

**You Be the Judge:  
Teaching Privacy Law Through Classroom Participation**

Teaching idea submitted for  
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## **You Be the Judge: Teaching Privacy Law Through Classroom Participation**

### **I. Introduction**

Privacy law can be one of the most difficult areas to teach to undergraduate students, for several reasons. First, although many students come into media law classes with at least a partial understanding of intrusion, some are surprised to learn that in many states there are three other, very different privacy torts. Second, some students confuse elements of false light with elements of libel. Third, privacy has both legal and ethical components, and students sometimes are troubled to learn that conduct they perceive as violating privacy actually is legal, although perhaps unethical.

This exercise was used to make privacy torts clearer to students in a New Media and the Law class by forcing them to play judge and “rule” on the privacy claims in two real cases whose outcomes they did not know. Although the technique was used in a seminar-style class that focused on legal issues in emerging media, it could be used in any class that considers privacy law.

### **II. Rationale for the teaching idea**

The goal of my New Media and the Law course, taught as a special topics offering, was to let students focus more specifically on the legal issues of newer media than they could in my department’s basic Communication Law course. I soon learned, however, that I could not assume that students knew a lot about the basic principles of media law. Fewer than half the students had taken Communication Law, which is an elective. In addition, because enrollment in my course was low – not unusual in my department the first time a special topics course is offered – I had allowed in an interested non-major and a journalism student who had not yet taken key courses. As a result, throughout the semester, I needed to find ways to bring students up to speed on the basics of media law while still maintaining the focus on law in newer media.

During the course, I also tried to show students that media law is often are complex. Although textbooks and casebooks sometimes reduce cases to being “about” the single issue that appears most prominently in a court’s opinion, plaintiffs often allege that a number of wrongs have been committed, hoping that at least one argument will be persuasive. Unraveling which party should prevail on which issues is a part of clear legal thinking and a good exercise in the sort of critical judgment that journalism, mass communication and media studies programs should stress.

### **III. How the idea was implemented**

I used two cases in You Be the Judge: *Ouderkirk v. People for the Ethical Treatment of Animals*, 2007 U.S. Dist. LEXIS 29451 (E.D. Mich. 2007), which involved a story and video posted to the animal rights group’s Web site, and *Bret Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal., 1998), in which two celebrities sought an injunction against online publication of a sex tape. Although other cases certainly could be used in this exercise, these were good choices, for several reasons. First, they covered the full range of privacy torts. Although *Ouderkirk* turned on an intrusion claim, the plaintiffs also alleged appropriation and false light. Similarly, while publication of private facts was the key allegation in *Michaels v. IEG*, the plaintiffs also claimed appropriation and intrusion (along with copyright violation). Second, the text and video at issue in *Ouderkirk* were available online to show students. Finally, the cases involved issues that seemed likely to draw students’ attention. *Ouderkirk* concerned animal welfare, an issue that some college students feel strongly about, which meant that some members of the class might have to work to separate their emotions from the legal issues. *Michaels* had celebrity plaintiffs: former “Baywatch” star and *Playboy* model Pamela Anderson Lee and an ex-boyfriend, former Poison lead singer Bret Michaels. Although Poison pre-dated students’ musical preferences, they knew Michaels as a contestant on 2010 episodes of the television’s “Celebrity Apprentice” and as the star of 2007-2009 seasons of the VH-1 reality show “Rock of Love.”

I started the exercise at the beginning of a class, telling students (who had been introduced to the four privacy torts during a previous meeting) that we were going to play a game. Without mentioning any litigation, I then explained the facts of *Ouderkirk v. PETA*: Michigan chinchilla ranchers Robin and Julie Ouderkirk were contacted by Philip

Schein, who said he was thinking of raising chinchillas and asked if they knew anyone interested in selling a herd. The Ouderkirks, who had considered getting out of chinchilla ranching because of Robin's health, invited Schein and his girlfriend to visit. The Ouderkirks agreed, in an e-mail, to let the visitors videotape for future reference what went on at the ranch, including how chinchillas were killed. After a second visit to the ranch, Schein told the Ouderkirks by e-mail that he had decided to raise portobella mushrooms instead.

As soon as I mentioned portobella mushrooms, one student said, "That has to be some sort of animal rights thing!" Indeed, it was. I then explained that Schein was a researcher for People for the Ethical Treatment of Animals and passed out a copy of the account Schein wrote about chinchilla ranching for the PETA Web site. (See <http://www.peta.org/feat/chinchilla/account.html>) Then I showed the first few seconds of the video (available at [http://www.petatv.com/typopup/Prefs.asp?video=chinchilla\\_mov\\_final](http://www.petatv.com/typopup/Prefs.asp?video=chinchilla_mov_final)) that he collected for PETA. (The excerpts I used showed only the handling of a chinchilla, not its death, but I nevertheless told students they could shield their eyes and only listen to the video's audio, which proved crucial in the court's determination of whether there was intrusion.)

I briefly reviewed the concept of appropriation, explained the Ouderkirks' appropriation claim, which was based on the fact that their images were used without their permission on a PETA Web site that also solicited donations, and PETA's reaction to the claim. Then I passed out slips of paper and asked students to pretend to be judges and vote, anonymously, on whether PETA had engaged in appropriation. One student tallied the votes. Then I asked students on both sides to discuss what factors had persuaded their judgments on appropriation. I then told the students that the court ruled in favor of PETA, because it found that the Web site's main purpose was to share information, not to solicit contributions.

We followed a similar procedure in discussing the false light claims and the intrusion claims – with a couple of important differences. When discussing the false light claims, in which the Ouderkirks largely argued that several literally true statements painted them in a false light, I gave the students the Ouderkirks' contentions and asked them to "play attorney" and make the arguments that PETA would offer in response. Then I explained PETA's actual response before asking students to render a judgment on the false light claims. When we got to the intrusion claims, I asked students to take on the roles of both plaintiffs' and defendant's attorneys. First they discussed what they thought the Ouderkirks would have claimed constituted intrusion, and then I told them what the plaintiffs' actual claims were. Afterward, they discussed what PETA's defense might be, and then I told them what it actually was. Finally, the students "ruled" on the intrusion claim.

During the next class period, the class considered publication of private facts in *Michaels v. IEG* in a similar manner (and looked back briefly at appropriation and intrusion). Several facets of this case – including the fact that Pamela Anderson Lee had previously sued over, then licensed distribution of, a sex tape she made with an ex-husband, Motley Crüe drummer Tommy Lee – kept students pondering until it was time to "be the judge" and render a verdict.

#### **IV. Student learning outcomes**

Students were intensely engaged with the exercise. In fact, although I thought I would be able to cover both cases – and thus touch on all four privacy torts – in one 80-minute class period, student discussion of the privacy issues just in *Ouderkirk v. PETA* was so spirited that it took an entire class period.

Students also told me that they had a better understanding of privacy torts after working with the cases. Students were nearly unanimous, for example, in voting with the U.S. District Court for the Eastern District of Michigan that there was no intrusion in *Ouderkirk v. PETA*, pointing to the fact that Schein had been invited to the Ouderkirks' ranch and had been given permission in writing to videotape instructions for raising and killing chinchillas.

Even when students did not "rule" like the real judges, they learned something. Only one student voted with the U.S. District Court for the Central District of California to enjoin online dissemination of a sex tape made by Bret Michaels and Pamela Anderson Lee. When that student realized that all her classmates thought that Lee had, in essence, given up her privacy rights by being a sex symbol and authorizing distribution of a different sex tape, the student made a careful and thoughtful argument about why they were wrong. It was a delight to tell her that U.S. District Judge Dean D. Pregerson had agreed with her interpretation of the law.