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### Author

Rosenfeld, Shelly

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## 15 Minutes of Shame? Copyright Issues in Celebrity Sex Videos

Shelly Rosenfeld\*

*It's the tape that launched a thousand clips—Paris Hilton's Celebrity Sex Video became a form of "Must See TV". Celebrities are used to performing for the camera. But when Hilton was caught on video, she reacted as many participants do when their celebrity sex tapes are revealed—they file a lawsuit. This article explores the various legal tools that one can consider in response to their involvement in a dispute over a celebrity sex tape. Copyright law presents an important framework to consider. The torts of public disclosure of private facts, intrusion upon seclusion, and the right of publicity may also help protect one who wishes to nail his or her opponent.*

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\* Associate, Lewis Brisbois Bisgaard & Smith, LLP; LL.M., UCLA Law School, 2011; J.D., UC Hastings College of the Law, 2010; M.S.J., Northwestern University, 2004; B.A., UC Berkeley, 2003. Before becoming an attorney, Ms. Rosenfeld worked as a television anchor and reporter. Special thanks to Dan DeCarlo, Lewis Brisbois Bisgaard & Smith, LLP, for his support of this article.

I. INTRODUCTION.....	258
II. STRIPPED OF THEIR RIGHTS.....	259
III. THE BARE FACTS OF AUTHORSHIP ISSUES IN COPYRIGHT.....	262
A. <i>Calling the (Camera) Shots</i> .....	262
B. <i>Uncovered: The Rights of Joint Authors</i> .....	267
III. “SEX, LIES, AND DIGITAL DOWNLOADS”: PUBLIC DISCLOSURE OF PRIVATE FACTS AND INTRUSION UPON SECLUSION (INVASION OF PRIVACY).....	268
IV. BEHIND THE SEAMS: RIGHT OF PUBLICITY.....	271
V. CONCLUSION: USE LEGAL PROTECTION.....	274

## I. INTRODUCTION

I made love to my boyfriend at the time, we just happened to videotape it. It wasn't for anybody else's eyes to see but ou[r] eyes.

—Kendra Wilkinson, former *Playboy* Playmate, after her sex tape was released<sup>1</sup>

To quote . . . Eric Dane's lawyer—if you don't want a sex tape on the internet, 'don't make one!'

—Nick Denton, publisher of Gawker Media, which published Eric Dane's tape<sup>2</sup>

Celebrity sex videos may be the ultimate form of reality television. From Paris Hilton to Kim Kardashian to Bret Michaels,<sup>3</sup> celebrities are casting themselves in their own hit shows of their intimacy. Although many disputes ultimately settle out of court,<sup>4</sup> in the fight to keep these videos under wraps to prevent dissemination over the Internet, many of

<sup>1</sup> *Kendra Wilkinson On Sex Tape: 'It Hurts, But I Know It's Going To Make Me & Hank Better Parents'*, ACCESS HOLLYWOOD (Aug. 9, 2012, 10:24 AM), [www.accesshollywood.com/kendra-wilkinson-on-sex-tape-it-hurts-but-i-know-its-going-to-make-me-and-hank-better-parents\\_article\\_33298](http://www.accesshollywood.com/kendra-wilkinson-on-sex-tape-it-hurts-but-i-know-its-going-to-make-me-and-hank-better-parents_article_33298).

<sup>2</sup> Ken Lee, *Eric Dane & Rebecca Gayheart Sue Over Nude Tape*, PEOPLE MAGAZINE (Sept. 23, 2009, 7:25 PM), available at <http://www.people.com/people/article/0,,20307787,00.html?xid=rss-topheadlines> (last accessed Aug 31, 2013).

<sup>3</sup> See, e.g., *Michaels v. Internet Entm't Grp.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

<sup>4</sup> Rob Arcamona, *Does Gawker's Publication of McSteamy Sex Tape Constitute Fair Use?*, MEDIASHIFT (Nov. 11, 2009), [www.pbs.org/mediashift/2009/11/does-gawkers-publication-of-mcsteamy-sex-tape-constitute-fair-use315.html](http://www.pbs.org/mediashift/2009/11/does-gawkers-publication-of-mcsteamy-sex-tape-constitute-fair-use315.html).

the lawsuits filed involve copyright issues.<sup>5</sup> These copyright issues include whether the material is copyrightable in the first place and issues relating to joint authorship. If a celebrity sex tape is protected by copyright, then an entity distributing the video without a license from at least one copyright owner would violate the copyright holder's exclusive right granted under copyright law to distribute the tape to the public,<sup>6</sup> as well as the right to publicly display individual images of the video.<sup>7</sup> Once the naked truth is out in the public or about to be released, however, the best legal tools to use in response are likely the torts of public disclosure of private facts, intrusion upon seclusion, and the right of publicity.

## II. STRIPPED OF THEIR RIGHTS

JERRY

David Putty used *\*my\** move?

ELAINE

Yes, yes.

JERRY

Are you sure?

ELAINE

Jerry! There is no confusing *\*that\** move with any other move.

JERRY

I can't believe it. He *\*stole\** my move . . .<sup>8</sup>

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<sup>5</sup> Matt Belloni, *Gawker pays to settle 'McSteamy' copyright suit*, THE HOLLYWOOD REPORTER (Dec. 21, 2010, 11:02 AM), <http://www.hollywoodreporter.com/blogs/thr-esq/gawker-pays-settle-mcsteamy-copyright-64132..>

<sup>6</sup> 17 U.S.C. § 106(4) (2013).

<sup>7</sup> 17 U.S.C. § 106(5) (2013).

<sup>8</sup> *Seinfeld: The Fusilli Jerry*, (NBC television broadcast Apr. 27, 1995).

In order to understand the potential rights a participant may have in his or her sex tape, it is important to determine whether the video has copyright protection in the first place. Copyright protection is found “in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated.”<sup>9</sup> The quest to define the term “original” has reached the United States Supreme Court. The Court has held that arranging an alphabetical listing in a phone book is not original enough to merit copyright protection because, after all, “[i]t is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.”<sup>10</sup> It may not take much more than a phone book, however, to be considered “original.” Originality merely requires a “modicum of creativity”<sup>11</sup> and that the work be an independent creation, which means that one cannot copy from someone else. In *Nat’l Basketball Ass’n v. Motorola, Inc.*, the NBA sued Motorola for copyright infringement for “transmitting” information from basketball games to its customers’ pagers.<sup>12</sup> While broadcasts of basketball games receive copyright protection, the court distinguished the broadcasts from the actual basketball games, which are not copyrightable because they do not amount to “original works of authorship.”<sup>13</sup> The court ruled in favor of Motorola and stated that “[u]nlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script.”<sup>14</sup> Rather, it is “the director, cameramen, or others who contribute to the originality of a broadcast.”<sup>15</sup>

Much like an athletic contest, the specific sexual activity underlying a sex video is not copyrightable. Just as a basketball game would cease to be competitive if the first team or player who came up with the “slam dunk” would be able to copyright the move, it would be unreasonable to allow a couple in a video to copyright their sexual sequence. In *Seinfeld*, Jerry would not have been able to copyright his

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<sup>9</sup> 17 USC § 102.

<sup>10</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

<sup>11</sup> *Id.* at 346.

<sup>12</sup> *NBA v. Motorola Inc.*, 105 F.3d 841, 843 (2d Cir. 1997).

<sup>13</sup> *Id.* at 846.

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

<sup>15</sup> *Id.* at 847.

sexual “move” to prevent others from using it without his permission.<sup>16</sup> What is copyrightable is not the underlying sexual activity, but rather the original work of authorship that is fixed in the tangible medium of expression, whether it is a videotape or other fixed expressive medium. The creative decisions involved in making the video production likely result in copyrightable subject matter in the category of “motion pictures and other audiovisual works.”<sup>17</sup> The very copyrightable aspects go far beyond the sexual activity and rather extend to the performance for the camera, such that it is the participants who are “authoring” as they go along. In the context of a celebrity sex video, the only directors are the participants themselves. In contrast, athletes focus purely on the sport and have no role in the technical aspects of the video recording.

Moreover, from a practical perspective, the United States Copyright Office has granted copyrights for celebrity sex videos. In the case of Paris Hilton’s sex video, Rick Salomon obtained a copyright.<sup>18</sup> The work was simply titled “Home Video.”<sup>19</sup> Salomon gave the Copyright Office photos and “descriptive material” rather than the video itself, and he indicated that he was the cameraman.<sup>20</sup> Once the Copyright Office concludes that the video is copyrightable, deciding who has rights in the video is determined by whether the individual is considered an author or, in the case of more than one author, a joint author.

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<sup>16</sup> *Seinfeld: The Fusilli Jerry*, *supra* note 8.

<sup>17</sup> 17 U.S.C. § 102 (2013) (internal quotations omitted).

<sup>18</sup> Lola Ogunnaiké, *Sex, Lawsuits and Celebrities Caught on Tape*, N.Y. TIMES, March 19, 2006, available at [http://www.nytimes.com/2006/03/19/fashion/sundaystyles/19tapes.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2006/03/19/fashion/sundaystyles/19tapes.html?pagewanted=all&_r=1&).

<sup>19</sup> *Home Video*, [http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=6&ti=1,6&SAB1=richard%20salomon&BOOL1=all%20of%20these&FLD1=Keyword%20Anywhere%20%28GKEY%29%20%28GKEY%29&GRP1=OR%20with%20next%20set&SAB2=&BOOL2=as%20a%20phrase&FLD2=Keyword%20Anywhere%20%28GKEY%29%20%28GKEY%29&CNT=25&PID=g3Y7H3-5ZNY\\_myEm\\_WhKpYaZe9J8&SEQ=20121022022655&SID=6](http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=6&ti=1,6&SAB1=richard%20salomon&BOOL1=all%20of%20these&FLD1=Keyword%20Anywhere%20%28GKEY%29%20%28GKEY%29&GRP1=OR%20with%20next%20set&SAB2=&BOOL2=as%20a%20phrase&FLD2=Keyword%20Anywhere%20%28GKEY%29%20%28GKEY%29&CNT=25&PID=g3Y7H3-5ZNY_myEm_WhKpYaZe9J8&SEQ=20121022022655&SID=6) (last accessed Sept. 2, 2012).

<sup>20</sup> *Id.*

### III. THE BARE FACTS OF AUTHORSHIP ISSUES IN COPYRIGHT

In 2009, viewers tuned in to watch Eric Dane play the role of Dr. Mark Sloan on *Grey's Anatomy* every week. But an “episode” that grabbed viewers’ attention did not feature Dane in the operating room, but rather in the bedroom. The cast included Dane; his wife, actress Rebecca Gayheart; and beauty pageant winner Kari Ann Peniche. On the copyright registration, Dane and Gayheart are credited with authorship roles as “director” and “cinematographer.”<sup>21</sup> Dane and Gayheart sued Gawker Media, LLC for copyright infringement after the company featured the video on its website.

The fact that Dane registered the copyright would be especially helpful for a future action to enforce his copyright in the video, but because the defendant’s alleged act of copyright infringement happened before Dane registered the copyright,<sup>22</sup> Dane would be barred from recovering statutory damages and attorney’s fees.<sup>23</sup> However, that did not stop Dane and Gayheart from suing for more than a million dollars in damages. A certificate of copyright registration is prima facie evidence that the registering party owns the copyright.<sup>24</sup> Since the celebrity sex videos generally involve more than one participant, whether another person is a joint author determines whether a copyright holder must share his or her rights with another person who has equal ownership in the video.

#### A. *Calling the (Camera) Shots*

To understand the protections and rights potentially available to a celebrity sex video participant, it is important to understand the framework that could provide these legal protections. The Ninth Circuit case *Aalmuhammed v. Lee* involved joint authorship issues in the film *Malcolm X*, which was directed by Spike Lee and starred Denzel

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<sup>21</sup> “ED-RG-KAP Video by ED & RG,” [http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=1&ti=1,1&Search\\_Arg=ED-RG-KAP&Search\\_Code=TALL&CNT=25&PID=8r6\\_u9REtTsXITovWKmV91z68yjb&SEQ=20130903002239&SID=1](http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=1&ti=1,1&Search_Arg=ED-RG-KAP&Search_Code=TALL&CNT=25&PID=8r6_u9REtTsXITovWKmV91z68yjb&SEQ=20130903002239&SID=1) (last accessed Sept. 2, 2013).

<sup>22</sup> David Carr, *McSteamy Vid Lawsuit? It's a Copyright Beef*, N.Y. TIMES, Sept. 25, 2009, available at <http://mediadecoder.blogs.nytimes.com/2009/09/25/mcsteamy-vid-lawsuit-its-a-copyright-beef/>.

<sup>23</sup> 17 U.S.C. § 412 (2008).

<sup>24</sup> 17 U.S.C. § 401(c) (2008).

Washington. Jefri Aalmuhammed sued Lee, claiming he was a co-owner of the copyright as a joint author of the film. The movie's credits listed Aalmuhammed as an "Islamic Technical Consultant." In his role, Aalmuhammed suggested script revisions to ensure religious accuracy; directed some of the actors, including Washington; translated Arabic into English for subtitles; and even used his own voice for voiceovers.<sup>25</sup> Moreover, he chose the prayers for the characters, and during postproduction he even edited sections of the movie.<sup>26</sup>

The case highlights an important point: although someone might make significant and even copyrightable contributions to a film, those activities do not necessarily make that person a joint author. Section 101 of Title 17 of United States Code embodying The Copyright Act defines a joint work as a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>27</sup> The Ninth Circuit has separated this definition into three required elements: "(1) a copyrightable work, (2) two or more 'authors,' and (3) the authors must intend their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>28</sup> The Copyright Act does not define the term "author." Thus, in order to understand the second prong, the court in *Aalmuhammed* held that the following factors, although not a "rigid formula,"<sup>29</sup> should be considered:

(1) whether the purported author controls the work and is "the inventive or master mind" who "creates, or gives effect to the idea," . . . (2) whether the "putative coauthors make objective manifestations of shared intent to be coauthors," . . . and (3) whether "the audience appeal of the work turns on both contributions and 'the share of each in its success cannot be appraised.'"<sup>30</sup>

The court stated that the best way to meet the second factor would be a contract stating that both individuals are to be coauthors. In the celebrity sex video context, however, it is highly unlikely that such a

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<sup>25</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1230 (9th Cir. 2000).

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

<sup>27</sup> 17 U.S.C. § 101.

<sup>28</sup> *Aalmuhammed*, 202 F.3d at 1231.

<sup>29</sup> *Id.* at 1235.

<sup>30</sup> *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1123 (C.D. Cal. 2001), citing *Aalmuhammed v. Lee*, 202 F.3d at 1233-34.



contract would exist. Thus, in its joint authorship analysis, the *Aalmuhammed* court held that the first element is met because as a film, *Malcolm X* is copyrightable, and that the third element is met because all parties involved intended that the movie would be a “unitary whole.” The second element warranted further discussion, however. Although Aalmuhammed made contributions, such as speaking Arabic to those in charge of the Egyptian mosque or instructing actors in Islamic practices, this did not mean that he made a copyrightable contribution to the film.<sup>31</sup> More significantly, even if Aalmuhammed wrote scenes that were independently copyrightable, this would not necessarily make him an author. When it comes to movies, the court stated that “authorship [would generally be limited] to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter—someone who has artistic control.”<sup>32</sup>

After all, Aalmuhammed’s involvement certainly did not rise to the level of control of the work. Aalmuhammed was far from being billed at the top of the credits. Furthermore, there were no objective manifestations of any desire to make Aalmuhammed a joint author. Warner Bros., the producer of the film, even made Lee sign a work-for-hire agreement, so even the director of the film possessed no joint-authorship rights. A major studio such as Warner Bros. surely would have had Aalmuhammed sign a work-for-hire agreement if it had perceived there was even a remote possibility that he could successfully assert a joint-authorship claim. If Lee was not an author, certainly Aalmuhammed, who had a much less artistic role, would not have a claim. The creative process would clearly be hampered if every person who gave a suggestion or worked on a film and enhanced its creativity in any way could claim to be its joint author. Aalmuhammed was clearly not the star of *Malcolm X*, and the audience appeal of the work did not turn on his contributions. Moviegoers did not buy tickets because of the opportunity to see Aalmuhammed’s work. “It is striking in [*Malcolm X*] how much the person who controlled the hue of the lighting contributed, . . . yet no one would use the word ‘author’ to denote that individual’s relationship to the movie.”<sup>33</sup> Finally, Aalmu-

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<sup>31</sup> *Aalmuhammed*, 202 F.3d at 1231.

<sup>32</sup> *Id.* at 1233.

<sup>33</sup> *Id.*

ammed was paid for the work he contributed, so his share in the success of the film could be appraised. Therefore, the Ninth Circuit did not consider Aalmuhammed a joint author of the film.

An opposite result ensued in *Morrill v. Smashing Pumpkins*.<sup>34</sup> The court in *Smashing Pumpkins* found that the Defendant was a joint author of a music video, and thus there was no copyright infringement when the band used a segment of the plaintiff's music video in its own documentary. Plaintiff Jonathan Morrill made an "original music video/documentary" called *Video Marked* with Billy Corgan and his band at the time.<sup>35</sup> Years later, Corgan, Smashing Pumpkins, and Virgin Records America created the video *Vieuphoria*, which contained clips from *Video Marked*.<sup>36</sup> Similar to the analysis in *Aalmuhammed*, because *Video Marked* was a music video, it was copyrightable. The video was also intended to showcase Corgan and his band and function as a unitary whole. While the plaintiff claimed he was the only copyright owner and registered the documentary as such,<sup>37</sup> the court held that Morrill, the plaintiff, may have "film[ed] and edit[ed] . . . the video", but that Defendant Corgan actually composed and performed the songs.<sup>38</sup> Thus, the court held that both Morrill and Corgan's contributions were consistent with them being joint authors.

Applying this analysis to the celebrity sex video context, since Paris Hilton's sex video was a movie and it received a copyright registration, it is a copyrightable work, much like the film in *Aalmuhammed* and the music video in *Smashing Pumpkins*. Although Salomon is the only one listed as an author on the registration, arguably the activity depicted in the sex video involves the contributions of at least two individuals that are merged into interdependent parts of a single video. By their very actions, they manifest their intention that their individual contributions are part of the same copyrightable work. The question that remains is whether Hilton could make the case for being a joint author.

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<sup>34</sup> *Morrill*, 157 F. Supp. 2d 1120.

<sup>35</sup> *Id.* at 1121.

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

<sup>37</sup> *Id.* at 1122.

<sup>38</sup> *See id.* at 1123.

Far from the mere assistance that Aalmuhammed provided, in the case of the Paris Hilton sex video, Hilton had a major role in controlling the work's content and direction. On the one hand, in the celebrity sex video context, though there may be only a stationary camera, the author or authors of the video may participate in numerous tasks and artistic decisions. These tasks include selection of the "cast," the participants in the video; location; lighting; a camera operator who calls the shots and frames the images; wardrobe (or lack thereof); post-production editing; and perhaps even a planned sequence or dialogue. Moreover, each participant may direct each other or themselves.<sup>39</sup> Since "Ms. Hilton offered directorial comments and physically controlled and directed the camera,"<sup>40</sup> she gave effect to the idea. Had this been a major motion picture such as *Malcolm X*, Hilton's would have been listed at the top of the credits.

Given the less formal nature of a sex video as opposed to a major motion picture such as *Malcolm X*, there are less documented, objective manifestations of a shared intent to be coauthors. However, "[a]t one point in the video, Hilton even pushed Salomon out of the frame so as to not block the shot."<sup>41</sup> By offering directorial guidance, operating the camera during some of the video, and having a starring role, Hilton would thus have a strong case for artistic contributions.

As to the third factor—whether both contributions affect the work's audience appeal—the reason that people tuned in was certainly because of Hilton, rather than Rick Salomon. The audience appeal of the work was largely driven by Hilton's role in the film, and also by the fact that she was engaging in intimate relations with Salomon. Therefore, it is likely that the audience appeal of the work turns on both of their contributions. The share of each of them in the success of the film would not be appraised because Salomon's camera work, combined with Hilton's directions to Salomon and her poses for the camera, both heightened the success of the video. Thus, although

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<sup>39</sup> See TMZ Staff, *Hulk Hogan's Sex Tape Partner Taped Sex with Multiple Men*, TMZSPORTS (Oct. 19, 2012, 4:30 AM), <http://www.tMZ.com/2012/10/19/hulk-hogan-sex-tape-partner-heather-clem-swinger-recording/>.

<sup>40</sup> Todd Peterson, *Claim: Paris Hilton 'Directed' Sex Tape*, PEOPLE MAGAZINE (Feb. 24, 2004, 11:47 AM), <http://www.people.com/people/article/0,,627681,00.html>.

<sup>41</sup> Paris Hilton 'directed' sex video, CNN, (Feb. 24, 2004, 7:53 AM), <http://www.cnn.com/2004/SHOWBIZ/02/24/hilton.sextape.reut/index.html>.

Salomon registered the copyright in his name alone, it is likely that Hilton could successfully argue she was a joint author.

B. *Uncovered: The Rights of Joint Authors*

Joint authorship results in each co-author having the right “to use or license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.”<sup>42</sup> Since the court in *Smashing Pumpkins* determined there was joint authorship between Morrill and Corgan, it did not find Corgan liable for copyright infringement for using segments of the music video in his own video. A joint author is considered a “tenant in common” and thus cannot infringe on the copyright of an original fixed expression that he or she owns along with someone else.<sup>43</sup> Joint authorship allows one to license the work, so Corgan was able to “grant a non-exclusive license for the use of this work,” which he gave to Virgin Records America, the company he worked with on *Vieuphoria*.<sup>44</sup>

A non-exclusive license to use a joint work need not be explicit . . . . By conveying a video that used material from his joint work, Corgan impliedly granted a non-exclusive license to Virgin to distribute this material. Virgin, as a non-exclusive licensee of a copyright co-owner, therefore cannot be subject to copyright liability for its use of Video Marked.<sup>45</sup>

This means that either joint author may license the copyrighted video on a non-exclusive basis without the coauthor’s consent. Should the nonlicensing coauthor make a claim for copyright infringement against the licensee, the licensing joint author has an absolute defense. The licensing coauthor must still account for and pay to the other coauthor his or her share of the profits from the license, however.<sup>46</sup> The complaint in the case *Eric Dane v. Gawker Media LLC* alleged that because Dane and Gayheart are listed as coauthors on the copyright registration

<sup>42</sup> Robert A Gorman et al., COPYRIGHT, CASES AND MATERIALS 331 (8th ed. 2011).

<sup>43</sup> Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120, 1126 (C.D. Cal. 2001).

<sup>44</sup> *Id.* at 1126-27.

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

<sup>46</sup> As discussed in the right to privacy section, just because the licensee has a defense to copyright infringement does not necessarily mean the licensee has a defense to the non-licensing coauthor’s invasion of privacy claim. Thus, any entity wishing to exploit a sex tape would be well-served to get the consent of all parties depicted in the video.

of their sex video, if one of them wanted to grant an exclusive licensing right to a third party, he or she would be required to get the other's consent. In addition, regardless of whether the other person was involved in licensing the work, the joint author who licenses the work must share profits with the other.<sup>47</sup> This requirement actually comes from the "equitable doctrines relating to unjust enrichment and general principles of law governing the rights of co-owners."<sup>48</sup> Since Dane and Gayheart were joint authors, Dane could transfer his entire interest to another party without Gayheart's consent.<sup>49</sup> However, if he sought to transfer Gayheart's interest, he would need her consent to do so.<sup>50</sup> In other words, to transfer the entire interest of the Dane/Gayheart/Peniche sex video, both Dane and Gayheart would have to agree.

### III. "SEX, LIES, AND DIGITAL DOWNLOADS":<sup>51</sup> PUBLIC DISCLOSURE OF PRIVATE FACTS AND INTRUSION UPON SECLUSION (INVASION OF PRIVACY)

Can celebrities such as Pamela Anderson and Kendra Wilkinson, both of whom posed naked in Playboy and the latter of whom appeared on a reality show depicting her relationship with Hugh Hefner, expect to have any sexual privacy? *Michaels v. Internet Entertainment Group, Inc.* put that issue to bed.<sup>52</sup> The case involved an attempt by Pamela Anderson Lee, an actress, and Bret Michaels, the lead singer of the band Poison ("Anderson" and "Michaels"), to obtain a preliminary injunction barring the website Internet Entertainment Group, Inc. (IEG) from distributing their sex tape and even from showing still images from the video. The court granted the preliminary injunction because Anderson and Michaels demonstrated a "likelihood of success on the merits and irreparable injury" as to their copyright, right to privacy, and the state-law right of publicity.<sup>53</sup> Both Anderson and Michaels claimed to own a copyright interest in the

<sup>47</sup> *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 522 (9th Cir. 1990) (citing *Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984)).

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

<sup>49</sup> 1-6 Nimmer on Copyright § 6.11.

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

<sup>51</sup> See generally *SEX, LIES AND VIDEOTAPE* (Miramax 1998).

<sup>52</sup> *Michaels v. Internet Entm't Grp.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

<sup>53</sup> *Id.*

tape. Because the court evaluated the matter for the purposes of a preliminary injunction and did not analyze whether Anderson and Michaels should be named joint authors, it simply presumed that they were.<sup>54</sup>

Right-to-privacy issues such as a cause of action for public disclosure of private facts could certainly be implicated if a sex tape is released. The elements of the public disclosure of private facts in California are: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to a reasonable person and (4) which is not of legitimate public concern.<sup>55</sup> Proving intrusion upon seclusion is similar, since the “intrusion into private affairs need not be physical, and in order to be actionable [it] must be offensive to a reasonable person.”<sup>56</sup> Perhaps the most significant obstacle to asserting these causes of action successfully is the “newsworthy privilege,” which applies the First Amendment to allow reporters to write stories on matters of public concern. Matters of public concern “include not only matters of public policy, but any matter of public concern, including the accomplishments, everyday lives, and romantic involvements of famous people.”<sup>57</sup> Courts have drawn the line, however, “[w]here the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake.”<sup>58</sup> The *Michaels* court reasoned that the element of public disclosure would be satisfied were IEG to distribute the tape via the Internet. The element of “private facts whose disclosure would be objectionable to a reasonable person” would be met given that the tape is a celebrity sex video depicting both Anderson and Michaels.<sup>59</sup> A reasonable person would not want a video of himself or herself engaging in sexual relations with another distributed over the Internet.

The issue of whether sex symbols have privacy is one that the *Michaels* court analyzed in reference to both Anderson and Michaels. IEG argued that because Anderson has been featured without clothing

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<sup>54</sup> *Id.* at 828-29.

<sup>55</sup> *Id.* at 839.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 840 (quoting *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 767 (Cal. Ct. App. 1983)) (internal quotation marks omitted).

<sup>59</sup> *Id.*

in films and magazines, the fact that a sex tape is out there with Anderson in it is not private. However, the court distinguished between Anderson's public role as an actor and her private life in the bedroom: "[t]he fact that she has performed a role involving sex does not, however, make her real sex life open to the public."<sup>60</sup> IEG further argued that a sex video of Anderson already existed, which depicted her with her husband, Tommy Lee. The court distinguished between the two tapes and reasoned that the two are different, and that "[s]exual relations are among the most personal and intimate of acts. The Court is not prepared to conclude that public exposure of one sexual encounter forever removes a person's privacy interest in all subsequent and previous sexual encounters."<sup>61</sup> This is good news for Hilton and other celebrities who have already had a sex video released. If a celebrity has already made another sex video, or plans to do so in the future, he or she could still potentially sue to protect his or her right to privacy.

The court also held that Michaels had a "privacy interest in his sex life."<sup>62</sup> Although Michaels voluntarily assumed the role of "rock star," the court held that although celebrities may have more of their private life out in the open as part of the package, that does not entail their most "intimate details of their lives."<sup>63</sup> It is one thing to have an article describing that two celebrities have had a romantic encounter, but quite another to have a video distributed that shows the individuals engaging in the act. Thus, the court held that even sex symbols have a right to privacy. In addressing the newsworthiness privilege in the context of intrusion upon seclusion, the *Michaels* court employed a balancing test of "(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."<sup>64</sup> The court found that given that the video showed Lee and Michael solely engaging in sexual relations, they could establish that the video had virtually no social value. The court held that Anderson and Michaels would likely persuade a jury that a video recording

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

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

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

<sup>64</sup> *Id.* at 841.

of their sexual intimacy embodies the deepest of intrusions into their private affairs. In contrast to the first two factors, the voluntariness of ascending to fame certainly weighs in favor of the tape's newsworthiness. Both Anderson and Michaels have taken affirmative steps over numerous years to attain star status. Furthermore, the court noted that Anderson's rise to celebrity involved sex appeal. Considering all the factors together, the court still found a greater likelihood of success that the newsworthiness privilege did not cover Anderson and Michael's sex tape.

In order to obtain a preliminary injunction in the Ninth Circuit, a party must prove "either (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted, or (2) the existence of serious questions governing the merits and that the balance of hardships tips in its favor."<sup>65</sup> The court granted a preliminary injunction to prevent the tape's release in order to protect Anderson and Michael's right to privacy. Especially involving public disclosure of private facts, the court stated that the injury in general is to "human dignity and peace of mind," which is harder for monetary damages to repair. Once the sex video is on the Internet and thus easily accessible to the public, one cannot un-ring that bell and make the act between Anderson and Michaels private again.

#### IV. BEHIND THE SEAMS: RIGHT OF PUBLICITY

California has recognized a person's right of publicity to protect one's name or likeness from being used for a commercial purpose without his or her permission. Section 3344(d) of the California Civil Code provides:<sup>66</sup> "Any person who knowingly uses another's name, voice . . . photograph, or likeness, in any manner, on or in products . . . or for purposes of advertising . . . without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."<sup>67</sup> The common-law right of publicity offers more protection than the statutory framework.<sup>68</sup> In other words, the common-law right of publicity is easier to prove because it has

<sup>65</sup> *Id.* at 830.

<sup>66</sup> CAL. CIV. CODE § 3344 (West 2012).

<sup>67</sup> *Id.* at § 3344(a).

<sup>68</sup> *Michaels v. Internet Entm't Grp.*, 5 F. Supp. 2d 823, 836 (C.D. Cal. 1998).



fewer elements than the statutory right. The common law elements are: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercial or otherwise; (3) lack of consent; and (4) resulting injury.<sup>69</sup>

California Civil Code § 3344, on the other hand, has two additional elements, which are: "knowing use of the plaintiff's name, photograph of likeness for purposes of advertising or solicitation of purchases, and a 'direct connection' between the use and the commercial purpose."<sup>70</sup>

The *Michaels* court also evaluated the common law and statutory elements in the context of Anderson and Michaels' video. The court held that IEG used Anderson and Michaels' "names and bodily descriptions to promote the tape on television and radio" and that IEG obtained a commercial advantage through its actions. This is because IEG's business model is based on subscriptions, and a significant percentage of customers would likely cancel their subscriptions if IEG did not distribute the tape to them.<sup>71</sup> In this case, lack of consent was easier to find because both Anderson and Michaels denied consenting to licensing the tape to IEG, and there was no evidence to show otherwise.<sup>72</sup> The resulting injury was shown in two ways. First, IEG received additional membership profit by using Anderson and Michaels' names and likenesses, and this was money that both Anderson and Michaels could have made had they licensed the video to IEG. Second, Anderson and Michaels argued that their names being associated with a sex video damaged their show business careers in "mainstream entertainment."<sup>73</sup> Despite the adage that there is no such thing as bad publicity, Michaels and Anderson persuaded the court by providing evidence of their alleged harms, such as the decreased likelihood that they would receive product endorsements. Not only were the common-law elements met, but the statutory requirements were met as well. The court held that IEG was well aware that it was using Anderson and Michaels' names and likenesses to promote the sex video and

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<sup>69</sup> *Id.* at 837 (quoting *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983), *superseded by statute on other grounds as stated in* *KNB Enter. v. Matthews*, 92 Cal. Rptr. 2d 713 (Cal. Ct. App. 2000)).

<sup>70</sup> *Id.* (quoting *Eastwood*, 198 Cal. Rpt. at 347).

<sup>71</sup> *See id.* at 837-38.

<sup>72</sup> *Id.* at 837.

<sup>73</sup> *Id.* at 838.

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that the use of their names and likenesses was directly connected to the video's advertising. After all, catching a glimpse of Anderson and Michaels is precisely what interested potential viewers.

In order to obtain a preliminary injunction, Anderson and Michaels demonstrated that without such an injunction, *i.e.*, with the release of the sex video, they would suffer irreparable injury. The court stated that Anderson and Michaels presented evidence that it had taken them years of work to develop their image, and their ability to reap what they have sown and would be "irreparably harmed" if their names and likenesses were used to promote the sex video.<sup>74</sup>

There is an important distinction within the right of publicity that ensures that the public interest will still be served. Although Anderson and Michaels have the right, at the exclusion of others, to profit from their names and likenesses via the right of publicity, they do not have such a right to control their names and likenesses as to publishing with respect to information that furthers the public interest. The common-law right of publicity, as interpreted in case law addressing the First Amendment, and California's statutory right of publicity, as explicitly stated in the statute, exempt the "use of a name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign."<sup>75</sup> Although the court enjoined IEG from using Anderson and Michaels' "names and likenesses" to sell their sex tape, the injunction did not apply to the use of their "names and likenesses" in the news, since essentially the injunction functions as a prior restraint.<sup>76</sup>

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

<sup>75</sup> *Id.* (citing CAL. CIV. CODE § 3344(d) (internal quotations omitted)).

<sup>76</sup> *Id.* at 838.

## V. CONCLUSION: USE LEGAL PROTECTION

“Would you be where you are had there not been a sex tape?”

—Oprah Winfrey to Kim Kardashian<sup>77</sup>

Celebrity sex videos generate tremendous profits. Kim Kardashian’s tape not only launched her career but also reportedly generated millions of dollars for her.<sup>78</sup> Although Kendra Wilkinson tried to stop the release of her sex tape,<sup>79</sup> it was reported that she received \$680,000 and fifty percent of the tape’s profits.<sup>80</sup> Paris Hilton sued to stop the tape’s dissemination, and settled for \$400,000.<sup>81</sup> In addition, soon after the tape appeared on the Internet, Hilton’s television show, *The Simple Life*, became more successful.<sup>82</sup>

Sex tapes are eligible for copyright protection. Even if the celebrity is considered an author of the video, the celebrity still cannot stop the video from being published by a website if another coauthor grants a license to an entity. As a joint author, however, any money one author makes has to be shared with the joint author. If both joint authors wish to prevent the dissemination of the tape, they may be able to receive a preliminary injunction, as evidenced by *Michaels v. Internet Entertainment Group*. Another option is suing under invasion of privacy, intrusion upon seclusion, or a California state law or common-law right of publicity. Either way, Hollywood’s sex tapes are likely here to stay, because regardless of whether they are intentionally disseminated, they offer celebrities much needed “exposure.”

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<sup>77</sup> Alison Schwartz, *Kim Kardashian: Yes, My Sex Tape Introduced Me to the World*, PEOPLE MAGAZINE (Jun. 18, 2012, 9:50 AM), <http://www.people.com/people/article/0,,20604870,00.html>.

<sup>78</sup> Ashley Lutz, *12 Celebrity Sex Tapes Worth Millions*, BUS. INSIDER (Sept. 20, 2012, 11:14 AM), <http://www.businessinsider.com/vivids-celebrity-sex-tapes-2012-9?op=1>.

<sup>79</sup> ROLL CALL: *First Images Of Kendra Wilkinson’s Sex Tape Released*, ACCESS HOLLYWOOD (May 13, 2010, 2:11 PM), [http://www.accesshollywood.com/roll-call-first-images-of-kendra-wilkinsons-sex-tape-released\\_article\\_32291](http://www.accesshollywood.com/roll-call-first-images-of-kendra-wilkinsons-sex-tape-released_article_32291).

<sup>80</sup> ROLL CALL: *Kendra Wilkinson’s Sex Tape Drops – So, Is Her Marriage Intact?*, ACCESS HOLLYWOOD (May 26, 2010, 2:37 PM), [http://www.accesshollywood.com/roll-call-kendra-wilkinsons-sex-tape-drops-so-is-her-marriage-intact\\_article\\_32826](http://www.accesshollywood.com/roll-call-kendra-wilkinsons-sex-tape-drops-so-is-her-marriage-intact_article_32826).

<sup>81</sup> Rob Arcamona, *Does Gawker’s Publication of McSteamy Sex Tape Constitute Fair Use?*, MEDIA SHIFT (Nov. 11, 2009), <http://www.pbs.org/mediashift/2009/11/does-gawkers-publication-of-mcsteamy-sex-tape-constitute-fair-use315.html>.

<sup>82</sup> Abbey Goodman, *The Man Who ‘Made’ Paris Hilton*, CNN (Nov. 2, 2011, 4:13 PM), <http://www.cnn.com/2011/11/02/showbiz/celebrity-news-gossip/jason-moore-on-paris-hilton/index.html>.