authorize marketers and licensees to do the same. *Infra* 44-50." Then, all of this information (and more) is used to carpet bomb the other side in the Argument. (The same technique was used *five* other times in the Statement, shortening it significantly.) Here, YouTube uses facts to advance two arguments: (1) Viacom planted copyrighted material on YouTube (suggesting that Viacom is suing for injuries that it caused to itself), and (2) Viacom's difficulty in identifying its own copyrights demonstrates the infeasibility of Viacom's suggestion that the Second Circuit should require YouTube to monitor every video posted on its website.

Source: YouTube's brief in *Viacom v. YouTube*, 676 F.3d 19 (2d Cir. 2012) (omitting dozens of citations to the record).

Like many other media companies, Viacom directly and through its marketing agents posted to YouTube countless videos containing its copyrighted material. Several aspects of Viacom's embrace of YouTube are particularly significant.

First, Viacom's posting of content to YouTube was extensive. Viacom's own documents reveal that it uploaded a "boatload of clips onto YouTube for distribution" and was "VERY aggressively providing clips on an ongoing basis"[13] Viacom's uploading activity started early in YouTube's existence, and even Viacom's decision to sue could not curb its desire to "continue to 'place' authorized clips on YouTube." Indeed, Viacom kept uploading material to YouTube throughout this litigation. *E.g.*, JA-V:306 (Paramount in March 2007: "We are still uploading content to YouTube"); JA-V:308 (MTV lawyer in August 2007: "Actually we're OK with uploading our own material on youtube for promotional purposes."); SJA-VIII:2075 (August 2008 email from marketer to YouTube: "We work with MTV (Viacom) on several of their shows and upload a lot of their content."); JA-IV:285 (MTV authorizing postings to YouTube in February 2008).[14]

Second, Viacom and its agents posted a wide variety of videos on YouTube, including long excerpts (or even full episodes) of television shows and clips taken

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13. *See also* JA-VI:682 (Viacom lawyer reporting that "there are A LOT of clips they [VH1] have seeded to you tube"); JA-IV:317 ("We actually provide clips to YouTube quite aggressively."); JA-VI:782 ("it would be a significant task to keep you updated on each and every clip we post ongoing"). . . .

14. Viacom has admitted that its employees uploaded "approximately" 600 clips through May 2008, but that number (while significant) is wildly inaccurate. It omits Viacom's extensive use of third-party marketing agents who uploaded thousands of additional clips at Viacom's direction. It also ignores Viacom's acknowledged inability to provide a full accounting of its postings on YouTube.

from its films with nothing indicating their origins. JA-VI:640(¶2); JA-VI:657-659; JA-VI:694; SJA-VII:1752-54 (Paramount explaining that "MI:3 scenes found on YouTube.com" were "brought online this week as pa[r]t of normal online publicity before the release of the film"). These videos were not obvious advertisements, and indeed many clips were calculated to look unauthorized. Viacom uploaded what its documents describe as footage from the "cutting room floor" and clips "rough[ed] up" to "add to the 'hijacked' effect" (JA-IV:234) — which Viacom now calls a "common" practice (JA-II:755(¶1.61)).

Third, while YouTube knew that Viacom was posting some clips, YouTube did not know, and could not have known, the full extent of Viacom's marketing activities. Viacom uploaded certain clips using its "official" YouTube accounts, but it did more of its posting using obscure accounts and agents. JA-VI:641-643(¶¶3-5); JA-IV:102(¶4); JA-IV:184(¶¶5-6); SJA-VI: 1301-03; SJA-IX:2163-66; SJA-VI:1234-38. The extent of Viacom's stealth-marketing emerged only in discovery, when YouTube uncovered no fewer than 50 Viacom-related accounts that collectively uploaded many thousands of clips to YouTube. JA-IV:212-216(¶5(a)-(f)); JA-VI:641-642(¶4). There is no way to tell from the names of these accounts — including "demansr," "gooddrugy," "thatsfunny," "ultrasloppyjoe," and "waytoblue" — that they were linked to Viacom or to distinguish them from other run-of-the-mill YouTube accounts.

Blurring its connection to the videos it authorized was an important part of Viacom's strategy. JA-IV:238. Examples abound: B

- MTV employee in 2006: "Spoke with Jeff [another MTV employee] and we are both going to submit clips to YouTube.com — him through his personal account so it seems like a user[] of the site and me through 'mtv2'";
- Paramount executive asking that clip be posted on YouTube "NOT WITH A PARAMOUNT LOGO OR ASSOCIATION";
- Paramount executive instructing marketer that clips were "to be uploaded from his personal acct and not associated with the film";
- Paramount executive advising that clips posted to YouTube "should definitely not be associated with the studio — should appear as if a fan created and posted it";
- MTV approving marketer's request to post clips on YouTube, "if u can do it the in cognito [sic] way";
- Paramount employee discussing uploading YouTube clip from Kinko's in order to mask its origin.

Such practices not only left YouTube users (and YouTube itself) at a loss to know who was posting the videos, they often made it difficult for Viacom itself to distinguish between authorized and unauthorized clips.

A The amount of evidence that YouTube produces in this section borders on overwhelming. It refers to multiple executives at multiple networks all uploading — and disguising — multiple videos. With such a volume of content, a judge might think that no one could possibly keep track of which videos violated copyrights. And that is exactly the effect that YouTube wanted.

B YouTube referred to these facts (and the other facts in this example) in its Statement, but signaled there that it would discuss them in greater detail in the Argument (to prevent the Statement from becoming too long).

FREQUENTLY ASKED QUESTIONS ABOUT APPLYING FACTS IN ARGUMENTS

Q. I want to include the same basic facts in my Statement and Argument. How do I keep my motion or brief from being repetitive?

A. Phrase the facts differently. Or provide more detail in one place than the other. Or provide a longer quote in your Statement and then quote just a few key words in your Argument so that your motion *reminds* judges of what a witness said or an exhibit showed. You can also quote a document in one place and then characterize or paraphrase it in another place. Repetition impairs the flow of your argument, so keep things fresh for readers. Also, as Example 6.6 demonstrates, if your case involves multiple litigants (or multiple distinct issues or very fact-intensive issues), you may simply tell readers in your Statement that your Argument will delve into the relevant facts of a given subject in more detail.

Q. The chapter overview mentions using extrinsic facts (such as government reports) to support my position. If those extrinsic facts are not in the record, how do I place those facts in front of my judge?

A. At the trial court, you can submit materials into the record; write a declaration authenticating those documents and then submit the document as an attachment to your or your witness's declaration, which accompanies your motion. On appeal, you can often discuss facts that aren't in the record if the court can take "judicial notice" of those facts — a term that usually refers to government documents. Lawyers try to stretch the limits of this exception.

For example, Facebook used this technique effectively during a recent appeal. Its adversaries claimed that Facebook had duped them during settlement talks into accepting Facebook shares by falsely claiming that the shares were worth almost $36 apiece when in fact they were worth less than $9 per share. Facebook (on appeal) countered that California law required it "to report the values of stock options to the California Department of Corporations, which proceeds to post them on the Web for all to review." Facebook then added — even though this fact had not been raised to the trial court — that its adversaries could "easily have looked up" these valuations just "as this Court could even now." That public website showed that the shares were worth just $6.61. In other words, Facebook used a public website to show that it reported publicly that its shares were worth "far less than the $35.90/share value" that its adversaries "now say they had attributed to the stock." Facebook thus supplemented the record.

Q. How do I include photographs, videos, instructional films, charts, or other visuals in my motion or brief?

A. Lawyers rely on multimedia with increasing frequency. Photos are easy to deploy: just insert them into the body of your motion or brief (or into an appendix). *See* Example 6.5. This is a common technique; indeed, it is nearly ubiquitous in certain cases, such as trademark disputes. Likewise, you can include a URL in your motion or brief (so that judges can watch a video or see a report). Before including URLs, try to assess the tech-savviness of your judge. Also be mindful of how images will affect your page count.

Q. During oral arguments, it's common for judges to ask hypothetical questions of lawyers to test the limits of the lawyer's position. Can I use this sort of hypothetical argument in my motion or brief?

A. Do so sparingly and concisely (if at all). In general, leave elaborate hypotheticals for the judges. For lawyers, hypotheticals are most useful when they are short and concrete (e.g., "this case would be different if any witnesses had seen the accident") or when they present metaphors that help readers grasp a complicated concept by comparing it to something more accessible. Here is an example of using an elaborate hypothetical effectively, but I urge new lawyers not to indulge in such involved analogies, metaphors, or hypotheticals. The passage came from Oracle's appellate brief in its lawsuit against Google. The brief alleged that Google's Android operating system infringed on Oracle's copyrighted software. The brief analogizes Google to someone who plagiarizes:

> Ann Droid wants to publish a bestseller. So she sits down with an advance copy of *Harry Potter and the Order of the Phoenix* — the fifth book — and proceeds to transcribe. She verbatim copies all the chapter titles [and] copies verbatim the topic sentences of each paragraph. . . . She then paraphrases the rest of each paragraph. She rushes the competing version to press before the original under the title: *Ann Droid's Harry Potter 5.0.* The knockoff flies off the shelves. J.K. Rowling sues for copyright infringement. Ann's defenses: "But I wrote most of the words from scratch. Besides, this was fair use because I copied only the portions necessary to tap into the Harry Potter fan base." Obviously, the defenses would fail.

Q. Can I make a fact-based argument based on what my judge previously said?

A. Yes, and Example 14.7 provides a good example of how to point out respectfully that the court has already addressed an issue and reached a helpful conclusion. By contrast, playing "Gotcha!" (e.g., "it would be hypocritical of you, Your Honor, if . . . .") can be very dangerous, as judges may resent feeling cornered.