

**Celebrities' Rights to Privacy:
How Far Should the Paparazzi Be Allowed to Go?**

Jamie E. Nordhaus

Table of Contents

I.	Introduction: The Paparazzi	286
II.	The Right of Privacy	287
	<i>A. The Rights of Celebrities</i>	289
	<i>B. The Rights of the Press</i>	292
	1. <i>Newsgathering</i>	292
	2. <i>Newsworthiness</i>	293
	<i>C. Current Privacy Law</i>	295
	1. <i>Intrusion upon Seclusion</i>	296
	2. <i>Appropriation of Name or Likeness</i>	298
	3. <i>Publicity of Private Facts</i>	298
	4. <i>False Light</i>	300
	5. <i>Statutory Regulations</i>	301
III.	The Right to Publicity	303
	<i>A. Appropriation</i>	305
	<i>B. Copyright</i>	307
IV.	The <i>Galella</i> Solution	310
V.	Legislative Solutions	311
	<i>A. France</i>	312
	<i>B. Great Britain</i>	312
	<i>C. The United States</i>	313
VI.	Conclusion	314

I. Introduction: The Paparazzi

The term “paparazzi” is defined as “a freelance photographer, esp. one who takes candid pictures of celebrities for publication.”¹ The use of the term originated from the surname of such a photographer in the 1959 Federico Fellini film, *La Dolce Vita*.² But the connotation that arises from the word “paparazzi” is much stronger than just that of freelance photographers of celebrities; it is that of annoying, persistent photographers who in essence stalk their celebrity victims and go to any length necessary to get the shot they desire.

The paparazzi tend to target celebrities who fascinate the public. The public’s obsession further encourages the paparazzi in their pursuit and effectively endorses the paparazzi’s invasive antics as accepted practice. It is only when harm or the near threat of harm occurs that the public becomes outraged enough to criticize the newsgathering techniques of the paparazzi.

The recent death of Princess Diana brought renewed attention to the media and its newsgathering techniques, particularly those of the paparazzi in their coverage of celebrities. Media attention to celebrities has resulted in a complete loss of privacy concerning both private and public issues for many celebrities. This loss is partially due to the status of celebrities as public figures, which subjects their everyday lives to more extensive scrutiny than the average citizen. The public encourages this intrusion into the lives of celebrities by their obsession with every bit of gossip that comes their way. The paparazzi fulfills this hunger by gathering the information that the public yearns to consume.

The techniques of the paparazzi are criticized as invading the privacy rights of celebrities. The difficulty that arises in the prosecution of the paparazzi is that their work generally occurs in public places where the right to privacy is greatly limited. This right of privacy is discussed in Part II. A correlative issue arises once the photographer publishes a photograph and, thus, invades the right to publicity. The right to publicity is discussed in Part III. Part IV

1. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 978 (1991).
2. *See id.*

presents the solution to the paparazzi intrusion based on *Galella v. Onassis*.³ Part V addresses legislative solutions that currently exist and new ones that are underway to protect the privacy rights of celebrities and other individuals from the paparazzi. Finally, Part VI concludes by suggesting that the *Galella* solution is indeed the appropriate way to reconcile the paparazzi problem.

II. The Right of Privacy

Although the Constitution makes no explicit mention of the right, the courts have recognized a constitutional right to privacy.⁴ Thomas Cooley first acknowledged this right as a right "to be let alone" in his treatise on torts.⁵ Justices Warren and Brandeis, in what has traditionally been seen as the first advocacy for the protection of privacy rights, expanded on Cooley's idea and recognized the intrusive nature of newsgathering techniques into private lives in a very influential Harvard Law Review article entitled "The Right to Privacy."⁶

The right of privacy has developed to protect against four main types of invasions: (1) intrusion into solitude, (2) public disclosure of private facts, (3) depiction in a false light, and (4) commercial exploitation of a person's name or likeness, also called appropriation.⁷

3. 353 F. Supp. 196 (S.D.N.Y. 1972).

4. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (explaining how the Bill of Rights creates various "zones of privacy"); *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 932 (C.D. Cal. 1968) (holding that the defendants invaded the plaintiff's right to privacy under both California law and the federal constitution); *Galella v. Onassis*, 353 F. Supp. 196, 231 (S.D.N.Y. 1972) (describing how the "Constitution itself creates a right of privacy").

5. See Thomas M. Cooley, *COOLEY ON TORTS* 29 (2d ed., Chicago, Callaghan & Co. 1888).

6. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). There is some speculation that this article was prompted by an invasion of Justice Warren's own private life by the press. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 295-96 (1983) (discussing the background of the Warren and Brandeis article). Note that the Warren and Brandeis article was published prior to the appointment of either Justice to the Supreme Court.

7. See William L. Prosser, *LAW OF TORTS* § 117, at 804-12 (4th ed. 1971) (identifying and discussing the invasion of privacy torts).

Although other areas of the law distinguish between public and private figures in determining the standard that applies for recovery,⁸ the right of privacy applies equally to public and private figures, at least in theory.⁹ In practice, celebrities as public figures tend to have a much harder time recovering for an invasion of privacy than private individuals. This discrepancy is a result of the narrow scope of matters that are considered private in the life of a celebrity.¹⁰

The preeminent case of a celebrity successfully restricting the techniques of the paparazzi through the use of the United States legal system involved Jacqueline Kennedy Onassis.¹¹ Onassis brought an action against Ron Galella for his continuous surveillance and intrusion into the lives of her and her children. The court in this action recognized that the right to privacy includes:

a general 'right to be left alone,' and to define one's circle of intimacy; to shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from the unremitting assault of the world and unfettered will of others in order to achieve some measure of tranquillity for contemplation or other purposes, without which life loses its sweetness.¹²

In a subsequent hearing in the case, the court clarified its earlier decision to recognize that while Ms. Onassis could not prevent the

8. Public figures must prove actual malice to recover in an action for defamation. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (extending the *New York Times* standard from public officials to public figures). Public figures must also prove actual malice to recover for intentional infliction of emotional distress. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Private figures, on the other hand, need only demonstrate negligence to recover for intentional infliction of emotional distress. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (noting that private figures can recover on a more lenient standard than actual malice). Most plaintiffs choose to prove actual malice regardless, because such a showing is necessary to recover punitive damages. *See Mark A. Franklin & David A. Anderson, MASS MEDIA LAW 282* (5th ed. 1995); *see also Gertz*, 418 U.S. at 350 (requiring proof of actual malice to recover punitive damages).

9. *See Mark A. Franklin & David A. Anderson, MASS MEDIA LAW 357* (5th ed. 1995).

10. *See, e.g., Eastwood v. Superior Court of L.A. County*, 149 Cal. App. 3d. 409, 410 (Cal. Ct. App. 1983) (holding that the truthful reporting of Clint Eastwood's romantic affairs is a genuine matter of public concern).

11. *See Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 487 F.2d 986 (2nd Cir. 1973).

12. *Id.* at 232.

taking of photographs of her and her children, she did have a right to protect against certain acts committed in the taking of the photograph.¹³ Eventually Ms. Onassis succeeded in enjoining Galella from approaching her within a distance of 25 feet or her children within a distance of 30 feet.¹⁴ Despite this precedent, few celebrities have taken advantage of *Galella* to protect themselves against the paparazzi.

The question that arises is why the *Galella* precedent is not invoked more often to protect the private lives of celebrities from being invaded by the paparazzi. The answer lies in a three-fold analysis. First, the position of celebrities in society encourages such invasions. Second, the paparazzi can use the newsgathering and newsworthiness defenses to protect their actions. Finally, current privacy law is not structured in such a way as to afford celebrities the proper protection they need.

A. *The Rights of Celebrities*

Celebrities are entitled to the same general right of privacy that extends to all individuals. However, the degree to which that right is protected is much narrower for public figures. Articles recounting details of the daily lives of celebrities generate a much higher level of interest on the part of the public than do similar stories concerning unknown people. As a result, a broad spectrum of information concerning celebrities is transferred from the protective shield of privacy into the realm of the public interest.

Various rationales exist for affording a smaller degree of protection to the private lives of public figures than to private figures, although such justifications are hardly flawless. The first rationale is that most public persons seek and consent to publicity.¹⁵ Actors and actresses strive to be stars who are known and recognized worldwide. The same holds true for politicians striving to attain higher positions, as well as other individuals who relish their moments in the spotlight.

13. See *Galella*, 533 F. Supp. at 1105.

14. See *Galella*, 487 F.2d at 998-99.

15. See L. Lee Byrd, Note, *Privacy Rights of Entertainers and Other Celebrities: A Need for Change*, 5 ENT & SPORTS L.J. 95, 98 (1988).

However, consent in a general sense does not justify invasions into every aspect of an individual's life.

Second, the personalities and affairs of celebrities are viewed as inherently "public."¹⁶ In this sense, the public nature of celebrities' occupations is construed as waiving their rights to privacy.¹⁷ This waiver should be regarded, however, as a limited waiver, restricting the press to examining and exposing only that information that has some bearing on the individual's position in society.

Third, the constant exposure that celebrities receive, coupled with their expectation that such exposure will occur, tends to make celebrities more "psychologically tolerant" of press behavior than they might otherwise be.¹⁸ However, while some celebrities are willing to tolerate such behavior, others cherish their privacy. The tolerance of some leads to the abuse of many as the press begins to expect a license to behave in certain ways. It is difficult to argue that such behavior is outlandish and unacceptable so long as abusive press practices are tolerated.

Finally, the press has a right to inform the public about matters of public interest, absent a significant state interest to the contrary.¹⁹ As celebrities cultivate their positions in the public spotlight, they generate continued interest in their activities. The public begins to feel as if they "know" the individual and are thus entitled to be privy to their private lives. As the court in *Gallella* recognized, much of this so-called public interest is merely public curiosity that merits no rights.²⁰ However, maintaining celebrity status often demands satisfaction of public curiosity. In other words, a celebrity "creates audience appeal not only through the substantive achievements that bring him fame, but at the

16. *See id.* at 98.

17. *See* D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 709 (1985/1986).

18. *Id.*

19. *See* *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979) (holding that the state cannot punish the publication of lawfully obtained truthful information absent a need to further a state interest of the highest order).

20. *Gallella v. Onassis*, 353 F. Supp. 196, 225 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 487 F.2d 986 (2d Cir. 1973). The *Gallella* court noted that information about Ms. Onassis' comings and goings, tastes in ballet, and food preferences are not vital to the public well-being. *See id.*

expense of the privacy that he must surrender in becoming a public personality."²¹ The end result is a virtual free-for-all by the media into the celebrity's life, justified only by the position the celebrity occupies in society.

The standards are rather high for a celebrity to claim an invasion of privacy. Some states require that the benefit the perpetrator receives from the invasion must be commercial in nature.²² Others require that the individual be identifiable as the subject.²³ In all cases, the photograph must be taken or published without consent;²⁴ however, the mere taking of a photograph without consent by itself will not generally constitute an invasion of privacy.²⁵

Another obstacle encountered by celebrities in pursuing a cause of action against photographers for an invasion of privacy is that the taking of a photo in a public place is generally not considered an invasion of privacy. Individuals in public places are regarded as voluntarily subjecting themselves to the scrutiny of the public.²⁶ Thus, whether that scrutiny is limited to first-hand observers or extended to

21. James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 646 (1973).

22. See Byrd, *supra* note 15, at 105.

23. See *Negri v. Schering Corp.*, 333 F. Supp. 101, 103 (S.D.N.Y. 1971) (holding that a picture is not actionable unless it bears a recognizable likeness to the plaintiff).

24. See Byrd, *supra* note 15, at 104-05. *But see* *Shields v. Gross*, 448 N.E.2d 108, 111 (N.Y. 1983) (finding that parental consent satisfies the consent requirement for photographing a child); *Russell v. Marboro Books*, 183 N.Y.S.2d 8, 29-30 (1959) (holding that retouching a photograph to change the context invalidates previously given consent).

25. See *Howell v. New York Post Co.*, 612 N.E.2d 699, 705 (N.Y. 1993) (holding that mere publication without consent does not satisfy the standards for an intentional infliction of emotional distress).

26. See *Forster v. Manchester*, 189 A.2d 147, 150 (Pa.1963) (finding that appellant had "exposed herself to public observation and therefore is not entitled to the same degree of privacy" as if she were at home); see also *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471, 482 (D. Me. 1987) (holding that harassment of a passenger on board a cruise ship by photographers did not constitute an invasion of privacy because the encounters occurred only on the public parts of the ship); *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 867 P.2d 1121, 1131-32 (Nev. 1994) (finding that the unauthorized videotaping of a circus trainer beating the animals was not an invasion of privacy because it occurred backstage where the trainer could be viewed by other individuals).

others who observe through the eyes of the media, is generally regarded as irrelevant and not a maintainable cause of action.²⁷

B. *The Rights of the Press*

The First Amendment guarantees freedom to the press,²⁸ which has generally been extended to photographers as they cover the news.²⁹ However, the extent to which the daily lives of celebrities qualify as news is questionable. The press can defend their rights to this subject matter on two grounds: newsgathering and newsworthiness.

1. *Newsgathering.*—While the First Amendment protects the right to speak and publish and recognizes the necessity of freedom of the press in gathering news,³⁰ it does not grant “an unrestrained right to gather information.”³¹ In *City of Oak Creek v. Ah King*, the court held that while there is “an undoubted right to gather news from any source by means within the law,” it does not grant the press a “right of special access to information not available to the public generally.”³² This rule narrowed the approach taken by the United States Supreme Court in *Richmond Newspapers v. Virginia*.³³ In *Richmond Newspapers*, the

27. This is a result of the role of the press in society as the eyes of the public, *i.e.*, since not everyone in the public can be present, the press serves as the eyes and ears of society at large. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (allowing media access to criminal trials, the court recognized that the public no longer acquires information by firsthand observation but through the media, thus validating the media's role as surrogate for the public).

28. “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. There is much debate on whether this clause confers any special privilege on the press beyond the free speech rights of ordinary citizens. See generally Franklin & Anderson, *supra* note 9, at 56-78 (discussing this debate).

29. An exception to the inclusion of photographers under the First Amendment protections of the press is demonstrated by the exclusion of cameras from places such as courtrooms and executions.

30. See generally *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (noting the importance of free speech for the country's welfare).

31. *City of Oak Creek v. Ah King*, 436 N.W.2d 285, 293 (Wis. 1989) (holding that preventing photographers from approaching an accident site does not violate their First Amendment rights).

32. *Id.* at 292.

33. 448 U.S. 555 (1980).

Court recognized that the press often serves as a "surrogate" for the public, which may necessitate broader rights of access for the press in order to provide the public with the greatest amount of information possible.³⁴ By interpreting *Ah King* in accordance with *Richmond Newspapers*, it can be seen that the courts intend to protect the gathering of news to the extent necessary to adequately keep the public informed, but not to the extent of allowing access to information to which the public would not normally be entitled.³⁵

While the First Amendment does protect legitimate newsgathering, it does not provide the press with an impenetrable shield from liability for torts committed while gathering the news.³⁶ Four separate tort actions are available to protect individuals against invasions of privacy by the press: appropriation, false light, public disclosure of private facts, and intrusion.³⁷ The standards required for these torts, however, often preclude a finding of liability in the newsgathering context for celebrity subjects.³⁸ The important point to note is that the press can be held responsible for invasion of privacy in gathering the news despite the protections of the First Amendment.³⁹

2. *Newsworthiness*.—The established test for determining "newsworthiness" involves a balancing of three key factors: the social value of the item published, the depth of the intrusion into exclusively private affairs, and the extent to which the party voluntarily assumed a

34. *Id.* at 573.

35. This argument begins a bridge into the "what is news," *i.e.*, newsworthiness, arguments that are addressed *infra* Part II.B.2.

36. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) (recognizing that the press is not exempted from the application of civil and criminal statutes through the First Amendment).

37. *See* William L. Prosser, *LAW OF TORTS* § 117 at 804-12 (4th ed. 1971) (identifying and discussing the invasion of privacy torts).

38. *See* discussion *infra* Part II.C.

39. *See* *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973) (noting that crimes and torts committed in newsgathering are not protected).

position of public notoriety.⁴⁰ Once a “matter is deemed newsworthy, there can be no invasion of privacy based upon a public disclosure,”⁴¹ as the press has a right to publish newsworthy matters. Contemporary attitudes toward the media and celebrities make it very difficult for celebrities to claim that certain facets of their lives are not newsworthy, especially since celebrities are categorized as voluntary public figures.

News and entertainment become more commingled with every passing day, to the point where news and entertainment are now virtually indistinguishable.⁴² The judiciary has been criticized for promoting this trend by their unwillingness to make the distinction between “public interest” and “public curiosity,” resulting in an emphasis on fulfilling the public’s curiosity rather than giving them the news they need.⁴³ So long as the courts and legislature are unwilling to impose standards on the media, the media are left to regulate their own behavior. Until “society’s inevitable appetite for lurid and personal information” is curbed, the media will continue to treat such information as “newsworthy,” striving to satisfy the cravings of the public.⁴⁴

In 1982, the National Enquirer published a photograph of Clint Eastwood with Tanya Tucker on its cover, alleging a love triangle involving the two.⁴⁵ Eastwood brought suit alleging appropriation of his name and likeness and false light. The court noted that ordinarily

40. See *Galella v. Onassis*, 353 F. Supp. 196, 224 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 487 F.2d 986 (2d Cir. 1973); see also *Goldman v. Time*, 336 F. Supp. 133, 138 (N.D. Cal. 1971) (applying the three factors to find the article in question protected by newsworthiness); *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969) (listing factors to be considered in determining newsworthiness for privilege against liability).

41. Eduardo W. Gonzales, Comment, “Get That Camera Out of My Face!” *An Examination of the Viability of Suing “Tabloid Television” For Invasion of Privacy*, 51 U. MIAMI L.REV. 935, 943 (1997).

42. Celebrities themselves recognize and critique this trend in the press as well. See *Dateline NBC* (NBC television broadcast, Sept. 2, 1997) (transcript available in 1997 WL 7755320) (interviewing George Clooney concerning his criticism of the tabloid media).

43. Gurney, *supra* note 17, at 698.

44. Hilary E. Ware, Note, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for “Outed” Celebrities*, 32 HARV. C.R.-C.L. L. REV. 449, 465 (1997).

45. See *Eastwood v. Superior Court of L.A. County*, 149 Cal. App. 3d 409, 414 (Cal. Ct. App. 1983) (citing *Clint Eastwood in Love Triangle with Tanya Tucker*, NATIONAL ENQUIRER, Apr. 13, 1982, at 1).

“the purported romantic involvements of Eastwood with other celebrities ... is a matter of public concern, which would generally preclude the imposition of liability.”⁴⁶ The court held, however, that if the article was found to be a calculated falsehood, liability could be imposed.⁴⁷

An interesting side effect of the general sensationalism in today's news and the behavior of the paparazzi has been the “decline in the credibility of the press.”⁴⁸ The public can no longer distinguish between what is and is not news and is becoming disenchanted with techniques that seem to go beyond the realm of public decency. Thus, the legitimate media who serve the true public interest and fulfill their intended role in society must suffer as a result of the actions of their less responsible counterparts.

C. *Current Privacy Law*

Current privacy law is defined predominantly by the common law of the fifty individual states, although some states do have statutory protections.⁴⁹ The federal courts have also acknowledged an implicit constitutional right of privacy, although the Supreme Court has hesitated to explicitly define this right.⁵⁰ While the courts do protect a right to privacy, decisions reflect a “growing judicial uncertainty regarding the application of the right of privacy in the context of a celebrity.”⁵¹ The best mode of analysis of current privacy law in

46. *Id.* at 423.

47. *See id.* at 425.

48. Marvette Darien, *U.S. Media: How to Control the Paparazzi*, INTER PRESS SERVICE, Sept. 2, 1997, available in 1997 WL 13256365.

49. *See* Craig Bloom, Project Update, *State by State Guide to Privacy Law*, NEWS MEDIA & THE L., Summer 1994, at 5-23.

50. *See* RESTATEMENT (SECOND) OF TORTS § 652A cmt. c (1977); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (recognizing that the right to privacy protects against intrusions into marital decisions regarding contraception); *Galella v. Onassis*, 353 F. Supp. 196, 231 (S.D.N.Y. 1972) (finding the right to privacy sufficient to enjoin a photographer from approaching a family); *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 929 (C.D. Cal. 1968) (holding that the right to privacy protects against unwanted invasions in an individual's home).

51. Catherine Louise Buchanan, *A Comparative Analysis of Name and Likeness Rights in the United States and England*, 18 GOLDEN GATE U. L. REV. 301, 348 (1988).

general and the protection that it affords celebrities is through an examination of the four individual privacy torts as defined by the Second Restatement of Torts.⁵²

1. *Intrusion upon Seclusion.*—

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 his privacy, if the intrusion would be highly offensive to a reasonable person.⁵³

Ron Galella was found liable for invading the privacy of Jacqueline Kennedy Onassis under an intrusion theory.⁵⁴ The intrusion must be into a private place, such as the individual's home, or concern private matters of the individual. Thus, there can be no "liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye."⁵⁵ This commentary has paved the way for court recognition that there is no privacy in a public place, allowing the paparazzi a virtual free-for-all in public areas. Intrusion may still be found involving an individual's private matters under this tort, although most states seem to require publication and limit intrusion to physical intrusion, much like a trespass.⁵⁶ The difficulty in maintaining an action for intrusion into private matters is that the spectrum of privacy for celebrities is interpreted narrowly, leaving very little room for a celebrity to successfully argue lack of newsworthiness. For example, the privacy of politicians (political celebrities) has been virtually obliterated by the public policy rationale that the way an individual handles his personal life is a representation of his character and judgment, which

52. RESTATEMENT (SECOND) OF TORTS § 652 (1977). This Note does not address the specific requirements of each state, as the law varies from state to state. Indeed, not all states recognize all four torts. See generally Bloom, *supra* note 49 (analyzing privacy law state by state).

53. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

54. See *Galella*, 353 F. Supp. at 229.

55. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977).

56. The requirement of publication turns this tort into that of publicity given to private facts. See RESTATEMENT (SECOND) OF TORTS § 652C and discussion *infra* Part II.C.3.

is important to the public in determining who they wish to represent their interests.⁵⁷

Intrusion into an individual's privacy must also be highly offensive to a person of reasonable sensibilities. In determining this factor, courts should "consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news."⁵⁸ Once again, this is a difficult standard to meet, although most behavior of the paparazzi surpasses this threshold. In a recent case, "Inside Edition" camera crews were preliminarily enjoined "from engaging in conduct, with or without the use of cameras and sound equipment, which invades the privacy of [the plaintiffs] and their children" based on a likelihood of finding intrusion on the merits.⁵⁹ The crews had been conducting a van surveillance of a prominent businessman and his family in an attempt to pressure him into granting an interview concerning a high-profile investigation of his corporation. The court found that such activities did not amount to "routine newsgathering," but instead involved the compilation of "entertaining background for their TV expose."⁶⁰ Another case, *Dempsey v. National Enquirer*,⁶¹ found that persistent attempts to photograph a pilot who was involved in a highly publicized accident were not actionable. Although such actions were annoying and involved unannounced appearances at his house as well as following the pilot to restaurants, they were not highly offensive

57. See Larry J. Sabato, FEEDING FRENZY 46 (1991). This is perfectly illustrated by the current debate and frenzy surrounding President Bill Clinton's affair with White House intern Monica Lewinsky. Sabato attributes the widespread development of this intrusive philosophy to the 1969 Chappaquiddick incident in which a woman was killed when Senator Edward Kennedy drove his car off a bridge while driving under the influence of alcohol. See *id.* at 9, 46. Afterwards the public was outraged when it appeared that the press had known of Kennedy's "womanizing, drunkenness, tendency to speed, and general recklessness" and had shielded such information from the public. *Id.* at 72.

58. *Shulman v. Group W. Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998).

59. *Wolfson v. Lewis*, 924 F. Supp. 1413, 1435 (E.D. Pa. 1996). Other factors the court considered were the likelihood of irreparable harm to the plaintiffs without an injunction, the irreparable harm to the defendants because of the injunction, and the public interest. See *id.* at 1434-35.

60. *Id.* at 1432-33. An appeal is pending in the Third Circuit. See *Wolfson v. Lewis*, 168 F.R.D. 530, 531 (E.D. Pa. 1996) (noting the pending appeal).

61. 702 F. Supp. 927 (D. Me. 1988).

and occurred only on public property.⁶² Most recently, the California Supreme Court found that while no cause of action exists for the filming of a wreckage scene by a news crew, the press could be found liable for invasion of privacy for photographing and recording inside a rescue helicopter and conducting conversations with medical personnel, because this could be found offensive to a person of reasonable sensibilities.⁶³ The court, however, took special care to note throughout the opinion that this case involved the standard for “an otherwise private person *involuntarily* involved in an event of public interest.”⁶⁴

2. *Appropriation of Name or Likeness.* —

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 his privacy.⁶⁵

The tort of appropriation recognizes an individual’s inherent property right in controlling the use of his name or likeness. It is the value associated with such name or likeness that creates liability when it is appropriated.⁶⁶ The value does not have to be commercial in nature, but can be that of reputation, prestige, social or commercial standing, or public interest.⁶⁷ Actions for appropriation involving celebrities, however, generally relate to the commercial exploitation of the celebrity.⁶⁸

3. *Publicity of 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 his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.⁶⁹

62. *See id.* at 931.

63. *See Shulman v. Group W. Prods., Inc.*, 955 P.2d 469, 494 (Cal. 1998).

64. *Id.* at 485.

65. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

66. *See id.* § 652C cmt. c.

67. *See id.*

68. Invasion of privacy under the tort of appropriation is best discussed in relation to the right of publicity *infra* Part III.A.

69. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

The main difference between the tort of publicity of private facts and that of intrusion seems to be that intrusion covers the obtaining of the private information while publicity of private facts covers disclosure. The term "publicity" in this case refers to the public communication of private facts in such a way that the private facts become or have the potential to become common knowledge.⁷⁰ As in intrusion, if the matter is one that the individual has already exposed to the public, even by mere presence in a public place, then no cause of action can be sustained.⁷¹ As to offensiveness, the commentary suggests that the reasonableness be judged in light of community customs and standards and that an individual "must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others."⁷²

The tort also requires that the subject matter not be a matter of legitimate public concern. This element has been officially recognized by the Supreme Court in their holding that an action for invasion of privacy does not exist if the subject matter is of legitimate public interest.⁷³ The Restatement draws the line for private facts at disclosures that offend the common decency by "[ceasing] to be the giving of information to which the public is entitled, and [becoming] a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."⁷⁴ Two celebrities have recently succeeded in actions against *Playgirl* for the publication of nude photos on the grounds of publicity of private facts. Brad Pitt was able to prevent further distribution of the magazine, while Leonardo DiCaprio received a settlement.⁷⁵

70. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977) (stating that the focus is not on the means of communication, but on whether the communication reaches or is sure to reach the public).

71. See *id.* § 652D cmt. b.

72. *Id.* § 652D cmt. c.

73. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

74. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

75. See *DiCaprio, Playgirl Settle Suit Over Nude Photos*, CHIG. TRIB., June 30, 1998, at C2.

4. *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.⁷⁶

The theory underlying an invasion of privacy under false light is that information is publicized as truthful when in fact it is not. A defense to a claim of false light invasion depends not only on “whether the facts stated are true, but on whether the endorsement that the facts imply is true.”⁷⁷ The cause of action created by the false light tort is separate from that of defamation, since there is no requirement that the individual be defamed.⁷⁸ The publication, however, has to be offensive to a reasonable person. Thus, unimportant false statements, although inaccurate, are seldom actionable because the offensiveness triggered by such errors is minimal if present at all.⁷⁹

The tort of false light can create a strong cause of action against tabloid journalism in particular, and encourages accuracy in reporting at a minimum. It does not, however, serve to protect the interests of celebrities from paparazzi-style newsgathering or even reporting to the extent that the story or picture is portrayed accurately. In addition, even if inaccuracies exist in the representation, they must be highly offensive to be actionable. As demonstrated by *Eastwood v. Superior Court of Los Angeles County*,⁸⁰ the “deliberate fictionalization” of a celebrity’s persona is actionable only “when ... presented to the reader as if true,” with the publisher having intent to knowingly deceive the reader.⁸¹

76. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

77. Treece, *supra* note 21, at 671.

78. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977).

79. See *id.* § 652E cmt. c.

80. 149 Cal. App. 3d 409 (Cal. Ct. App. 1983).

81. *Id.* at 409, 426.

5. *Statutory Regulations.*—While privacy has been recognized as a protected right under the First Amendment,⁸² it has been protected only by state statutes and common law.⁸³ The concern is that while most existing statutes and the common law protect actions under the four privacy torts,⁸⁴ they do not provide adequate protection for celebrities from the intrusive actions of the paparazzi in public places in taking photographs and later publishing them.

While celebrities may currently have trouble maintaining a cause of action against invasions by the paparazzi, the paparazzi are not completely licensed to do as they wish as they gather information. Trespass laws exist to protect individuals including celebrities against invasions of privacy while on private property, but that still leaves public property open for potential invasions. Trespass law does not serve the purpose needed to protect celebrities in this context because it only protects individuals against invasions on private property.

An interesting issue that has arisen and will continue to arise with the sophistication of new technology concerns the use of telephoto lenses to photograph celebrities who are on private property from a secured spot on public property. In *Globe International, Inc. v. Los Angeles Superior Court*,⁸⁵ Joan Collins was photographed with a telephoto lens from public property while with a male companion on private property.⁸⁶ She brought an action under RICO. The court found that no RICO claim existed, but recognized in dicta that a cause of action for invasion of privacy under the intrusion tort may be found.⁸⁷ It will be interesting to see how the courts reconcile this issue in the future considering the absence of a physical intrusion.⁸⁸

82. See *Galella v. Onassis*, 353 F. Supp. 196, 231 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 487 F.2d 986 (2d Cir. 1973).

83. For a state by state analysis of existing law in the 50 states, see *State-By-State Guide to Privacy Law*, NEWS MEDIA & THE L. 5 (Summer 1994).

84. See *id.*

85. 12 Cal. Rptr. 2d 109 (1992).

86. See *id.* at 110.

87. See *id.* at 113.

88. It would seem that the use of a telephoto lens could be analogized to a physical intrusion, because the necessity of such a lens to obtain a photo would tend to suggest a reasonable expectation of seclusion. The Second Restatement of Torts suggests that intrusion may be accomplished through the use of "mechanical aids, to oversee or overhear the plaintiff's private affairs." RESTATEMENT(SECOND) OF TORTS § 652B cmt. b (1977).

Another technological advancement aiding invasion of privacy has been the use of hidden cameras in places of public occupancy for security reasons. When a notorious figure happens to be captured on tape, the security recordings can potentially be used for commercial purposes. The courts have yet to specifically address this issue, but they will likely consider the individual's reasonable expectation of privacy and the nature of the use.⁸⁹

Stalking laws prevent some obsessive surveillance of celebrities, particularly by crazed fans, but are insufficient to protect against the paparazzi because of their requirement of *intent* to place the person in reasonable fear.⁹⁰ While the actions of the paparazzi may place celebrities and others in reasonable fear, the intent of the paparazzi is generally to take a photograph and not to scare the individual, once again exposing a loophole in the protection of celebrities from the paparazzi.

New York and California provide the most extensive regulations for protecting privacy interests, probably as a result of the concentration of celebrity figures in these two states. Both states have harassment statutes that eliminate the element of intent from stalking statutes as a prerequisite to obtaining an injunction against alarming, annoying, or harassing behavior.⁹¹ California limits its actions to only that harassment that "serves no legitimate purpose."⁹² The "no legitimate purpose" qualification may create an obstacle to certain actions in light of the current overlap between news and entertain-

89. Courts have, however, addressed the deliberate use of hidden cameras in connection with newsgathering. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1224, 1229 (M.D.N.C. 1996) (applying the principles of fiduciary duty and unfair and deceptive trade practices to find damages for the use of hidden cameras in an investigative reporting feature).

90. See Nicholas DeWitt, et al., *Madonna's Lawyers Speak: Representing Celebrity Stalking Victims*, 12 ENT. L. & FIN. 1, 4 (1996); see also CAL. PENAL CODE § 646.9(a) (defining "stalking" as including an intent to place a person in reasonable fear for his or her safety).

91. See *id.* at 4; see also N.Y. PENAL LAW § 240.25 (West 1998) (defining first degree harassment as repeatedly committing acts that place a person in reasonable fear of physical injury); Cal. CIV. PROC. CODE § 527.6 (b) (West 1998) (defining harassment as any conduct directed at a person that seriously alarms or annoys that person and serves no legitimate purpose).

92. Cal. CIV. PROC. CODE § 527.6 (b).

ment.⁹³ It seems that as long as the photographer can claim the legitimate purpose of newsgathering, the statute will not apply. However, in response to recent events, two California senators are preparing a proposal to extend the harassment statute to provide for a cause of action specifically against the paparazzi, thereby eliminating the loophole caused by the protection of newsgathering.⁹⁴

While existing state law offers only limited protection in the privacy realm, the police have offered some protection as they take more precautionary measures to prevent the media's interference in police activities. For example, a photographer in New York was arrested at the funeral of a famous rapper, the Notorious B.I.G., as part of a crowd of disorderly people.⁹⁵ Other actions taken by the New York police have included physically obstructing photographers who attempt to document newsworthy events, physically assaulting members of the press, and restricting the areas of photographer and reporter access to news scenes, a practice known as "penning."⁹⁶ While the legality of these restraints is questionable, their use demonstrates the adverse impact that the actions of the paparazzi photographers are having on newsgathering in general.⁹⁷

III. The Right to Publicity

Beyond the invasion of privacy resulting from the pursuit and photographing of an individual by the paparazzi, the right to privacy may be further invaded by the subsequent publication of that photograph. Justices Warren and Brandeis recognized in their

93. See *supra* text accompanying notes 41-43 (discussing the social effects of the judiciary's failure to distinguish public interest from public curiosity).

94. See Jenifer Joyce, *Lost Photo Opportunities*, A.B.A. J., Nov. 1997, at 36.

95. See *Reporter Arrested at Rapper's Funeral; Photographer Beaten by Gang Members*, NEWS MEDIA & THE L. 12, 12-13 (Spring 1997).

96. *Id.* at 13; see also *City of Oak Creek v. Ah King*, 436 N.W.2d 285, 287 (affirming the right of police to prevent photographers from approaching a plane wreck site).

97. Restrictions on the press have been permitted in other contexts under a public policy rationale; courtrooms are a prime example. It will be interesting to see the extent to which such rationale will be extended in the future to control the media in general and paparazzi specifically, especially in light of recent events.

renowned article that the right of privacy includes intellectual property rights and the right to choose whether or not to publish and profit from one's own property.⁹⁸ This aspect of privacy law has developed into the now-recognized right of publicity.

A New York court first inadvertently recognized the right of publicity in 1902 in the case of *Roberson v. Rochester Folding Box Co.*⁹⁹ In *Roberson*, the court found that Roberson, an actress, could have owned a legally protected interest in her commercialized personality and physical likeness, although the court refused to recognize that her right to privacy had been invaded by the appropriation and subsequent publication of her image without her consent in the absence of legislation or prior precedent prohibiting such invasions.¹⁰⁰ Soon after, the New York legislature enacted a law prohibiting the use of one's name or likeness without consent for advertising purposes, officially legitimizing the right of publicity.¹⁰¹

The right of publicity recognizes the commercial value of one's name or likeness. It is most often characterized as the right to control and profit from the value of one's own identity or persona.¹⁰² For celebrities, the interest in their public persona extends beyond the "natural copyright" interest in their physical appearance to encompass the fictitious persona that they may have carefully cultivated.¹⁰³ Thus, the issue of the right of publicity is not whether the individual has been unfairly exposed to public view, but rather who will profit from the sale.¹⁰⁴ When a celebrity is involved, the value of that sale can be quite substantial.¹⁰⁵ If celebrities' rights are not protected, their

98. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

99. 64 N.E. 442 (N.Y. 1902).

100. *Id.* at 447.

101. See N.Y. CIV. RIGHTS LAW § 5 (McKinney 1909).

102. See Byrd, *supra* note 15, at 100.

103. See Jeffrey Malkan, *Stolen Photographs: Personality, Publicity and Privacy*, 75 TEX. L. REV. 779, 798 (1997), citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); see also *Eastwood v. Superior Court of L.A. County*, 149 Cal. App. 3d. 409, 422 (Cal. Ct. App. 1983) (noting the considerable effort necessary to develop one's persona in a commercial market).

104. See Malkan, *supra* note 103, at 794.

105. Photographs of Madonna's baby, Lourdes, were valued at \$500,000 the week after she was born. See Brenda Warner Rotzoll, *Focusing on the Paparazzi*, CHI. SUN-TIMES, Sept. 2, 1997, at 6.

private and commercial lives are effectively forced into the public domain, and they lose the right to exercise control over who profits from the use of their persona.¹⁰⁶

In order for a celebrity to exercise a claim under the right to publicity tort, the celebrity must prove non-consensual use of his name, image, or likeness for another's benefit, usually commercial.¹⁰⁷ This use can be through either appropriation under privacy law or through a violation of copyright law.

A. Appropriation

The difference between appropriation in the privacy context and in the publicity context is the requirement that the use be for *commercial* purposes in the case of publicity. The right of publicity "presumes that commercial exploitation is harmful not because it exposes the underlying personality, but because personality itself is appropriated and exploited."¹⁰⁸ Although the media and especially tabloids claim to provide these privacy invading pictures and stories as legitimate news serving the public interest, the media undoubtedly profit from being able to place photographs of celebrities on their magazine covers as the tool they use to attract sales.¹⁰⁹ Courts have held that the unconsented use of a photograph or story in connection with a legitimate news publication or even to advertise such publication does not constitute an actionable appropriation.¹¹⁰ Thus, photographs obtained and published relating to articles in the press

106. See Gurney, *supra* note 17, at 698.

107. See Byrd, *supra* note 15, at 99.

108. Malkan, *supra* note 103, at 799.

109. See *Eastwood v. Superior Court of L.A. County*, 149 Cal. App. 3d 409, 420 (Cal. Ct. App. 1983) (stating that the use of a picture of Clint Eastwood and tag to a related story on the cover of THE NATIONAL ENQUIRER served to "generate maximum curiosity and the necessary motivation to purchase the newspaper," resulting in a commercial gain).

110. See, e.g., *Titan Sports, Inc. v. Comics World Corp.*, 690 F. Supp. 1315, 1315 (S.D.N.Y. 1988) (permitting use of photos as posters to advertise an issue of the wrestling magazine containing the posters); *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980) (holding that no cause of action accrues for the unconsented publication of a photograph as part of a magazine feature).

become part of its “journalistic content” and are protected by the newsworthiness defense.¹¹¹ It is only when such photographs are “used to draw attention to an unrelated article” or can be related to no legitimate news purpose that the right of publicity is violated.¹¹²

Allowing commercial publication without compensation “enables the media to benefit from the celebrities’ fame at no cost.”¹¹³ In addition, the future earning capacity of the celebrity can be negatively impacted by associating the celebrity with a product in such a way that diminishes his credibility or effectively places the celebrity’s image in the public domain so that advertisers are no longer willing to pay for the celebrity’s endorsement.¹¹⁴ It can be argued that unless celebrities are hired to be a part of the image produced, they are not entitled to compensation because they have expended no energy or talent in the production of the image.¹¹⁵ However, no social purpose is served in allowing the media to get for free what they would otherwise normally pay for—a right to use the image of a celebrity.¹¹⁶ If celebrities, the public, and the courts continue to tolerate such practices, then the right to publicity will eventually be completely obliterated.

There are two sides to every coin, though. While the media may profit from covering the daily lives of celebrities, they also provide the celebrity with career-enhancing “free advertising.”¹¹⁷ As always, the extent of the enhancement depends on each individual’s situation. For example, Ethan Hawke received tremendous publicity when he was photographed dancing late at night at a club with Julia Roberts. While that publicity may have helped him by thrusting his name into households across the United States, Julia Roberts needed no career enhancement, and publicity of that sort could only be damaging to her personal life and her marriage at the time to Lyle Lovett.

111. Treece, *supra* note 21, at 662.

112. *Id.* at 662-63.

113. Gurney, *supra* note 17, at 707.

114. *See* Treece, *supra* note 21, at 642-43.

115. *See id.* at 644 (referring to a publisher’s argument for unauthorized use of images).

116. *See* Gurney, *supra* note 17, at 707 (applying the Supreme Court decision in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) in which a broadcaster was held liable for airing a human cannonball’s performance in its entirety).

117. *Id.* at 697.

An argument exists that if celebrities expect to use the press for their own personal gain they should expect to be used by the press in return.¹¹⁸ Once individual interests are recognized, an equilibrium can be reached that serves the goals of both the press and the celebrity. If respected, the result is a mutual benefit for all. It is only when the press takes advantage of their liberties and invades too closely the intimate circle of privacy surrounding the celebrity that the balance is upset.¹¹⁹ By protecting against "the unauthorized publication of a celebrity's photograph . . . the law would help maximize the incentive to develop and maintain skills and talents that society finds appealing."¹²⁰

B. Copyright

Although most cases examined under a right of publicity use appropriation as a basis for recovery, copyright principles may provide an equally sound basis under the proper circumstances. In order to obtain a copyright, the object must be an "original work of authorship fixed in any tangible medium of expression."¹²¹ The statute defines a work as "fixed" "when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."¹²² Thus, for photographs, copyright vests when the photograph is taken because at that point it becomes "'fixed' in a tangible medium."¹²³

118. See Ninez Cacho-Olivares, *My Cup of Tea: Media not Entirely to Blame*, BUSINESSWORLD (Manilla), Sept. 2, 1997, available in 1997 WL 13851187 (exploring the relationship between the media and celebrities, especially Princess Diana and Ms. Onassis).

119. See Gurney, *supra* note 17, at 697-98.

120. *Id.* at 707.

121. 17 U.S.C. § 102(a) (1990).

122. *Id.* § 101.

123. *Id.* § 101. Copyright of photographs was first acknowledged by the Court in an 1884 decision regarding the reproduction of a photograph of Oscar Wilde without the photographer's consent. The Court recognized that the photographer's selection and arrangement of the elements of the photograph were sufficient to constitute an original work of authorship, despite the fact that it is merely a mechanically reproduced exaction of existing physical elements in a two-dimensional form. See Burrow-Giles Lithographic

Copyright protects the celebrities' interests under the right of publicity against the unauthorized use by the media of images owned by the celebrity or others. Copyright thus has little use in protecting celebrities against the paparazzi since it provides protection against infringement of works that have already been fixed. Copyright does, however, protect celebrities from losing the value they have in their images that have been fixed by prohibiting the unconsented use of such images.

To pursue an action for copyright infringement, an individual must be able to show the ownership of a valid copyright in the image and copying of that image. In the context of celebrity photographs, the biggest problem celebrities often encounter is their lack of ownership in the photograph being exploited, particularly in works-for-hire.¹²⁴ The copyright in a photograph generally vests in the photographer because he is the creative engineer who "fixes" the image in a tangible medium.¹²⁵ The argument is based on the consent given to have a photograph taken.¹²⁶ In the case of public places and the paparazzi, this consent would be implied.

The best way to avoid this problem is to form a written agreement before the photographs are taken as to who will own the copyright upon completion. This enables celebrities to retain maximum control over the use of their image. This option, of course, is not available when the photograph is taken without explicit consent.

Several cases have arisen in which the celebrity consented to the taking of a photograph for a particular use, and the photograph was later exploited in ways inconsistent with that consent. This has occurred primarily in connection with publications such as *Celebrity Skin*, a magazine featuring photographs of nude or scantily clad celebrities and merchandise such as baseball cards, posters, pins, and t-shirts. For the most part, the courts have enjoined the unauthorized

Co. v. Sarony, 111 U.S. 53, 60 (1884).

124. A "work for hire" is a work prepared in the course of employment, whether as part of a regular job or specially commissioned project. 17 U.S.C. § 101 (1995). The employer or person for whom the work is prepared is considered to be the owner of the copyright and all rights associated therewith. *See Id.* § 201(b).

125. *Sarony*, 111 U.S. at 60.

126. *See Shields v. Gross*, 448 N.E.2d 108, 111 (N.Y. 1983) (upholding the right of the owner of photographs of Brooke Shields as a child to publish them even though the original consent was granted by her mother and not by Ms. Shields herself).

merchandising involving the celebrity.¹²⁷ However, the courts have protected the use of photographs in magazines.¹²⁸

Causes of action have also been upheld for misappropriation of celebrity images by look-alikes in commercials,¹²⁹ which seems to suggest some copyright ownership over one's image. If celebrities can protect against others profiting from mimicking their image for commercial purposes without permission, they should be able to protect against the exploitation of their actual image in general. Currently, though, no cause of action has been upheld for the unconsented use of another's image apart from meeting the elements of one of the four privacy torts or commercial appropriation.

Protection against exploitation under the right of publicity vests regardless of whether or not it is exercised during the lifetime of an individual.¹³⁰ In addition, such protection survives the death of the

127. See *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 (2d Cir. 1978) (prohibiting distribution of an Elvis Presley poster); *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983) (banning the likeness of a rock musician on buttons); *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1214 (N.D. Ill. 1981) (banning a likeness on T-shirts).

128. See *Ann-Margaret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980) (allowing the use of a photograph by the magazine because it did not constitute trade or advertising); *Shields*, 448 N.E.2d at 111 (permitting the use of photographs based on the consent of the parents).

129. In *Onassis v. Christian Dior-N.Y., Inc.*, the court held that use of a look-alike of Ms. Onassis in a Christian Dior ad violated Ms. Onassis' right of privacy by appropriation of her likeness. See 472 N.Y.S.2d 254, 263 (N.Y. Sup. Ct. 1984). The court stated that it was unnecessary to address the violation of her right of publicity. See *Id.* Other cases have used section 43(a) of the Lanham Act to find likelihood of confusion over the use of a celebrity's likeness as an endorsement in an ad. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (invoking the Lanham Act to find likelihood of confusion over the use of Vanna White's image in ad); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 36, 370 (S.D.N.Y. 1988) (invoking the Lanham Act to find likelihood of confusion over the use of Woody Allen's image); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 628 (S.D.N.Y. 1985) (invoking the Lanham Act to find likelihood of confusion over the use of Woody Allen's image).

130. See *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 682 (11th Cir. 1983) (holding that the right of publicity survives the death of a celebrity and passes to his heirs regardless of whether the celebrity exercised the right during his lifetime).

individual and is devisable upon that death.¹³¹ These rights will gain increasing importance as technological advancements allow for digital sampling to create realistic images of individuals, including those already deceased, as though they were active participants in the image portrayed.¹³²

IV. The *Galella* Solution

Galella v. Onassis is the most prominent case in which a celebrity has successfully enjoined a member of the press from an invasion of privacy.¹³³ The rule developed by the court held that interference by the press in the privacy of the individual can “be no greater than necessary to protect the overriding public interest.”¹³⁴ Broken down, this rule can be seen as a three-part balancing test that considers the propriety of granting an injunction against the obtrusive presence of the press.¹³⁵ First, the court should consider the legitimate public interest in the information sought.¹³⁶ In *Galella*, the court found that while the public may have been curious as to the daily habits of Ms. Onassis and her family, the need to know such information was not essential to the public’s well-being. Second, the court should consider the individual’s right to be let alone—the right of privacy.¹³⁷ By the time suit was brought, *Galella* had become a cumbersome intrusion into the life of Ms. Onassis and her children. His constant presence and aggressive techniques interfered with the family’s daily activities and at times even endangered them. Finally,

131. *See id.* *But see* *Lugosi v. Universal Pictures*, 603 P.2d 425, 430 (Cal. 1979) (holding that *Lugosi*’s heirs could not prevent the continued exploitation of his likeness in connection with his performance in *Dracula*); *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, 455 (Cal. 1979) (refusing to extend protection against a fictionalization of Rudolph Valentino’s life).

132. *See* RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT: UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 246-47 (6th ed. 1995).

133. *Galella v. Onassis*, 487 F.2d 986, 998-99(2d Cir. 1973).

134. *Id.* at 995.

135. *See Galella v. Onassis*, 533 F. Supp. 1076, 1077 (S.D.N.Y. 1982), *aff’d in part, rev’d in part*, 487 F.2d 986 (2d Cir. 1973).

136. *See id.* at 1105.

137. *See id.* at 1106.

the court should consider the likelihood of continued surveillance absent court intervention.¹³⁸ Galella made it very clear that he intended to continue his pursuit of Ms. Onassis. In fact, Onassis later had to bring suit to enforce the injunction against Galella's continued violations.¹³⁹

Although this rule does not prevent the taking of photographs or the subsequent related actions regarding the use of the photos, it can help the celebrity maintain some semblance of a private life. In addition, the active invocation of the rule serves as a notice to the press that certain behaviors are unacceptable and will not be tolerated. Ideally, such measures would not be necessary because the press would recognize the proper standards of behavior on their own, but until such an attitude becomes prevalent, more regulated controls are apparently necessary.

V. Legislative Solutions

For years the paparazzi have gone unrebuked for their newsgathering methods. But finally, in a country considered to have some of the most protective privacy laws,¹⁴⁰ a tragedy of the utmost stature occurred, in part as a result of the pursuit of the paparazzi, and unleashed the wrath of the public on the media.¹⁴¹ The death of Princess Diana sparked an international debate on the prudence of current newsgathering techniques, especially those used by the paparazzi, and the extent to which they can be regulated. Governments around the world have been prompted to reconsider their

138. *See id.*

139. *See id.* at 1076.

140. *See* Thomas Kamm & Paul M. Barrett, *The Legal Picture: How Would Paparazzi Who Stalked Diana Fare in French Court?*, WALL ST. J., Sept. 2, 1997, at A1 (indicating four charges that could be brought against the paparazzi who stalked Princess Diana).

141. Princess Diana was killed August 30, 1997 in a car accident while being chased by the French paparazzi. It was later determined that the blood-alcohol level of her chauffeur well-exceeded the legal limits. Fault has not officially been attributed to any party. *See* Gregory Katz, *Questions Linger in Diana Death; French Maintain Secrecy a Year After Fatal Accident*, DALLAS MORNING NEWS, Aug. 30, 1998, at A1 (discussing the investigation into the cause of the accident).

lackadaisical approach to the protection of privacy rights, especially involving celebrities.

A. France

While French law prohibits the publication of photographs against the will of the subject, the laws protect the taking of photographs in public places.¹⁴² In addition, although unconsented publication is against the law, it is only punishable by a \$32,000 fine, a chance most tabloids are willing to risk because profits can easily exceed that figure.¹⁴³ As a result, these laws tend to counter the effects of each other and thus inadvertently permit celebrities and individuals to be subjected to the antics of the paparazzi. Therefore, while the French government has enacted some strong preventative measures, they are ineffectual and in great need of revamping. As the French come to terms with the tragedy that occurred on their soil, they will be forced to confront the counter-productivity of their laws in relation to the media. Hopefully they can find a better method for deterring the behavior of the paparazzi and protecting their celebrity subjects.

B. Great Britain

Britain, while known for its "history of restrictive press laws and government intimidation of news gatherers," has never fully succeeded in protecting its royal family from the entourage of the press.¹⁴⁴ Although the British Law Commission and the European Convention on Human Rights both drafted proposals for protecting the rights to privacy of individuals,¹⁴⁵ it was not until after the death

142. See Kamm & Barrett, *supra* note 140, at A1.

143. See Brenda Warner Rotzoll, *Focusing on the Paparazzi*, CHI. SUN-TIMES, Sept. 2, 1997, at 6 (stating that a growing number of magazines have become prepared to accept the fine).

144. *A Sad Death, a Bad Law*, N.Y. TIMES ABSTRACT, Sept. 15, 1997, at A1.

145. See Comment, *Di's Pictures*, 137 SOLIC. J. 1123 (1993) (advocating adoption of the proposals to protect the privacy interests of the Royal family and commoners).

of Princess Diana that Britain adopted new privacy guidelines as proposed by their Press Complaints Commission, the self-regulating body of the media.¹⁴⁶ Among these new guidelines are a "ban on pictures obtained by persistent pursuit," a goal of "preventing media scrums and collective harassment," greater protection for children, and a broader definition of private property allowing for more extended protection.¹⁴⁷ From the wording of these proposals, it is clear that the British intend to prevent a replay of the events that occurred in France leading up to Diana's death. The media's own self-regulating body proposed these guidelines, which moots any free speech arguments by the media in both Great Britain and the United States.

C. *The United States*

The United States has also jumped on the legislative bandwagon. Two weeks after the death of the Princess, Sonny Bono (R-CA) introduced a bill in the House of Representatives entitled "Protection from Personal Intrusion Act."¹⁴⁸ The proposed bill creates a criminal offense for harassment, which is defined as:

persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to ensure that privacy, for the purpose of capturing by camera or sound recording instrument of any type a visual image, sound recording, or other physical impression of the victim for profit in or affecting interstate or foreign commerce.¹⁴⁹

Some commentators have critiqued this proposal as "unnecessary and potentially unconstitutional,"¹⁵⁰ but by adding the phrase "in or affecting interstate or foreign commerce" to the regulation, the federal

146. See *Press Code of Conduct Unthinkable in the United States*, AGENCY FRANCE-PRESSE, Sept. 26, 1997, available in 1997 WL 13402593.

147. *Id.*

148. H.R. 2448, 105th Cong. § 1 (1997). Congressman Bono has since passed away; however, the proposal continues to be reviewed in his absence by the House Committee on the Judiciary.

149. *Id.* at § 2(a), (b).

150. *A Sad Death*, *supra* note 144. See also Joyce, *supra* note 94, at 36 (reporting the reactions of various media organizations and attorneys to the proposed legislation).

government ensures that it has jurisdiction to regulate under the Commerce Clause of the United States Constitution.¹⁵¹ In addition, two California Senators prepared an extension to the California harassment statute to provide for a cause of action specifically against the paparazzi, thereby eliminating the loophole caused by the protection of newsgathering.¹⁵² The California Assembly Judicial Committee unanimously approved the proposal.

VI. Conclusion

Celebrities have very few enforceable causes of action available to them to protect their rights of privacy and publicity against invasions by the press. Existing statutes and case law are ineffectual to protect these interests because the rights of celebrities are interpreted so narrowly, and the press boundaries under newsgathering and newsworthiness are so broad. While *Galella* presents a solution that seems to reasonably satisfy all interests, the absence of cases specifically invoking this standard suggests that other solutions may be necessary. Recent events have led governments around the world to attempt to solve this problem by creating greater protections for individuals from the invasive actions of the press, but the United States has yet to enact any new legislative proposals into existing law.

Celebrities should not necessarily be entitled to greater protection for their privacy interests than other individuals. However, the position that celebrities hold in the public limelight naturally entails more attention given to their lives and thus more frequent and generally more intrusive invasions. In addition, the arguments celebrities have for lack of newsworthiness are not as substantial or respected as those for ordinary individuals. Thus, in defining the scope of the right to privacy, it is necessary to give some added attention to the status of celebrities and other public figures to ensure that they receive equal protection of their interests.

The limitations in this area of law are not completely attributable to deficiencies in existing statutes and court decisions; they are

151. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power to... regulate Commerce with foreign Nations, and among the several States.").

152. See S.B. 1379 (Cal. Reg. Sess. 1998); Joyce, *supra* note 94, at 36.

partially attributable to a lack of effort on the part of celebrities to test the boundaries of the law by bringing suit against intrusive actions. Whether such abstinence is based on apathy, a desire not to draw unnecessary attention to the intrusion, or an economic decision concerning time, effort, and money is unclear. The impression it leaves, though, is one of tolerance for the newsgathering techniques of the paparazzi.

The solution to this problem does not necessarily lie solely in the willingness of celebrities, the public, the courts, or the legislature to actively take on the press. Ideally, the press should regulate their own behavior and enforce their own standards of acceptability in newsgathering practices rather than risk having their rights severely limited by unsympathetic courts and legislatures. By doing so, the best interests of all could be served by maintaining a free press and respecting the rights of individuals. In reality, though, such practices by the press will continue to diminish the newsgathering process and the respectability of the media.

A solution is available that can adequately meet the interests of the press, celebrities, the public, and the courts. It involves no new legislation and no new developments in the law. Rather, the solution lies dormant, awaiting resurrection by the courts and the victims of the paparazzi. The test articulated by the *Galella* court could fulfill the seeming gap in privacy law. Its enforcement not only provides a solution to the problem of the paparazzi, but could also result in a restoration of some order in the courts and the press.