



A primer on invasion of privacy

Celebrities, politicians and other sought-after sources of news would appear, by their routine claims that members of the media have violated their privacy, to understand precisely what is private and what is public, or newsworthy, information.

Journalists, however, often possess different notions of privacy and newsworthiness, and know that the question is more complicated. Reporting news stories in a way that serves and informs the public will often entail publicizing facts or displaying images that will embarrass or anger someone.

To make privacy matters even more difficult for journalists, courts constantly redefine what is private based upon interpretations of the elusive legal standard of a "reasonable expectation of privacy." For example, the California Supreme Court recently introduced into the equation the question of whether the claimed intruder is a member of the news media -- thus allowing privacy claims based upon the fact that an individual expected not to be observed by a member of the news media, rather than the fact that the individual expected not to be observed in general. *See Sanders v. American Broadcasting Cos., Inc.*, 978 P.2d 67 (Cal. 1999).

The U.S. Supreme Courts scolding of the media in the 1999 "ride along" cases for a perceived inattention to the privacy rights of the people featured in the news most likely reflects the current attitude of many judges and lawmakers and, thus, underscores the importance for journalists to be aware of general privacy principles.

In the context of determining that law enforcement officers who permit the news media to accompany them across the threshold of a home while serving a search warrant violate the Fourth Amendments prohibitions against unreasonable searches and seizures, the Supreme Court expressed disdain for the medias arguments in favor of access to information related to the execution of warrants, but alleged by the subjects of those warrants to be private.

Writing for the Court, Chief Justice William Rehnquist said that the presence of the news media did not further the objectives of an authorized intrusion by law nforcement officers into a home to execute a search or arrest warrant. The ostensible benefits of media presence -- accurately informing the public about law enforcement efforts to control crime, minimizing police abuses, and protecting officers from violence by the subjects of searches and arrests by recording those events -- were outweighed by the privacy interest of homeowners.

The assertion that media presence during the execution of a search warrant can serve a legitimate law enforcement purpose "ignores the importance of the right of residential privacy at the core of the Fourth Amendment," the Court held.

The California Supreme Court has taken a similar position on media presence and privacy and in two cases decided in 1998 and 1999, allowed the subjects of broadcast news pieces to hinge the parameters of their

expected privacy on the nuances and gradations of their surroundings.

In June 1998, California's highest court concluded that two people injured in a car accident could sue for invasion of privacy based on the fact that a cameraman recorded emergency aid given in a rescue helicopter. The accident victims, the court held, could claim a reasonable expectation of privacy in the rescue helicopter, even if they did not expect their conversations in the helicopter would not be overheard and could not claim a right to privacy at the accident scene prior to being moved to the helicopter. *See Shulman v. Group W Productions*, 955 P.2d 469 (Cal. 1998).

A year later, the California Supreme Court held that even an employee who knows a conversation in an open office space will be overheard by coworkers can pursue an invasion of privacy claim if that conversation is recorded by a reporter's hidden camera. The case involved "telepsychic" hotline workers who were secretly videotaped by an undercover reporter, and writing for the court, Justice Kathryn Mickle Werdegar rejected the notion of privacy as an "all-or-nothing" concept and described an "expectation of limited privacy."

"There are degrees and nuances to societal recognition of our expectations of privacy: the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law," she wrote.

The court noted its ruling was not meant to imply "that investigative journalists necessarily commit a tort by secretly recording events and conversations in offices, stores, or other workplaces." However, the court's ruling allows the "identity of the claimed intruder and the means of intrusion" to determine whether the subjective expectation of privacy was reasonable. *See Sanders v. American Broadcasting Cos., Inc.*, 978 P.2d 67 (Cal. 1999).

The combination of a lack of recognition for the benefits of undercover investigative journalism and an acceptance of gradations of privacy in offices and stores open to the public by appellate courts of last resort such as the U.S. Supreme Court and the California Supreme Court puts journalists with no knowledge of privacy law in a dangerous position.

Under different circumstances, however, courts find the news media are justified in doing what their subjects may feel is invasive. For example, in May 1998, the U.S. Supreme Court decided not to review the decision of a split federal court of appeals in Pasadena (9th Cir.) that a flight attendant could not sue ABC for surreptitiously videotaping her from across the street as she stood at her doorstep and spoke to an ABC producer. The flight attendant had been on the flight that O.J. Simpson took on the night of his ex-wife's murder, and she voluntarily spoke with a producer who identified himself as a member of the news media on her doorstep, but declined an on-camera interview.

The flight attendant could not claim an invasion of her privacy occurred, however, because she knowingly spoke to a member of the media about a newsworthy topic and was filmed in public view from a public place. In rejecting her claim, the majority of the federal appellate court in Pasadena noted that the producer "did not enter her home. There was no evidence that any intimate details of anyone's life were recorded."

The pursuit and publication of images can expose journalists to crushing financial liability if a court determines that the news organization has invaded a person's privacy. The invasion of another's privacy is a "tort," meaning a civil wrong against another that results in injury.

A privacy tort occurs when a person or entity breaches the duty to leave another person alone. When journalists intrude on a person's privacy and cause emotional or monetary injury, they may be forced to pay damages. [\[1\]](#)

Each state has developed its own privacy law, either through the common law, statutes, or both. The right to privacy is an evolving branch of the law, and in most jurisdictions many legal questions remain unsettled. [\[2\]](#)

The First Amendment places some limits on the application of privacy law to the media. It does not, however, immunize the media completely. To avoid lawsuits, journalists must know how the law in their jurisdiction balances the competing interests of the press and the public against the privacy interests of the subjects of reports.

Courts have recognized four major branches of privacy law: 1) unreasonable intrusion upon seclusion; 2) unreasonable revelation of private facts; 3) unreasonably placing another person in a false light before the public; and 4) misappropriation of a person's name or likeness.

The facts of a particular case may implicate more than one branch of privacy law. Some states refuse to recognize one or more of the four torts; other states replace or supplement the common law with statutory privacy rights. [\[3\]](#)

This guide provides a general explanation of each privacy tort and related causes of action. The state case law section summarizes privacy cases involving photography from federal and state courts throughout the country.

Although photography poses some unique problems in privacy law, in general the legal analysis for invasion of privacy through images parallels the analysis for invasions through words. A complete examination of the privacy law in every jurisdiction is beyond the scope of this guide. However, the introduction to each state summary notes which of the four privacy torts have been recognized in any context by the state.

Intrusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts, § 652B.

Journalists run afoul of this tort through the process of gathering information. The subsequent publication of the information is not required.

Actions that may violate this privacy right include trespass onto private property, hidden surveillance, and the fraudulent entry into private areas.

Conduct that invades privacy may also violate the criminal law. In general, courts have held that journalists must obey generally applicable laws. *See, e.g., Cohen v. Cowles Media Co.*, 111 S.Ct. 2513 (1991) (newspaper not immune from liability to source after paper broke confidentiality agreement); *City of Oak Creek v. Ah King*, 436 N.W.2d 285 (Wis. 1989) (photographer has no First Amendment right of access to

crash scene from which the public has been excluded); *Stahl v. Oklahoma*, 665 P.2d 839 (Okla. Crim. App. 1983) (journalists who accompanied nuclear power plant protestors guilty of criminal trespass).

Trespass is the illegal entry onto private property. If the owner or person in charge of private property orders a photographer to leave, the photographer should leave or be prepared to face a trespass charge. Photographers who accompany police onto private property are not necessarily immune from liability.

Twelve states have statutes that ban the surreptitious use of cameras in private places. *See box on page 4*. The statutes are described in the general law category of the state-by-state privacy law summary.

Camera operators should also be aware of federal and state laws that govern the taping of oral communications. The federal wiretap statute prohibits the interception of oral communications unless one party -- such as the journalist -- consents to the recording. 18 U.S.C. §§ 2510-2520. Some states go further, and bar the taping of oral communications unless *all* parties consent to the taping. *See box on page 5*. The all-party consent statutes are also noted in the general law category of the state summary.

Private Facts

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter is of a kind that:

- (a) would be highly offensive to a reasonable person and
- (b) is not of legitimate concern to the public.

Restatement (Second) of Torts, § 652D.

The private facts tort presents the disturbing scenario in which journalists may be liable for money damages for reporting the truth. The U.S. Supreme Court noted that in this particular privacy tort, "claims of privacy most directly confront the constitutional freedoms of speech and press." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

In several cases the Supreme Court has held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

Although the Supreme Court has prevented states from punishing journalists who published legally obtained names of juvenile offenders and rape victims, the Court has not absolutely rejected the private facts tort in this context. Although crimes such as rape are newsworthy -- and newsworthiness is a defense to a private facts suit -- not all courts have agreed that the identity of a rape victim is newsworthy.

Absent special circumstances involving crime victims and witnesses, photographs of virtually anything visible in a public place do not give rise to actions for publication of private facts.

False Light

One who gives publicity to a matter concerning another that places the other before the public in a

false light is subject to liability to the other for invasion of his privacy, if:

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts, § 652E.

A photograph or videotape by itself will rarely place a subject in a false light. Rather, the accompanying text, caption, or voice-over could be misleading and portray the person in a false context. However, an accurate depiction of a person in a publication the person finds offensive does not, in itself, state a false light claim.

The U.S. Supreme Court ruled in *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967), concerning a photo essay about a fictionalized play based on a real-life hostage drama, that the First Amendment bars recovery for "false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of falsity or in reckless disregard of the truth."

Subsequent Supreme Court decisions, however, left open the possibility that in cases involving private persons rather than public figures, states could permit false light recovery if plaintiffs merely proved negligence.

Although the facts that give rise to a false light claim may also support a defamation claim, injury to reputation is not required for a false light claim. The false light tort aims primarily to protect against emotional distress rather than to protect one's reputation. First Amendment concerns, and the similarity between the claims, have persuaded some states not to recognize the false light tort.

Misappropriation

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.

Restatement (Second) of Torts, § 652C

States often have detailed statutes that govern the right of publicity. These laws have two purposes: 1) to protect ordinary individuals from the mental anguish that may accompany the undesired commercial use of their name or image, and 2) to protect the property interest that celebrities develop in their identities.

Under these laws the use of a relevant picture to illustrate a newsworthy article will generally not lead to liability. The unauthorized use of a celebrity's picture in an advertisement often will.^[4]

However, the Supreme Court ruled that newsworthiness is not necessarily a defense to a misappropriation claim. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the court ruled that a news broadcast showing the entire 15-second act of a "human cannonball" violated his right to publicity.

Defenses To Privacy Suits

Several defenses are available to photographers and news organizations accused of invasion of privacy.

If the subject of the photograph has no reasonable expectation of privacy, then no invasion of privacy is possible. Photographs taken in public places generally are not actionable. Photos of crimes, arrests and accidents usually are considered newsworthy and immune from privacy claims.

Public figures, who voluntarily expose themselves to scrutiny, waive much of their right to privacy.

Corporations generally cannot claim a right to privacy; unlike the defamation tort, the right to privacy concerns the personal "right to be left alone" rather than reputation. Heirs cannot file suit on behalf of deceased people, although some states make exceptions for misappropriation claims.

If a subject does have a reasonable expectation of privacy, consent to have photographs taken and published is a defense to an invasion of privacy action.

In deciding whether to take and publish a questionable photograph, journalists must consider many factors. The following pages survey the privacy law of the 50 states and the District of Columbia, with emphasis on cases involving photography. In many states the courts have not addressed or resolved questions about the scope of privacy law. Many cases turn on subtle distinctions of fact, and could be decided either way. When in doubt, you should consult an attorney or call the Reporters Committees toll-free legal assistance hotline: 1-800-336-4243.

End Notes

¹ Even if a news organization arguably violates a subjects right to privacy, the subjects remedy usually will not include the ability to bar the publication of the picture. *See CBS, Inc. v. Davis*, 114 S.Ct. 912 (Blackmun, Circuit Justice 1994) (granting relief from injunction barring broadcast of surreptitious videotape of beef processing plant because of presumptive invalidity of prior restraints)

² People also have a constitutional right to privacy that protects against invasions by the government. Journalists who act jointly with government officials could violate a persons constitutional privacy right. *See, e.g., Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994)

³ Journalists conduct also may lead to other tort claims, such as trespass or the intentional infliction of emotional distress.

⁴ Because the use of a celebrities likeness in advertising may imply endorsement, a celebrity whose likeness is used without consent may also have a claim under the federal Lanham Act, 15 U.S.C. § 1125(a), which prohibits false descriptions of products or their origins.

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