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Got A Beef With The Media? Pay Someone Else To Sue Them

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The revelation that Silicon Valley billionaire Peter Thiel bankrolled Hulk Hogan's sex tape lawsuit against Gawker sent shockwaves through the media industry. Commentators had barely recovered from the \$140 million in damages awarded to Hogan. Now they were grappling with a bigger question: Is this kind of financial arrangement even legal? Could it happen to them?

The short answer to both is yes—picking up the tab on someone else's lawsuit is now perfectly legal (it wasn't always), and people who do it aren't required to reveal that they're doing it or why. The practice is reviled by the business community, and yet Thiel, a staunch pro-business libertarian, has shown billionaires everywhere that it's possible to not only sue a media company indirectly for revenge but to make money doing it. Now that the message is out, there's nothing to stop other billionaires from following his lead.

“This [case] could really change the landscape, because everyone who has gripes about what the media has done is going to start thinking about dollars and cents and running to their lawyers,” says Thomas Julin, a partner at Miami-based law firm Hunton and Williams who focuses on First Amendment litigation.

“And it's going to get lawyers thinking, ‘Maybe I should be more willing to represent other individuals against the media.’”

Regardless of how you feel about Gawker, Hogan, or Thiel, this financial arrangement sets a dangerous precedent for anyone running a business—especially a media business. Litigation finance is a booming industry, and Thiel's success likely makes the entire media industry vulnerable to professional litigation financiers willing to fund other vendettas.

“Litigation financing is really dangerous,” says Bryan Quigley from the Institute for Legal Reform, the civil justice arm of the US Chamber of Commerce, an advocate for American businesses. “There's no doubt it's going to create more litigation in general.”

In 2013, Gerchen Keller, a Chicago-based investment firm that deals exclusively with litigation finance, pegged the size of the US litigation market at more than \$200 billion—and it's growing exponentially each year. Gerchen Keller itself has grown from \$100 million in capital commitments to more than \$1.4 billion in assets under management since 2013. When their clients win their lawsuits, Keller gets a cut of the winnings. Burford Capital, a British litigation

investment firm, saw its operating profit grow more than 385 percent since 2011 to the tune of \$77.2 million. The company gets a 70 percent net return on its investments,according to its annual report.

Both companies work almost exclusively with businesses, dealing with legal issues around patents, trade secrets, and copyrights. These types of firms have such a high return on their investment because they only invest in cases they're almost certain they can win or settle. Until now, that ruled out most cases involving the media, because privacy and libel lawsuits are harder to win than other cases, where odds are easier to predict. Now, thanks to Thiel, that could change.

When in Rome

Litigation finance actually goes all the way back to Roman society, though Emperor Anastasius banned it by the sixth century. The reasoning even back then sounds spookily applicable today: a controversy could only properly concern the people involved in the transaction, historian Max Radin wrote, not other meddlers. In other parts of the world, the concept of “champerty”—assisting in a lawsuit in exchange for a cut of the proceeds—persisted, notably in medieval England, when members of the nobility would put money into fraudulent land grabs in return for a share of the property recovered.

With the rise of capitalism—and the explosion of litigation in the 1950s—the prohibitions around these old common laws fell out of fashion. “This sector is about purely rational actors trying to make money investing in litigation because they believe the introduction of additional capital can add value,” says Anthony Sebok, a professor at Cardoza Law and a consultant for Burford.

The first big US investment outfit specifically focused on funding lawsuits, Juridica, was founded in 2007, just before the US economy collapsed. By around 2008, Sebok says, general anxiety among investors made a relatively sure thing like litigation financing attractive. This is partially because big investors can tip the scales in their favor simply by pouring money into a case. When a firm like Burford backs a plaintiff, it can keep throwing money into the lawsuit to keep it in the courts for as long as it wants, which can intimidate a defendant into settling to avoid a drawn-out legal nightmare. In this scenario, it doesn't matter whether the case is valid or not because the focus isn't on winning or losing but on getting a payout.

Maintaining Justice

Common law recognizes a related concept known as “maintenance,” which simply means any kind of support by a stranger for a lawsuit that is not his or her own. In recent decades, “maintenance” has evolved into the public interest litigation model. In the late 1950's, lawmakers used prohibitions on litigation finance to target civil rights groups in order to cut them off from donations to challenge racist laws. The state of Virginia passed statutes barring

litigation finance in hopes of crippling the NAACP in 1956, but the US Supreme Court overturned the statutes seven years later, saying they violated the First Amendment.

Litigation finance took off in the 1960s as a way to fund legal battles defending the rights of minorities and women who were completely powerless politically and financially. In most of those cases, outside funds came primarily from donations, meaning no one was looking for a financial return on their money. Litigation finance helped codify laws that protect our civil rights today, so there's a reason why the practice is legal. But using it for personal revenge or profit is relatively new—and so far, that version of litigation finance has managed to slip through the regulatory cracks.

“I would call this the Wild West right now,” says Quigley. “You might have some legitimate funders but you're also going to have some bad actors. Either way, litigation finance distorts the process of justice by injecting billions of dollars in the [courts].”

A Dangerous Precedent

While the practice of litigation finance has grown in recent decades, the bulk of these cases have involved personal injury or business-to-business lawsuits. The Thiel-Hogan-Gawker case is essentially unprecedented, litigation finance and media law experts say, because it involves a media company and because Thiel sidestepped the burgeoning litigation finance firms altogether, placing his own bet against Gawker with the sole intent of bankrupting the company.

“I think cases involving media companies may be too hard for an intelligent observer to model for purposes of investment,” says Sebok.

Now that Thiel has done this successfully, however, the dynamic could change. Sure, Gawker has published items that walk the line of ethical journalism. But there's little to stop any other billionaire with a score to settle against a free press performing its most basic function: holding the powerful accountable.

“This is potentially a powerful weapon to get even with the press,” says Walter Olson, a senior fellow of the Cato Institute and a writer for the website *Overlawyered*. “If you want a nightmare scenario, it could happen not just with billionaires, but with some clearinghouse organization who can't stand the press, or some sector of the press.”

This isn't just a hypothetical scenario. When billionaire Frank Vandersloot sued Mother Jones for defamation over a 2012 article, he lost. But he went on to say he'd create a \$1 million fund for others looking to sue the media.

As insidious as that sounds, consider that under today's lax rules, such a fund could bankroll a lawsuit in which no one knows where the money is coming from. When the ACLU brings a case to the courts, the judge and jury both know that the organization is paying for that lawsuit with outside funds. When Hogan sued Gawker, nobody knew that his case was being funded by a disgruntled billionaire. Not the judge nor the jury, because no one was legally obligated to disclose that information. If the law required Thiel, Hogan, or his attorney to disclose Thiel's involvement from the beginning, would the outcome have changed?

The Hogan case may be an isolated feud between Thiel and Gawker, but its consequences could be far-reaching. Thiel may or may not go up against other media companies, but he's created a blueprint for other billionaires to do so. Don't like a story about you? Find a proxy to sue for you, and tie up a financially strapped news organization in court until they run dry. Instead of fighting speech with more speech, fight it with money.

It's an approach we're all likely to see more of in the future, and Peter Thiel is its patron saint.