Privacy, Culture and Law
in the United States

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“If it came to a choice between this invasion of my privacy and the media promoting my career, I’d say, don’t help me.”

–Tom Selleck


“An American has no sense of privacy. He does not know what it means. There is no such thing in the country.”

–George Bernard Shaw

Keep these questions in mind as we discuss rights of privacy, publicity and defamation.

1. What does “The Right to Privacy” mean to you in Australia? In the U.S.?

2. Should “celebrities” enjoy the same privacy rights as ordinary citizens?

3. Who is a “celebrity”?
The right to privacy is the right to prevent (or be compensated in damages for) the unauthorized disclosure of personal information of a kind the communication of which would offend a person of reasonable sensibilities.

E.G., in the U.S. some usual elements of an invasion of privacy interests are:

- (1) an individual expectation of privacy; and
- (2) an intentional intrusion by an interloper into a private place, conversation, or matter;
1. Early cases in Privacy in the U.S. focused upon concerns of *commercial misappropriation*;
2. Contemporary cases in the U.S. tend to focus upon *commercial misappropriation AND intrusion into solitude*;
3. The interest in privacy must be balanced against an interest in *Freedom of Expression*;
4. Freedom of expression possesses *primacy* in U.S. law;
5. It has been difficult to distinguish between *informing and entertainment*;
6. Professional Athletes are often “Public Figures.”
7. **Boundaries** of public concern/interest not always clear.
Observation:

- The U.S. has a sophisticated system of rights protecting personality;
- however,
- Due to the preferred position of Freedom of the Press through the First amendment to the U.S. Constitution, the actual interests of public figures is often pragmatically diminished.
“(W)hilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures. A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions.”

“While in the former case the press exercises its role of “public watchdog” in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public’s right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – despite the person concerned being well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person’s private life and have the sole aim of satisfying public curiosity in that respect. In the latter case, freedom of expression calls for a narrower interpretation.” (Emphasis Added)
“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.”
Recent inventions and business methods call attention to the next step . . . for securing to the individual . . . the right "to be let alone."

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; . . . ‘what is whispered in the closet shall be proclaimed from the house-tops’. . . .

The law must afford some remedy for the unauthorized circulation of portraits of private persons. . . .
“The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle . . . .” (Emphasis Added)
Definition of matters covered by Right of Privacy in Brandeis and Warren article – Issue: What is the *Legitimate Public Interest*

“... the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.” (Emphasis Added)
Birth of “privacy” rights

The Warren and Brandeis article concluded that traditional notions of implied contract or breach of confidence are not adequate to protect the right to be left alone, so new “right” of privacy must be created.
Privacy Rights: What interest is protected?

The “right to be let alone.”
Robeson v. Rochester Folding Box Co., 171 N.Y. 538, 542 (N.Y. 1902). Privacy and *Emotional Distress*

- Robeson claimed that she had “been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked, causing her great distress and suffering both in body and mind; that she was made sick and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician, because of these facts; that defendants had continued to print, make, use, sell and circulate the said lithographs, and that by reason of the foregoing facts plaintiff had suffered damages in the sum of $ 15,000.” (Emphasis Added)
O’Brien v. Pabst, 124 F.2d 167 (1941) – Do Celebrities “waive” privacy claims?

“(C)onsidered from the standpoint merely of an invasion of plaintiff's right of privacy, no case was made out, because plaintiff was an outstanding national football figure and had completely publicized his name and his pictures.”
Haelan Labs v. Topps Chewing Gum, 202 F.2d 866 (1953):

FACTS:

Haelan Labs manufactured chewing gum. Haelan entered into an exclusive contract with several baseball players to use the baseball players’ photographs to sell Haelan Labs chewing gum.

Baseball players also entered into a contract with Topps Chewing Gum for use of baseball player’s photo. Haelan Labs sued Topps.
Claims

1. That Topps tortiously interfered with the business relationship between Haelen Labs and the players; and

2. That Topps misappropriated the property of Haelan Labs.
"... many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures." (Emphasis Added)

1. **Intrusion** upon the plaintiff's seclusion or solitude, or into his private affairs.
2. **Public disclosure** of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a **false light** in the public eye.
4. **Appropriation**, for the defendant's advantage, of the plaintiff's name or likeness.”
Right of Privacy compared to Defamation – Do Not Conflate

- Right of Privacy seeks to address injury to “feelings,” emotional sensitivities, or mental suffering.
- Defamation deals only with injury to REPUTATION (one’s relationship with the outside world).
Right of Privacy vs. Right of Publicity – Do Not Conflate!

- **PROTECTS:** right to be left alone/ dignity and state of mind/psychological interests
- **PREVENTS:** Intrusion into Private Space or intrusion upon psychological interests in safety and security

- **PROTECTS:** Economic Interest in celebrity’s image/persona
- **PREVENTS:** Unjust Enrichment
Usual Defenses:

1. That the use is not really “of and concerning the claimant;”
2. Consent to the use;
3. That in the specific circumstances the individual did not possess a Reasonable Expectation of Privacy;
4. That notwithstanding an invasion of privacy interests, that it is not of a sort that would be considered as highly objectionable;
5. That the use is privileged or within recognized exceptions; or
6. That the individual is a public figure, the information is newsworthy, and the subject of public interest, THEREFORE, it is protected by principles of freedom of expression.
Privacy Tort: Public Disclosure of Private Facts

Usual Elements:

1) Public Disclosure
2) Of a private fact (cannot already be a fact made public)
3) Disclosure of which would be offensive and objectionable to a reasonable person and
4) Which is not of legitimate public concern

(See next slides: nexus test required; newsworthiness bars recovery)
Element 4: “Which is not of legitimate public concern”--Nexus Test Required

Nexus Test:

If a publication discloses private facts, the contents of the publication (the disclosure of private facts) are only protected to the extent those facts have a “substantial relevance to a matter of public interest.”
Difficulty in Application!!
The Supreme Court concluded that even though certain pulp magazines that contained tales of bloodletting, violence, and sex had no discernible value, they nonetheless received the same First Amendment protections as the "best of literature." The Court observed:

“*The line between the informing and the entertaining is too elusive for the protection of that basic right.* Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. They are equally subject to control if they are lewd, indecent, obscene or profane.” (Emphasis Added)
Public Figures and Newsworthiness

- If an individual is deemed a “public figure,” then many aspects of their lives will be considered of “legitimate public concern” and, therefore, “newsworthy.”
“Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and . . . may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship . . . . And it exacts a correspondingly high price from the victims . . .” (Emphasis Added)
Why Special Treatment of Public figures?

“First is the rationale of self-help. Public figures have greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy . . . Second, and perhaps more important, is the notion of assumption of risk. Public officials and public figures in some sense voluntarily put themselves in a position of greater public scrutiny and thus assume the risk that disparaging remarks will be negligently made about them.” Gertz v. Welch
Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are ‘the chief agents of moral change in the United States,’ they certainly are widely used—far more than are institutionally anchored elites—to symbolize individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.”
“[S]peech on 'matters of public concern'... is 'at the heart of the First Amendment's protection.' The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” That is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” (Emphasis Added)
“[N]ot all speech is of equal First Amendment importance,’ however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. . . . ‘

“We noted a short time ago * * * that ‘the boundaries of the public concern test are not well defined.’”

“Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’” *Snyder v. Phelps*
Video games are entitled to the full protections of the First Amendment, because “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).”

BUT Such rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment.

Keller, O’bannon et al. v. Electronic Arts Inc., 724 F.3d 1268 (9th Cir. 2013)
“Under California’s transformative use defense, EA’s use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment. . . . and conclude that state law defenses for the reporting of information do not protect EA’s use.” *Keller v. E.A.*
Tactics of Paparazzi

- Accosting celebrities in public places, physically or verbally, in an effort to provoke a reaction;
- High-speed chases;
- Impersonation;
- Long-range photographic equipment;
- Disclosure of private facts.
Concern of Celebrities

Solitude and Safety
State Efforts to Curb Paparazzi Behavior

- California is the only U.S. state to date to enact legislation specifically designed to curtail offensive paparazzi conduct.

- Other state laws may, however, be employed to address certain aspects of the problems that concern well-known persons: for example, laws that address anti-stalking, trespass, assault/battery, etc.
California statute is limited to damages caused by the defendant’s “physical invasion of privacy,” “constructive invasion of privacy” (when physical space WOULD have been invaded but for the use of visual or auditory enhancement device), or assault.

Does limit to “physical/constructive invasion of privacy” substantially limit this tort?
The statute has been considered by many as largely ineffective, to date, although it has provided some protection against some forms of intrusion.