

## Becoming Immune to Reputation Damage: Tips from Kim Kardashian?

By [Rachel Wilkes Barchie](#) on January 19, 2012

This blogger is proud to say that I have never watched any show featuring a member of the



Kardashian family (okay, okay, unless you count their step-brother **Brody Jenner**...you know **I could never resist *The Hills***). I normally try to pretend to steer clear of anything Kardashian, as I fall into the camp of people who wonder, “why the heck is she famous, anyway?” (Yes, that’s a rhetorical question — I know it’s because of her video debut.) But I can’t resist writing an update about the Old Navy commercial we **posted about back in March 2011**. (Extra shout-out to fellow blogger Megan Rivetti for anticipating Kim K.’s lawsuit, which wasn’t actually **filed until July**.)

Kim’s **lawsuit claims** that Old Navy and its parent company The Gap Inc. **violated her right of publicity and misled and confused consumers**, and seeks \$15–20 million in damages. (For more on the right of publicity, see [here](#); for more on consumer confusion, see [here](#); for more on how the actress who starred in the Old Navy commercial is totally re-living Kim Kardashian’s life in other ways, see [here](#).) But now The Gap’s lawyers are moving in on Kim’s “private life” (and the use of air quotes has never seemed more appropriate). Among other things, they have sought financial records that show how much stores Bebe and Sears earned by making deals with Kim and why Bebe dropped Kim, and information about “Kim Kardashian’s reputation as a singer and dancer.” As Eriq Gardner of THR, Esq. **points out**, one reason The Gap may be seeking information about Kim’s business dealings is to make out an argument — often used in defamation cases — that the plaintiff is “libel-proof” because her reputation is so ruined that no additional damage could be caused.

So let’s take a look at the contours of the so-called “libel-proof” defense.

This doctrine has so far not been recognized by California state courts, but has been discussed by federal courts in and out of California. In a case against the *National Enquirer* brought by Henry Wynberg, who had a “brief but celebrated ‘close and personal relationship’” with Elizabeth Taylor, the **court held that** “Depending upon the nature of the conduct, the number of offenses, and the degree



and range of publicity received, there comes a time when the individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements." (In plain English: everyone knows you're such a scumbag that your reputation can't actually be harmed any further.) The court applied the libel-proof doctrine to Wynberg because he had a well-known history of criminal convictions and of taking advantage of Taylor and others.

In a **subsequent lawsuit** by Robert Guccione (publisher of *Penthouse* magazine) against *Hustler* for defamation, based on the statement that Guccione had both a wife and a live-in girlfriend, the doctrine reared its head again. After referring to the parties as "pornographer plaintiff and pornographer defendant," and explaining that the same standards for libel applied to them as anyone else, the court applied the libel-proof doctrine. (The **opinion** is worth reading for sheer entertainment value, including a recitation of many of counsel's "flamboyant" remarks such as "Grutman described Flynt as 'the Son of Sam among publishers,' a 'Philistine Goliath,' and 'Quasimodo'; he called Flynt's and *Hustler's* attacks on Guccione 'torture' and 'death by a thousand cuts'; [and] he said those connected with the alleged libel were trying 'to poke Mr. Guccione in the eye with a sharp stick, just as they have been doing for 10 years.'" Dramatic much?) The court noted that the libel-proof doctrine "is to be applied with caution, since so few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements." Of course, that caution didn't stop the court from applying it to Guccione himself, because reports of Guccione's adultery had been widely published in various media outlets based on "truthful reporting of facts freely admitted by Guccione himself," so subsequent reporting "could not further injure his reputation on the subject."

More recently, this defense was raised in a defamation suit brought by Britney Spears' former manager, Osama "Sam" Lufti, against Britney's mom Lynne Spears, claiming that she made statements which were false, including that in order to control Britney, Lufti hid her cell phones and dog and disabled several of her cars. Mama Spears **argued** that the complaint should be stricken because Lufti's bad reputation was already established before her tell-all memoir ***Through The Storm*** was published. The judge **rejected** the defense but with little explanation for why he did so.



So how will Kim K. fare if presented with the defense that her reputation/brand is already tarnished? According to the law set forth in the *Enquirer* case, someone can either be libel-proof only with respect to a particular subject, or (to paraphrase), if a person's reputation is really crappy, she can be libel-proof in general. Here, the essence of Kim's complaint is that her brand is extremely valuable, she is very selective about what she advertises (you know, *only* **Shape-Ups**, **Quick Trim**, **Carl's Jr.**, the **State of California**...) and she gets paid a lot for use of her likeness, which Old Navy exploited by using a (much cheaper) lookalike. The Gap will want to argue that Kim's brand is not as strong as she suggests, and that in fact she has been lambasted in many of her business endeavors. For example, shortly before Bebe axed Kim's line, the **NY Times** apparently called her pop-up store a "clothing desert," while others have accused her of being involved with **shady business dealings**. If Kim already has a widespread reputation for failing to successfully promote products, then The Gap may be able to show that the value of her mark is minimal.

On the other hand, as much as we'd love to hear more about Kim's relationship with Reggie Bush, the more juicy details of her personal life are not as relevant to the issues in her complaint. If this were a defamation case where a publication insulted Kim about her handling of personal relationships or her craving of the spotlight, then one could imagine a court finding her to be libel-proof. But the fact that Kim is a two-time divorcée whose second marriage **lasted just 72 days**, and has been called a "**plastic surgery-loving fame whore**" (by her ex-husband — ouch) does not necessarily mean that she no longer has a valuable mark for purposes of advertising. In fact, in the tabloid world where hot messes and attention seekers get the most attention, Kim's mark may be **stronger now than ever**. (Tell me you wouldn't tune in to watch **Kim Kardashian's Fairytale Divorce!**)

Of course, the fact that such information isn't relevant isn't stopping The Gap from asking for it: the company is apparently seeking testimony from **Kim's ex Reggie Bush**, who followed up his relationship with Kim by **dating her commercial lookalike**, Melissa Molinaro. (Truly, if any man has ever had a "type," it is Reggie Bush.) Perhaps The Gap's lawyers just want some juicy reading during their many billable hours of document review? In any event, keep your tabloid page-turning fingers on high alert.