

**IN THE CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT  
DIVISION 3**

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Case No. B285629

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FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.,  
DEFENDANTS-APPELLANTS

v.

OLIVIA DE HAVILLAND, DBE  
PLAINTIFF-RESPONDENT,

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On Appeal from the Los Angeles County Superior Court Case No.  
BC667011

The Honorable Holly E. Kendig, Dept. 42

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**APPLICATION FOR PERMISSION  
TO FILE BRIEF *AMICI CURIAE*  
OF INTELLECTUAL PROPERTY AND CONSTITUTIONAL LAW  
PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS**

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**APPLICATION FOR PERMISSION TO FILE  
AMICI CURIAE BRIEF**

Pursuant to California Rule of Court 8.200(c), prospective amici respectfully request permission to file the attached brief in support of appellants FX Networks, LLC, and Pacific 2.1 Entertainment Group.\*

*Amici* are law professors who teach or write about intellectual property or constitutional law:

Jack Balkin	Yale Law School
Barton Beebe	New York Univ.
Christopher Buccafusco	Cardozo Law School
Stacey Dogan	Boston Univ.
Jay Dougherty	Loyola Law School, Los Angeles
William Ford	John Marshall Law School
Eric M. Freedman	Hofstra Univ.
Brian Frye	Univ. of Kentucky
Richard W. Garnett	Notre Dame Law School
Jon Garon	Nova Southeastern Univ.
Eric Goldman	Santa Clara Univ. School of Law
Stacey Lantagne	Univ. of Mississippi
Mark Lemley	Stanford Law School
Raizel Liebler	John Marshall Law School
Mark McKenna	Notre Dame Law School
Tyler Ochoa	Santa Clara Univ. School of Law
Aaron Perzanowski	Case Western Reserve Univ.
Lisa Ramsey	Univ. of San Diego
Betsy Rosenblatt	Whittier Law School
Jennifer E. Rothman	Loyola Law School, Los Angeles
Rebecca Tushnet	Harvard Law School
Eugene Volokh	UCLA

Each signatory has researched, taught, and written about various intellectual property and First Amendment issues; they are the authors or coauthors

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\* Counsel certifies that this brief was not authored in whole or in part by any party or any counsel for a party in this case, and that no person or entity other than Loyola Law School, Harvard, and UCLA has made any monetary contribution intended to fund the preparation or submission of this brief.

of, among other works, Jennifer Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* (Harvard Univ. Press forthcoming 2018); Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity*, [www.rightofpublicity.roadmap.com](http://www.rightofpublicity.roadmap.com); Jennifer Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 Colum. J. L. & Arts 441 (2016); Jennifer Rothman, *The Inalienable Right of Publicity*, 101 Geo. L.J. 185 (2012); Jennifer Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. Davis L. Rev. 199 (2002); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Houston Law Review 903 (2003); Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking about You*, 52 Stan. L. Rev. 1049 (2000); Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 Colum. J. L. & Arts 157 (2015); Stacey Dogan, *The Right of Publicity: A Cautionary Tale from the United States*, in *The Internet and the Emerging Importance of New Forms of Intellectual Property* (Suzy Frankel & Daniel Gervais, eds. 2016); Stacey Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in *Intellectual Property at the Edge: The Contested Contours of IP* (Rochelle Cooper Dreyfuss & Jane C. Ginsburg, eds. 2014); Stacey Dogan & Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stanford Law Review 1161 (2005); Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 Colum. J. L. & Arts 1 (2003); William Ford, *Restoring Rogers: Video Games, False Association Claims, and the "Explicitly Misleading" Use of Trademarks*, 16 J. Marshall Rev. Intell. Prop. L. 306 (2017); William Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 Santa Clara Computer & High Tech. L.J. 1 (2012); Bryan Frye, *The Athlete's Two Bodies: Reflections on the Ontology of Celebrity*, Incite J.

Experimental Media, no. 7 (2017); Stacey Lantagne, *When Real People Become Fictional: The Collision of Trademark, Copyright, and Publicity Rights in Fanfiction about Celebrities*, 7 Case W. Reserve J. L. Tech & Internet 39 (2016); Mark Lemley & Marc McKenna, *Irrelevant Confusion*, 62 Stan. L. Rev. 413 (2010); Mark McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 Pittsburgh L. Rev. 225 (2005); David S. Welkowitz & Tyler Ochoa, *Celebrity Rights: Rights of Publicity and Related Rights in the United States and Abroad* (2010); Tyler Ochoa, *When Does Freedom of Speech Trump Celebrity Publicity Rights?*, 14 Internet L. & Bus. 329 (2013); Tyler Ochoa, *Teaching Rights of Publicity: Blending Copyright and Trademark, Common Law and Statutes, and Domestic and Foreign Law*, 52 St. Louis L. J. 905 (2008); Tyler Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 Santa Clara L. Rev. 651 (2005).

Each signatory is concerned about the danger that unduly broad readings of the right of publicity, such as the one in this case, pose to the constitutionally secured right of freedom of speech. *Amici* hope that their extensive experience with free speech and right of publicity law will prove especially helpful to the Court, and thus ask that this court accept and file the attached brief.

DATED: January 24, 2018      Respectfully Submitted,

By: s/ Eugene Volokh

Eugene Volokh

Counsel for Proposed *Amici*



**CERTIFICATE OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is UCLA School of Law, 405 Hilgard Ave., Los Angeles, CA 90095.

On January 24, 2018, I served true copies of the APPLICATION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE* OF INTELLECTUAL PROPERTY AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**AS TO SERVICE BY MAIL:** I caused the document to be enclosed in a sealed envelope addressed to the persons at the addresses listed in the Service List as being served by mail, and to have it placed in the U.S. Postal Service mailbox with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 24, 2018, at Los Angeles, California.

s/ Eugene Volokh  
Eugene Volokh

**SERVICE LIST**

<p>Glenn D. Pomerantz          Kelly Klaus          Fred A. Rowley Jr.          Mark R. Yohalem          Munger, Tolles, &amp; Olson          350 South Grand Ave.          Los Angeles, CA 90071          Tel: (213) 683-9100          Fax: (213) 687-3702          glenn.pomerantz@mto.com          [Served electronically]</p>	<p>Attorneys for Defendants-          Appellants FX Networks,          LLC and Pacific 2.1          Entertainment Group, Inc.</p>
<p>Don Howarth          Suzelle M. Smith          Zoe E. Tremayne          Howarth &amp; Smith          523 West Sixth St., Suite 728          Los Angeles, CA 90014          Tel: (213) 955-9400          Fax: (213) 622-0791          dhowarth@howarth-smith.com          [Served electronically]</p>	<p>Attorneys for Plaintiff-          Respondent Olivia de          Havilland, DBE</p>
<p>Clerk of Court          Los Angeles County Superior Court          Stanley Mosk Courthouse          111 N. Hill Street          Los Angeles, CA 90012          For: Hon. Holly Kendig, Dept. 42          [Served by mail]</p>	<p>Superior Court          Case No. BC667011</p>
<p>Clerk of Court          California Supreme Court          350 McAllister Street          San Francisco, CA 94102-4797          [Served electronically]</p>	