

Who owns Superman? The Man of Steel fights trademark law

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Author

[Matthew Rimmer](#)

ARC Future Fellow and Associate Professor in Intellectual Property, Australian National University

Disclosure statement

Dr Matthew Rimmer is an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. He is an associate professor at the ANU College of Law, an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA), and a member of the ANU Climate Change Institute. Dr Matthew Rimmer receives funding as an Australian Research Council Future Fellow working on "Intellectual Property and Climate Change: Inventing Clean Technologies" and a chief investigator in an Australian Research Council Discovery Project, "Promoting Plant Innovation in Australia".



The character of Superman has had a storied intellectual property history, having spawned countless imitations and emulations in comic books, films and popular culture. Wikimedia Commons

Who is Superman's greatest threat? Evil genius Lex Luthor? General Zod from the Phantom Zone? The doppelganger Bizarro? Super-villain Brainiac? Kryptonite? Or is it intellectual property law?

In 2013, DC Comics and Warner Brothers have sought to reboot the Superman movie franchise with the new film Man of Steel.

[Man of Steel Trailer](#). (Watch video)

The film is directed by Zac Snyder and produced by Christopher Nolan, who successfully revived Batman with the Dark Knight trilogy. Snyder observes that Superman is a “cool mythological contradiction”. The director observes: “He’s incredibly familiar Americana and alien, exotic, bizarroland, but beautifully woven together.”

With the release of this marquee film, DC Comics and Warner Brothers have sought to protect intellectual property rights associated with Superman. This week, in the Federal Court of Australia, Justice Annabelle Bennett delivered a brilliant judgment in the case of [DC Comics v Cheqout Pty Ltd](#). The decision demonstrated a mastery not only of intellectual property law, but also of philosophy and the history of superheroes. The case raises larger questions about trademark law, superhero franchises, and remix culture.

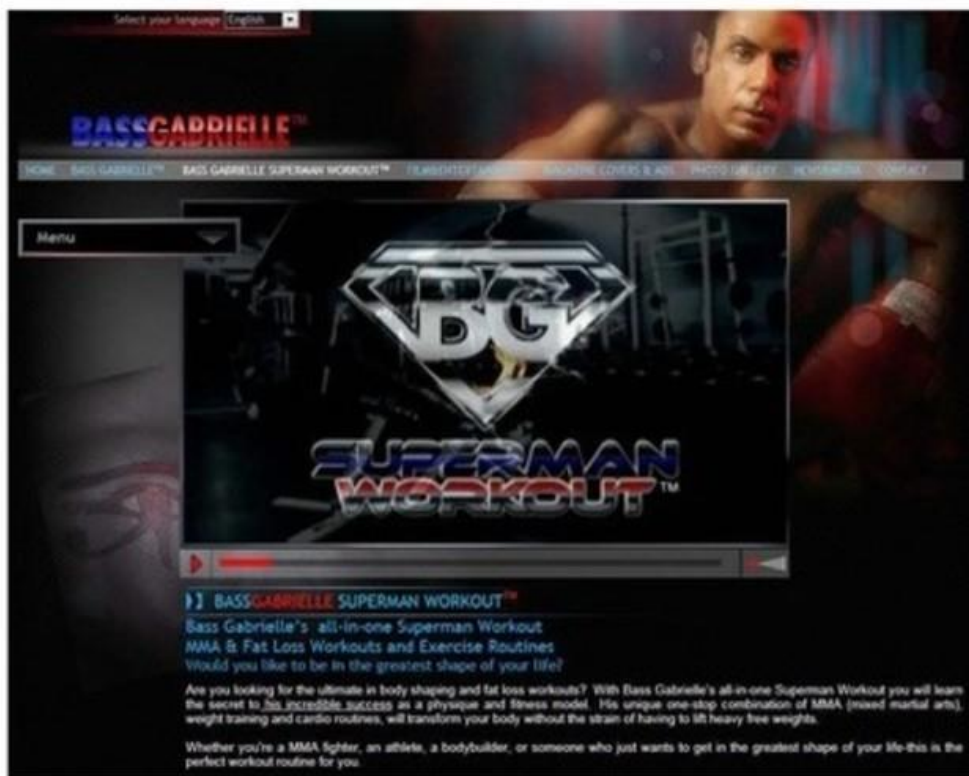
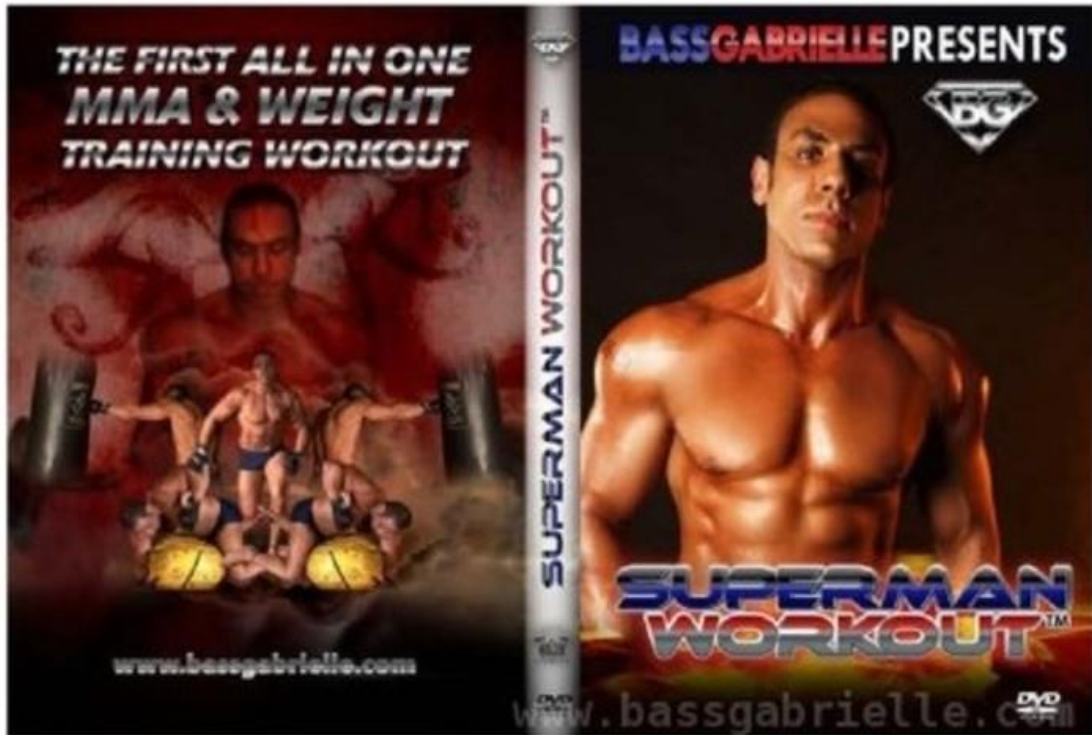
A ‘Superman workout’

The case concerned a fitness company making a trademark application for the “Superman workout” to IP Australia.

Michael Kirov, a delegate of [the Registrar of Trade Marks allowed a fitness company, Cheqout Pty Ltd, to register the trade mark “Superman workout”](#) in respect to the Class 41 services of “conducting exercise classes; fitness and exercise clinics, clubs and salons; health club services (exercise)”.

In rejecting DC Comics’ opposition, he said:

On any view of the Applicant’s conduct in the present matter, I do not believe the making of its application to register the plain English words “superman workout” as a trademark for the Services could reasonably be said to be of an unscrupulous, underhand or unconscientious character.



Promotional material for Chequov's 'Superman workout'.

Beyond Good and Evil: From Mickey Mouse to Friedrich Nietzsche

DC Comics appealed to the Federal Court of Australia, claiming the trademark application was made in bad faith and would be likely to deceive or consumer

consumers. DC Comics argued that its case was similar to the 1937 case of [Radio Corporation Proprietary Limited v Disney](#), where the High Court of Australia considered the words “Mickey Mouse” and “Minnie Mouse” as trademarks.

Justice Bennett said:

DC Comics maintains that the public will be misled or confused by use of the word alone ... there is no dispute, and no doubt, that Superman the superhero is well known and recognised, by look and by name, to the public at large.

She considered the definition of “Superman” as outlined by the Macquarie and Oxford dictionaries, and noted that “DC Comics does not assert that “superman” is a word invented by it” and “accepts that the word, in English, derives from “Übermensch” as discussed by Friedrich Nietzsche”.

She observed that DC Comics have argued:

that the word “superman” and the expression “super man” have come to be associated with the character invented by Jerry Siegel and Joe Shuster in 1938 and well publicised since then (Superman).

The judge said that:

when the trademark is used without reference to any of the well-known indicia associated with the DC Comics superhero and as contained in the registered trade mark or other trade marks registered by DC Comics, there is no likelihood that use of the trade mark would be likely to deceive or cause confusion by reference to the Superman word mark, or the subject matter of DC Comics’ registered trade marks.

However, Justice Bennett was:

satisfied that DC Comics has established that Cheqout made the application for the Trade Mark in bad faith”. This was evidenced “by the use ... of the word Superman together with the BG Shield Device, in the context of male fitness and strength.

Justice Bennett ruled:

that at the date of application for the trade mark, Cheqout’s conduct fell short of the standards of acceptable commercial behaviour observed by reasonable and experienced persons.

The intellectual property avengers

[DC Comics and Marvel have engaged in lucrative IP deals.](#) (Watch video)

Superheroes play an important role in the history of intellectual property law.

There has been ferocious legal debate between DC Comics and the estate of Jerry Siegel over the ownership of the rights to [Superman](#) and even [Superboy](#).

In her book, [Contested Culture](#), Jane Gaines devotes a whole chapter to "Superman, Television, and the Protective Strength of the Trademark". She wrote that the "Superman text is the cultural turf over which an important conflict between copyright and trademark has waged". Her argument is that DC Comics have relied upon a multiplicity of forms of intellectual property to protect Superman and other members of the Justice League, such as Batman, Wonder Woman, and The Green Lantern.

[DC Comics' rival Marvel](#) have also relied upon a variety of intellectual property rights - including copyright law, trade mark law, personality rights, and character merchandising. Nicole Sudhindra comments: "Marvel's robust IP assets have without a doubt enabled it to reap enormous benefits from its licensing activities."

[DC Comics](#) and [Marvel](#) have even licensed their works to the Danish toy manufacturer, Lego.

Fan fiction, remix culture, and cosplay

There has been a concern that the excessive protection of intellectual property rights of superheroes could have an adverse impact upon creativity, remix culture, and fan fiction.

In his novel, [The Amazing Adventures of Kavalier and Clay](#), Michael Chabon charts the birth of superhero comics in the United States, and explores the mythologies of superheroes.

Intellectual property and superheroes is complicated. Superman has spawned a host of imitations and emulations in comic books, graphic novels, and films - everything from Dr Manhattan in *The Watchmen* to Mr Incredible in Pixar's *The Incredibles*. Over-protection of Superman under intellectual property could repress and suppress such creativity and innovation.

Superman has also been the subject of endless appropriation, reappropriation, and remixing in popular culture — see R.E.M.'s song, [I Am Superman](#). The iconography of Superman has been the subject of mash-ups in fan fiction, art, music, fashion, and film.

There has been a concern about the impact of intellectual property rights holders seeking to censor critical work. Famously, the Argentine-Chilean writer Ariel Dorfman complained about Disney relying upon copyright law to try to censor his work, [How to Read Donald Duck: Imperialist Ideology in the Disney Comic](#).

In the United States, the [Organization of Transformative Works](#) has been formed to help support and defend fan fiction from over-reaching intellectual property claims.


The group “believes that fanworks are creative and transformative, core fair uses, and will therefore be proactive in protecting and defending fanworks from commercial exploitation and legal challenge”.

Under such a view, the Man of Steel is not merely a commercial franchise — Superman belongs to us all. Even the Justice League should embrace justice in intellectual property law.

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