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American Bar Association  
Forum on the Entertainment and Sports Industries  
2016 Annual Meeting  
Las Vegas, NV  

Power Lawyers with Matt Belloni of the Hollywood Reporter  

Friday, October 7, 2016  
2:00pm-3:30pm  

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Power Lawyers with Matt Belloni of the Hollywood Reporter

Friday, October 7, 2016
2:00pm-3:30pm

Program Description and Learning Objectives

Matt Belloni, Executive Editor of the Hollywood Reporter and Billboard and Editor of the annual Hollywood Reporter’s Power Lawyers issue will present a Barbara Walters-style interview with several pre-eminent power lawyers about their representation of high profile clients in current hot-topic matters in entertainment and sports law.
Power Lawyers with Matt Belloni of the Hollywood Reporter

Friday, October 7, 2016
2:00pm-3:30pm

PROGRAM OUTLINE

Intros
Explanation of Power Lawyers list: Why entertainment lawyers in Hollywood comprise such a unique community and what defines a Power Lawyer according to The Hollywood Reporter. How the list is generated.

Topic 1:
- Unique challenges of representing high-profile clients
- Media disasters and near-disasters.
- Working with the media to get your client in or out of the headlines.

Topic 2:
- Hot topics in Hollywood.
- Hulk Hogan and the impact of the Gawker case
- China: Friend or Foe?
- Hollywood dealmaking: Who’s investing in movies/TV now?

Topic 3:
- How Hollywood deals are different than deals in other industries
- How to generate and maintain clients in Hollywood
Privacy, the First Amendment and Hulk Hogan’s $140.1 Million Jury Verdict

By: Charles J. Harder

I. Introduction

On October 15, 2012, Terry Bollea, professionally known as “Hulk Hogan,” filed a $100 million lawsuit against Gawker Media, LLC, its founder/CEO Nick Denton, and its then-Editor-in-Chief of gossip website Gawker.com, A. J. Daulerio. In March 2016, a Florida jury returned a verdict in his favor in the amount of $55 million in economic damages, plus $60 million in emotional distress damages, plus punitive damages of $15 million against Gawker Media, $10 million against Denton, and $100,000 against Daulerio, for a total award of $140.1 million.

This law review article discusses the legal authorities that apply to the right of privacy and the First Amendment to the U.S. Constitution, within the context of video, audio or photographic content that is private in nature and exposed publicly, against the consent of the subject. While the Bollea case happens to involve a worldwide celebrity, the legal authorities discussed herein apply to celebrities and non-celebrities alike—all of whom are deemed by courts to have privacy rights and, conversely, all of whom can be the fair subject of news reporting.

The vast majority of the legal authorities cited herein form the basis of the legal arguments by both Bollea and Gawker in their respective court papers supporting and opposing numerous motions in the underlying case, including motions for a temporary injunction, motions to dismiss, motions for summary judgment, and various pre-trial and post-trial motions. These same legal authorities are expected to form the basis of the Gawker’s appeal to the Florida appellate courts and beyond. This article includes additional legal authorities, for a more comprehensive discussion, as well as a short discussion about journalism ethics, as explained by Professor Mike Foley of the University of Florida School of Journalism. This article is intended to serve as a guide to any attorney, judge or other legal practitioner on the laws pertaining to the rights of privacy and the First Amendment to the U.S. Constitution.

II. Brief Summary of the Facts

In mid-2007, Bollea was recorded without his knowledge or consent in a private bedroom, without clothing, engaged in private activities with a woman. The woman was

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1 Charles J. Harder, Esq. is lead counsel for Terry Bollea aka “Hulk Hogan” in Bollea v. Gawker Media, in which Bollea was awarded $140.1 by a Florida state court jury in March 2016. Mr. Harder is co-founder and partner of HARDER MIRELL & ABRAMS LLP (www.HMAfirm.com) a law firm in Los Angeles, California that specializes in entertainment, privacy, publicity, reputation protection, intellectual property and business litigation. In other federal and state lawsuits, Mr. Harder has represented Halle Berry, Sandra Bullock, George Clooney, Bradley Cooper, Cameron Diaz, Clint Eastwood, Julia Roberts, Melania Trump and Reese Witherspoon, among other clients. Mr. Harder also serves as Editor and Co-Author of the law treatise Entertainment Law & Litigation (LexisNexis 2011-16) (Matthew Bender).
Heather Clem, the wife of Bollea’s best friend, Bubba the Love Sponge Clem. The encounter occurred with the encouragement of Bubba and Heather. Bollea was unaware the encounter had been recorded until five years later, in 2012.

In late September 2012, Gawker received from an alleged “anonymous” source a DVD containing a 30 minute video of the encounter. Gawker edited it into a 1 minute 41 second “highlight reel” (Daulerio’s term) which included about ten seconds of footage of Bollea fully naked, receiving oral sex, and engaging in sexual intercourse. The video also included a minute and a half of the private bedroom conversations, before and after sex, of Bollea and Ms. Clem.

Gawker posted the video the afternoon of October 4, 2012. The next morning, Bollea’s counsel immediately demanded the video be removed from Gawker.com, and said that if it was removed, Bollea would consider the matter resolved. Gawker refused to remove the video. Millions of viewers were flocking to Gawker.com to watch the video, and the web traffic was driving revenue and converts to the Gawker family of websites (eight in all). Gawker kept the video at Gawker.com, knowing that Bollea had been secretly filmed. The video remained at Gawker.com for six months, and more than 60 other websites (mostly porn sites) lifted the same 1:41 video from Gawker.com and played it at their own websites. More than 7 million people watched the video on the Internet: 2.5 million at Gawker.com and 4.5 million at the other sites.

Bollea’s complaint, filed on October 15, 2012 (eleven days after the video was posted), alleged causes of action for invasion of privacy/public disclosure of private facts, invasion of privacy/intrusion, misappropriation of right of publicity, and violation of Florida’s Secured Communications Act (also known as the “Wiretap Act”). In March 2016, nearly three-and-a-half years after suit was filed, the jury entered its award.

III. The Broader Implications of Bollea v. Gawker Media

Two weeks before the March 2016 Bollea v. Gawker Media jury trial, former ESPN on-camera reporter Erin Andrews2 went to trial against a person who secretly recorded her naked in a hotel room and published the video recordings to the Internet. She also brought claims against the hotel that allowed the person who recorded her to book a hotel room immediately adjacent to Andrews’ room. On March 7, 2016, the jury awarded Andrews $28 million against the person who recorded her, and $26 million against the hotel.3

The Bollea and Andrews situations have many similarities: both involve a famous person recorded naked in a private bedroom without his or her knowledge or consent, where the footage was posted to the Internet and millions of people watched it there. The same defenses claimed by Gawker in the Bollea v. Gawker Media case potentially could be raised by the person who filmed Andrews and posted the footage to the Internet, or any so-called “news” outlets that might choose to publish the most explicit, uncensored “excerpts” of the footage showing Andrews fully naked in her hotel room—in the name of “news reporting.”

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2 Andrews later became employed as an on-camera reporter for Fox Sports.
The Bollea and Andrews situations are not uncommon. In this era of smart phones that also make high definition video recordings and have 24/7 Internet access allowing such recordings to be posted to the Internet with one “click,” all persons in modern society are at risk of their private moments being secretly recorded and posted for millions of people to watch—in the name of “the news” or otherwise. These situations are becoming increasingly common, for both celebrities and non-celebrities alike. Celebrities like Eric Dane, Rebecca Gayheart, Fred Durst, Brett Favre and Seth Rollins, among others, have been the victims of Gawker Media’s posting of nude images of them without permission. Gawker Media also has posted nudity and sexual activity of hundreds of non-celebrities. As one example, a young woman who was very intoxicated and recorded without her consent having sex on the bathroom floor of an Indiana sports bar begged Gawker Media for the footage to be removed. Gawker’s executives responded to her with callous disregard, claiming they were “reporting the news,” and those emails were presented during the Bollea v. Gawker Media trial as an example of Gawker’s “news reporting” activities.

The point being: the legal authorities discussed herein have broad implications on modern society, including all individuals, and all media companies that post private recordings of people without their consent.

IV. Authorities Supporting the Right of Privacy

The law of privacy has been discussed and implemented over the course of centuries. The Founding Fathers did not draft a Constitutional provision to ensure privacy generally, but did include Constitutional provisions ensuring privacy in certain respects, including prohibiting unreasonable search and seizure (the Fourth Amendment to the U.S. Constitution: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…”), and prohibiting the quartering of troops in private homes in times of peace (the Third Amendment).4

In 1890, law partners Samuel D. Warren and Louis D. Brandeis (who later became a Justice of the U.S. Supreme Court) wrote a landmark law review article entitled The Right to Privacy, published in the Harvard Law Review. 4 Harvard L.R. 193 (Dec. 15, 1890). Their words are as applicable today as they were in 1890:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right “to be let alone.” Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of invasion of privacy by the newspapers, long keenly felt….

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.…

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.…

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.…

The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented.…

Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for public office.…

Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.

In 1960, William L. Prosser, Dean of the University of California at Berkeley School of Law, wrote another landmark law review article published in the CALIFORNIA LAW REVIEW simply titled: Privacy. The article discussed the origin of the 1890 article by Warren and Brandeis, and summarized the numerous state court decisions following their lead and creating a common law right of publicity in the majority of U.S. states. Prosser’s article also identified four different types of privacy invasions: intrusion upon seclusion, public disclosure of private facts, false light invasion of privacy, and unauthorized appropriation of name or likeness. The article discussed each separate category privacy invasion, in detail, and advocated a separate tort for each. The RESTATEMENT (SECOND) OF TORTS, Section 652, followed Dean Prosser’s recommendation of four separate privacy torts, discussed infra, and several states have followed the Restatement in establishing same.
The U.S. Supreme Court has held that sexual privacy, both within and outside the institution of marriage, is entitled to protection under the U.S. Constitution.\(^5\)

Several states also have enacted provisions within their respective state Constitutions to ensure a general right of privacy. Perhaps the most comprehensive and strongly worded of all state Constitutions, from the standpoint of the individual, arguably is found in Article I, Section 1 of the California Constitution:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.\(^6\)

The California Supreme Court, citing Article I, Section 1 of the California Constitution, has held: “California accords privacy the constitutional status of an ‘inalienable right,’ on par with defending life and possessing property. California’s privacy protection similarly embraces sexual relations.” Vinson v. Superior Court, 43 Cal.3d 833 (1987) (citations omitted); see also, Bollea v. Superior Court, 201 Cal. App. 3d 467 (1987) (California Court of Appeal holding: “The California right has been described as a protective ‘zone of privacy’ surrounding sexual behavior; the right is grounded in the 1972 initiative by which the voters added the right of privacy to Article I, Section 1 of the California Constitution”) (citations omitted); Fults v. Superior Court, 88 Cal. App. 3d 899 (1979) (same).

The Florida Constitution has a similar provision in Article I, Section 23:

> Right of privacy. Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.\(^7\)

The Restatement (Second) of Torts, Section 652, likewise recognizes separate torts for each. Section 652A, citing to the various other torts and corresponding sections of the Restatement, provides:

**652A. General Principle**

1. One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

2. The right of privacy is invaded by:

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\(^7\) Fla. Const., Art. I, Sec. 23 (emph. added).
(a) unreasonable intrusion upon the seclusion of another, as stated in 652B; or 
(b) appropriation of the other's name or likeness, as stated in 652C; or 
(c) unreasonable publicity given to the other's private life, as stated in 652D; or 
(d) publicity that unreasonably places the other in a false light before the public, 
as stated in 652E.

Section 652D provides: “One who gives publicity to a matter concerning the private life 
of another is subject to liability to the other for invasion of his privacy, if the matter publicized is 
of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate 
concern to the public.”

Comment h to Section 652D provides:

There may be some intimate details of her life, such as sexual relations, which 
even [a motion picture] actress is entitled to keep to herself. In determining 
what is a matter of legitimate public interest, account must be taken of the customs 
and conventions of the community; and in the last analysis what is proper becomes 
a matter of the community mores.

The line is to be drawn when the publicity ceases to be the giving of information 
to which the public is entitled, and becomes a morbid and sensational prying 
into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern….

[T]he limitations are those of common decency, having due regard to the freedom 
of the press and its reasonable leeway to choose what it will tell the public, but also 
due regard to the feelings of the individual and the harm that will be done to 
him by the exposure.8

On this point, the Ninth Circuit U.S. Court of Appeal held in Virgil v. Time Inc:

Does the spirit of the Bill of Rights require that individuals be free to pry into 
unnewsworthy private affairs of their fellowmen? In our view it does not. In our 
view, fairly defined areas of privacy must have the protection of law if quality of 
life is to continue to be reasonably acceptable. The public’s right to know is, then, 
subject to reasonable limitations so far as concerns the private facts of its individual 
members.

If the public has no right to know, can it yet be said that the press has a constitutional 
right to inquire and to inform? In our view it cannot. It is because the public has a 
right to know that the press has a function to inquire and to inform. The press, then,

8 Id. (emphasis added).
cannot be said to have any right to give information greater than the extent to which the public is entitled to have information.\textsuperscript{9}

The \textit{Virgil} court, citing Section 652D of the \textit{Restatement (Second) of Torts}, and quoting comment f thereto (“[t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern….”), further held:

In our judgment such a standard for newsworthiness [comment f, later renumbered comment h, to Section 652D] does not offend the First Amendment . . . it avoids unduly limiting the breathing space needed by the press for the exercise of effective editorial judgment. See \textit{Miami Herald Publishing C., v. Tornillo}, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). The definition of the ‘line to be drawn’ is not as clear as one would wish but it expresses the distinction between that which is of legitimate public interest and that which is not as well as we could do. . . . In our view this the Restatement has done. Accordingly, we accept the Restatement’s standard for newsworthiness.\textsuperscript{10}

In \textit{Virgil}, the Ninth Circuit further held:

[A]s matter of law, in the public interest to know about some area of activity, it does not necessarily follow that it is in the public interest to know private facts about the persons who engage in that activity. The fact that they engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure. Most persons are connection with some activity, vocational or avocational, as to which the public can be said as matter of law to have a legitimate interest or curiosity. To hold as matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone’s private life to public view.\textsuperscript{11}

In \textit{Toffoloni v. LFP Publishing Group, LLC},\textsuperscript{12} the Eleventh Circuit U.S. Court of Appeals held that a magazine’s publication of private, nude photographs of Nancy Benoit, a female professional wrestler who was murdered, was not protected by the First Amendment, and not a matter of public concern. Even though the murder was a matter of public concern, and Benoit was a public figure, the photographs themselves were not matters of public concern. Relying on comment h to Section 652D of the \textit{Restatement (Second) of Torts} (quoted \textit{supra}), among other legal authorities, the Eleventh Circuit held that the magazine “may not make public private, nude images of Benoit that she, allegedly, expressly did not wish made public, simply because she once wished to be a model and was then murdered.”\textsuperscript{13}

\textsuperscript{9} 527 F.2d 1122, 1128 (9th Cir. 1975), \textit{cert. denied} 428 U.S. 998 (1976).
\textsuperscript{10} \textit{Id.} at 1129-30.
\textsuperscript{11} \textit{Id.}
\textsuperscript{12} 572 F.3d 1201 (11th Cir. 2009).
\textsuperscript{13} \textit{Id.} at 1212.
The photographs of Benoit published by LFP neither relate to the incident of public concern conceptually [her murder] nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny. The photographs bear no relevance—let alone “substantial relevance”—to the “matter of legitimate interest.” On these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as “newsworthy.” Surely that debases the very concept of a right to privacy.14

In *Gilbert v. Med. Econ. Co.*,15 the Tenth Circuit U.S. Court of Appeals held:

Because each member of our society at some time engages in an activity that fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to exposure of any truthful secret about that person would render meaningless the tort of public disclosure of private facts. . . . [the First Amendment] does not require such a result. Therefore, to properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.

In *Haynes v. Alfred A. Knopf, Inc.*,16 the Seventh Circuit U.S. Court of Appeals held:

An individual, and more pertinently the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.

In *Michaels v. Internet Ent. Group* ("Michaels I"),17 the U.S. District Court in Los Angeles held that Pamela Anderson Lee and Brett Michaels were entitled to a preliminary injunction prohibiting the distribution of their privately-recorded, stolen sex tape, and rejected the First Amendment defense by the company that sought to commercially exploit the tape against their objections. The court specifically held the tape itself was not legitimate news, and the contents of the tape were not matters of public concern.

It is also clear that Michaels has a privacy interest in his sex life. While Michaels’s voluntary assumption of fame as a rock star throws open his private life to some extent, even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives. . . . the private matter at issue here is not the fact that Lee and Michaels were romantically involved. Because they sought fame, Lee and Michaels must tolerate some public exposure of the fact of their involvement…. The fact recorded on the tape, however, is not that Lee and

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14 *Id.* (internal citations omitted)
15 665 F.2d 305, 308 (10th Cir. 1981).
16 8 F.3d 1222, 1232 (7th Cir 1993).
Michaels were romantically involved, but rather the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.18

But see, Michaels v. Internet Ent. Group, Inc. (“Michaels II”),19 (same same case, holding that short, non-explicit excerpts of the footage played during a Hard Copy television news broadcast were not actionable and protected by the First Amendment), discussed in greater detail infra in Section IV.

In Bartnicki v. Vopper,20 U.S. Supreme Court held that media could publish excerpts of secret recordings of union negotiators discussing union negotiations with management, but all nine Justices held that the Court’s holding did not mean that secret recordings of purely personal activity can be published, and a majority of five Justices said that the publication of illegally recorded private celebrity sex tapes is not protected by the First Amendment. Justice Stevens’ majority opinion exempted from its First Amendment holding “domestic gossip or other information of purely private concern.”21 Justice Breyer, speaking for himself and Justice O’Connor, stated that the First Amendment did not protect the publication of truly private matters involving celebrities or public figures, because those matters were not matters of public concern: “This is not to say that the Constitution requires anyone, including public figures, to give up entirely the right to private communication, i.e., communication free from telephone taps or interceptions. But the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters.”22 Justice Breyer supported this proposition by citing Michaels I, entering an injunction order against the publication of the stolen Pamela Anderson-Bret Michaels sex tape.

Chief Justice Rehnquist, speaking for himself and Justices Scalia and Thomas, stated that the publication of illegal recordings was not protected by the First Amendment at all (whether or not the recordings contain matters of public concern) and that laws prohibiting such publications were constitutional:

These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement [i.e., a requirement that the journalist know or should know that the recording is illegal] to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny. These laws therefore should be upheld if they further a substantial governmental interest unrelated to the suppression of free speech, and they do.23

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18 Id. at 840 (emph. added).
21 Id. at 533.
22 Id. at 540.
23 Id. at 548-549.
In *City of San Diego v. Roe*, the U.S. Supreme Court held that a police officer’s recording of himself engaged in sexual activity while wearing a police uniform was not a matter of public concern: “[T]here is no difficulty in concluding that Roe’s expression does not qualify as a matter of public concern under any view of the public concern test…. Roe’s activities did nothing to inform the public about any aspect of the [San Diego Police Department’s] functioning or operation.”

In *Judge v. Saltz Plastic Surgery*, the Utah Court of Appeals reversed a summary judgment for a defendant, where the plaintiff had alleged that the defendant distributed to the media topless “before and after” photos of the plaintiff, a patient at the defendant’s cosmetic surgery clinic. The trial court ruled that there was no triable issue of fact on the issues of whether the photos disclosed a private fact, and whether they were a matter of public concern, because the plaintiff had voluntarily disclosed to the media that she had obtained cosmetic surgery. The Court of Appeal reversed, holding:

First, the issue of whether private facts are a matter of public concern touches on community standards and is a jury question: “the determination of whether the private facts were sufficiently related to a matter of public interest to have themselves become matters of public interest necessarily implicated factual questions . . . respecting the state of community mores.” So long as “reasonable minds could differ as to whether the private facts have become matters of legitimate public interest,” it is improper to grant even a summary judgment for the defendant, let alone a motion to dismiss.

Second, reasonable minds can differ as to whether a person’s decision to put some private information into the public eye waives privacy rights as to other private information. “On the record before us, we conclude that reasonable minds could differ on whether appearing on television to discuss cosmetic surgery gives rise to a legitimate public interest in viewing explicit photographic documentation of the results of the interviewee’s surgery.” This is based on the fact that there are legitimate reasons why a person might want to allow one otherwise private fact to become public while protecting other related private facts.

Appearances can change. A college student may decide to play on the ‘skins’ side of a ‘shirts versus skins’ basketball game in a public park. By doing so, he may have made a public fact of what his torso looked like on that day in that park such that publication of a picture taken while he was playing would not be actionable. But by doffing his shirt, he would not lose the ability to argue that a future picture of his torso exposes a private fact. Our shirtless basketball player may be willing to make a public fact of his exercise-honed torso in his twenties but swim with his shirt n thirty years later to avoid revealing extra pounds, medical scars, or now-regretted tattoos.

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25 Id. at 84.
27 Id. at 135 (internal quotation omitted).
28 Id.
29 Id. at 136.
30 Id. at 134-35.
In *Shulman v. Group W Productions, Inc.*, the California Supreme Court held: “All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest.”

In the *Bollea v. Gawker Media* case, Gawker claimed that because it posted only 1:41 of a larger 30 minute video, and the posted video contained “only” 10 seconds of footage of full frontal nudity and explicit sexual activity, the publication supposedly was “newsworthy” and protected. Legal authorities, however, generally do not support that position. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, for example, the U.S. Supreme Court rejected a fair use argument in a copyright case that relied on the number of pages that were *not* published, because the defendant took the “heart of the book” by publishing without permission a small portion of Gerald Ford’s memoirs that dealt with the resignation and pardon of President Richard Nixon.

Moreover, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the U.S. Supreme Court held that a TV news broadcast of the meaningful part of a “human cannonball” act showing the performer being shot from the cannon and landing into a net was actionable as a violation of right of publicity and unprotected by the First Amendment.

By analogy, Gawker’s posting of 1:41 of surreptitiously-recorded footage from a bedroom, including 10 seconds of nudity and sex, and 1:30 of private bedroom conversations, is not somehow “too little” to be actionable.

In *Aguilar v. Avis Rent a Car Sys., Inc.* the California Court of Appeal upheld an injunction against the use of racial epithets in a workplace which constituted unprotected harassment. In its reasoning, the Court discussed that the First Amendment rights of free speech and of the press is not absolute but rather has been limited by numerous courts for a variety of reasons, and its abuse may be punished:

Although stated in broad terms, the right to free speech is not absolute. *Near v. Minnesota* (1931) 283 U.S. 697, 708, 51 S.Ct. 625, 75 L.Ed. 1357 (“Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse. *Whitney v. California* [(1927) 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095]; *Stromberg v. California* [(1931) 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117].”)

Many crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, §653f), perjury (Pen. Code, §118), or making a terrorist threat (Pen. Code, §422). As we stated in *In re M.S.* (1995) 10 Cal.4th 698, 42 Cal.Rptr.2d 355, 896 P.2d 1365: “[T]he state may penalize threats, even those consisting of pure speech,

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31 18 Cal. 4th 207, 955 P.2d 469, 483–84 (Cal. 1998).
32 *Id.* at 222 (holding that oral communications in a rescue helicopter between an accident victim and paramedics were private and the broadcast of such communications by a film crew inside of the helicopter, without the victim’s permission, was a violation of the victim’s privacy, however, the broadcast of oral communications between the same parties outside of the helicopter, in public, was not actionable).
35 980 P.2d 846, 858 (Cal. 1999).
provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection.

In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one’s beliefs...." (See also NAACP v. Claiborne Hardware Co. (1982) 458 U.S. 886, 916, 102 S.Ct. 3409, 73 L.Ed.2d 1215; Milk Wagon Drivers v. Meadowmoor Dairies, Inc. (1941) 312 U.S. 287, 292, 295, 61 S.Ct. 552, 85 L.Ed. 836; Fallon, Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark (1994) 1994 Sup.Ct.Rev. 1, 13.)

Civil wrongs also may consist solely of spoken words, such as slander and intentional infliction of emotional distress. A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. (Roberts v. United States Jaycees (1984) 468 U.S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 ["[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection."]).

* * *

The foregoing high court decisions recognize that once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited “prior restraint” of speech.36

Other courts have upheld injunctions against speech, when such speech violates a person’s privacy or other rights.37

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36 Id. at 134 (internal citations omitted).
37 Murray v. Lawson, 649 A.2d 1253 (N.J. 1994) (upholding injunction against residential picketing of abortion doctor was intended to protect the doctor’s privacy rather than to suppress the content of the protesters’ message and was, thus, not an unconstitutional prior restraint); I.C. Mktg., Inc. v. The Taunton Press, Inc., No. Civ. 03-3069-CO, 2005 WL 503180, at *15 (D. Or. Mar. 3, 2005) (upholding injunction issued on grounds that speech was unprotected false or misleading commercial speech and thus did not constitute an unconstitutional prior restraint); Borra v. Borra, 756 A.2d 647, 651 (N.J. Super. Ct. 2000) (upholding injunction precluding husband from contesting wife’s membership in country club, based on finding of husband’s bad faith, and holding it was not a prior restraint because husband could still express his opinion of his wife in other circumstances).
V. Authorities Supporting the First Amendment

In Bollea v. Gawker Media, LLC,\textsuperscript{38} the U.S. District Court declined to issue a preliminary injunction barring continued publication of the Gawker-edited Terry Bollea sex video, holding:

Plaintiff's public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.\textsuperscript{39}

“As such, Defendants' decision to post excerpts of the Video online is appropriately left to editorial discretion, particularly when viewed in connection with a request for a prior restraint.”\textsuperscript{40} “Defendants in this case have not attempted to sell the Video and only posted excerpts of the Video in conjunction with the news reporting function of Defendants' website.”\textsuperscript{41}

In the context of privacy law, the privilege to publish facts of legitimate public concern extends beyond the dissemination of news to information concerning interesting phases of human activity even when the individuals thus exposed did not seek or have attempted to avoid publicity…. The privilege is broad and extends beyond subjects of political or public affairs to all matters of the kind customarily regarded as ‘news’ and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published.\textsuperscript{42}

“[N]ewsworthiness is defined broadly to include not only matters of public policy, but any matter of public concern, including the accomplishments, everyday lives, and romantic involvements of famous people.”\textsuperscript{43}

In Gawker Media, LLC v. Bollea,\textsuperscript{44} the Florida Court of Appeal likewise reversed the state trial court’s order granting a temporary injunction prohibiting continued publication of Gawker-edited Terry Bollea sex video. The court held:

Mr. Bollea, better known by his ring name Hulk Hogan, enjoyed the spotlight as a professional wrestler, and he and his family were depicted in a reality television show detailing their personal lives. Mr. Bollea openly discussed an affair he had while married to Linda Bollea in his published autobiography and otherwise discussed his family, marriage, and sex life through various media outlets. Further, prior to the publication at issue in this appeal, there were numerous reports by

\textsuperscript{38} 2012 WL 5509624 (M.D. Fla. Nov. 14, 2012).
\textsuperscript{39} Id. at *3.
\textsuperscript{40} Id. (emphasis in original).
\textsuperscript{41} Id. (emphasis in original).
\textsuperscript{42} Id. at *2 n. 3 (internal quotation omitted).
\textsuperscript{43} Id. at *3 n. 8.
\textsuperscript{44} 129 So. 3d 1196, 1201 (Fla. 2d DCA 2014).
various media outlets regarding the existence and dissemination of the Sex Tape, some including still shots therefrom.45

“Here, the written report and video excerpts are linked to a matter of public concern—Mr. Bollea's extramarital affair and the video evidence of such—as there was ongoing public discussion about the affair and the Sex Tape, including by Mr. Bollea himself.”46

In Michaels II,47 the U.S. District Court granted summary judgment in favor of a television production company with respect to a public disclosure of private facts claim by Anderson and Michaels relating to Hard Copy broadcast that included brief, non-explicit excerpts from the Anderson-Michaels sex tape:

Newsworthiness is defined broadly to include not only matters of public policy, but any matter of public concern, including the accomplishments, everyday lives, and romantic involvements of famous people….

The privilege to report newsworthy information is not without limit. Where the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection. The plaintiff has the burden of proof to demonstrate that the matters publicized are not newsworthy, or that the depth of intrusion in private matters was ‘in great disproportion to their relevance’ to matters of public concern….

The Court has reviewed the tape of the Hard Copy broadcast, which contains eight brief excerpts, purportedly from the Tape, ranging in length from two to five seconds. The excerpts are blurry, and in some places the video image was manipulated to make body parts unrecognizable….

Because the privacy tort is concerned with intrusion into the plaintiff’s affairs rather than with unfair competition with the plaintiff’s exploitation of his own name and likeness, the newsworthiness privilege in this context also includes a balancing of the depth of the intrusion against the relevance of the matters broadcast to matters of legitimate public concern…. The factors to be considered include (1) the social value of the facts published; (2) whether the plaintiff voluntarily became involved in public life; and (3) for private persons involuntarily caught up in events of public interest, whether a substantial relationship or nexus exists between the matters published and matters of legitimate public concern….

Although the social value of the facts published is arguably very low, it is clearly established that ‘newsworthiness’ is not limited to ‘news’ in the narrow sense of reports of current events. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or

45 Id. at 1200-01.
46 Id. at 1202.
enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published…. As discussed above, California courts have held that the romantic interests of celebrities are matters of legitimate public concern….

[T]he private facts depicted in the Hard Copy broadcast have a substantial nexus to a matter of legitimate public interest: IEG’s plans to disseminate the Tape on the Internet, and the dispute between TEG, Michaels and Lee over that dissemination. The fact that the Tape depicts sex acts is clearly part of the story regarding IEG’s plans and Lee’s legal battles with IEG.48

The court did not rule for Paramount on all grounds offered. The court rejected the argument that because other media had described the contents of the tape, Paramount could broadcast excerpts. “The description of these acts by a radio commentator, however, is not equivalent to the broadcast of the actual images on television.”49

Further, the case ultimately turned on balancing the public’s concern with Pamela Anderson Lee’s sex life against the intrusiveness of what Hard Copy actually showed, which was heavily censored. “The video images presented in the Hard Copy broadcast—while highly suggestive—were brief and revealed little in the way of nudity or explicit sexual acts. Given the uncontroverted fact that images of Lee engaged in sex are already widely available, the intrusiveness of these images is slight when balanced against Paramount's First Amendment interest in conveying information about the imminent release of the Tape, and the effect of such imminent release on Lee's entertainment career.”50

In Cape Publications, Inc. v. Hitchner,51 the Florida Supreme Court reversed summary judgment for the plaintiff in a public disclosure of private facts case, holding that a reporter’s publication of certain contents of the case file of a closed child abuse prosecution, including interviews with the child which contained explicit descriptions of the alleged abuse, was protected as a matter of public concern. A Florida statute prohibited the disclosure of the contents of such files. Nonetheless, the Court held that the statute could not constitutionally create a cause of action against a media defendant with respect to a matter of public concern. The Court’s opinion contains a broadside against the public disclosure tort:

We disagree with the court’s analysis and we believe that the facts here are clearly a matter of legitimate public concern. The developing law surrounding the private-facts tort recognizes that the requirement of lack of public concern is a formidable obstacle. In fact, the ‘newsworthiness’ defense has been recognized by commentators as being so broad as to nearly swallow the tort.52

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48 Id. at *7-10 (emphasis added; citations omitted).
49 Id. at *8.
50 Id. at *10.
51 594 So.2d 1374 (Fla. 1989).
52 Id. at 1377.
However, the remainder of the opinion emphasizes the public’s right to receive information about the judicial process and characterizes the holding as narrow: “we hold narrowly that the information disclosed by Cape was of legitimate public concern.”

In *Snyder v. Phelps*, the U.S. Supreme Court affirmed a Court of Appeals ruling reversing a jury verdict for intrusion upon seclusion and intentional infliction of emotional distress, based on the defendants’ homophobic picketing of a military funeral with grossly offensive signs. The Court held that appellate courts must independently review the record on the issue of public concern. “Deciding whether speech is of public or private concern requires us to examine the content, form, and context of that speech, as revealed by the whole record…. As in other First Amendment cases, the court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.”

The court further held that even offensive speech can meet the public concern test. “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community…. or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public…. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”

The public concern test is contextual. “In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”

On the other hand, the dispositive holding of *Snyder* was that the signs, while they contained offensive content, undoubtedly discussed an important public issue.

While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs—such as ‘You're Going to Hell’ and ‘God Hates You’—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.

The *Snyder* court concluded by stating: “Our holding today is narrow.”

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53 Id. at 1379.
55 Id. at 453 (internal quotations omitted).
56 Id (internal quotations omitted).
57 Id. at 454.
58 Id.
59 Id. at 460.
In *Cape Publications v. Bridges*, a kidnapping victim who was forced to strip by her kidnapper was photographed escaping during a police raid clad only in a dish towel. The Court did not describe what was visible directly, but said it was little more than what would be seen had the plaintiff been wearing a bikini. The photo, found on Google, shows her chest and pelvic areas covered by a dish towel, but the rest of her uncovered. The Florida state court of appeal reversed a jury verdict for the plaintiff for public disclosure of private facts, holding:

Although publication of the photograph, which won industry awards, could be considered by some to be in bad taste, the law in Florida seems settled that where one becomes an actor in an occurrence of public interest, it is not an invasion of her right to privacy to publish her photograph with an account of such occurrence…. Just because the story and the photograph may be embarrassing or distressful to the plaintiff does not mean the newspaper cannot publish what is otherwise newsworthy.

Authorized publicity, customarily regarded as “news,” includes publications concerning crimes, arrests, police raids, suicides, marriages, divorces, accidents, fires, catastrophes of nature, narcotics related deaths, rare diseases, etc. and many other matters of genuine popular appeal.

Courts should be reluctant to interfere with a newspaper's privilege to publish news in the public interest.

However, the court emphasized the fact that the newspaper was not attempting to titillate its readers. “There were other more revealing photographs taken which were not published. The published photograph is more a depiction of grief, fright, emotional tension and flight than it is an appeal to other sensual appetites.”

In *Cinel v. Connick*, the Fifth Circuit U.S. Court of Appeals affirmed the dismissal of a public disclosure claim arising out of broadcast of portions of video of priest engaging in a sexual encounter with two young men on the syndicated television program, *Now It Can Be Told*. The court held that the public concern test protected the broadcast. The court implied that at least one of the young men on the tape was underage and that the tape could be child pornography. The plaintiff conceded that the story was one of public concern and argued that the excerpts of the video could not be broadcast. The court rejected this argument. “We disagree. The materials broadcast by the Appellees were substantially related to Appellant's story. Perhaps the use of the materials reflected the media's insensitivity, and no doubt Appellant was embarrassed, but we are not prepared to make editorial decisions for the media regarding

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60 423 So.2d 426 (Fla. 5th DCA 1982).
61 *Id.* at 427-28 (citation omitted).
62 *Id.* at 427 n. 2.
63 *Id.* at 428.
64 *Id.* at 427.
65 15 F.3d 1338 (5th Cir. 1994).
66 *Id.* at 1346, n. 8.
information directly related to matters of public concern.” The court did not discuss how explicit the excerpts were, though one can probably assume that because they were aired on syndicated television, they were not explicit.

In *Anderson v. Suiters*, the Tenth Circuit U.S. Court of Appeal affirmed summary judgment for media defendants in public disclosure case arising out of broadcast of portions of a video recording of a rape made by the rapist.

The media defendants have satisfied this inquiry because the videotape was substantially relevant to a matter of legitimate public interest: the prosecution of Anderson's husband, a local attorney, for rape, as well as for other sexual assault charges involving multiple victims. By the time the media defendants aired the excerpts from the videotape, Anderson's husband had already been arrested for at least one other rape…. Anderson's allegation that she had been raped by her husband increased the likelihood that there was support for the other pending charges against him. Information concerning the possible guilt or innocence of a person charged with a crime is a classic example of a matter of legitimate public concern…. By airing the videotape, the media defendants heightened the report's impact and credibility by demonstrating that the allegations rested on a firm evidentiary foundation and that the reporter had access to reliable information.

The court held that material such as this must be taken as a whole when determining whether it meets the public concern test. “Anderson argues the videotape was highly personal and intimate in nature. While the sensitive nature of the material might make its disclosure highly offensive to a reasonable person, that does not make the videotape any less newsworthy so long as the material as a whole is substantially relevant to a legitimate matter of public concern.”

The *Anderson* court went out of its way to state that its ruling was limited, and had the excerpts been more explicit, the case could have gone the other way:

By holding that the content of the media defendants' newscast was substantially relevant to a matter of legitimate public interest, we do not imply that members of the media may escape any liability for publication of private facts whenever the subject of the publication is an alleged perpetrator of a crime. Some facts about the victim of an alleged crime will be too tangential to the prosecution of the perpetrator to be substantially relevant to a matter of legitimate public interest. Wherever that line may be drawn in other cases, the facts that the media defendants published in this case, for the reasons stated above, are substantially relevant to the alleged criminal activities of Anderson's husband, a matter of legitimate public concern. The focus of the news broadcast was on the perpetrator, not the victim. And as even Anderson acknowledges in her brief, she was never identified by name, and the excerpted portion of the videotape was limited to a few movements of the alleged perpetrator.

67 Id. at 1346.
68 499 F.3d 1228 (10th Cir. 2007).
69 Id. at 1236.
70 Id.
attacker's naked body without disclosing the sexual acts in great detail; only Anderson's feet and calves were clearly visible, and they bore no identifying characteristics.... But it is also difficult to see how the broadcast at issue could be said to have no legitimate public interest—the test we must apply. Had the broadcast gone further in invading Anderson's privacy, rather than focusing on her estranged husband's wrongdoing, we would have had a very different case. But the simple fact is that this was a broadcast about a rapist, not a rape victim, and the legitimate privacy interests of the two could not be more different.\(^71\)

The \textit{Anderson} court also rejected expert testimony on the public concern issue:

Anderson also argues that a declaration by Prof. Melinda Levin of the University of North Texas—reporting her conclusion that the videotape was unnewsworthy—creates a genuine issue for trial. We disagree for two reasons. First, Prof. Levin opines on whether the news broadcast was ‘newsworthy’ or an issue of ‘public concern.’ But this determination, based on the undisputed facts in the record, is the ultimate question of law before us. While expert witnesses may testify as to the ultimate matter at issue…, this refers to testimony on ultimate facts; testimony on ultimate questions of law, i.e., legal opinions or conclusions, is not favored…. Second, Levin concludes that the videotape is not newsworthy because it exploits Anderson and adds to her victimization. Even if true, Levin's declaration attacks not the newsworthiness of the video excerpts, but the media defendants' editorial judgment in airing them. Editorial judgment is a matter that courts have generally left to the press…. While Levin's critique of the broadcast may be relevant to whether it would be highly offensive to a reasonable person, her opinion as to the video excerpt's substantial relevance to a legitimate matter of public concern impermissibly addresses the ultimate legal question.\(^72\)

\section*{VI. Professor Mike Foley on Journalism Ethics}

Bollea retained as a trial expert on Journalism and Journalism Ethics, Professor Mike Foley of the University of Florida School of Journalism. Prior to joining the faculty of the University, Professor Foley was employed by the \textit{St. Petersburg Times}, which was repeatedly ranked by TIME Magazine as one of the Top 10 newspapers in the United Stated, along side The New York Times, Washington Post, Wall Street Journal and others. The offices of the \textit{St. Petersburg Times} (now known as the \textit{Tampa Bay Times}), are located within about a mile from the courthouse when the \textit{Bollea v. Gawker Media} trial occurred. The following are excerpts from Professor Foley's written expert report in the \textit{Bollea v. Gawker Media} case:

\textbf{QUESTION 1:} Did Gawker's publication of the Hulk Hogan sex video serve any valid, ethical journalistic purpose?  

\textbf{CONCLUSION:} Based on my experience, background, knowledge, training, education, and more than 40-year career in journalism, I conclude with a

\(^{71}\) \textit{Id.} at 1237 (emphasis added).  
\(^{72}\) \textit{Id.} at 1237-38 (citations omitted).
reasonable degree of certainty, that Gawker’s publication of the sex video itself did
not serve any valid, ethical journalistic purpose.

Journalists don’t check their humanity at the door when they enter the profession. They don’t have to have cold hearts or lack sympathy or eliminate their empathy. In fact, just the opposite is true. A journalist is sensitive and understands the power he or she has—tremendous power to help or harm.

NEWS VALUES

Is it news that a sex video involving a famous professional wrestler exists? Probably. He is a celebrity, after all. Is it news that the ex-wife of the wrestler’s friend also is on the tape? Yes. Is it news that the video was shot secretly and that the person(s) responsible is (are) unknown? Yes.

But is the video itself news? Absolutely not.

Real journalists are ethical. Journalism has standards and values. The First Amendment is a privilege, not a license. To protect that privilege, professionals have established guidelines for reporting and publishing the news. They are designed to help journalists get at the truth while respecting basic human rights.
Consider these excerpts from the Society of Professional Journalists’ Code of Ethics, which, in my experience and based on my expertise, is commonly accepted as authoritative on ethical issues in the profession:

“MINIMIZE HARM

“Ethical journalists treat sources, subjects, colleagues and members of the public as human beings deserving of respect.
“Journalists should:
“Balance the public’s need for information against potential harm or discomfort. Pursuit of the news is not a license for arrogance or undue intrusiveness.
“Recognize that legal access to information differs from an ethical justification to publish or broadcast.
“Avoid pandering to lurid curiosity, even if others do.”

Respect for privacy is fundamental to the profession of journalism. While it is sometimes necessary to publish intimate details of a story, it is unethical to make it the goal. It is customary in the industry not to publish grisly images of car accidents, for example, unless it is absolutely necessary to the telling of the story. And when it is deemed necessary, the least-offensive material sufficient to tell the story is used.

* * *

THE SEX VIDEO FOOTAGE IS NOT NEWS
Gawker’s posting of this video isn’t because of its “news” value. Consider this headline on the site:

Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe For Work but Watch it Anyway

Based on my 30 years in the journalism profession, posting this video shows a total disregard for privacy. It’s insensitive. It shows contempt for the community and, from everything I have read, incredible arrogance.

Take the case of celebrity Erin Andrews. The fact that some criminal made a surreptitious video of her naked in a hotel room is news. However, I know of no reputable journalistic enterprise that published the tape or even a detailed description of its content. Gawker posted a link to the video.

Last year, a Tampa businessman was arrested and charged with secretly recording hundreds of instances of women showering and using the toilets at his company. The Tampa Bay Times and other news outlets ran stories. Not one published the video.

Last June, the Los Angeles Times published a story about a dance company worker who was arrested and accused of video recording underage girls in a dressing room. Is it a good news story? You bet. Did the Times print any of his pictures? Of course not. I doubt the possibility was even raised.

Last summer, Johns Hopkins Hospital began paying a $190 million legal settlement to patients of a gynecologist who secretly videotaped women during examinations. I am not aware of any news outlet publishing any of that footage and, based on my experience, I cannot imagine any news outlet even spending a moment considering publishing that material.

In fact, the archives of the Tampa Bay Times and other Florida media outlets contain numerous stories about men being arrested for secretly filming women in restrooms or in the dressing room of a clothing store. As far as I know, nobody published the footage. And, based on my experience, I feel certain that none of these videos was even considered for publication.

The fact that these events occurred is news. Footage of the criminally recorded videos and photos is not.

PRIVACY IGNORED
Based on my examination of Gawker’s practices in this matter, as well as others, Gawker violated the privacy of Terry Bollea (Hulk Hogan), which is unfair and meant to cause harm, rather than minimize it.

Gawker Media (@Gawker.com or one of its affiliated publications, Deadspin):

* Published topless photos of Kate Middleton, wife of the future king of England.
* Linked to the surreptitiously and criminally recorded tape of Erin Andrews naked.
* Posted private footage of Grey’s Anatomy star Eric Dane, his wife Rebecca Gayheart and another young woman naked, and the couple sued Gawker for doing so.
* Posted cellphone photos of what was claimed to be Brett Favre’s penis.

And, in perhaps one of the coldest “news reporting” examples, Deadspin posted a video of an apparently intoxicated couple (neither of whom was a public figure) having sex on the restroom floor of an Indiana sports bar. Emails begging that the video be deleted were met with this response from Gawker’s counsel, with a copy to writer and editor A.J. Daulerio

“[Name], This is a news story, and completely newsworthy. It’s the truth, which can be hurtful, granted, but one’s actions can have unintended consequences, especially when carried out in a public or semi-public place where clearly people were able to easily watch the activity at hand….This whole story will blow over quickly if it is not given legs, but we believe that we are publishing this legitimately and as such, we will not remove the clip.”

(The clip was eventually taken down after the editor, Daulerio, reported, “We saw enough.”)

Gawker refused the request of Hulk Hogan’s attorney—sent immediately after the sex video was posted—to take down the video. The sex video remained at Gawker.com for six months.

**QUESTION 2: Did Gawker’s posting of the Hulk Hogan sex video footage violate fundamental principles of journalism?**

**CONCLUSION:** Based on my experience, background, knowledge, training, education, and more than 40-year career in journalism, I conclude with a reasonable degree of certainty, that Gawker’s posting of the Hulk Hogan sex video footage violated fundamental principles of journalism.

There are three **absolute** requirements for good reporting: The story must be **accurate**, it must be **complete** and it must be **fair**.
Journalists should not publish unverified anonymous tips and rumors. The custom and practice in journalism is to check and often double check everything. (There’s an old saying in the business: “If your mother tells you she loves you, check it out.”) Journalists contact everyone involved with the story. They get all sides.

They have ethics. They try to avoid using anonymous sources when it is not necessary to serve the public interest, and they carefully verify stories when they do. They avoid conflicts of interest. They run corrections if they make mistakes. They give careful thought and consideration before publishing offensive material. (It has to have “news” value and be essential to the telling of the story.) They respect peoples’ privacy and only disclose private information when it is necessary to report matters of public concern.

The ultimate goal is to help readers/viewers understand a confusing world.

Based on my extensive review of Gawker’s work, it is not Gawker’s institutional intention to adhere to the fundamental principles of journalism. In fact, Gawker, its founder and its editors have said publicly that they do not.

**INADVERTENT “JOURNALISM”**

In an interview with Howard Kurtz that appeared in the *Washington Post*, Gawker’s founder and CEO Nick Denton is quoted as saying, “We don’t seek to do good….We may inadvertently do good. We may inadvertently commit journalism. That is not the institutional intention.”

In a February 2014 interview in *Playboy* magazine, Denton reportedly was asked: Is it possible you set a lower value on privacy than most people do?

His response: “I don’t think people give a f--k, actually.”

He also is quoted as saying, “…every infringement of privacy is sort of liberating.” And “You could argue that privacy has never really existed.”

* * *

The posting of the sex video definitely is not fair. Hulk Hogan had no idea he was on camera. The video is hurtful and embarrassing. And it doesn’t add to the story or move it along.

It represents a total disregard for privacy and is nothing more than pornography.

**VII. Opinions of Legal Experts**
Beyond the legal authorities set forth above, several Constitutional Law experts have weighed in on the privacy versus First Amendment battle playing out in the Bollea v. Gawker Media, lawsuit. Erwin Chemerinsky, the Dean of the University of California at Irvine School of Law and professor of First Amendment Law, wrote an op-ed piece titled “Privacy versus speech in the Hulk Hogan sex tape trial” which was published in the Los Angeles Times on March 14, 2016 (during the Bollea v. Gawker Media trial). Dean Chemerinsky wrote:

The law allows recovery for publicly disclosing private information if the revelation would be offensive to a reasonable person and if the information is not “newsworthy.” Put another way, the facts disclosed must not be a matter of legitimate public concern. But courts, including the Supreme Court, have failed to offer a definition or way of determining what is newsworthy. Defining the concept is problematic. Should juries assess newsworthiness according to the public's actual interest in the material? Isn't anything then newsworthy if enough people want to look at it? By this standard, the Hogan videotape is newsworthy simply because many people watched it and — logically — there is virtually no such thing as an invasion of privacy in a prurient society. (Sex, Daulerio readily conceded at trial, sells.) Alternatively, should juries determine newsworthiness according to what the public should be interested in? But then who gets to decide what's valid and what's not? Indeed, this case reflects how the changing notions of privacy in society make it much harder to decide what would be offensive to the reasonable person and what isn't of public concern…. But I can imagine a clear rule: No videos of people having sex should be made public unless all of the participants consent. I think the media will survive the restriction.73

Law Professor Amy Gajda of Tulane University, author of the book The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press, wrote an article titled “Privacy vs. Press,” published at Slate.com on March 21, 2016 (days after the Bollea v. Gawker Media jury verdict.) Professor Gadja states “these jurors may not be alone in giving new deference to privacy concerns” and discusses how the U.S. Supreme Court, based on the Bartnicki decision, is likely to favor Bollea under the circumstances presented in the case, because of the relative lack of public importance of seeing sexual activity in a private bedroom as contrasted with the importance of protecting the privacy of the participants.74

Robert Levine, author of the book Free Ride: How Digital Parasites Are Destroying the Culture Business wrote an article titled “What Hulk Hogan’s Gawker Lawsuit Means for Our Privacy” published in the New York Times on April 4, 2016. In discussing the trial testimony by Bollea regarding the difference between the public persona of the character “Hulk Hogan” with the private personal of the individual, Terry Bollea, Levine states: “the idea that a person may divulge some information in one context but not another is at the heart of modern privacy theory.” He further states that Bollea’s “essential complaint is one that many of us share in and one that our laws haven’t addressed: How do we control our information in the digital age?”

Levine concludes that, in the era of modern technology: “What we really need are more nuanced laws that can safeguard privacy in the digital age.”

VIII. YouGov.com Survey, March 2016

On March 22-23, 2016, a few days after the Bollea verdict, YouGov.com conducted a survey of 1,000 Americans, and asked the question: “Do you think it was acceptable or unacceptable for Gawker to publish the video of Hulk Hogan having sex?” By a margin of 11-to-1, respondents favored Hulk Hogan, with 77% answering “Unacceptable” to only 7% answering “Acceptable” (and 16% answering “Not sure.”) The same survey also reported that 80% of Americans say that it should be illegal for media outlets to publish tapes like the Bollea video, with only 8% saying it should be legal: a 10-to-1 margin.

IX. Conclusion

In the words of Professor Mike Foley of the University of Florida School of Journalism, Bollea’s retained expert on journalism and journalism ethics who testified at the Bollea v. Gawker Media trial:

[Gawker’s posting of the Bollea sex video] was not about reporting the news that a sex video of Hulk Hogan did, indeed, exist; the news story could have been written without posting the footage from the video. Gawker posted the 1 minute and 41 seconds of sex footage because Gawker is in the business of publishing sex and calling it news.

The posting of the sex video definitely is not fair. [Bollea] had no idea he was on camera. The video is hurtful and embarrassing. And it doesn't add to the story or move it along. It represents a total disregard for privacy and is nothing more than pornography.

When the men who framed the Constitution and crafted the list of freedoms that guide this country, the Internet—and websites like Gawker—were not part of the thought process. I don't think they could have imagined the enormous power to help—or hurt—people that has evolved. I certainly don't think they would be happy.

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MELANIA TRUMP
725 Fifth Avenue
New York, New York 10022

Plaintiff,
v.

WEBSTER GRIFFIN TARPELEY
115 Goucher Terrace
Gaithersburg, Maryland 20871

and

MAIL MEDIA, INC. d/b/a MAIL ONLINE
42 Greene Street, Fourth Floor
New York, New York 10013

SERVE:
Maryland State Department of
Assessments and Taxation
301 W. Preston St.
Baltimore, Maryland 21201

Defendants.

Case No. V4244192

RECEIVED
SEP 01 2016
Clerk of the Circuit Court
Montgomery County, Md.

COMPLAINT

Plaintiff, Melania Trump, by and through counsel, brings this action against Defendants Webster Griffin Tarpley and Mail Media, Inc. d/b/a Mail Online.

PARTIES

1. Plaintiff is an individual residing in New York, New York.

2. On information and belief, Defendant Webster Griffin Tarpley (“Tarpley”) is an individual residing in Gaithersburg, Maryland who operates Tarpley.net, a weblog on the Internet.
On information and belief, Defendant Mail Media, Inc. d/b/a Mail Online ("Daily Mail") is a Delaware corporation, with its principal place of business in New York, New York, that manages, operates and/or publishes dailymail.co.uk, a news website. Daily Mail has United States web traffic of nearly 2 million visitors each day.

**JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to Md. Code Ann., Courts and Judicial Proceedings § 6-102 because Tarpley is domiciled in Montgomery County, Maryland. This Court also has jurisdiction over this action pursuant to Md. Code Ann., Courts and Judicial Proceedings § 6-103 based upon the transaction of business in the State of Maryland by Tarpley and Daily Mail.

5. Venue in this Court is appropriate pursuant to Md. Code Ann., Courts and Judicial Proceedings § 6-201 because Tarpley resides in Montgomery County, Maryland.

**COUNT I**

(Defamation Against Tarpley)

6. Plaintiff realleges and incorporates by reference paragraphs 1 through 5 as though fully set forth herein.


8. The Tarpley Post contains the following false and defamatory statements:

   a. “Rumors Swirl in Manhattan That Ms. Trump Is Having an Apoplectic Fit After Plagiarism Incident at GOP Convention and Is Refusing to Return to Campaign Trail, Putting Enormous Strain on Trump Operation;”

   b. “Ms. Trump Reportedly Obsessed by Fear of Salacious Revelations by Wealthy Clients from Her Time as a High-End Escort;”
c. "It is also widely known that Melania was not a working model but rather a high end escort."

d. "But now, two wives of wealthy business associates of the GOP nominee have reportedly been overheard during this past weekend as saying that Melania is in a state of apoplectic tantrum, and is suffering from a full-blown nervous breakdown."

e. "She may also be contemplating flight, according to these unconfirmed reports coming from a well-informed source."

f. "It is speculated that Trump will attempt to hide Melania’s mental breakdown and rejection of campaigning from the media and the public for as long as possible."

g. "Melania’s condition is already compounding Trump’s stress during the arduous presidential campaign."

h. "According to this report, Melania Trump is terrified about possible revelations involving her past activities, which are widely known to fellow Manhattan insiders, but are largely concealed from the general public."

i. "It is alleged that Melania did not work with any regularity as a model, much less a supermodel, before she knew Trump, but was described by the sources as a high end escort."

j. "Melania is said to be most afraid that some of her former clients will now come forward and implicate her as a luxury escort."

k. "Fear of embarrassing revelations is reported to be felt by both Trumps."

l. "The rapper 50 Cent has also made critical observations about Ms. Trump’s past as a ‘porn star.’"
m. “Certain Twitter feeds have also discussed Melania as a professional 'service provider.'”

n. “As part of the atmospherics of Melania’s reported mental breakdown, the Rupert Murdoch-owned New York Post has chosen to publish nude photos of Melania for two separate issues in recent days.”

9. The statements of fact in the Tarpley Blog Post are false. Plaintiff did legitimate and legal modeling work for legitimate business entities. Plaintiff was not an escort or prostitute. Plaintiff did not have an apoplectic fit, apoplectic tantrum, nervous breakdown or mental breakdown, nor is she terrified or obsessed by fear about revelations from her past. Finally, Plaintiff never refused to return to the campaign trail or contemplated flight.

10. The defamatory statements made in the Tarpley Blog Post were of and concerning Plaintiff, and were attacks on her reputation which discouraged members of the public from having a positive opinion of her.

11. On information and belief, Tarpley published the Tarpley Blog Post while consciously doubting the truth of the claims in the article and thus acted with actual malice.

12. The defamatory statements in the Tarpley Blog Post were not privileged.

13. On or about August 21, 2016, Plaintiff, through counsel, sought a retraction and apology from Tarpley. On or about August 22, 2016, Tarpley removed the Tarpley Blog Post and published an apology and retraction of the Tarpley Blog Post.

14. The injurious character of the defamatory statements in the Tarpley Blog Post is self evident and therefore constitutes defamation per se. Further, Plaintiff is involved in many business ventures involving the licensing of her name and likeness, and relying upon her valuable reputation, and the defamatory publication foreseeably caused substantial damage to her
business, career, reputation and her actual and prospective economic relationships. As a result of
Tarpley’s conduct, Plaintiff has been damaged in an amount to be proven at trial.

15. Tarpley’s conduct was despicable, abhorrent, intentional, malicious, and
oppressive, and thus justifies an award of punitive damages.

WHEREFORE, the plaintiff, Melania Trump, demands judgment against the defendant,
Webster Griffin Tarpley, in an amount in excess of Seventy Five Thousand Dollars ($75,000.00)
in compensatory damages and punitive damages, for a permanent injunction enjoining the
publication of the defamatory statements set forth herein, plus interest and costs and for such
other relief as this Court deems proper.

COUNT II
(Libel Against Daily Mail)

16. Plaintiff realleges and incorporates by this reference paragraphs 1 through 5 as
though fully set forth herein.

17. On or about August 19, 2016, Daily Mail published an article entitled “Naked
photoshoots, and troubling questions about visas that won’t go away: The VERY racy past of
Donald Trump’s Slovenian wife” (the “Daily Mail Article”) on dailymail.co.uk.

18. The Daily Mail Article contained the following false and defamatory statements:

a. “Just as it’s now claimed Melania moved to New York in 1995 — not
1996 as she still says — based on a set of highly-charged, lesbian-themed, nude
photographs of her said to have been taken in New York in 1995, which re-surfaced last
week — it is also now being suggested the Trumps may have got confused about the date
of their first meeting."

b. “According to a Slovenian journalist who has recently published an
unauthorised biography of Melania, the Kit Kat meeting was staged — an elaborate act
for the benefit of the public.”

c. “Bojan Pozar claims the pair first met three years earlier, in 1995, around the time of the nude photo shoot. ‘During my research I was told that they met in 1995,’ says Pozar, a journalist who is co-author of Melania Trump — The Inside Story: From A Slovenian Communist Village To The White House.”

d. “The years between 1995 and 1998 are the most secret years of Melania Trump. She’d had a number of boyfriends in Slovenia, but we did not find anyone involved with Melania romantically during these years — it is very strange.’”

e. “But why lie about the dates in the first place? Well, firstly, in 1995 Trump was still married to his second wife, Marla Maples, whom he’d wed in 1993.”

f. “Claims that the 1998 meeting was a ‘ruse’ are also made in another book, published this year, and available on Amazon.”

g. “The book makes a number of unpleasant claims — such as one that a modelling agency Melania worked for in Milan before moving to New York was ‘something like a gentleman’s club’.”

h. “Earlier this month, a Slovenian magazine, Suzy, published a front page story claiming Melania’s modelling agency in New York, run by New York entrepreneur, Paolo Zampolli, also operated as an escort agency for wealthy clients.”

i. “‘On the one hand they [the girls] pretended to be models, but they principally earned money as elite escorts,’ the magazine article claimed. ‘They even had two composite cards (presentation cards held by each model) — with two photos and basic information such as measurements, eye and hair colour, and agency details.’”
j. "One composite card was for the modelling business, and the other one for the sex business, as it stated whether they prefer the older men and described their abilities in the bedroom."

k. "The article added: 'What Melania’s [composite card] looked like only the people involved know, but it is no coincidence she got a rich husband.'"

l. "Biography writer Bojan Pozar has been told conflicting stories. One is that they were introduced at a restaurant in New York’s Soho, another that it was at a party given by a well known basketball player. But his sources agree on one thing — that it wasn’t at the Kit Kat Club in 1998."

19. The statements of fact in the Daily Mail Article are false. Plaintiff did legitimate and legal modeling work for legitimate business entities and did not work for any “gentleman’s club” or “escort” agencies. Plaintiff was not a sex worker, escort or prostitute in any way, shape or form, nor did she ever have a composite or presentation card for the sex business. Plaintiff did not come to the United States until 1996. Thus, Plaintiff did not, and could not have participated in a photo shoot in the United States or met her current husband in the United States prior to that time.

20. The defamatory statements made in the Daily Mail Article were of and concerning Plaintiff, and were attacks on her reputation which discouraged members of the public from having a positive opinion of her.

21. On information and belief, Daily Mail wrote, edited and/or published the Daily Mail Article while consciously doubting the truth of the claims in the article, and after having received a written statement from Plaintiff’s representative that the claims in the article were false, and specifically that the source that they relied on was "an unauthorized book written by
malicious and bitter 'reporters' who have never met or spoken to Mrs. Trump and wrote a book filled with lies for their own personal gain”. Further, the Daily Mail Article itself admitted that the claims that Plaintiff worked as an escort were “unsubstantiated” and that the author of the article was unable to contact the book author who was the supposed “source” of the claims. The book upon which the Daily Mail Article was based was apparently self-published and inherently unreliable. Daily Mail thus acted with actual malice.

22. The defamatory statements in the Daily Mail Article were not privileged.

23. On or about August 22, 2016, Plaintiff, through counsel, sought from Daily Mail a retraction of the Daily Mail Article, and an apology. On August 25, 2016, the Daily Mail Article was removed from dailymail.co.uk. However, as of the date of filing of this Complaint, there has been no retraction of the Daily Mail Article, or an apology.

24. The injurious character of the defamatory statements in the Daily Mail Article is self evident and therefore constitutes defamation per se. Further, Plaintiff is involved in many business ventures involving the licensing of her name and likeness, and relying upon her valuable reputation, and the defamatory publication foreseeably caused substantial damage to her business, career, reputation and her actual and prospective economic relationships. As a result of the conduct of Daily Mail, Plaintiff has been damaged in an amount to be proven at trial.

25. The conduct of Daily Mail was despicable, abhorrent, intentional, malicious and oppressive, and thus justifies an award of punitive damages.

WHEREFORE, the plaintiff, Melania Trump, demands judgment against the defendant, Mail Media, Inc. d/b/a Mail Online, in an amount in excess of Seventy Five Thousand Dollars ($75,000.00) in compensatory damages and punitive damages, for a permanent injunction enjoining the publication of the defamatory statements set forth herein, plus interest and costs
and for such other relief as this Court deems proper.

COUNT III
(Tortious Interference With Actual and/or Prospective Business Advantage
Against All Defendants)

26. Plaintiff realleges and incorporates by this reference paragraphs 1 through 25 as though fully set forth herein.

27. Plaintiff has numerous licensing and endorsement contracts based on her good name and reputation as a prominent woman in American business, politics and fashion.

28. The defamatory statements of each of the Defendants, as pleaded in this Complaint, were intentionally made and were foreseeably and substantially certain to cause interference with Plaintiff's actual and/or prospective business relationships by damaging Plaintiff's good name and reputation, and deterring persons and entities from doing business with her.

29. Defendants' conduct in publishing the defamatory statements alleged herein actually interfered with Plaintiff's actual and/or prospective business relationships by sullying her good name and accusing her of criminal, immoral conduct which advertisers and business people did not wish to be associated with.

30. Defendants' conduct in publishing false and defamatory statements was wrongful and tortious conduct.

31. Defendants' publication of false and defamatory statements was not privileged.

32. As a proximate result of Defendants' conduct, Plaintiff has suffered damage to her actual and/or prospective business relationships in an amount to be proven at trial.

33. Defendants' conduct was despicable, abhorrent, intentional, malicious, and oppressive, and thus justifies an award of punitive damages.
WHEREFORE, the plaintiff, Melania Trump, demands judgment jointly and severally against all defendants in an amount in excess of Seventy Five Thousand Dollars ($75,000.00) in compensatory damages and punitive damages, for a permanent injunction enjoining the publication of the defamatory statements set forth herein, plus interest and costs and for such other relief as this Court deems proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues in this case pursuant to Md. Rule 2-325.

Respectfully submitted,

MILLER, MILLER & CANBY

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(Pro hac vice application to be filed)

September 1, 2016
DEPARTMENT K LAW AND MOTION RULINGS

If the parties wish to submit on the tentative ruling and avoid a court appearance on the matter, the moving party must contact the opposing party and all other parties who have appeared in the action and confirm that each will submit on the tentative ruling. Please call the court no later than 4:30 p.m. on the court day before the hearing, leave a message with the court clerk at (310) 260-3501, or via e-mail at samdeptk@lasuperiorcourt.org advising that all parties will submit on the tentative ruling and waive hearing, and finally, serve notice of the Court’s ruling on all parties entitled to receive service. If any party declines to submit on the tentative ruling, then no telephone call is necessary, and all parties should appear at the hearing personally or by Court Call.

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**Case Number:** SC120883  **Hearing Date:** October 13, 2015  **Dept:** K

The Motion for Summary Judgment filed by Defendants LNT Acquisition, LLC, Sears Brands, LLC, Sears Holdings Management Corporation, and Torrey Commerce, Inc. is denied.

The Communication Decency Act does not shield Defendants from any intellectual property claims including state law intellectual claims.

This Court finds the interpretation of 47USC 230(e)(2) by the First, Second and Eleventh Circuits to be persuasive. There is no Supreme Court decision to follow.

The Motion for Summary Adjudication as to the 2nd Cause of Action (Common Law Right of Privacy) filed by Defendants LNT Acquisition, LLC, Sears Brands, LLC, Sears Holdings Management Corporation, and Torrey Commerce, Inc. is granted.

Whether an entity is an internet service provider or an information content provider depends on the specific content that gave rise to the plaintiff's claims and the role the defendant played in relation to that specific content.

The Common Law Right of Privacy is not an intellectual property claim and the undisputed evidence shows that Defendants did not act as an information content provider to any of the offending content upon which Plaintiff’s claims of invasion of privacy are based.

The spreadsheet in combination with the Person Most Knowledgeable testimony (Timothy Swanson) show that Defendants had no role in originating any of the content listed on the internet sights.

Plaintiff argues that the Defendants' spreadsheet of the offending content does not establish that Defendants did not create or in some way contribute to the origination of the content and omits a number of offending items. Defendants are not merely relying on the spreadsheet to establish that they did not create or contribute to the original of the content. Defendants are relying on their Person Most Knowledgeable's testimony that they do not review the content of third party seller listings, do not modify the content, do not contribute or in any way originate that content and that all the listings on the spreadsheet were third party seller listings. See the Declaration of Timothy Swanson.
With regard to the omitted entries on the spreadsheet, Defendants’ showing is sufficient to shift the burden to Plaintiff to raise a triable issue of material fact regarding whether Defendants acted as something other than an internet service provider as to the offending content. Plaintiff’s evidence that the spreadsheet omitted some offending content is not sufficient. Plaintiff’s evidence indicates that the omitted offending content were all third party seller listings. Given the nature of third party seller listings, Plaintiff must not only demonstrate that the spreadsheet omitted offending content but that Defendants contributed to the origination of offending content. Plaintiff fails to do so.

Plaintiff’s Objections to the Declaration of Kim Ashley:
1. Overruled
2. Overruled

Plaintiff’s Objections to the Declaration of Timothy Swanson:
3. Overruled
4. Overruled
5. Overruled
6. Overruled
7. Overruled
8. Overruled
9. Overruled
10. Overruled
11. Overruled
12. Overruled

Why He Matters

Brittenham, likely the most powerful deal lawyer in Hollywood, long ago diversified beyond representing talent. He has handled studio executives and investment bankers, shepherding Legendary Entertainment’s $3.5 billion acquisition by China’s Dalian Wanda Group in January, the recent recapitalization of Skydance Media and the planned rollout of Sean Parker’s controversial home-movie service Screening Room. But Brittenham, married since 1992 to actress and activist Heather Thomas, still handles A-list actors, and none had a better year than Harrison Ford.

Besides reprising his Han Solo in the year’s top-grossing film, *Star Wars: The Force Awakens*, Ford is filming a *Blade Runner* sequel and signed for a fifth *Indiana Jones* movie. The actor, whom Brittenham has represented since before the original *Star Wars* in 1977, still plays tennis a few times a week at his lawyer’s home court in Santa Monica. “He’s actually an amazing player,” says Brittenham. But Ford plays with a tennis pro from the nearby Riviera Country Club; the attorney and client don’t face off against each other. Says Ford, “Skip’s more of a doubles guy.”
“It’s just so crazy the year that he’s having. I started working with him in 2007. I went to see *In the Heights*, his first musical, and I knew I would do anything in the world to represent him.”

*Rose, O’Hara & department of the year*
“Think twice before you invade someone’s privacy or violate their rights. Just because rules might seem more relaxed on the internet, the same laws that protect people still apply.”

CHARLES HARDER AND TEAM with client HULK HOGAN

WHY HE MATTERS
Harder (third from right) acted as lead counsel for Hogan (second from right) in his headline-grabbing case against Gawker for publishing a personal sex tape. A Florida jury shocked the media world by awarding Hogan (real name: Terry Bollea) $140.1 million in damages.

Other clients: Lena Dunham, Reese Witherspoon, Sandra Bullock, George Clooney, Claire Danes, Cameron Diaz, Michael J. Fox, Kate Hudson, Patrick Stewart and producer Dick Wolf.

BEST MEAL I’VE EXPENSED
“The Hulk Hogan verdict celebration dinner. We ordered lots of food. It was excellent, but we hardly ate any— we were too excited—and mostly just drank champagne.”

From left, Seema Ghatnekar, Kenneth Turkel, Shane Vogt, Harder, Hogan and David Houston were photographed by Andrew Hetherington on March 22 in St. Petersburg, Fla.

HARDER, ON THE GAWKER VERDICT
“Think twice before you invade someone’s privacy or violate their rights. Just because rules might seem more relaxed on the internet, the same laws that protect people still apply.”

Tina Perry
OWN, executive vp business and legal affairs
"Hart of Dixie” Perry is helping OWN break into the world of original scripted series. She negotiated a deal with Lionsgate for "Greenleaf" and another with Ava DuVernay to write, direct and executive produce "Queen Sugar," both of which will premiere this year. Perry also worked with Tyler Perry to secure new episodes of his four hit series that air on OWN.

Martin Willhite
Legendary Entertainment, COO and general counsel
"Legally Sane Law School," Willhite is lead negotiator on all of Legendary’s corporate deals, including its $3.5 billion sale this year to China’s Dalian Wanda Group. The deal was the largest media acquisition by a Chinese company to date and transformed Legendary from an independent studio to a global media player. With new resources and reach, Willhite is looking to build out Legendary’s television business (it has four shows on the air). Before Wanda, Willhite refitted and extended the company’s $850 million senior credit line with JP Morgan.
It's that type of school.”

our head of school, and Beyoncé performed, and

is named. You can't get

band, producer Harry Gittes, for whom the

Southwestern Law School

Georgetown University Law Center

MOST HOLLYWOOD THING ABOUT MY LIFE

… lawyers: She repped writer-producers Scott

War ‘s

Wonder

Justice Leagues

Along with representing clients such as YouTube

Capital), but now he’s branching into digital.

Fox in a trial against Tracey Ullman, who claimed a slice

Berkeley. She enjoyed early career success defending

Flagship Entertainment joint venture with China

Hollywood make movies for the Chinese mar-

Erramouspe

Tom Hardy. He has met John Travolta,” says

— MATTHEW BELLONI

— he'd sail through a confirmation hearing.”

Stars, including reality shows (the Kardashians.

Myman Greenspan

and Warner Music Group.

Grubman Shire

BMG Rights Management

Ubisoft’s game-to-film adaptations (including

Ready Player One

and 3D rerelease of

Mission: Impossible

and is advising Stan Lee’s company POW!

comments for new projects, including new

Production, Alex Brands, Sir Galahad, The Happy

a spin-off of

Batman

that spent 16 years repping

including John F. Kennedy University

LaPolt Law P.C.

members of the Grateful

and Barbra Streisand,

Dre (helping with

time lawyer also reps Dr.

Berliner

Adele.

roster of clients spans

clients include showrunners Shonda

American Idol.

the Family reunion tour.

Grill Parker

Grammy-award winning

and, recently, Irwin Winkler, whom Fields

produce a TV reboot of

and is advising Stan Lee’s company POW!

infringement cases against Vimeo and has

labels. Frackman also is repping Capitol

After all these years,

infringement

‘Some of
“To me, the ideal client asks many questions and wants to be fully informed — and that is certainly the case with Sean. There’s no one I’d rather share a trench with.”

MATTHEW ROSENbART with client SEAN PENN

WHY HE MATTERS Representing social media star Peter Hollister, One Day Rosenberg negotiated $29.9 million designating $3.8 million to amends for the actor’s mother against Zimato — representing Los Angeles’ popular Spanish restaurant El Chapo that Penn controlled cinematographically (to charge the actor subsequently). Another day he’s representing Penn to deal with the fallout from his federal court case before he wrote about El Chapo’s fall. And yet another day he’s dealing with the fallout from a Pennsylvania case Penn wrote about El Chapo and prepping him to explain himself on 60 Minutes. Other clients of the former paparazzi include Patricia Applegate and Michael Douglas.

OUTSIDE THE OFFICE: I'M MOST PASSIONATE ABOUT TECHNOLOGY.

Peter Duff Photography were co-published by Digital Harcourt and with Money.com.

POWER LAWYERS 2016 CORPORATE | LITIGATION | TALENT | TECHNOLOGY

JOHN GRUBMAN

Saget Sagan

David Neuman

Brooklyn Law School

Alicia DiGugliemo

A LAZY SUNDAY, I’D RATHER SHARE A TRENCH WITH

WILLIAM ROSENbART

I wanted to be Han Solo so badly. I asked around in a Han Solo-style vest. I was Boba Fett.”

“My favorite lunch spot? Tennis!”

“The biggest deal of the year, I’m like the little girl on YouTube who found out Obama bought Sue Mengers’ house.”

“I hate to argue. You have to be informed — and that is certainly the case with Sean. There’s no one I’d rather share a trench with.”

“Hertz’s year: sending the manuscript on April 4 in Los Angeles — a 2014 memoir titled $$.
— to client Aaron Sorkin. The Oscar winner liked it so much, he’s not only adapting the screenplay but also will make the project his directorial debut. This year, Hertz also structured a tour of Annie Leibovitz’s photography and helped launch Masterclass.com, an education site that allows students to interact online with learned celebrities like Kevin Spacey and Christine Aguilera.

**FICTIONAL LAWYER I WOULD NOMINATE FOR THE SUPREME COURT** “Professor Charles Kingsfield Jr. [from The Paper Chase].”

**Southwestern Law School**

**JIM JACKOWAY**
Jackoway Tyerman Wertheimer Austen Mandelbaum Morris & Klein

**WHY HE MATTERS** Jackobson has become an expert in the interpretative issues surrounding Seacrest's hit show. He has represented the producer in a number of high-profile cases and is known for his ability to navigate complex legal issues with ease.

**NYU School of Law**

**CRAIG JACOBSON**
Hansen Jacobson Teller Hoberman Newman Warren Richman Rush & Kaller

**WHY HE MATTERS** Jacobson has been helping long-time client J.J. Abrams move deeper into the digital space (with Abrams’ Bad Robot producing 11.22.63, Hulu’s first major original drama) and finalized an extension of longtime client Seth MacFarlane’s deal with 20th Television. He also extended Mitch Hurwitz’s deal with Netflix for another season of Arrested Development (though scheduling conflicts among the cast might end up delaying its arrival), even as decades-long client David Letterman retired.

**GOOD LUCK CHARM** “Red pieces of yarn tied around my neck and wrist by Buddhist monks in Bhutan and Cambodia.”

**NYU School of Law**

**MATTHEW JOHNSON**
Ziffren Brittenham

**WHY HE MATTERS** Johnson is representing three individuals who claim ABC’s hit drama Quantico was derived from the script and documentary they had been working on for more than a decade. Idea theft cases are notoriously difficult to win, but Johnson has a good track record in court, recently settling a class action lawsuit against Universal over home video money for $26 million.

**Southwestern Law School**

**NEVILLE JOHNSON**
Johnson & Johnson

**WHY HE MATTERS** Johnson is representing three individuals who claim ABC’s hit drama Quantico was derived from the script and documentary they had been working on for more than a decade. Idea theft cases are notoriously difficult to win, but Johnson has a good track record in court, recently settling a class action lawsuit against Universal over home video money for $26 million.

**POWER LAWYERS 2016**

**CORPORATE | LITIGATION | TALENT | TECHNOLOGY**

**NEW DEVELOPMENTS IN HOLLYWOOD DIVORCE LAW**

**HOW TO PLAN FOR YOUR FUTURE EX’S REALITY SHOW AND OTHER TIPS FROM TOP FAMILY ATTORNEYS**

**WHY HE MATTERS** Kraft has become a go-to-talent lawyer for internet stars. His client list includes Cameron Dallas, Michelle Phan, Rhett & Link, Andrew Bachelor, Logan Paul, Fourey and scores of other top entertainers that nobody over the age of 35 ever heard of. But he also represents old-fashioned content makers, helping producer Beau Flynn set up a boywatch feature at Paramount and working on seven-figure deals for NBC’s Chicago Fire creators Michael Brandt and Derek Haas as they build a spinoff empire.

**FAVORITE LUNCH SPOT** “The Grill, I could teach a semester-long course on the seating geography and political science of that place.”

**University of Tennessee College of Law**

**JOEL KATZ**
Greenberg Traurig

**WHY HE MATTERS** Katz is the music legend who acts as general counsel for the Michael Jackson estate — recently closed the $750 million sale of Jackson’s 50 percent stake in Sony/ATV Music Publishing to Sony Corp. The Atlanta-based attorney also worked on the development of the Margaritaville Beach Resort in Hollywood, Fla., and brokered a deal between the Berklee College of Music and the government of the Central West African nation of Gabon to build a pan-African music school, called the African Music Institute, in the Gabon capital Libreville.

**University of Michigan Law School**

**DALE KINSELLA**
Kinsella Weitzman Iser Kump & Aldisert

**WHY HE MATTERS** KinSELLA is representing producer Barry Josephson in his lawsuit against Fox over profits from the long-running hit series Bones as well as former Walking Dead executive producer Frank Darabont in his suit against AMC (Darabont claims the network licensed the series for far below market rates, cutting his potential profits). His big Godzillia case (he represented producers who claimed they were unfairly ousted from the 2014 film) was settled last summer.

**UCLA School of Law**

**DARWIN KING**
King Holmes Paterno & Berliner

**WHY HE MATTERS** King is repping Jared Leto in a case against TME (the posting of a video removed from the actor-musician’s studio) and is helping Rita Ora and Avenged Sevenfold find ways out of their record deals with Interscope and Warner Bros. Records. He also is trying to extricate singer Phillip Phillips from his American Idol deal, picked up Lil Wayne as a new client and is continuing his appeal of 2015’s big loss in the “Blurred Lines” case (he already has succeeded in having the $7.3 million jury verdict against clients Pharrell Williams and Robin Thicke reduced by $2 million).

**GOOD LUCK CHARM** “A tie from Harrods my wife bought me while I deposed Michael Jackson.”

**UCLA School of Law**

**KINSELLA WEITZMAN ISER KUMP & ALDISERT**

**WHY HE MATTERS** He’s representing main producer Barry Josephson in this hit series against Fox over profits from the long-running hit series Bones as well as former Walking Dead executive producer Frank Darabont in his suit against AMC (Darabont claims the network licensed the series for far below market rates, cutting his potential profits). His big Godzillia case (he represented producers who claimed they were unfairly ousted from the 2014 film) was settled last summer.

**FICTIONAL LAWYER I WOULD NOMINATE FOR THE SUPREME COURT** “James Woods in True Believer.”

**UCLA School of Law**

**DEBORAH KLEIN**
Jackoway Tyerman Wertheimer Austen Mandelbaum Morris & Klein

**WHY SHE MATTERS** She specializes in comics and comic book heroes. She repped Will Ferrell in three films this past year (Get Hard, Daddy’s Home and Zoolander 2) and brokered the deal for Paul Rudd to join the ensemble in Marvel Entertainment’s Captain America: Civil War as Avengers Ant-Man, out May 6 (he also will be reprising his role for 2018’s Ant-Man and the Wasp).

**LAST VACATION** “The Maldives, the most amazing place ever.”

**UCB School of Law**

**RICHARD KLEIN**
Kendall Brill & Klieger

**WHY HE MATTERS** The former federal prosecutor has represented such clients as Viacom, Paramount and NBCUniversal. But this year, he found himself embroiled — indirectly — in a messy divorce case, representing Dick Wolf’s late business manager, Robert Philpott, in a suit brought by Wolf’s ex-wife, who claimed that Philpott misled her into a divorce settlement worth less than it should have been. On April 16, Kendall won a summary judgment for Philpott.

**GOOD LUCK CHARM** “The suit he wore at the last argument he won.”
HOW A HIT TV SHOW LOSES MONEY

BONES SUIT SHINES A NEW LIGHT ON SO-CALLED HOLLYWOOD ACCOUNTING

IT’S THE CLASSIC HOLLYWOOD STORY: A TV SHOW becomes a worldwide hit yet somehow ends up in the red when it comes to its studio paying the show’s creative team. Such is the case with Fox’s BONES, which, according to a lawsuit filed in November by executive producer Barry Josephson, took in $318 million in just the first seven of its 11 (and counting) seasons but lost nearly $45 million. On April 18, a Los Angeles judge sent the case (as well as a similar complaint by stars David Boreanaz and Emily Deschanel) to arbitration, but not before THR got its hands on an auditor’s report (the revenue-and-expense breakdown is below).

“As these numbers make abundantly clear, Fox’s suggestion that Barry Josephson brought claims ‘to attract headlines is offensive and absurd,’” says his lawyer Dale Kinsella. “Mr. Josephson seeks redress for Fox’s creative accounting.” — A.C.

| Distribution fees | $57.6M |
| License fees from Hulu | $948K |
| Distribution expenses | $47.6M |
| Negative cost | $447.6M |
| Total defined gross receipts | $139,546,800 |

LICENSE FEES FROM HULU $948K

OTHER FEES $105.8M

FEE, EXPENSES AND PRODUCTION COSTS OUTWEIGH REVENUE
Here’s where talent lawyers say the studio magic happens. By far the greatest expense is the “negative cost” of actually making the show (plus what 20th calls an “administrative charge”). Then there are distribution fees, which vary from 12.5 percent for free TV to 10 percent for home video, and “expenses” charged for advertising, guild fees, dubbing, shipping and, ironically, litigation.

Distribution fees $42.2M

Distribution expenses $57.6M

Negative cost $447.6M

TOTAL ADJUSTED GROSS $43,849,300
BILL COSBY HAS BEEN A HOUSEHOLD NAME FOR DECADES. BUT in the past few years, nearly every mention of the comedian has been connected to allegations made by dozens of women that he drugged and sexually assaulted them. Many of the alleged incidents are barred by the statute of limitations, but a recently unsealed suit with Constand in Pennsylvania from a 2004 incident with ex-Temple University employee Andrea Constand. The charges came after a judge unsealed Cosby’s testimony from a settled civil suit with Constand in which he admitted to giving women quaaludes for sex. Cosby has gone on the offensive in Pennsylvania, suing accuser Andrea Constand, her mother and her attorneys for breach of contract, representing plaintiff Janice Dickinson, says she’s determined to push forward to a resolution: “We are grateful that the court ruled that the tabloid violated its obligations to keep quiet by publishing many stories about the allegations against Cosby.” — A.C.

W H Y  H E  M A T T E R S: Netflix heard a lot from Newman this year as she helped Drew Goddard launch Daredevil (now in its second season on the streamer), Melissa Rosenberg start Jessica Jones and Amy Sherman-Palladino revive Gilmore Girls on the streaming service for its fourth 10-episode season. She also helped reality show production giant Endemol Shine launch Hunted on CBS and crafted an overall deal with Fox for Empire co-creator Lee Daniels.

M O S T  H O L L Y W O O D  T H I N G  A B O U T  M Y  L I F E “My house was built by Cedric Gibbons for his then-wife Dolores del Río.”


W H Y  S H E  M A T T E R S: O’Donnell got a lot of attention in 2014 when he pushed through Donald Sterling’s sale of the NBA’s Los Angeles Clippers. But other high-profile cases also have kept him in the spotlight. In 2015, he won a groundbreaking judgment for Shelly Sterling from her husband’s mistress, recovering a $1.8 million home and $800,000 worth of cash the woman had been given during the affair with Donald. O’Donnell now is representing Sumner Redstone’s former companion Manuela Herzer.
put down, there’s no one better,” says music manager Irving Azoff.

How Petrocelli came to be at the center of more Hollywood controversies than any lawyer in a lifetime is, in his unapologetic deposition and a lot of good fortune. A registered Democrat (when asked if he’d vote for Trump, he says only, “It depends who he is running against”), he lives in Brentwood, a stone’s throw from the former Simpson estate, with his wife, Alexan, and two (of her four) children. A New Jersey native who came to UCLA to study music (he was once in a band called The Hamburger), he took night classes at Southwestern Law School, a third-tier school in Los Angeles, and managed to get his foot in the door at L.A.’s Mitchell Silberberg & Knupp firm, which specialized in music law. He then made partner in six years and began to sign clients. One of them, Paul Marciano, chairman of Guess, told Petrocelli that he was virtuosic in a particular trial, he turned all his business to him. “We won in spectacular fashion and true to his word, he put me in charge of all of Guess’ legal work,” says Marciano. “He got a big boulder to push up the hill,” says Warners general counsel John Rogovin. “He was a rocket scientist. He had the right lawyer.”

More days after O.2 was set free, Petrocelli secretly flew to Fred Goldman’s house in the San Fernando Valley, and they spoke until sunrise. Petrocelli got the gig. He later would take Simpson’s deposition under oath — and the defendant refused without warning on that point. The $35.5 million verdict against Simpson was a “masterful” work, O.2 says, “on the best lawyer. He made me understand that there’s no way out of justice, that there’s no way out of law. And if you refuse to go to jail, maybe you’ll just go to jail.”

It is unfair to the public to have a leading candidate take away the case from me. Toberoff criticized the candidacy of Donald Trump because of the financial interest he stood to gain personally from the Man of Steel via the Siegel and Shuster families, claiming that the candidate “is being pursued by the legal community.”

“I was speeding down the 405, I thought I was doing 65, and the CHP pulled me over. I told them I was 50 years old and would go to jail,” said the actor. “She was still friendly.”

“Do ex-wives count?”

He has a plan to exploit the property. Toberoff criticized the candidacy of Donald Trump because of the financial interest he stood to gain personally from the Man of Steel via the Siegel and Shuster families, claiming that the candidate “is being pursued by the legal community.”

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Harvard Law School

BRUCE RAMER
Gang Tyre Ramer & Brown

**WHY HE MATTERS** Hollywood clients don’t get bigger than Steven Spielberg, whom Ramer has represented since before Jaws. Another signature Ramer client, Clint Eastwood, is back this fall directing Sully, about the pilot (played by Tom Hanks) who safely landed a plane on the Hudson River in 2009. And Ramer has used his position as directing his upcoming World War II film Dunkirk and Jonathan (a writer-producer on CBS’s Person of Interest and HBO’s upcoming Westworld). He also reps Geoffrey Rush (who will star in another Pirates of the Caribbean film with Johnny Depp), as well as P.J. Shapiro, where he finished his most recent decisions and turn them into fictional characters!”

UC School of Law

ROBERT SCHWARTZ
Irell & Manella

**WHY HE MATTERS** In May 2015, Schwartz made the jump from long-time home O’Melveny & Myers to Irell & Manella, where he finished his successful defense of Hulu in a privacy class-action suit. At his new firm, he has picked up new client CBS Radio, charged with not paying royalties for pre-1972 sound recordings. He’s also handling a cutting-edge privacy case involving biometric data collected when video games allow users to create avatars from photographs.

Columbia Law School

IRA SCHRECK
Schreck Rose Dapello & Adams

**WHY HE MATTERS** Schreck spent much of the past year juggling Kevin Hart deals — for such films as Central Intelligence (with Dwayne Johnson) and The Intouchables (with Bryan Cranston), plus another season of his hit BET series Real Husbands of Hollywood and a third stand-up movie, Kevin Hart: What Now? But he also reps showrunner clients — including Jason Katims (Hulu’s The Path), Peter Tolan (WGN America’s Outsiders) and Bridget Carpenter (hulu’s TheII.22.63) — and negotiated the deal to bring 15-year Daily Show veteran Jo Miller aboard Samantha Bee’s TBS show."

UC Berkeley School of Law

MICHAIL SCHENKMAN
Bloom Hergott Diemer Rosenthal LaViolette Feldman Schenkman & Goodman

**WHY HE MATTERS** He’s the Nolan family lawyer, repping Christopher (for executive producing Batman v. Superman: Dawn of Justice as well as directing his upcoming World War II film Dunkirk) and Jonathan (a writer-producer on CBS’s Person of Interest and HBO’s upcoming Westworld). He also reps Geoffrey Rush (who will star in another Pirates of the Caribbean film with Johnny Depp), as well as P.J. Shapiro, where he finished his most recent decisions and turn them into fictional characters!”

UC Berkeley School of Law

P.J. SHAPIRO
Glidden Brittenham

**WHY HE MATTERS** Shapiro negotiated Josh Gad’s voice acting deal for the Frozen sequel and Dakota Johnson’s fully body-acting deal for Fifty Shades of Grey sequels. He also put together

Photographed by Melanie Dunn on March 28 at St. Ann’s Warehouse in Brooklyn

__Harvard Law School__

KEN RICHMAN
Hansen Jacobson Teller Hoberman Newman Warren Richman Rush & Kaller

**WHY HE MATTERS** A television deal specialist, Richman recently signed Bill Simmons, helping him piece together his post-ESPN life with an expansive pact at HBO and a new website called The Ring. Richman also made Samantha Bee’s deal for her TBS late-night show Full Frontal and Jason Jones’ pact for his TBS show The Detour, as well as Parks and Recreation’s Mike Schur’s rich overall deal at Universal TV, where Schur has the upcoming NBC show Good Place, starring Kristen Bell.

UCLA Law School

MATTW ROSENGART
Greenberg Traurig

**WHY HE MATTERS** In May 2015, Schwarzenegger moved the jump from long-time home O’Melveny & Myers to Irell & Manella, where he finished his successful defense of Hulu in a privacy class-action suit. At his new firm, he has picked up new client CBS Radio, charged with not paying royalties for pre-1972 sound recordings. He’s also handling a cutting-edge privacy case involving biometric data collected when video games allow users to create avatars from photographs.

HAVE YOU EVER ARGUED YOUR WAY OUT OF A TRAFFIC TICKET? I was speeding back to L.A. from Mammoth. When the CHP pulled me over, I pointed to an ice pack on my left shoulder — I had dislocated it in a collision with a snowboarder. He let me go, saying he was impressed that I was wearing my seat belt over the injury.”

UC School of Law

P.J. SHAPIRO
Glidden Brittenham

**WHY HE MATTERS** Shapiro negotiated Josh Gad’s voice acting deal for the Frozen sequel and Dakota Johnson’s fully body-acting deal for Fifty Shades of Grey sequels. He also put together
pacts for the members of The Lonely Island (Akiva Schaffer, Andy Samberg and Jorma Taccone) for their first feature film, Popstar: Never Stop Never Stopping, helped Elizabeth Banks make her successful transition into a director-producer with Pitch Perfect 2 (she'll also direct a new Charlie's Angels film) and set Emma Stone to star in Disney's live-action Cruella film.

GOOD LUCK CHARM "A box of silver dollars given to me years ago by my dad.”

Columbia Law School
NINA SHAW
Del Shaw Moonves Tanaka Finkelstein & Lezcano

WHY SHE MATTERS Shaw counts_STATUS_ the elevens of the Columbia to principal dancer at the American Ballet Theatre as one of her proudest moments (second place: signing Copeland to her Under Armour deal). During the past year she also took pride in helping client F. Gary Gray get the directing job on Universal’s Fast 8.

Cultural Impact: I would nominates the SUPREME COURT for the court. He also knocked back a libel case against Shelton over an appended.

New York, 9 alums

It's also the headquarters for the U.S. branch of Association Littéraire et Artistique, an organization founded in Paris to protect literary and artistic property.

6 Southwestern Law School
Los Angeles, 8 alums

It's not considered a top-tier school, but it produces a lot of Hollywood lawyers. An entertainment and the arts legal clinic helps.

7 Loyola Law School
Los Angeles, 6 alums

Along with its strong network of entertainment lawyers, the school partners with Peking University Law School to offer an annual U.S.-China Entertainment Law Program.

8 Georgetown Law Center
Washington, D.C., 4 alums

Hollywood and D.C. aren't that different. The school held its ninth annual Sports & Entertainment Law Symposium in February that included a panel titled “The Impact of Digital Media on Talent, Production and Distribution Deals.”

9 Brooklyn Law School
Brooklyn, 5 alums

It might not be as prestigious, but the school has a dedicated entertainment law course co-taught by Vernon Brown, who represented the late rapper Notorious B.I.G.

10 Cornell Law School
Ithaca, N.Y., 5 alums

All first-year students are enrolled in the school’s Lawyering Program, which teaches oral presentation and counseling in addition to writing — skills that come in handy in entertainment.

11 George Washington University Law School
Washington, D.C., 5 alums

Through its leading intellectual property program, the school offers a four-week IP immersion experience in Munich. — ERIK FORRESA AND ASHLEY CALVINS

UC Berkeley School of Law
BERKELEY: MICHAEL HALBERSTADT/ARCAID/CORBIS.
POWER LAWYERS 2016

CORPORATE | LITIGATION | TALENT | TECHNOLOGY

USC School of Law
DAVID WEBER
Sloane Offer Weber & Dern

WHY HE MATTERS: Weber’s pay-episode business model for Louis C.K.'s web series Horace and Pete (it cost $5 a download) turned the industry on its head (and had plenty of people scratching their heads). He also cut deals for Jean-Marc Vallée to direct two new HBO dramas (Big Little Lies and Sharp Objects) and represented the cast and creators of It’s Always Sunny in Philadelphia for seasons 13 and 14. On the film side, Weber repped Suicide Squad director David Ayer with his follow-up film, the cop thriller Bright, which went to Netflix after a heated bidding war.

OUTSIDE THE OFFICE, I’M MOST PASSIONATE ABOUT “Finding our way to net neutrality in L.A. without good cell reception.”

UC Berkeley School of Law
HOWARD WEITZMAN
Kinsella Weitzman Iser Kump & Aldisert

WHY HE MATTERS: Even in death, Michael Jackson keeps his litigator busy. On behalf of the Jackson estate, Weitzman is battling the IRS, Quincy Jones, a publicist, a business manager, a choreographer, another songwriter and a collector of the singer’s memorabilia. The estate finally is in the black thanks to a $500 million deal to offload Jackson’s half of the Sony/ATV Music Publishing Library, so Weitzman is looking to protect incoming money for the singer’s children. He also is Justin Bieber’s go-to attorney (with partner Jeremiah Reynolds) on matters ranging from an altercation with a paparazzo to a claim that the 2010 song “Somebody to Love” by Bieber and Usher, was stolen. The latter is headed to trial this year.

FICTIONAL LAWYER I WOULD NOMINATE FOR THE SUPREME COURT “Denny Crane from Boston Legal.”

Stanford Law School
ALAN WERTHEIMER
Jackoway Tyerman Wertheimer Austen Mandelbaum Morris & Klein

WHY HE MATTERS: Wertheimer’s client J.J. Abrams directed the biggest film of the past year, Star Wars: The Force Awakens (nearly $2.1 billion and counting). He helped Amy Pascal make the transition from Sony chairman to Ghostbusters producer and inked directing deals for Patty Jenkins to make Wonder Woman, James Foley for two Fifty Shades of Grey sequels and David Michod for War Machine with Brad Pitt for Netflix. Plus, the softball-loving “Werth” helped star Kyle MacLachlan land his deal to star for Netflix. Plus, the softball-loving “Werth” helped star Kyle MacLachlan land his deal to star for Netflix. Plus, the softball-loving “Werth” helped star Kyle MacLachlan land his deal to star for Netflix. Plus, the softball-loving “Werth” helped star Kyle MacLachlan land his deal to start up the Ziffren Center for Media, Technology and Sports Law. Recently gave $5 million to his alma mater UCLA.

Looking ahead to his legacy, Ziffren said his “philanthropic focus will be on providing opportunities for young people to have the same kind of experience.”

UC Berkeley School of Law
ALONSO WICKERS
Davis Wright Tremaine

WHY HE MATTERS: A rare First Amendment specialist who also can litigate a case, Wickers is on the defending Electronic Arts from NFL players who don’t want their faces depicted in EA’s video games (the Jim Brown case is in its eighth year). In addition to doing clearance work for Viacom, he has been repping Universal in a case involving the ex-wife of a true-life character portrayed in the upcoming Tom Cruise movie Mena. (Wickers also does First Amendment work for THR.)

FAVORITE LUNCH SPOT “Officine Brera — as of last week.”

Columbia Law School
BRYAN WOLF
Ziffren Brittenham

WHY HE MATTERS: Wolf guided Relativity Television’s management team — Tom Forman and Andrew Marcus — through the dark days of bankruptcy protection, ultimately leading them to the creation and financing of their new company, Critical Content. Other clients include Steve Carell, Judd Apatow, Nick Stoller (with a deal to write, direct and produce Neighbors 2 as well as Warner Animation Group’s Storks) and Skydance’s David Ellison (helping him expand into TV with shows like Grace and Frankie).

FICTIONAL LAWYER I WOULD NOMINATE FOR THE SUPREME COURT “Tom Hagen, the family lawyer in The Godfather.”

Tulane Law School
KEVIN YORN
Morris Yorn Barnes Levine Krintzman Rubenstein Kohner & Gellman

WHY HE MATTERS: Yorn negotiated a new deal with NBC and Warner Bros. for megaclient Ellen DeGeneres that extends her show through 2020 (and he’s a partner in her home decor/apparel line, ED, negotiating deals with Bed Bath & Beyond and other retailers). He also has done multiple deals for Zoe Saldana (the Avatar sequels) and Scarlett Johansson (Avengers, Ghost in the Shell). “My superhero franchise girls,” he calls them. Yorn signed The Fault in Our Stars’ Ansel Elgort and shepherded him into Baby Driver, opposite Kevin Spacey.

OUTSIDE THE OFFICE, I’M MOST PASSIONATE ABOUT “Raising my daughter.”

UCLA School of Law
KEN ZIFFREN
Ziffren Brittenham

WHY HE MATTERS: At L.A.’s film czar, the legendary talent lawyer and UCLA professor represents the entire industry on important state issues like film tax credits. He still has plenty of regular clients, though, including Starz, RealDD and iconic Peanuts, the Schultz family company that partnered with Fox for November’s The Peanuts Movie. Looking ahead to his legacy, Ziffren recently gave $5 million to his alma mater UCLA to start up the Ziffren Center for Media, Entertainment, Technology and Sports Law.

GOOD LUCK CHARM Ellen Ziffren

why-he-matters articles by paul bond, ashley collins, rebecca ford, molly galuppo, eric gardner, natalie gervey, roys ke, kendall mcclain, pamela mcinstosh, brian porcza, bryn elise sandberg, tatiana segel, ane stanhope, rebecca sun and michael walker.
“That meant hiring Petrocelli, so Barrack arranged a blind date of sorts in November. “Afterward, Donald said, ‘This is one of the best guys I have ever seen,’ ” recalls Barrack. (Trump declined comment.)

The Trump University case is both a risk and a challenge for Petrocelli. “I don’t think it would be appropriate to have a trial at this point in time,” he says. “It is unfair to the public to have a leading candidate taken away from the process to defend a court case.” At the minimum, he adds, “it should wait for the convention in July to see if Mr. Trump is the nominee, and if he is, it should await the election in November, and if he is elected president, that’s a whole other issue.”

Judge Curiel is set to rule May 6 when a trial will take place. The plaintiffs are pushing for an early date, so Petrocelli realizes he may be defending a presidential candidate from fraud claims in the midst of an election. “He’s probably having a lot of fun,” says Fields, who once represented Trump. Adds Barrack, “If he ends up losing, it’ll be high visibility, but that will just heighten Dan’s intensity.” Still, there’s some evidence that representing Trump hasn’t been a plus for Petrocelli in Hollywood. Disney declined to talk about him because the company didn’t want to be associated with Trump even via a shared lawyer. “I compartmentalize it,” says Petrocelli when asked to address Trump’s statements about women and minorities. “My goal is simply to advocate a client’s cause. He didn’t hire me for my political views. He hired me for my legal skills.”

And for now, those skills are at work putting together Trump’s defense. “Trump will certainly be an important witness at trial to explain his role,” says Petrocelli, arguing that those who attended Trump University knew exactly what they were getting into. “They didn’t think they were going to USC or UCLA,” he adds. “They were taking real estate courses over a weekend at a hotel. Those who pushed themselves found success, and those who lacked effort didn’t, and I think jurors will get that.”

**Petrocelli**

CONTINUED FROM PAGE 85

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CONTINUED FROM PAGE 85

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Charles J. Harder

Trial attorney in the areas of privacy, publicity, defamation, reputation protection, entertainment, IP and business law.

Represents plaintiffs and defendants in the industries of motion pictures, television, music, videogames, live theater, sports, Internet, social media, advertising, fashion and art (among others).

Editor and Co-Author of ENTERTAINMENT LAW & LITIGATION, law treatise published by LexisNexis providing in-depth analysis of substantive and procedural law of trademark, copyright, idea submission, right of publicity, right of privacy, defamation, anti-SLAPP, profit participation, Talent Agencies Act, labor and employment, and insurance law.

Listed, Top 100 “Power Lawyers” in America by The Hollywood Reporter (one of 30 litigators).

Lead counsel for the plaintiffs in the following lawsuits:

- **Melania Trump v. Tarpley, Mail Media, Inc.,** Maryland state court, $150 million demand
- **Hulk Hogan (Terry Bollea) v. Gawker Media,** Florida state court, $140 million jury verdict
- **George Clooney and Julia Roberts v. DPI,** Los Angeles Superior Court
- **Sandra Bullock v. US Jewelry Liquidators et al,** Los Angeles Superior Court
- **Bradley Cooper and Liam Neeson v. Vutec Corp.,** Los Angeles Superior Court
- **Reese Witherspoon v. Marketing Advantages Int’l, Inc.,** Los Angeles Superior Court
- **Halle Berry v. Toywatch S.p.A.,** Los Angeles Superior Court
- **Jude Law v. Paloform,** Los Angeles Superior Court
- **Clint Eastwood v. Evofurniture,** U.S. District Court, Los Angeles
- **Sandra Bullock, Cameron Diaz, Kate Hudson, Diane Keaton, Mandy Moore and Michelle Pfeiffer v. CompUSA, et al.,** Los Angeles Superior Court

Lead counsel for the estates of Humphrey Bogart, Marlon Brando and Julia Child in several state and federal court lawsuits regarding post-mortem right of publicity and trademark claims

J.D., Loyola Law School, Los Angeles, 1996
B.A. with College Honors, University of California, Santa Cruz, 1991

Judicial Law Clerk, Senior U.S. District Judge A. Andrew Hauk, Los Angeles, 1996-97

General Counsel, VP of Business/Legal Affairs, Load Media Network, Los Angeles, 2000-01
A YEAR AGO, CHARLES HARDER was a relatively low-profile Beverly Hills litigator, bringing fairly cookie-cutter lawsuits for Hollywood stars like George Clooney and Reese Witherspoon against furniture stores and jewelry makers that used their names in advertisements without permission. Then came the case of his career, an audacious effort on behalf of Hulk Hogan to take down the gossip website Gawker, which published snippets of a sex tape starring the former wrestler. That the billionaire investor Peter Thiel secretly was bankrolling the whole endeavor made the case even juicier. Then in March, a Florida jury shocked the media world by awarding Harder’s bandana-clad client $140 million — $40 million more than Harder requested. Gawker, once the king of gossip websites and an early influencer on digital media, soon filed for bankruptcy and was sold to Univision, which shut down Gawker.com as the appeals process began.

That’s when Harder’s phone really started ringing. Today, the 46-year-old attorney is perhaps the highest-profile media lawyer in America. He has been deluged by representatives of famous people who believe the Gawker case finally could curtail invasive activities by media companies. And since the verdict, he has become involved in three of the most headlinegenerating news stories of the year. Ousted Fox News CEO Roger Ailes and his wife, Elizabeth, enlisted Harder to attempt to squelch unflattering media coverage in New York magazine over the sexual harassment allegations against him. Actress Amber Heard hired Harder to sue the comedian Doug Stanhope, who, in the midst of Heard’s salacious divorce from Johnny Depp, wrote online that she was blackmailing the actor. And then there’s Melania Trump, whom Harder is representing in a lawsuit over a Daily Mail article that suggested the potential first lady worked as a paid escort in the 1990s. That suit prompted a rare public retraction and mea culpa from the U.K. tabloid — but Harder isn’t backing off. “We appreciate that the Daily Mail finally admitted that it got the story completely wrong, but it is a half-hearted retraction and apology,” he says in his first extensive interview since taking on Trump and Ailes as clients. “It will not stop or even slow the lawsuit.”

It’s Harder’s bullish attitude that inspires invective from members of the media and a growing number of admirers among those at the center of the media’s attention. The “rich man’s favorite tool for assaulting journalism” is how Forbes writer Katia Savchuk characterized Harder. Warns Katie Townsend, litigation director at the media-rights advocacy group Reporters Committee for Freedom of the Press: “The Gawker verdict represents that someone with financial backing can effectively eliminate a media organization. It has a chilling effect.”

Harder, who says he’s still getting used to his own celebrity status, won’t be deterred: “I’m anything but the enemy of a free press,” he counters. “I believe very strongly in a free press. But I don’t believe in a reckless press. The First Amendment isn’t unlimited.”

Harder seems to have appeared on the media scene out of nowhere, but before Gawker and Ailes and Trump, the Loyola Law School graduate co-authored a treatise called Entertainment Law & Litigation and spent years developing a particular legal expertise — prosecution of so-called “likeness rights.” He now touts his practice somewhat menacingly as “reputation protection,” and what once sounded banal suddenly has become highly in-demand by people in the media’s crosshairs. Whereas the $550-an-hour litigator once quietly obtained settlements for Clint Eastwood, Bradley Cooper and other celebrities in cases over the misappropriation of their names and images, now the simple act of him sending a warning letter makes news. “I’ve been doing it for years, but I’m definitely doing it at higher frequency,” he says. “There’s higher-profile clients and more stories about me, but otherwise, my life hasn’t changed much. I’m still driving the same 12-year-old Lexus SUV and living in the same small house [in West Los Angeles with his wife, Kathleen], raising kids.”

Harder won’t say whether he has spoken to Donald Trump about the Melania case, nor will he even admit to representing Ailes. (Told his threatening letter to New York magazine and its tenacious writer Gabriel Sherman was leaked and rendered his representation public, he responds, “Is it? If someone sends a private letter, is it public?”) He declines to reveal what specifically about Sherman’s reporting, which included a recent cover story calling Ailes “the most powerful, and predatory, man in media,” was inaccurate.
But, he adds, “Separate and apart from Mr. Ailes, reporters who say things that are false and not factual in nature and are acting recklessly are subjecting themselves to liability. When that situation is occurring, any reporter should anticipate [repercussions].”

Harder is much more comfortable talking about the invasion of privacy case that consumed four years of his life and required him to spend weeks this winter in St. Petersburg, Fla. Despite criticism in certain quarters that Thiel is using Hogan (and thus Harder) to wage a personal war on Gawker founder Nick Denton after the website outed Thiel as gay, Harder argues that the motive doesn’t change the merits of the case — or the verdict. “[Hogan] needed help from someone because Gawker didn’t bat an eyelash spending $10 million trying to beat him,” he says. “The deck is stacked against plaintiffs. I don’t know too many people who can combat $10 million. And I have to say, they drove up the bills. They were the ones bringing motion after motion, taking subpoenas, making 10 to 15 appeals on every issue. What Peter Thiel was able to do was level the playing field. That’s all he did.”

Denton, in an email to THR, takes exception to that characterization. “Thiel is a tech billionaire on a mission, and his Hollywood lawyer represents Roger Ailes and the Trumps, among many others,” Denton writes. “They say Peter Thiel has no sense of humor. But the idea that his team are the underdogs is hilarious.”

Harder, who grew up in Encino, a few freeway exits from Hollywood, and rode a bike across the country at age 19, became interested in entertainment in the 1990s while in law school. In 2013, he, along with entertainment experts Douglas Mirell and Jeffrey Abrams, launched their own 10-lawyer boutique firm on Rodeo Drive, a fraction of the size of most L.A. firms handling cases of national import. In his offices, Harder keeps charts mapping the differences in libel and privacy laws throughout the country. He also has become a pro on where to strategically file cases. The Hogan suit took place in Florida, where a jury might be friendlier to a local celebrity. The Heard case was in Nevada before it was dropped. Melania’s lawsuit is proceeding in Maryland, which some legal experts speculate is because of its plaintiff-friendly rules that don’t require her to pay the Daily Mail’s legal bill if she loses. (Harder says he doesn’t anticipate much movement in that case before the presidential election because the state has a backed-up trial docket.)

Could another Trump media suit be in the works? On Sept. 17, Donald, who has made his feuds with various media outlets a cornerstone of his campaign, tweeted that his lawyers want him to sue The New York Times for “irresponsible intent” in its reporting. While “irresponsible intent” is not an actual legal claim and the GOP nominee didn’t specifically mention Harder, it’s not a huge leap to imagine which lawyer would bring a defamation case on his behalf. (In June, Harder threatened a defamation suit against Gawker on behalf of a New York hair restoration clinic that allegedly services Trump over a story titled, “Is Donald Trump’s Hair a $60,000 Weave? A Gawker Investigation.”)

To beat the Times, Harder would have to show the paper acted with “actual malice,” the very high hurdle articulated in the 1964 case New York Times v. Sullivan, which requires public figures who sue the media to establish a motive or gross negligence. It’s a standard Trump has suggested would be challenged if he becomes president, and Harder could be the lawyer who is charged with attempting to do so. Indeed, Harder says he agrees libel laws need a further look. And he has specific ideas (like a limitation on early appeals and fewer fee awards for the winning side in lawsuits) that would make any First Amendment advocates cringe and some in Hollywood cheer.

“I think the actual malice standard is too stringent,” says Harder, perhaps previewing how a Donald Trump administration might approach the media and the laws governing it. “If you look at Justice [Byron] White’s opinion in a Supreme Court case 20 years after New York Times v. Sullivan, he wrote a dissent and said we all made a mistake, that it has gotten to a point where it has created huge problems for a public figure who is defamed to do anything about it.”
Power Lawyers with Matt Belloni of the Hollywood Reporter

Friday, October 7, 2016
2:00pm-3:30pm

Bios

**Matt Belloni**  
**Executive Editor at The Hollywood Reporter Inc**  
Mr. Matthew Belloni has been an Executive Editor at The Hollywood Reporter Inc. since January 23, 2013. Mr. Belloni joined served as an Editor and reporter at The Hollywood Reporter Inc. since 2006 and served as its News Director. He practiced entertainment law in Los Angeles before starting his career in journalism. He is a graduate of UC Berkeley and USC Law School.

**P. John Burke**  
**Partner, Akin Gump Strauss Hauer & Feld (Los Angeles, CA)**  
Mr. Burke’s practice focuses on media finance, with an emphasis on motion picture transactions including advising clients with respect to structuring and executing film slate financings, complex distribution agreements, tax-advantaged financing, subsidies and co-production arrangements in various countries throughout the world.

**Charles J. Harder**  
**Partner, Harder Mirell & Abrams LLP (Beverly Hills, CA)**  
Charles Harder is one of the few go-to litigators in the United States for entertainment, intellectual property and business litigation. He literally “writes the book” on his core practice areas as Editor and Co-Author of Entertainment Law and Litigation, a law treatise published by LexisNexis. Mr. Harder has been listed repeatedly as one of the Top 100 “Power Lawyers” in America by The Hollywood Reporter (one of only 30 litigators

**Susan Zuckerman Williams**  
**Partner, Loeb & Loeb (Los Angeles, CA)**  
Ms. Williams concentrates her practice on media finance and entertainment transactions. She routinely advises clients on the legal and business aspects of sophisticated debt and equity financing as well as complex licensing and distribution arrangements for motion pictures, television and new media, both domestically and internationally.