A Fetish of the Freedom of the Press?
The Terminator v. the Paparazzi

Dr. Katrin C. Varner
Dr. Carson H. Varner
Department of Finance, Insurance & Law, Illinois State University, USA

INTRODUCTION

“I believe the courts...under American influence made a fetish of the freedom of the press,” was a remark by Judge Bostgen M. Zupzancic of Slovenia, serving on the European Court of Human Rights and concurring with the majority in the case von Hanover v. Germany.¹ The case dealt with pictures taken by an independent paparazzo and published in the German middle class coffee table magazine Bunte Illustrate of Princess Caroline of Monaco, von Hanover being her married name. The pictures were all very innocuous. They were taken in public and while there were no claims of harassment, she claimed that under European norms her privacy was illegally invaded. Among the pictures were one of her leaving her home in Paris, France; another of her horseback riding; one of her combing her hair; and one on the beach.² None were in any way embarrassing, but they did show an admitted public figure going about the routine affairs of her private life in various public places.

The ruling, the details of which will be dealt with later, was rendered by the European Court of Human Rights in Strasbourg and was an interpretation of the European Declaration of Human Rights, to which 47 European states are parties. (Note that the European Union has only 27 members, so the application of the Declaration is much wider than just the EU member nations.) The court ruled that Article 8 of the Treaty on Rights to Privacy in the circumstances trumped Article 10 on free speech and press. Injunctive relief was granted, the court ruled that the Princess, admittedly a public figure, had a right to be left alone as she went about in public affairs of her life that were essentially private.

Against this and other European case law and tradition, we would like to examine some of the American “fetish,” as Judge Zupzancic put it, with a central focus on California Code 1708.8, a revision of which was recently signed by Governor Arnold Schwarzenegger.³ The revised statute attempts to control paparazzi by imposing civil fines not only on the photographers themselves, but also on publications like the German Bunte that buy their products. We will examine the problems and the First Amendment issues that obviously arise from a reading of the statute.

We note that basic American rights are enumerated in eight brief paragraphs in the 1789 Bill of Rights, with the last two being catch-all provisions. The European Convention on Human Rights is much longer and more detailed. Privacy as a right is actually unmentioned in our Constitution. It was, however, found by Justice William O. Douglas in the case of Griswold v. Connecticut in 1965.⁴ In Europe it is the subject of Article 8, while free speech and press are left for number 10. Our Slovenian judge seems to suggest that numbers count and what we list first by its positioning shows its importance both to us and, by contrast, to our European cousins. We may wish to ponder that if one is one, that two is not at all far behind.

A European could make quite a case that the American First Amendment does protect a rogue’s gallery of undesirables in the U.S. that, across the pond, are left to the tender mercies of European law. Nazis and their collectibles have full freedom here; the Ku Klux Klan is free to compete, as Oliver Wendell Holmes put it, in the “marketplace of ideas”; and flag burners, at whatever personal risk, may express themselves in their protected expression. Possibly worse in the European view is that sellers may hawk their wares with only the most modest restrictions⁵ More recently, according to the case of Citizens United, business corporations and unions have been given seemingly unlimited free to

---

¹ No. 59320/00, 2004-VI ECHR 294.
² Id.
⁴ 381 U.S. 479.
state and pay for the causes of favored political candidates. All legal systems must have some balance between free expression and social order. America consistently favors freedom with social order generally left to fend for itself. Now, what about the paparazzi? Their actions offer us an opportunity to again judge where the balance should be.

THE EVOLUTION OF THE PAPARAZZI

The term “paparazzo” comes from an Italian word used to describe an annoying, buzzing insect like a mosquito. The term was then made famous by Italian film director Federico Fellini in his 1960 film La Dolce Vita; one of the characters in the film is a photographer named Paparazzo. Since that time, the term “paparazzo” has come to describe a photographer who specializes in taking candid photos of celebrities. Paparazzi make a living by selling these candid photos to media outlets, such as tabloid newspapers, magazines, and Internet gossip sites.

The public has always had an appetite for news and information relating to celebrities, whether actors, musicians, athletes, or simply the rich and famous. The changing nature of that appetite, however, has had an impact on the type of media coverage given to them.

During Hollywood’s Golden Age, from approximately the 1920s to the 1950s, movie buffs had no shortage of fan magazines from which to choose if they wanted to find out about their favorite stars. These magazines specialized in glossy, flattering profiles of actors and actresses, accompanied by lavish photographs. The stories and photos were supervised by publicists and the studio system that tightly controlled the public faces of all its employees. The artificial nature of the presentation was the point; the public wanted to see its stars at their very best – expertly made-up, perfectly coiffed, wearing expensive and beautiful clothing, and in luxurious surroundings. The stars seemed to be better than us – better looking, richer, more glamorous, mysterious – and the media coverage perpetuated the fantasy.

Contrast such coverage with our modern-day entertainment magazines and websites. Rather than glamorous, staged shots of starlets surrounded by luxury, we instead have photos of Britney Spears coming out of a gas station bathroom in her bare feet. Rather than wanting to see celebrities at their best, as better than we ordinary citizens, people today seem to relish seeing celebrities at their worst – or at least subject to the same bad hair days and mundane tasks as the rest of us. Us Weekly, a popular tabloid specializing in photographs taken by paparazzi, even has a regular feature called “Just Like Us,” which features photographs of celebrities pumping gas, shopping for groceries, or wearing unflattering clothing.

In addition to signifying a change in how we perceive, or want to perceive, celebrities, the new type of coverage has had an enormous impact on the relationship between celebrities and the paparazzi. In Old Hollywood, where the photos were staged, or at least taken at professional functions, such as awards ceremonies or movie premieres, the relationship was a professional one. Celebrities knew they would be photographed and had some control over how it would be done. But today, in order to capture celebrities looking “just like us,” the paparazzi have to take photos in non-professional settings, which can interfere with celebrities’ personal lives, as well as the lives of their, often non-famous, friends and family. And the tactics the paparazzi use to obtain these valuable shots have become extremely intrusive, and sometimes dangerous, both to celebrities and to innocent passersby. In a New York Times story, the oft-repeated trials of certain celebrities were recounted. Lindsay Lohan, the then-18-year-old film star, reported that while driving her Mercedes on a crowded street, she was rammed by another car and within seconds, three photographers were there to record her reactions. In another story, actress Cameron Diaz was walking with then-boyfriend Justin Timberlake, another friend, and the friend’s dog. A photographer drove his SUV up onto the sidewalk next to them, pushing the friend over. Later a story appeared: “Cameron and Justin race to help a friend.”

Actress Reese Witherspoon reported being sideswiped and hemmed in by what turned out to be a photographer as she left the gym in her car. It seems that pictures of real-life frightened or angry celebrities bring a premium in the

---

9 Id.
10 Id.
While the above incidents are extreme, it seems that numerous stars are routinely subjected to what reasonable people would regard as annoyance and harassment, not to mention danger.

At what point does the photographer’s First Amendment right of free speech come into conflict with the celebrity’s right of privacy? And if it does, whose rights does the law recognize as more worthy of protection? This paper will discuss the tug of war between the paparazzi and the celebrities they cover. In Europe, the courts have established that celebrities are entitled to a measure of privacy, even when they are in public places. Leaning a bit in this European direction, California has recently passed a law that would seem to provide celebrities with protection from overly-intrusive paparazzi techniques – but what are its constitutional implications? Given the public’s keen interest in the activities of even the most D-list celebrities, such coverage is often considered newsworthy, and therefore protected by the First Amendment’s grant of freedom of the press. Would giving celebrities too great a buffer interfere with the paparazzi’s constitutional rights? And there are of course long-standing laws against assault, stalking, harassment, and invasion of privacy, some of which could apply in paparazzi-related situations. What protection, if any, do they provide?

**CALIFORNIA CODE § 1708.8**

Section 1708.8, which might be called the “Paparazzi Control Act of 2009” as amended was signed into law by Governor Arnold Schwarzenegger in October 2009 and went into effect January 1, 2010. The statute was first enacted in 1998, shortly after the famous paparazzi chase resulting in the death of Princess Diana in Paris, France in 1997. Provisions strengthening the act but not yet constitutionally tested went into effect in 2010.

**The Statutory Torts**

Tort law is mostly common law case law in the United States, although within the framework of the constitutions (state and federal), legislatures are free to add to or modify judge made law.

California Code § 1708.9 creates two statutory torts. Paragraph (a) “physical invasion of privacy” and (b) “constructive invasion of privacy.” Both torts require that they be committed in a “manner that is offensive to a reasonable person.” The tort is based on an act which attempts or intends to “capture any type of visual image, sound recording,” etc. Paragraph (j) says that it is no defense that the attempt was not successful. Intent seems to be the center of the tort.

According to paragraph (a), “physical invasion” begins with “knowing entry onto the land of another without permission.” The picture taken would be, for example, a photo of the plaintiff engaged in a “personal or familial activity.” The broad language suggests the activities covered would range from something quite imitate to playing ball with the kids or just sitting around the pool.

Paragraph (b) deals with “constructive invasion,” which requires no physical or even constructive trespass on another’s land. “Constructive invasion” may take place on the street, sidewalk, or in a public park. It requires the “personal or familial activity” and adds “where the plaintiff had a reasonable expectation of privacy.”

To summarize and raise questions, one notes that the pictures, whether of intimate, embarrassing, or very ordinary situations, are not relevant to the statute. It is the manner in which they are acquired. “Offensive to a reasonable person” is the standard. Offensiveness would be a question of fact to be determined by a jury. We might add that the standard would be that of a “reasonable American,” or, if such a thing exists, a “reasonable Californian.” European reasonableness might well be quite different. It might also seem that any physical or constructive trespass on the land of a plaintiff or that of a plaintiff’s friend would be offensive to that reasonable person. It might also seem that in public places there would need to be an element of harassing behavior as opposed to passively taking pictures. Finally, it seems quite an open question in contrast to Princess Caroline: Does a public figure have a reasonable expectation of privacy in public places, even if they might expect not to be harassed?

---

11 One of the better-known examples of this phenomenon involves actor Sean Penn. In 1987, he was jailed for 32 days after assaulting a photographer who attempted to take pictures of him and then-wife, Madonna. [http://nycpress.blogspot.com/2006/02/sean-penn-scuffles-with-paparazzi-at.html](http://nycpress.blogspot.com/2006/02/sean-penn-scuffles-with-paparazzi-at.html)
12 See supra, note 3.
**Damages**

The statute is neutral on its face in not just protecting public figure celebrities but ordinary citizens should a cause arise. Anyone in violation of (a) or (b) is subject to “general and special damages that are proximately caused” by the act. So far the provisions won’t engender a lot of interesting litigation. The next sentence of (d) changes things. If the plaintiff proves the invasion was “committed for a commercial purpose” (i.e., paparazzi, who take their photographs in the hope of selling them to the media), things change. Punitive damages within California law are permitted, as well as the “disgorgement to the plaintiff” of anything received for the pictures.

Paragraph (n) declares that the remedies are cumulative and more commutation comes. Paragraph (m) allows a county counsel or city attorney to bring a proceeding in any court of competent jurisdiction to bring a proceeding for a civil fine of $5,000 to $50,000. Encouraging action in cash-strapped jurisdictions, half of funds paid remain in the local community and the other half goes to the Arts and Entertainment Fund to be administered by the California Arts Council.

**Secondary Liability**

Paragraph (e) adds additional liability, modified in paragraph (f), to anyone who “directs, solicits, or actually causes another… to violate” the statute. This means that for any media outlet that pays the paparazzi for their work, their liability is as though there were an employer/employee relationship or respondeat superior relationship. Their liability would extend to all the damages listed above, including the $5,000 to $50,000 civil fine. Whatever First Amendment problems there might be in the statute, the obvious policy is to extend liability to the buyers of the paparazzi’s work because if demand can be legally cut off, the perceived problems of paparazzi harassment can be greatly reduced or eliminated.

Paragraph (f) limits the liability to the first user of the material. Any reuse or rebroadcast of material would be handled under copyright law. In addition, paragraph (f) requires anyone held subsequently liable to persons who “had actual knowledge that it was taken or captured in violation” of the statute. One thinks that “know” also includes “should have known,” as “deliberate” also includes “reckless,” but as the statute refers only to “actual knowledge,” the legality of a no-questions-asked purchase remains a question for the courts.

The above described is the essence of the new statute that is intended to control the paparazzi problem. As with any new law that in any way seeks to control the press, questions arise on statutory and common law questions of invasion of privacy. This then mixes with First Amendment issues that arise, as the European judge put it, from the American “fetish” with freedom of the press.

**Statute Limited to Paparazzi**

Paragraph (g) expressly excludes “otherwise lawful” activities of law enforcement officers, other government investigators, as well as private investigators who frequently work on the edge of the law. Section 1708.8 has no application to their work.

**Issues Arising out of Code § 1708.8**

*Statutory issue:* Constitutional issues aside, does a public figure/celebrity have a “reasonable expectation of privacy” when they are engaged in personal or family activities in public? If there is no reasonable expectation of privacy, then even images, recordings, etc., gathered in an offensive manner fall within the prohibitions of the statute. If there is, as in Europe, a reasonable expectation of privacy, then what constitutes an “offensive” manner in which they are collected?

*Common law issues:* While as with the statutory issue the constitutional issues come up quickly, to what extent does the right of privacy (the “right to be left alone” articulated by future Justice Louis Brandeis and Samuel Warren in their famous 1890 Harvard Law Review article¹³) apply to a public figure?

---

Constitutional issues: To what extent does freedom of the press trump rights of privacy for a public figure/celebrity? In this context, what rights to privacy or to be left alone does a public figure/celebrity have? In this context, is a celebrity’s shopping trip, going to the gym, or playing with their kids in the park “newsworthy”? To what extent may the media use offensive or otherwise illegal means (e.g., trespass) to gather these “newsworthy” happenings? Finally, are there any First Amendment problems with holding a first purchaser liable when they know the material was gathered in violation of the statute?

THE EUROPEAN VIEW

How American courts will interpret this new California Code as yet remains a mystery. In Europe, however, privacy is well-established as being generally more of a priority than unfettered press access to a subject.


This case takes us back to Europe, or to England at least. The House of Lords determined that the privacy of Naomi Campbell, a well-known model also known as a recovering drug addict, was violated when The Mirror published a picture of her coming out of a drug rehabilitation center. The House of Lords applied the European Convention on Human Rights of 1950 as amended, which gives rights to individuals as a sort of supra national law. The House of Lords saw that the case involved a balancing test between Article 8 on privacy and Article 10 on freedom of expression. Article 8 grants the “right to respect his private and family life.” In contrast to the sweeping language “Congress shall make no law” of the American First Amendment, Article 10 mentions freedom of expression and goes to a multitude of expectations for state security, protection of democracy, and “for the protection of the reputation or the rights of others…” In other words, in Europe, privacy trumps press. In the United States, the courts jealously guard their powers to protect individual rights under the Constitution, and treaties such as the United Nations Charter are seen as aspirational rather than a grant of standing to assert additional rights.

A note on French Privacy law

The following is a summary of French privacy law (law of July 17, 1970) as described by Jean Rivero in “Les Liberties Publiques.” French law does not distinguish between public figures and ordinary persons, except for celebrities who choose to live their private lives on the public stage. The liberty of private life is that zone of activity that is improper to penetrate, including religious and moral convictions, family life, private associations, and leisure activities. Violation of another’s privacy is not just a tort (faute), but can result in a jail term of up to one year and a fine. Defamation is an attack on the honor or good name of an individual or group. Truth is no defense if the attack is on the private life of another and, most interestingly, truth is no defense on the public life of another if the events took place more than ten years earlier.

By American standards this is an extreme right to privacy and applies even to public words or deeds. What did Presidents Clinton or Bush do during the Vietnam War? The inquiry is off limits. The French law dates from 1970 and one might therefore assume that many French politicians of the time may not have wanted their activities from the 1940s researched.

Private life is always out of bounds. In a page one story in the Wall Street Journal, the French are described as shocked at the revelation in Voici (roughly analogous to People magazine) that two well-known television presenters were having an affair. The horror was not at the affair, but at the law-breaking temerity of the magazine in reporting what was private. Also in France, it was rumored on numerous occasions that former President François Mitterrand had had an affair with Prime Minister Edith Cresson. Everybody in France “knew” this as an established fact, but it was never in print and there were certainly no legislative hearings into the scandal.

CONCLUSION

The Europeans have a long and established history of favoring the privacy of celebrities over the rights of the press. In the United States, the tradition has long been in favor of the free speech rights of the press. With this new California statute attempting to rein in some of the greater excesses of the paparazzi, the question is raised: Will our courts be willing to adopt this quasi-European standard or will the law be found unconstitutional? Having been passed only a short while ago, there are as yet no cases to provide us with an answer. If history is any guide, however, it seems unlikely that American courts will so quickly reverse its many years of rather entrenched precedent. Freedom of the press will likely be a “fetish” of our courts for years to come.