

# The Naked Newscaster, Girls Gone Wild, and Paris Hilton: True Tales of the Right of Privacy and the First Amendment

Joseph Siprut\*

## INTRODUCTION

In law, as in life, sometimes truth is stranger than fiction—and often just as interesting. Nowhere is this more true than cases and disputes involving the right of privacy tort, and its intersection with the First Amendment of the United States Constitution. In particular, consumers of tabloid fodder have been treated in recent years to wild tales of celebrity sex video tapes (Pam Anderson, Tommy Lee, Paris Hilton, Fred Durst, R. Kelly, and Colin Farrell, to name a few),<sup>1</sup> and celebrities “caught on tape”—like Catherine Bosley, the “Naked Newscaster,” whose impromptu participation in a wet T-shirt contest made her an overnight Internet legend, but derailed her career as a regional newscaster.<sup>2</sup>

Building on landmark cases of years past while also setting forth new rules to reflect new and emerging technology that did not exist even five or ten years ago, state and federal courts across the country have created an interesting—though not entirely consistent—body of “sex video” case law. This article attempts to chart a course through that terrain, and will comment on some

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\* Joseph Siprut is an attorney in the Chicago office of Howrey LLP. The author would like to thank Brantley Shumaker, Zoran Stanoev, Christine Gentili, and Sarvesh Nadkarni for their assistance in completing this article.

<sup>1</sup> See Karen Thomas, *Rewinding Other Sex-Tape Scandals*, USA TODAY, July 20, 2005 at D3, available at [http://www.usatoday.com/life/people/2005-07-19-sex-tape-list\\_x.htm](http://www.usatoday.com/life/people/2005-07-19-sex-tape-list_x.htm).

<sup>2</sup> *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 917–18 (N.D. Ohio 2004).

newer “sex video” cases still winding their way through the system.

### I. IN THE NEWS: PARIS HILTON, FRED DURST

On August 18, 2003, Rick Salomon, an online gambling entrepreneur formerly married to actress Shannon Doherty, reportedly told some of his friends that he had a homemade sex videotape of himself and Paris Hilton, whom he dated for a period of time in 2001.<sup>3</sup> In early November, Internet porn company Marvad Corp. acquired a copy of the video from Salomon’s ex-friend, Donald Thrasher, who claimed that Salomon gave him the tape to sell.<sup>4</sup> Shortly thereafter, excerpts of the video began appearing on the Internet.<sup>5</sup> The video ultimately became one of the top Internet downloads of all time, in part because of its graphic, though grainy content (so I’m told, of course), and because Paris Hilton’s reality television show *The Simple Life* premiered around this same time.<sup>6</sup>

Hilton and Salomon filed separate lawsuits against the Internet companies that distributed the tape.<sup>7</sup> Hilton’s suit included counts for violation of privacy, illegal business practices, and infliction of emotional distress.<sup>8</sup> Among its allegations, the complaint notes that “she [Hilton] intended the videotape only for personal use and never intended or consented that it be shown to anyone else or distributed to the public.”<sup>9</sup> Salomon, for his part, actually marketed the video and even filed a copyright registration for it.<sup>10</sup> He then brought suit in federal court for reproducing the video without his permission. The defendant claimed the copyright

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<sup>3</sup> See Tina Dirman & Kate Stroup, *Victim or Vixen*, US WEEKLY, Dec. 8, 2003, at 56–58, 60, 62.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *Paris Hilton ‘Directed’ Sex Video* (Feb. 24, 2004), <http://www.cnn.com/2004/SHOWBIZ/02/24/hilton.sextape.reut>.

<sup>8</sup> *Paris Hilton Sues Over Internet Sex Tape* (Feb. 9, 2004), <http://www.cnn.com/2004/TECH/internet/02/09/paris.lawsuit.reut>.

<sup>9</sup> See *Paris Hilton ‘Directed’ Sex Video*, *supra* note 7.

<sup>10</sup> *Id.*

registration was invalid because he had failed to list Hilton as a co-author who participated in the authorship of the recording.<sup>11</sup>

More recently, in March 2005, a homemade sex video starring Limp Bizkit frontman<sup>12</sup> Fred Durst made the rounds on the Internet.<sup>13</sup> In a copyright infringement/invasion of privacy complaint filed shortly thereafter, Durst claimed that he made the homemade video with the consent of his partner and that it was never intended for public viewing or distribution.<sup>14</sup> The complaint further alleged that his manager was contacted by an individual who claimed to have access—via a third party—to a video showing Durst having sex.<sup>15</sup> The individual stated that this third party had obtained the video by hacking into Durst's computer.<sup>16</sup> The manager rejected the individual's offer to sell the video and share in the profits.<sup>17</sup> Excerpts of the video subsequently began appearing on the Internet.<sup>18</sup>

The facts and issues underpinning the Hilton/Salomon and Durst matters are similar. However, to understand the scope of the legal remedies available to these plaintiffs (and others similarly situated), we must first consider the following cases.

## II. PAM ANDERSON: THE "FOUNDING FATHER" OF SEX VIDEO LAW

If anyone can be regarded as a true "Founding Father" of sex video law, it must be Pam Anderson. In *Lee v. Penthouse Int'l Ltd.*,<sup>19</sup> Pam and on-again, off-again husband Tommy Lee—former drummer for ultra-successful rock band Motley Crue<sup>20</sup>—brought suit against the publishers of *Penthouse* magazine over the June

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<sup>11</sup> *Id.*

<sup>12</sup> See Limp Bizkit band website, <http://www.limpbizkit.com>.

<sup>13</sup> See *Fred Durst Sues Over Stolen Sex Video*, Mar. 4 2005, <http://thesmokinggun.com/archive/0304051durst1.html> (last visited Oct. 21, 2005).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> No. CV96-7069SVW(JGX), 1997 WL 33384309 at \*1 (C.D. Cal. March 19, 1997).

<sup>20</sup> See Motley Crue band website, <http://www.motley.com/index.php>.

1996 issue. That issue included an article about the couple, and the cover featured a picture of Anderson over the blurb “PAMELA ANDERSON: HER X-RATED HOME VIDEO.”<sup>21</sup> The article was accompanied by a series of photographs republished from earlier French and Dutch editions of *Penthouse*, which were not controlled by the defendants.<sup>22</sup> The photos constituted graphic sexual images of the couple, and were allegedly stolen from their residence.<sup>23</sup> Anderson and Lee brought claims for appropriation of Anderson’s likeness for commercial purposes and for public disclosure of private facts.<sup>24</sup>

As to the appropriation claim, the court noted that the analysis turned on whether the defendants used plaintiffs’ names and images in conjunction with a “newsworthy” story.<sup>25</sup> If so, then even if it might be said that Defendants “exploited” those names and images for a commercial advantage, they are exempt from liability.<sup>26</sup> Noting that Pam Anderson is primarily known for her nude photo shoots and videos and that she had spoken publicly of her sex life often, the court held that the article itself was accordingly newsworthy.<sup>27</sup> Because the photos were then used in connection with an article about those same photos and the couples’ sex lives, the court held that the appropriation claim could not stand.<sup>28</sup> The court also noted that the “intimate nature of the photographs and the degree to which their publication intruded upon the privacy of plaintiffs is simply not relevant for determining newsworthiness” in the context of appropriation or

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at \*1 & n.1.

<sup>23</sup> *Id.* at \*1.

<sup>24</sup> *See id.* at \*1.

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at \*5.

<sup>28</sup> *Id.* at \*5. In reaching this holding, the court distinguished *Eastwood v. Superior Ct. for Los Angeles City*, 149 Cal. App. 3d 409, 416 (Cal. 1983). There, actor Clint Eastwood brought suit against the National Enquirer over a cover story entitled “Clint Eastwood in Love Triangle,” which included pictures—on the cover and in the magazine—of Eastwood with actress Tanya Tucker. The article related that Eastwood was involved in a romantic triangle with Tucker and actress Sondra Locke. The Eastwood court held that the appropriation claim advanced there could stand because the underlying article was determined to be false—and a fabricated story cannot be considered newsworthy.

publicity claims.<sup>29</sup> Finally, the court disposed of the disclosure of private facts claim by applying the long-established rule that “no right of privacy attaches to a matter of general interest that has already been publicly released in a periodical or in a newspaper of local or regional publication [sic].”<sup>30</sup> Because the photographs at issue had already been published in three separate magazines, *Penthouse* did not violate the public disclosure tort by simply republishing the photos.<sup>31</sup>

This would not be Pam Anderson’s only mark on right of privacy jurisprudence. In *Michaels v. Internet Entertainment Group, Inc.*,<sup>32</sup> Anderson and Bret Michaels—best known as the former lead singer of rock band Poison<sup>33</sup>—recorded video of themselves engaging in a sex act in October 1994.<sup>34</sup> Several years later, in 1997, Michaels received a letter from IEG claiming that IEG had acquired all rights in the video, including the right of distribution and publication, from an unidentified third-party.<sup>35</sup> Michaels fired off a cease and desist letter, and then promptly registered the video with the United States Register of Copyrights.<sup>36</sup> When IEG allegedly announced its intent to publish the tape on its Internet subscription service, Michaels successfully applied for a Temporary Restraining Order, bringing counts for copyright violations, right of publicity, and public disclosure of private facts.<sup>37</sup> During discovery, before the preliminary

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<sup>29</sup> *Id.* at \*5. The same does not hold true when analyzing public disclosure claims. *See, e.g., Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823, 841 (C.D. Calif. 1998) (three factors to consider in determining privilege for reporting private but newsworthy information include: “(1) the social value of the facts published; (2) the depth of the intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to a position of public notoriety.”). *See also infra* note 63 and supporting text.

<sup>30</sup> *Lee*, 1997 WL 33384309 at \*6 (citing *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 669 (Cal. App. 1 Dist. 1984)). The court in *Lee* misquoted *Sipple* by using the word “publication” instead of “circulation.”

<sup>31</sup> *Lee*, 1997 WL 33384309 at \*6. Of course, the analysis of any claims brought against the original publishers of the photos—the French and Dutch editions of *Penthouse*—would be altogether different.

<sup>32</sup> 5 F. Supp. 2d 823 (C.D. Cal. 1998).

<sup>33</sup> *See* Poison band home page, <http://www.poisonweb.com>.

<sup>34</sup> *Michaels*, 5 F. Supp. 2d at 828.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 829.

<sup>37</sup> *Id.*

injunction hearing, it was revealed that the unknown third party was a “private investigator” named Revilla representing a mystery client of his own, and that this client was an associate of Michaels who received a copy of the video as a “gift” from Michaels.<sup>38</sup> Revilla asserted that he did not believe his client had acquired any rights to distribute or publish the tape. Consequently, Revilla’s agreement with IEG was, on Revilla’s view, purportedly limited to the physical videotape itself—not any intellectual property rights in the expression fixed on the tape.<sup>39</sup>

In analyzing Michaels’ copyright claim, the court noted that IEG did not contest the existence of Michaels’ copyright, but rather that IEG had acquired a non-exclusive (oral) license to distribute and market the tape through its dealings with Revilla and his client.<sup>40</sup> The court held that although a narrow exception to the Copyright Act’s statute of frauds exists for non-exclusive licenses, the evidence here did not support a finding that Michaels had, in fact conveyed a license or any ownership interest to either Revilla or his client.<sup>41</sup> At most, the court said, Michaels had empowered his associate to negotiate a license on his behalf.<sup>42</sup> Even if Michaels had granted his associate an oral non-exclusive license—implicitly, if not explicitly—a copyright license itself does not include the right to transfer the license, unless the copyright owner explicitly conveys this right in addition to the license itself.<sup>43</sup>

IEG also raised a fair-use defense in connection with its planned use of “excerpts” of the video.<sup>44</sup> However, the court rejected this argument as well, finding that the nature of the use of the excerpts corresponded precisely with the most likely form of

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Although there was a dispute between Anderson and Michaels over whether Anderson should also be listed as a co-author of the video for purposes of copyright registration, the court felt this issue was a non-sequitur, because this was only relevant to determining whether Anderson (as well as Michaels) had the ability to grant a license to either Michaels’ associate or Revilla, and the evidence supported neither possibility. *Id.*

<sup>40</sup> *Id.* at 830.

<sup>41</sup> *Id.* at 831, 832.

<sup>42</sup> *Id.* at 833.

<sup>43</sup> *Id.* at 834 (citing *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984)).

<sup>44</sup> *Id.* at 833–4.

distribution, thereby conflicting directly with the exclusive rights of the copyright holders.<sup>45</sup> In other words, unlike short displays of a theatrical performance or motion picture for purposes of comment and criticism, video shorts and still images are the “stock-in-trade” of Internet adult entertainment businesses.<sup>46</sup> Moreover, although clips of the tape appeared on a foreign Internet site while the case was pending, and although a copyright owner’s prior publication of his work normally supports a finding of fair use, the court found that this did not apply to this situation because Michaels himself had not posted the tape on the Internet and had not otherwise authorized its distribution.<sup>47</sup>

Michaels’ right of publicity claim raised a number of additional issues as well.<sup>48</sup> As a threshold matter, the court considered whether Michaels’ copyright claim preempted the right of his publicity claim.<sup>49</sup> The court held that although a right of publicity action is preempted where the conduct consists only of copying the work in which the plaintiff claims a copyright, the claim will not be preempted where it contains elements “different in kind” from copyright infringement.<sup>50</sup> In this case, IEG used the likeness of Michaels and Pam Anderson to *advertise* the imminent distribution of the tape—conduct unrelated to the elements of copyright infringement, which are concerned only with distribution of the videotape itself—and thus, the claim was not preempted.<sup>51</sup>

The court then noted that the First Amendment requires an exemption for the unauthorized use of a name or likeness in the publication of matters of public interest, but that the videotape, in and of itself, did not qualify as such.<sup>52</sup> As the court further explained, any injunction issued may not reach the use of Michaels’ or Anderson’s names or likenesses to attract attention to IEG as a “news medium”—but it *could* forestall IEG’s efforts to

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<sup>45</sup> *Id.* at 835.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 836.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 837.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 840–42.

use the plaintiffs' names and likenesses to *advertise*<sup>53</sup> the videotape.<sup>54</sup> Finally, the court upheld the plaintiffs' public disclosure of private facts claim, despite the fact that clips of the tape began appearing on other Internet sites ten days prior to the date of the court's opinion.<sup>55</sup> The court noted that although IEG could still overcome the public disclosure claim with a newsworthiness defense, the content of the tape itself did not qualify: "[T]he preliminary injunction prohibits IEG from violating the plaintiffs' right to privacy by disseminating the *contents* of the Tape[;] the injunction does not restrict IEG's ability to participate in public discussion about the Tape or this litigation."<sup>56</sup>

The outcomes in these two cases—both involving Pam Anderson sex tapes—are different, at least in the sense that one was plaintiff-friendly, and the other was not. But are the holdings doctrinally consistent? Probably yes. In the first case involving Tommy Lee, the defendant used *pictures*, or stills, from the videotape to illustrate an article that directly related to the content of the video.<sup>57</sup> The article itself was deemed newsworthy, for reasons including the fact that Pam Anderson was publicly outspoken about her relationship with Tommy Lee.<sup>58</sup> Thus, if the article was newsworthy on its own terms and the pictures themselves bore a reasonable connection to the article, then use of the pictures was privileged.<sup>59</sup> And because the articles and pictures appeared in the magazine, it was permissible for *Penthouse* to advertise the content of its own magazine by putting

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<sup>53</sup> See *id.* at 837–38.

<sup>54</sup> Cf. *Cher v. Forum Int'l Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (holding that use of a person's name or likeness to advertise a magazine is not actionable, provided that the advertisement does not falsely claim endorsement).

<sup>55</sup> *Michaels*, 5 F. Supp. 2d at 840–42.

<sup>56</sup> *Id.* at 842 (emphasis added). Interestingly, the court did not discuss whether the public disclosure of private facts claim might have been preempted by the copyright claim, since the public disclosure claim—unlike the publicity claim—was seemingly limited to the *content* of the videotape, whereas the publicity claim moved beyond the content of the tape and targeted IEG's advertising efforts.

<sup>57</sup> *Lee v. Penthouse Int'l Ltd.*, No. CV96–7069SVW(JGX), 1997 WL 33384309, at \*1 (C.D. Cal. Mar. 19, 1997).

<sup>58</sup> *Id.* at \*5.

<sup>59</sup> *Id.* at \*4.

Pam Anderson on the cover.<sup>60</sup> In the second case, involving Bret Michaels, the defendant Internet company attempted to sell access to the videotape itself.<sup>61</sup> Thus, the only question was whether the content of the videotape—not the fact of the videotape’s existence—was itself newsworthy. The *Michaels* court decided it was not.<sup>62</sup> Moreover, Michaels had a copyright in the video,<sup>63</sup> and the defendant could not manage a fair use argument.<sup>64</sup> Finally, the court decided that, unlike the *Lee* case, the circumstances of the prior publication did not give rise to the conclusion that the private facts of the videotape had become public.<sup>65</sup> Doctrinally consistent? Perhaps—but neither holding was self-evident, by any means.

But there is more to this story. Independent of the actions giving rise to the Bret Michaels litigation, several days before IEG claimed it would release the tape on its website, tabloid news program *Hard Copy* broadcasted a story about the tape and its impending release. The broadcast included eight excerpts from the videotape ranging between approximately two and five seconds in length.<sup>66</sup> Pam Anderson then intervened in the Bret Michaels case and brought suit against Paramount, the producer of *Hard Copy*, for copyright, right of publicity, and right of privacy claims arising out of the broadcast. Several months after the first opinion issued in the case, the court ruled on Anderson’s claims against Paramount.<sup>67</sup> First, the court analyzed Anderson’s right of publicity claim and held that Paramount’s reporting of the fact of the videotape’s existence, as well as its planned release by IEG, was a newsworthy story.<sup>68</sup> Accordingly, Paramount was within its

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<sup>60</sup> *See id.* at \*3–4.

<sup>61</sup> *Michaels*, 5 F. Supp. 2d at 828–29.

<sup>62</sup> *Id.* at 842.

<sup>63</sup> *Id.* at 830.

<sup>64</sup> *Id.* at 836. In the *Lee* case, no copyright claims were brought. However, based on the facts of that case and the court’s disposition toward the right of publicity claims, such claims would likely have failed in any event.

<sup>65</sup> *Michaels*, 5 F. Supp. 2d at 841.

<sup>66</sup> *Michaels v. Internet Ent. Group, Inc.*, 48 U.S.P.Q.2d 1891, 1893 (C.D. Cal. 1998).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1895.

rights to show snippets of the tape in direct connection with its reporting of that story.<sup>69</sup>

As to Anderson's public disclosure of private facts claim, the court noted that although the newsworthiness privilege in the context of the invasion of privacy tort is similar to the privilege applicable to the right of publicity tort, the privacy tort privilege includes an additional element

grounded in the differing nature of the tort. 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.<sup>70</sup>

Given these factors, the court held the content of the broadcast—including both the news story and the accompanying videotape snippets themselves—to be newsworthy.<sup>71</sup>

Finally, the court then disposed of Anderson's copyright claim by finding that use of the videotape snippets was privileged fair use.<sup>72</sup> Unlike IEG's planned use of the video, the *Hard Copy* broadcast was transformative—*i.e.*, Paramount used the excerpts to illustrate its news story about the videotape's imminent release<sup>73</sup>—and used only small snippets (with nudity blurred).<sup>74</sup> The court,

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<sup>69</sup> *Id.* at 1896 (“[T]he commercial purpose of promoting the news outlet itself does not preclude the newsworthiness privilege.”).

<sup>70</sup> *Id.* at 1898.

<sup>71</sup> *Id.* at 1899.

<sup>72</sup> *See id.* at 1899–1902.

<sup>73</sup> *Id.* at 1900.

<sup>74</sup> *Id.* at 1901.

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therefore, granted summary judgment for Paramount on all counts.<sup>75</sup>

Why did Paramount fare better than IEG? For substantially the same reasons that *Penthouse* fared well against the plaintiff's claims in the *Lee* case: Paramount authored a news story that passed the newsworthy test, and the use of the videotape—albeit a private videotape—was used simply to accompany or illustrate a news story about the subject matter of the tape. Having reached that point, Paramount could then advertise its own news story by using those very same snippets in advertisements—including the likeness of Anderson and Michaels embedded therein—just as *Penthouse* could put Anderson on the cover of the magazine in which her video stills with Tommy Lee appeared.

These three cases go a long way toward fleshing out the legal landscape of the rights of privacy and publicity and the newsworthiness principle under the First Amendment. To better understand these legal principles at play in the “sex video” context, let us now consider cases concerning the popular “Girls Gone Wild” videos—which, while rehashing some of these same legal principles, introduce new ones as well.

### III. GIRLS GONE WILD

In *Gritzke v. M.R.A. Holding, LLC*,<sup>76</sup> a Florida college student named Becky Lynn Gritzke was part of an outdoor crowd at Mardi Gras, and exposed her breasts.<sup>77</sup> Defendant M.R.A. recorded Gritzke's camera flash and incorporated it into a videotape called *Girls Gone Wild*, substantial copies of which were (and are) sold in the United States and abroad.<sup>78</sup> According to the complaint, defendants used plaintiff's photograph, with her breasts exposed, on the videotape package, and in widely disseminated advertisements, including MRA's website—all without permission.<sup>79</sup>

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<sup>75</sup> *Id.* at 1902.

<sup>76</sup> No. 4:01CV495–RH, 2002 WL 32107540 (N.D. Fla. Mar. 15, 2002).

<sup>77</sup> *Id.* at \*1.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

In ruling on the defendant's motion to dismiss, the court stated at the outset that:

although defendant suggests it merely used videotape of the crowd at Mardi Gras as part of a true and accurate depiction of a newsworthy event . . . the complaint alleges, and for purposes of this ruling I accept as true, that defendant made plaintiff the focus of advertisements of its videotape, by prominently displaying plaintiff on the videotape package, in advertisements, and on defendant's web site.<sup>80</sup>

Thus, the court held that Gritzke stated a claim under the Florida misappropriation statute, which provides that "[n]o person shall publish, print, display or otherwise publicly use *for purposes of trade* or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person . . . ."<sup>81</sup> The court also held that Gritzke stated common law claims for misappropriation and false light, the latter by falsely suggesting that plaintiff willingly participated in and endorsed defendant's videotape.<sup>82</sup> In one scant paragraph, the court considered—and rejected—MRA's newsworthiness defense.<sup>83</sup> On MRA's view, it had a First Amendment right to record and disseminate footage of a newsworthy public event.<sup>84</sup> The court's response was that even if MRA

did indeed have such a right, this does not help defendant on the instant motion to dismiss, because the complaint alleges that defendant made plaintiff's photograph a focus of the videotape package and advertisements, suggesting plaintiff's willing participation in and endorsement of the product. The First Amendment provides no right to make an unconsenting individual the poster-person for a

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (emphasis added). The statute thus mirrors both the common law right of publicity and the California statute at issue in the three Pam Anderson cases discussed above.

<sup>82</sup> *Id.* at \*2. For the same reasons, the court also upheld Gritzke's claim under the Florida Unfair and Deceptive Trade Practices Act.

<sup>83</sup> *Id.* at \*4.

<sup>84</sup> *Id.*

commercial product, as plaintiff alleges defendant has done.<sup>85</sup>

Just why did the *Gritzke* court reach this holding, given that Gritzke did appear in the underlying video exposing herself? After all, an individual's likeness normally may be used to advertise a media product in which that individual appropriately appears. For example, the news media may use celebrity photographs from current or prior publications as advertisements for the periodical itself, illustrating the quality and content of the periodical without the person's written consent. Similarly, if a video documentary contains an unconsented, though protected, use of a person's likeness, there is little question that an advertisement for the documentary, containing a clip of that use, would be permissible. The owner of a product is entitled to show that product to entice customers to buy it, as the *Lee* court held by permitting Penthouse's cover of Pam Anderson.<sup>86</sup>

Because these questions were not answered by the *Gritzke* court,<sup>87</sup> we are left to speculate. Perhaps the answer is that when Penthouse "advertised its wares" by putting Pamela Anderson on the cover of the magazine, it was literally advertising an article about Pam Anderson specifically, which includes photos that directly relate thereto. By hypothesis, this is not the same thing—not quite the same thing, anyway—as putting Gritzke on the cover of a video in which she does appear, but only as part of a public scene. In other words, the video was never about Gritzke; it was about girls gone wild, as it were. The *Penthouse* magazine contained an article about Pam Anderson *per se*, and so the magazine cover could rightfully advertise that fact. Along the same lines, perhaps the *Gritzke* court felt that the *Girls Gone Wild* video at issue consisted in part of lurid material well beyond the scope of Gritzke's momentary indiscretion. Making her the poster child for *Girls Gone Wild* accordingly perhaps falsely implies that

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<sup>85</sup> *Id.*

<sup>86</sup> See *supra* notes 54–55 and accompanying text. See also RODNEY A. SMOLLA, 2 LAW OF DEFAMATION § 10:6 (2003); Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (Cal. 2001).

<sup>87</sup> No. 4:01CV495–RH, 2002 WL 32107540 (N.D. Fla. Mar. 15, 2002). The case was later settled without any further published opinions.

Gritzke was a participant in some of this more scandalous footage. Alternatively, of course, perhaps the case was wrongly decided, and had the decision gone up on appeal, the holding may have been reversed.

*Lane v. MRA Holdings*<sup>88</sup> presented another case involving a *Girls Gone Wild* video.<sup>89</sup> There, the plaintiff, while operating an automobile in Panama City Beach, Florida, was approached by individuals armed with a video camera.<sup>90</sup> After a brief negotiation, Lane flashed her breasts on camera in exchange for beads.<sup>91</sup> This footage was included in a *Girls Gone Wild* video.<sup>92</sup> In addition, MRA marketed these and other *Girls Gone Wild* videos with censored video clips of this same footage of Lane.<sup>93</sup> Lane argued that although she gave her consent to appear on camera, she did so only on the understanding that this video footage was for the personal use of the cameraman only, and that the cameraman represented this to be the case.<sup>94</sup> Lane then brought suit for claims including misappropriation, false light, and statutory unauthorized publication.<sup>95</sup>

To trigger the Florida misappropriation statute, much like the common law right of publicity, a plaintiff must show that his likeness or image was used for purposes of trade or for any commercial or advertising purpose—*i.e.*, using a person's name or likeness to directly promote a product or service.<sup>96</sup> The court also cited to Section 47 of the Restatement (Third) of Unfair Competition, which defines “the purposes of trade” as follows:

The names, likeness and other indicia of a person's identity are used “for the purposes of trade” . . . if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However,

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<sup>88</sup> 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

<sup>89</sup> *Id.* at 1210.

<sup>90</sup> *Id.* at 1209.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1210.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1211.

<sup>96</sup> *Id.* at 1213.

use “for the purpose of trade” does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising incidental to such uses.

. . . .

Therefore, under this definition, the “use of another’s identity in a novel, play or motion picture is . . . not ordinarily an infringement . . . [unless] the name or likeness is used solely to attract attention to a work that is not related to the identified person . . . .”<sup>97</sup>

The court thus held that while Lane’s image and likeness were used to sell copies of *Girls Gone Wild*, her image and likeness were never associated with a product or service unrelated to that work.<sup>98</sup> In other words, Lane did appear in the videos, so showing video snippets of that footage “as part of an expressive work in which she voluntarily participated” is not actionable.<sup>99</sup> The court further held that, in all events, Lane consented to appear in the videos.<sup>100</sup> Although Lane argued that the scope of her consent was limited, the court found that it was plainly “unreasonable to expect that a total stranger would limit the viewing of a video with shots of young women publicly exposing themselves to only those persons present at the time of filming.”<sup>101</sup>

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<sup>97</sup> *Id.* (quoting Restatement (Third) Of Unfair Competition § 47 cmt. c. (1995)).

<sup>98</sup> *Id.* at 1213, 1215.

<sup>99</sup> *Id.* at 1215.

<sup>100</sup> *Id.*

<sup>101</sup> See also *Capdeboscq v. Francis*, No. Civ.A.03–0556, 2004 WL 463316 (E.D. La. 2004). There, the plaintiff was photographed flashing her breasts in a roomful of people that included the rapper “Snoop Dogg,” and that photo appeared on the cover of a *Girls Gone Wild* video entitled *Girls Gone Wild Doggy Style*. *Id.* at \*1. The plaintiff did not actually appear in the underling video itself. The court held that a material dispute of fact existed as to whether the plaintiff had a reasonable expectation of privacy given the circumstances of the party. *Id.* The court seemed to have taken it for granted that if she did not have an expectation of privacy, she would be unable to recover for her likeness on the cover of the video. Correct or not, this result likely runs counter to *Gritzke*. *Id.* Moreover, the court did not discuss whether using the plaintiff’s likeness on the cover of a video in which she did not appear would implicate right of publicity and appropriation issues.

Interestingly, the court explicitly discussed the *Gritzke* case—which Lane cited in support of her claims—in the course of reaching its holding.<sup>102</sup> The court distinguished the *Gritzke* case:

In [the *Gritzke*] case, however, the court was working under the more liberal standard governing motions to dismiss . . . [i]n addition, the plaintiff in *Gritzke* was complaining about the use of her image on the outside cover of a videotape package. In this case, Lane has not alleged that her image was plastered on a billboard or box advertising *Girls Gone Wild*.<sup>103</sup>

The court also noted that “unlike in *Gritzke*, the Plaintiff’s image in this case was never doctored. It has always remained in its original video format.”<sup>104</sup> On this basis, therefore, the *Lane* court was untroubled by *Gritzke*.<sup>105</sup>

#### IV. THE NAKED NEWSCASTER

In *Bosley v. Wildwett.com*,<sup>106</sup> Catherine Bosley—a television news reporter for an Ohio CBS affiliate, and “regional celebrity”—moved for a preliminary injunction against an Internet company that sought to restrain the company’s commercial use of

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<sup>102</sup> Lane v. MRA Holdings, 242 F. Supp. 2d 1205, 1214 (M.D. Fla. 2002).

<sup>103</sup> *Id.* at 1215.

<sup>104</sup> *Id.*

<sup>105</sup> *Cf.* Jackson v. MPI Home Video, 694 F. Supp. 483 (N.D. Ill. 1988). There, Jesse Jackson delivered a speech at the 1988 National Democratic Convention that was recorded by news outlets. *Id.* at 484–85. The defendant purchased a license for the video footage from one of the news organizations, and sold copies of the speech as part of a video containing comprehensive footage of the convention. *Id.* at 485. Jackson’s image also appeared on the cover of the tape. *Id.* Jackson brought copyright claims over the unauthorized reproduction of his speech, but he brought right of publicity claims specifically in connection with his image on the video cover. *Id.* at 487–88. As to those claims, the court stated that the “right of publicity would not permit plaintiff to challenge the use of his picture on the cover of Time or Newsweek, and that in light of the fact that the evidence appears to support defendants’ claim that they were engaged in news reporting, the chances of success on the right to publicity claim appear less than negligible.” *Id.* at 492. Interestingly, however, the court then posited that a “better theory for plaintiff is that . . . the Lanham Act has been violated by the false implied representation that he has authorized or approved defendants’ tape.” *Id.* *Gritzke* did not assert any such claims under the Lanham Act. *Id.* at 492.

<sup>106</sup> 310 F. Supp. 2d 914 (N.D. Ohio 2004).

videotaped images of Bosley.<sup>107</sup> In March of 2003, while vacationing in Florida, Bosley entered a “wet t-shirt contest”.<sup>108</sup> In the course of participating in the contest, Bosley stripped naked, and was filmed by a company called “Dream Girls,” which makes videos similar to the *Girls Gone Wild* videos.<sup>109</sup> In May of 2003, Dream Girls released a video of the contest, entitled *Dream Girls Spring Break 2003, Volume One*.<sup>110</sup> Shortly thereafter, a second version of the video—this time emphasizing Bosley’s appearance as the “naked anchor woman”—was released.<sup>111</sup> In February 2004, an Internet company called Marvad, d/b/a/ SexBrat.com, allegedly obtained a license of the Bosley footage from Dream Girls, and allowed members who paid a SexBrat.com membership fee to view Bosley’s performance, as well as other images available on the “members only” portion of their website.<sup>112</sup> In the single day after images of Bosley were posted, the number of website hits received by SexBrat increased from 9,457 to 111,663, and for a brief period of time thereafter, Internet browser searches for Bosley were the most popular on the entire Internet.<sup>113</sup>

Bosley’s preliminary injunction suit included statutory and common law right of publicity claims against both Dream Girls and Marvad, and argued that both defendants had used Bosley’s images to advertise or promote the sexually-related materials marketed by the defendants.<sup>114</sup> The court held that the prominent display of Bosley’s name, image and likeness on the cover of the *Dream Girls* video—as well as promotional images of Bosley posted on the website—clearly constituted an advertisement for the video, thus bringing the conduct within the purview of the “commercial purpose” standard necessary to succeed on the publicity claim.<sup>115</sup> The court then went a step further and stated that the use of Bosley’s images in the *Dream Girls* video itself—

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<sup>107</sup> *Id.* at 917.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 918.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 918–19.

<sup>115</sup> *Id.* at 922.

not just on the cover—as well as that same footage in the “members only” portion of SexBrat.com, “constitutes a direct promotion of Defendants’ products or services”<sup>116</sup> so as to also implicate the right of publicity.

The court rejected comparisons to the *Lane* case,<sup>117</sup> finding *Lane* to be an “anomalous case which holds that ‘it is irrefutable that the *Girls Gone Wild* video is an expressive work created solely for entertainment purposes.’ This court cannot similarly hold that the images in question are expressive works, as they do not contain any creative components or transformative events.”<sup>118</sup> Instead, the court analogized to the *Michaels* case,<sup>119</sup> discussed above, in which *Michaels* successfully prevented an adult website from using video clips of his sex tape with Pam Anderson on right of publicity grounds, among others.<sup>120</sup> Similarly, the *Bosley* court held, “Defendant Dream Girls is attempting to sell a copy of Plaintiff Bosley’s performance without her permission. Such a sale is commercial, even if it does not reference Defendants’ other wares.”<sup>121</sup> The court further rejected the Defendants’ First Amendment defenses, finding that “otherwise newsworthy material is not protected in the context of advertising.”<sup>122</sup>

Let us pause here for a moment and take inventory. Thus far, the *Bosley* court considered both the *Lane* case and the *Michaels* case, and felt that *Bosley* was more like the plaintiff in *Michaels* than the plaintiff in *Lane*.<sup>123</sup> In *Lane*, as noted above, a woman

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<sup>116</sup> *Id.*

<sup>117</sup> See *supra* note 88 and accompanying text.

<sup>118</sup> *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 922 (N.D. Ohio 2004).

<sup>119</sup> See *supra* note 32 and accompanying text.

<sup>120</sup> *Michaels* also successfully asserted copyright and public disclosure of private facts claims, neither of which were asserted by *Bosley*. See *Michaels v. Internet Ent. Group Inc.*, 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998).

<sup>121</sup> *Bosley*, 310 F. Supp. 2d at 923.

<sup>122</sup> In support of this proposition, the court cited the famous case of *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996), in which GMC used statistics concerning Kareem Abdul-Jabbar’s basketball record in the context of an automobile advertisement. The court held that while his basketball record may be newsworthy, the use of the information was not in the context of a news or sports account, but rather an advertisement, and thus was not shielded by the First Amendment. *Id.*

<sup>123</sup> *Bosley*, 310 F. Supp. 2d at 929, 932 (citing *Michaels v. Internet Ent. Group Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) and *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002)).

flashed her breasts to a video camera in a public place and that footage was included as part of a larger assembly of spring break footage on a *Girls Gone Wild* video.<sup>124</sup> Snippets of that same video footage at issue were included in advertisements for the video.<sup>125</sup> The court held that not only had Lane consented to appear in the underlying footage, but that because she did legitimately appear in the video, the use of her image in the advertisements was not actionable either.<sup>126</sup> By contrast, in *Michaels*, the video footage was private in nature and Michaels registered a copyright in the video.<sup>127</sup> The video was deemed neither newsworthy nor expressive/transformational, and Michaels overcame the fair use defense to prevail on his copyright claims.<sup>128</sup>

The *Bosley* court felt that the situation there was more analogous to *Michaels* than *Lane*.<sup>129</sup> At first glance, however, it's not entirely clear why. Like Lane, Bosley exposed herself in a public place, with no expectation of privacy.<sup>130</sup> Granted, Lane was deemed to have granted consent to appear in the video,<sup>131</sup> whereas the *Bosley* court found that no explicit consent was given by Bosley.<sup>132</sup> Although one may seriously question the wisdom of this particular finding—there were signs posted at the wet t-shirt contest warning that the event was being filmed, not to mention the multitude of flash bulbs going off before, during and after the contest—the *Bosley* defendants' hopes did not rise and fall entirely with consent.<sup>133</sup> After all, the *Lane* court itself pointed out that even if Lane was not deemed to have consented to the filming, Lane still could not show that her image was used for trade, commercial or advertising purposes.<sup>134</sup> Rather, the *Girls Gone*

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<sup>124</sup> Lane v. MRA Holdings, 242 F. Supp. 2d 1205, 1209 (M.D. Fla. 2002).

<sup>125</sup> *Id.* at 1213.

<sup>126</sup> *Id.* at 1215.

<sup>127</sup> Michaels v. Internet Ent. Group Inc., 5 F. Supp. 2d 823, 842–43 (C.D. Cal. 1998).

<sup>128</sup> *Id.* at 836.

<sup>129</sup> Bosley v. Wildwett.com, 310 F. Supp. 2d 914 at 929, 932.

<sup>130</sup> *Id.* at 917–18.

<sup>131</sup> Lane v. MRA Holdings, 242 F. Supp. 2d 1205 at 1219.

<sup>132</sup> Bosley, 310 F. Supp. 2d at 932.

<sup>133</sup> *Id.* at 931.

<sup>134</sup> Lane, 242 F. Supp. 2d at 1213.

*Wild* video at issue there was an expressive work, and as such, was entitled to First Amendment protection.<sup>135</sup>

So, with that said, why did the *Bosley* court decide that Bosley was more like *Michaels* than *Lane*? Put another way, how could Bosley appear in public, dance naked in front of a multitude of onlookers, get caught on film, and then manage to assert publicity rights in the footage?<sup>136</sup>

Part of the answer lies in the *Bosley* court's reliance on *Zachinni v. Scripps-Howard Broadcasting Co.*,<sup>137</sup> the only case to date in which the United States Supreme Court has weighed in on the right to publicity. In that case, a news station broadcast Hugo Zacchini's entire fifteen second "human cannonball" act, which took place on a public fair ground.<sup>138</sup> Moreover, the Court held, "the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer."<sup>139</sup> Thus, "analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors" encourages socially beneficial commercial behavior.<sup>140</sup>

It is clear, however, that *Zachinni* is markedly distinct from the situation presented by *Bosley*. Among other things, *Zacchini* did

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<sup>135</sup> *Id.* at 1213. Moreover, cases are legion which hold that when one voluntarily appears as part of a public spectacle, an individual can be permissibly "singled out and photographed because his presence constituted a visual participation in a public event which invited special attention." See, e.g., *Murray v. New York Magazine Co.*, 27 N.Y.2d 406 (1971). There, the plaintiff was a spectator at a St. Patrick's Day parade in New York City. Dressed in "Irish garb," his photograph was taken without his knowledge and published on the front cover of a magazine to illustrate a story on contemporary Irish-Americans in New York City. *Id.* at 408.

<sup>136</sup> It should be noted in fairness, however, that at least part of the conduct targeted by Bosley's lawsuit was the way Marvad marketed the video—*i.e.*, advertising the "Naked Newscaster" and such on the SexBrat website. To that extent, if anything, Bosley is probably more like *Gritzke* than *Lane*.

<sup>137</sup> 433 U.S. 562 (1977).

<sup>138</sup> *Id.* There, the Supreme Court weighed in on the right of publicity by ruling that the right of publicity prevented the television station from broadcasting the entire act, reasoning that such broadcast "poses a substantial threat to the economic value of that performance." *Id.*

<sup>139</sup> *Id.* at 576.

<sup>140</sup> *Id.* at 573.

not seek to enjoin reproduction of his performance; he only sought compensation for lost revenues.<sup>141</sup> Perhaps more importantly, however, the performance at issue was Zachinni's stock and trade, as the Court itself noted.<sup>142</sup> The same cannot *nearly* be said for Bosley, whose stock and trade clearly is not performing in wet t-shirt competitions. In short, the Zachinni rationale is nothing less than absurd when applied to Bosley.

No doubt recognizing this fact, the *Bosley* holding was overruled on appeal to the Sixth Circuit.<sup>143</sup> In a scant, one-page unpublished opinion, the court stated:

We are not persuaded, at this stage of the proceedings, that the defendant's speech is outside the protections of the First Amendment. Even if the defendant's web site is viewed as purely commercial, some circuits have "indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applied to commercial speech."<sup>144</sup>

The injunction, therefore, was a "prior restraint on speech in violation of the First Amendment."<sup>145</sup> The Sixth Circuit's decision makes no real attempt to chart a course through the relevant legal principles; instead, the Court seems to have decided that the lower court's decision did not pass the "smell test," and left the heavy lifting for another day.<sup>146</sup> In any event, two weeks after the Sixth Circuit's decision, the case settled, and the images of Bosley were removed from SexBrat.com.

## V. WHAT HAVE WE LEARNED?

Based on these cases, let us try and deduce some general maxims of sex video law, and then consider what these maxims might have to say about our friends Paris Hilton and Fred Durst. Let's call these "Siprut's 8 Maxims of Sex Video Law."

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<sup>141</sup> *Id.* at 578.

<sup>142</sup> *Id.* at 576.

<sup>143</sup> *Bosley v. Wildwett.com*, No. 04-3428, 2004 WL 2169179, \*1 (6th Cir. April 21, 2004).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

1. If the video footage involves conduct that is deemed newsworthy in its own right,<sup>147</sup> or if the footage is assembled in such a way that a transformative or expressive work has been created, the use of the footage is likely to be shielded by the First Amendment.
2. If the recorded footage occurs in public, the cameraman is well on the way to meeting these tests.<sup>148</sup>
3. Notwithstanding Maxims 1 and 2, if the footage involves “performance-oriented conduct” a la *Zachinni*, proceed with caution.<sup>149</sup>
4. Even in such a *Zachinni*-type case, however, a snippet of the footage can still probably be shown, and a video still or two in connection with a news story about that performance will almost certainly be permitted to be shown.<sup>150</sup>
5. If the video footage is *private* in nature and somehow gets out into the public, it is still permissible to use a video still or two to illustrate a newsworthy story about the videotape’s existence.<sup>151</sup>
6. One cannot, however, simply sell the private video in and of itself—and certainly not if the subject of the video (or anyone else, for that matter) possesses valid copyright interests in it.<sup>152</sup>

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<sup>147</sup> See *Lee v. Penthouse Intern., Ltd.* No. 2:96CV07069, 1997 WL 33384309 at \*5 (C.D. Cal. Mar. 19, 1997)

<sup>148</sup> See *Lane v. MRA Holding*, 242 F. Supp. 2d 1205, 1209 (M.D. Fla. 2002); *Bosley*, 310 F. Supp. 2d 917.

<sup>149</sup> See *Zachinni v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562 (1977).

<sup>150</sup> See *id.* at 575–76.

<sup>151</sup> *Lee*, 1997 WL 33384309 at \*4, \*7.

<sup>152</sup> *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 830–31 (C.D. Cal. 1998).

7. Even if distribution of the underlying video footage is not actionable, caution should be exercised when advertising it. Although typically an owner of a product is entitled to show customers a piece of that product in order to entice them to buy it, any such advertisements that suggest a “false endorsement” incur risks.
8. Above all else, when in doubt, *get consent*.<sup>153</sup>

Of course, to state the obvious, the easy part is reciting the general rules. As is always true, the harder part is applying these rules to the facts of a particular case. It is one thing to say that you have a green light to distribute “newsworthy” footage, or that you should be wary of advertisements that border on “false endorsement”; it is quite another thing to analyze whether, in any particular case, these standards are met.

#### VI. PARIS HILTON AND FRED DURST REVISITED

Armed now with these general principles, let’s return to Paris Hilton and Fred Durst, who introduced this article. How will they fare with their legal claims?

For convenience, let’s distill and consolidate the relevant facts of both cases: (i) celebrity and partner videotape themselves engaging in sex act; (ii) the tape “mysteriously” gets out, and ends up in the hands of a third party; and (iii) the third party intends to distribute, and profit from, the video footage.<sup>154</sup> What’s the result?

As a threshold matter, note that Hilton, or at least Salomon, and Durst registered copyrights in the videos.<sup>155</sup> And why not? Like the Brett Michaels/Pam Anderson video, these videos here were made in private, were “authored” by the plaintiffs themselves, and otherwise qualify for copyright protection.<sup>156</sup> As such, to distribute the videos, the defendants will need to have acquired a

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<sup>153</sup> Cf. *Lane*, 242 F. Supp. 2d at 1215; *Bosley*, 310 F. Supp. 2d at 932.

<sup>154</sup> See Thomas, *supra* note 1.

<sup>155</sup> See *Paris Hilton ‘Directed’ Sex Video*, *supra* note 7; see also *Fred Durst Sues Over Stolen Sex Video*, Mar. 4 2005, <http://thesmokinggun.com/archive/0304051durst1.html>.

<sup>156</sup> *Michaels*, 5 F. Supp. 2d at 828.

valid copyright license granting these rights—a possibility which seems quite remote in light of the facts of these cases.<sup>157</sup> Even without a license, however, the defendants might still be able to publish a still photo or two from the videos in connection with a story about the tapes—assuming, as we probably can, that any such story is newsworthy.<sup>158</sup> Although showing snippets of actual video footage of the tape—not just still photos of the video—might qualify as fair use depending on the context or circumstances of such usage—e.g., if the footage appears in the larger context of a truly transformative work—given the content of the footage at issue here, a fair use argument will be difficult to make out.<sup>159</sup>

Apart from the copyright claims, both plaintiffs probably have right of publicity claims that could be overcome only with a showing of newsworthiness. The videos themselves, however, are probably not newsworthy in their own right—but as noted above, still photos from the videos can probably be used to illustrate a newsworthy story about the tapes.<sup>160</sup>

On balance, the plaintiffs in both cases are probably on solid legal ground.

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<sup>157</sup> *Id.*

<sup>158</sup> *Lee v. Penthouse Intern. Ltd.* No. 2:96CV07069, 1997 WL 33384309 at \*4 (C.D. Cal. Mar. 19, 1997).

<sup>159</sup> *Michaels*, 5 F. Supp. 2d at 836.

<sup>160</sup> *See supra* note 54–56 and accompanying text. Recall that Salomon marketed the video around the time he filed a copyright registration for it. One issue not raised in the Hilton/Salomon litigation is whether Hilton has potential claims against *Salomon* himself on this basis. For example, actor Colin Farrell recently successfully filed a lawsuit seeking injunctive relief preventing his former girlfriend, Nicole Narain, from distributing a sex video that they had previously created, and which Narain possessed. *See* Cesar G. Soriano, *Farrell: Sex, Lies & a Videotape?*, USA TODAY, July 20, 2005, at D3; *Actor Colin Farrell Tries to Stop Former Flame from Releasing Sex Tape*, AP Wire, July 18, 2005. In the Hilton/Salomon matter, however, the video may have been “leaked” before the time that Salomon began to try and market it himself. Under such circumstances, Hilton’s privacy-based claims against Salomon may be undercut, because the tape was already public—unless, of course, Salomon himself is alleged to be the “leaker.” In the Farrell matter, by contrast, the tape had not been leaked to the public previously.

## CONCLUSION

We have thus navigated the waters of sex video jurisprudence. The general principles at play here—the rights of privacy and publicity, and the First Amendment to the United States Constitution—go *well* beyond the scope of this article, of course. But these cases are truly the only of their kind to attempt to apply these general principles to “sex videos” and unwary celebrities “caught on tape.” As we have seen, at points, the courts’ reasoning leaves something to be desired. But on balance, these decisions are a mostly respectable effort to carve out some new territory in right of publicity law while adapting to new and emerging technologies.