PAPARAZZI AND YOU: A LOVE STORY

Second Place
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- MAX KIMBROUGH

"Now I feel I have an unspoken deal with the paparazzi:
'I won't do anything publicly interesting if you agree not to follow me.'"
-Matt Damon[1]

"I'm your biggest fan I'll follow you until you love me,
Papa-paparazzi,
Baby there's no other superstar you know that I'll be your
Papa-paparazzi"
-Lady GaGa[2]

I. INTRODUCTION

Celebrities are regularly swarmed by paparazzi, which swoop in like vultures to snap pictures of the celebrities engaged in exotic activities like waiting at the airport.[3] Sometimes the

1. Personal Quotes, Biography for Matt Damon, Internet Movie Database, http://www.imdb.com/name/nm0000354/bio (last visited Apr. 13, 2010).

2. Lady GaGa, *Paparazzi*, The Fame, Interscope (2008).

3. *See, e.g.*, The Paparazzi Reform Initiative, http://www.paparazzi-reform.org/ (last visited Apr. 13, 2010). The Web site posts, as its featured video, a video of model Kate Moss being "swarmed and harassed by paparazzi at Los Angeles International Airport." Throughout the

paparazzi stay at a respectful distance from the celebrity. Sometimes they get up close and jockey for position, occasionally bumping or knocking down their targets.[4] Still other times, paparazzi will go to extraordinary and extralegal lengths to capture a celebrity with their camera.[5] The paparazzi then sell the photographs to entertainment magazines, which publish them with much fanfare, to proclamations that the pictured celebrities are "just like us!"[6] Choice pictures can fetch anywhere from $6,000 to $100,000 when a paparazzo sells the photographs to an entertainment magazine.[7]

In response to escalating and aggressive paparazzi tactics, California enacted its anti-paparazzi statute, § 1708.8, in 1998.[8] Amended in 2006, today § 1708.8 establishes civil causes

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video, Moss and her children are enveloped by a strobe light effect produced by dozens of rapid camera flashes.

4. Sometimes the paparazzi become reckless and create dangerous situations because of their manic desire to capture the best shot. The most infamous example is that of Princess Diana, who died on August 31, 1997 in a car crash while fleeing from aggressive paparazzi. *See* Mary Jordan, *Paparazzi and Driver Found Negligent in Princess Diana's Death*, WASH. POST, Apr. 8, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040702743.html.

5. *See, e.g.*, Civil Assault: Liability: Hearing on A.B. 381 Before the Assemb. Comm. on Judiciary, 2005-06 Sess. 3-4 (Cal. 2005) [hereinafter *Civil Assault*], *available at* http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_381&sess=0506&house=B&author=montanez (under Analyses, click "Assembly Committee" link for Sept. 8, 2005) (explaining that paparazzi assault celebrities "in order to either capture the victim's reaction to the assault on film or tape, or to use the threat of assault to impede the mobility of a celebrity so that an image may be taken").

6. *See, e.g.*, Us Weekly magazine, which has a regular feature called "Stars—They're Just Like Us!" that shows pictures of celebrities doing "normal" things that are apparently un-celebrity-like. By way of example, a scanned page from the feature may be viewed here: http://www.cindab.com/images/stories/press/07-us.jpg (last viewed Apr. 13, 2010).

7. Civil Assault, *supra*, note 5, at 4. The hearing noted also that photographs of Angelina Jolie and Brad Pitt were rumored to have sold for $500,000. *Id.*

8. *See* Cal. Civ. Code § 1708.8 (2006).

of action for invasion of privacy in order to capture a physical impression;[9] constructive invasion of privacy;[10] and assault with the intent to capture a physical impression.[11] The statute has since been amended again, effective January 1, 2010, creating liability for the first person who publishes a physical impression captured illegally under the statute.[12] Nevertheless, the amendments will fail, as previous iterations of the statute failed, to curb aggressive paparazzi tactics. Instead, celebrities may be able to take advantage of an older cause of action to find redress and solitude: the right of publicity.

II. RIGHT OF PRIVACY

Under the Restatement (Second) of Torts:

> 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.[13]

Conceptually, invasion of privacy is the idea that a person is entitled to his privacy, and can avoid having others snoop into his personal affairs. The California Supreme Court recently found that the elements of the common law public disclosure tort were: "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4)

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9. *Id.* at (a).

10. *Id.* at (b).

11. *Id.* at (c).

12. *See* A.B. 524, 2009 Leg. § 2(f)(1) (Cal. 2009).

13. Restatement 2d Torts § 652B (1977).

which is not of legitimate public concern."[14] The key element being whether something is or is not of "legitimate public concern," this comes down to a determination whether something is "newsworthy"—newsworthiness shielding a defendant from liability for an otherwise actionable public disclosure tort.[15] Because of their public personas, celebrities are therefore often the subjects of paparazzi photographs because the celebrities are deemed "newsworthy."[16] What might otherwise be an actionable violation of a person's right of privacy is privileged under the First Amendment when it comes to celebrities whom the public has a legitimate interest in.[17] Section IV, below, will discuss the issue of newsworthiness and whether something is of legitimate public concern, but in the mean time this paper will discuss an offshoot of the right of privacy: the right of publicity.

III. CALIFORNIA'S RIGHT OF PUBLICITY

Like the right of privacy, the right of publicity is created on the state level, either through statute or common law.[18] The right of publicity may be thought of as an offshoot of the right of privacy: it grants an individual the right to be protected against appropriation of that person's name or likeness, to the defendant's advantage.[19] This right is protected because courts

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14. *Shulman v. Group W Prods, Inc.*, 955 P.2d 469, 478 (Cal. 1998).

15. *Id.* at 479.

16. *See generally id.*

17. *Id.*

18. *See* 1A LINDEY ON ENT., PUBL. & THE ARTS § 3:16 (3d ed.).

19. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413 (9th Cir. 1996) (citing *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983)).

recognize that individuals' names or likenesses may be "commercially exploitable."[20] "Unwarranted intrusion or exploitation" of someone's name or likeness is deemed unfair and "is the heart of the law of privacy."[21]

In California, the elements of a common law action for appropriation of name or likeness are: "(1) the defendant's use of plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[22] Moreover, "California's common law right of publicity is not limited to the appropriation of name or likeness. The key issue is appropriation of the plaintiff's *identity*."[23]

California also enacted Civil Code § 3344, which authorizes civil suit against unauthorized commercial use of the name, voice, signature, photograph or likeness of a person.[24] The statute was meant to compliment, not enact, the common law right of publicity cause of action.[25] Paragraph (a) provides:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods

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20. *Id.*

21. *Id.* (quotations omitted) (quoting *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979)).

22. *Id.* at 413-14 (quotations omitted) (quoting *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 347).

23. *Id.* at 413 (quotations and citations omitted; emphasis in original) (citing *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992)).

24. Unauthorized Commercial Use of Name, Voice, Signature, Photograph or Likeness, Cal. Civ. Code § 3344 (2009).

25. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 414 (citing *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 346).

> or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person . . . injured as a result thereof.[26]

Interpreting § 3344 along with California's common law right of publicity, courts read the causes of action as allowing suit where the defendant "gained a commercial advantage."[27]

In *Abdul-Jabbar v. Gen. Motors Corp.*, the plaintiff, a Hall of Fame basketball player, brought suit against General Motors for violation of Abdul-Jabbar's publicity rights.[28] General Motors had aired a commercial during the 1993 NCAA men's basketball tournament that referenced Abdul-Jabbar's birth name, Lew Alcindor.[29] The commercial used no pictures or sound recordings of Abdul-Jabbar; instead, a voiceover and text compared Abdul-Jabbar, a three-time NCAA tournament most outstanding player, with the Oldsmobile Eighty-Eight, a three-time "Consumer Digest's Best Buy."[30] The Ninth Circuit,[31] interpreting § 3344 and California's common law right of publicity, found that Abdul-Jabbar had stated a claim sufficient to defeat General Motors' summary judgment motion.[32] The court held that General Motors "gained a commercial advantage" in using Abdul-Jabbar's birth name to "attract[] television viewers'

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26. Cal. Civ. Code § 3344(a).

27. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 415 (citing *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 349).

28. *Id.* at 409.

29. *Id.*

30. *Id.*

31. The suit was brought in federal court because it also alleged a violation of Abdul-Jabbar's trademark rights, governed by the federal Lanham Act, 15 U.S.C. § 1125(a). *Id.* For purposes of paper, only the right of publicity will be discussed.

32. *Id.* at 415.

attention."[33] Indeed, "the law protects the celebrity's sole right to exploit the value of [his or] her fame."[34] Further, plaintiffs may find redress not only for economic loss, but also for right of publicity violations that "may induce humiliation, embarrassment, and mental distress."[35]

The court discussed, before ultimately rejecting, General Motors' argument that the use of Abdul-Jabbar's birth name was permissive because it was "newsworthy."[36] The court cited *Montana v. San Jose Mercury News, Inc.*, where the California Court of Appeal denied football star Joe Montana's suit under § 3344 and California's common law right of publicity.[37] In *Montana*, the San Jose Mercury News published photographs in the January 22, 1989 edition, showing Montana's San Francisco 49'ers winning the Super Bowl.[38] After the 49'ers won the Super Bowl the next year too, the Mercury News published similar photographs of the victory.[39] The front pages of these editions were subsequently made into posters for sale to the public; several were sold for $5, while the remaining were given away at charity events.[40] Montana later brought suit under California's common law and statutory (i.e., § 3344) misappropriation of

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33. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 415 (citing *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 349). Moreover, "The first step toward selling a product or service is to attract the consumers' attention." *Id.* at 416 (quotations omitted) (quoting *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 349).

34. *Id.* (quotations omitted) (quoting *White v. Samsung Electronics Am., Inc.*, 971 F.2d at 1399).

35. *See id.* at 415 (quotations omitted) (quoting *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992)).

36. *See id.* at 416.

37. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 416 (citing *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (Cal. Ct. App. 1995)).

38. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th at 792.

39. *Id.*

40. *Id.*

name and likeness.[41] The court held that the public interest in the photographs trumped any proprietary interest Montana had in them.[42] This is because the photographs and accompanying articles represented newsworthy information.[43]

Nevertheless, the *Abdul-Jabbar* court distinguished that case from *Montana*. The court noted that, although "Lew Alcindor's basketball record may be said to be 'newsworthy,' its use is not automatically privileged [because General Motors] used the information in the context of an automobile advertisement, not in a news or sports account."[44] General Motors' use of Abdul-Jabbar's birth name was therefore not protected.[45]

The Eighth Circuit made a similar finding in *C.B.C. v. Major League Baseball Advanced Media, L.P.*[46] Under Missouri law, the common law right of publicity elements are: (1) defendant's use of plaintiff's name qua symbol; (2) lack of plaintiff's consent; and (3) defendant's intent to obtain a commercial advantage.[47] These elements are substantially similar to California's common law right of publicity.[48] As to the first element, the Eighth Circuit explained, "when a name alone is sufficient to establish identity, the defendant's use of that

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41. *Id.* at 793.

42. *See id.* (citing *Dora v. Frontline Video Inc.*, 15 Cal. App. 4th 536 (Cal. Ct. App. 1993)).

43. *Id.* at 794.

44. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 416.

45. *Id.*

46. *C.B.C. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

47. *Id.* at 822 (quoting *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003)).

48. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413-14 (quotations omitted) (quoting *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 347), *supra* note 22.

name satisfies the plaintiff's burden to show that a name was used as a symbol of identity."[49] As to the third element, the court cited Missouri law finding that "a name is used for commercial advantage when it is used 'in connection with services rendered by the user.'"[50] Unlike trademark law, which focuses on consumer confusion, the court found that Missouri's "commercial advantage element" focuses on whether the defendant intended to gain a commercial benefit from misappropriation of the plaintiff's identity.[51]

There can be no doubt paparazzi photographs of celebrities use celebrities' identities, without their consent, so that the paparazzi (and the magazines they sell the photographs to) gain a commercial advantage.[52] Under both California and Missouri common law, most paparazzi photographs of celebrities would therefore establish a prima facie violation of the celebrities' rights of publicity.[53] Nevertheless, many celebrity magazines attempt to avoid liability by disguising the paparazzi photographs with a trite "news" story, which often is unrelated to the picture.[54] This is no doubt an attempt to avoid General Motors' fate in *Abdul-Jabbar*: pure

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49. *C.B.C. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d at 822.

50. *Id.* (citing *Doe v. TCI Cablevision*, 110 S.W.3d at 368; Restatement (Third) of Unfair Competition § 47 & cmt. a).

51. *See C.B.C. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d at 822 (citing *Doe v. TCI Cablevision*, 110 S.W.3d at 370-71).

52. *See* Civil Assault, *supra*, note 5, at 4.

53. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413-14, *supra* note 22; *C.B.C. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d at 822 (explaining that, under Missouri law, the common law right of publicity elements are: (1) defendant's use of plaintiff's name qua symbol; (2) lack of plaintiff's consent; and (3) defendant's intent to obtain a commercial advantage).

54. *See, e.g.*, Affleck Walks Off Set, TMZ, Feb. 27, 2007, http://www.tmz.com/2007/02/27/affleck-walks-off-set [hereinafter *Affleck*] (showing actor Ben Affleck's daughter, Violet, walking with mother Jennifer Garner, with the non-sequitur caption, "Jen and Vi are in Vancouver filming the movie 'Juno,' which is about a pregnant woman who

commercial exploitation is violative; news accounts are "newsworthy."[55] By way of example, the Web site Just Jared posted a series of photographs of actress Alyssa Milano waiting for a flight in the airport, in the guise of a legitimate news article.[56] The accompanying text states:

> Former Charmed star Alyssa Milano chats on her Blackberry Pearl as she prepares to depart from LAX Airport on Thursday morning.
>
> Alyssa, 34, is back in the TV series business, jumping from the CW to ABC. She'll be starring in a drama pilot about a lawyer/new mother who moves with her infant son from Atlanta to her hometown of Savannah, Ga., where her eccentric family still lives.[57]

While the first paragraph may conceivably be considered news reporting, the second paragraph merely gives a statement wholly unrelated to the subject of the photograph. Put another way, "the fact that Alyssa Milano is at an airport . . . ha[s] no correlation with [her] upcoming . . . television show[]."[58] Instead, the photographs are meant "merely to attract attention" to separate products.[59] The separate products are, namely, the magazines themselves, which operate off of advertising revenue.

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makes an unusual choice"); Guess Who's Under the Hoodie? US MAGAZINE, http://www.usmagazine.com/stylebeauty/photos/guess-the-hoodie-2009309/4374 (last visited Apr. 13, 2010) (showing actor Robert Pattinson, with the pseudo-news caption, "The *Twilight* star lazily walked to the set of upcoming film Remember Me in NYC's Brooklyn on July 10").

55. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 416.

56. Alyssa Milano is the Perfect Pearl, JUST JARED, Mar. 1, 2007, http://justjared.buzznet.com/2007/03/01/alyssa-milano-airport/.

57. *Id.*

58. Keith D. Willis, Paparazzi, Tabloids, and the New Hollywood Press: Can Celebrities Claim a Defensible Publicity Right in Order to Prevent the Media from Following their Every Move? 9 TEX. REV. ENT. & SPORTS L. 175, 194 (2007).

59. *See Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (remanding right of publicity suit for determination whether actor Cary Grant's photograph was used "merely to attract attention" to an article about fashion trends).

A. Newsworthiness and Legitimate Public Interest

An individual's right of privacy may be outweighed by public interest in a matter. The California Supreme Court in *Kapellas v. Kofman* held:

> In determining whether a particular incident is 'newsworthy' and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety.[60]

Courts balance these factors; public information may still be privileged even if the there is little social value in its dissemination.[61]

Conversely, matters of substantial public interest will afford a greater intrusion into private life, "especially if the individual willingly entered into the public sphere."[62] Regardless, and for good or for ill, courts recognize that "there is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities."[63] It is of legitimate public interest to publish information or news stories about the accomplishments "of those who have achieved a marked reputation or notoriety by appearing before the public."[64] Stated another way, "Public

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60. *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

61. *See, e.g.*, *Gill v. Hearst Publishing Co*., 253 P.2d 441, 444 (Cal. 1953) ("The photograph of plaintiffs [in public] merely permitted other members of the public, who were not at plaintiffs' place of business at the time it was taken, to see them as they had voluntarily exhibited themselves.").

62. *Kapellas v. Kofman*, 459 P.2d at 922.

63. *Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 746 (Cal. Ct. App. 1962).

64. *Id.* at 746-47.

figures have to some extent lost the right of privacy," and their lives are open to more scrutiny than "those of entirely private persons."[65]

Individuals' homes—even those of celebrities—are granted much greater respect and privacy.[66] In *Dietemann v. Time, Inc.*, the Ninth Circuit held that newsgathering took a back seat to an individual's privacy where the reporters invaded the individual's home with a hidden camera and concealed electronic equipment.[67] The *Dietemann* court stated, "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."[68] In sum, the public interest in the private affairs of persons does not grant a license to use illegal means to gather information from that private sphere.[69]

In contrast, courts traditionally do not view photographs of individuals in public places to be an invasion of privacy.[70] Nevertheless, courts do not allow completely unfettered access to individuals in public in the guise of newsgathering. In *Galella v. Onassis*, the Second Circuit

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65. *Id.*

66. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen.").

67. *See generally Dietemann v. Time, Inc.*, 449 F.2d 245.

68. *Id.* at 249.

69. *See id.* at 250 (finding that "there is no First Amendment interest in protecting news media from calculated misdeeds") (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967)). The Ninth Circuit, while acknowledging that the issue had yet to be decided in California, held that it "had little difficulty in concluding that clandestine photography of the plaintiff in his den and recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy in California." *Id.* at 248.

70. *See, e.g.*, *Gill v. Hearst Publishing Co*., 253 P.2d at 444 ("The photograph of plaintiffs [in public] merely permitted other members of the public, who were not at plaintiffs' place of business at the time it was taken, to see them as they had voluntarily exhibited themselves.").

upheld an injunction against a paparazzo that constantly harassed and took photographs of Jackie Onassis and her children in public.[71] What made Galella's actions so reprehensible to the court was that his "action[s] went far beyond the reasonable bounds of news gathering. When weighed against the *de minimis* public importance of the daily activities of [Mrs. Onassis], Galella's constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable."[72] This reasonableness standard was later adopted by the Court of Appeal of California in *KOVR-TV v. Superior Court*.[73] There, the court held that the First Amendment did not immunize from tort a television news reporter who informed three minor children, on camera, that two of their playmates had been murdered by the playmates' mother, who then committed suicide.[74] The court explained that:

> If indeed defendant sought to elicit an emotional reaction from the minors for the voyeuristic titillation of KOVR-TV's viewing audience, this is shameless exploitation of defenseless children, pure and simple, not the gathering of news which the public has a right to know. A free press is not threatened by requiring its agents to operate within the bounds of basic decency.[75]

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71. *See generally Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). In particular, the court noted, "Galella took pictures of John Kennedy riding his bicycle in Central Park across the way from his home. He jumped out into the boy's path, causing the agents concern for John's safety. . . . Galella on other occasions interrupted Caroline [Kennedy] at tennis, and invaded the children's private schools. At one time he came uncomfortably close in a power boat to Mrs. Onassis swimming. He often jumped and postured around while taking pictures of her party, notably at a theater opening but also on numerous other occasions. He followed a practice of bribing apartment house, restaurant and nightclub doormen as well as romancing a family servant to keep him advised of the movements of the family." *Id.* at 992. Such behavior should come as no surprise to anyone familiar with modern day paparazzi.

72. *Id.* at 995.

73. *Kovr-Tv, Inc. v. Superior Court*, 31 Cal. App. 4th 1023 (Cal. Ct. App. 1995).

74. *Id.* at 1027.

75. *Id.* at 1032.

In essence, the court extended the *Onassis* reasonableness standard to differentiate between "news which the public has a right to know" and "voyeuristic titillation . . . [which is] not the gathering of news which the public has a right to know."[76]

Courts still struggle with the definition of "newsworthiness," but many agree with this general reasonableness standard. In one such case, *Virgil v. Time, Inc.*, the Ninth Circuit adopted the Restatement (Second) of Torts' explanation of newsworthiness: "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes 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."[77] While not exactly illustrative, "community standards" harkens back to First Amendment jurisprudence on obscenity and pornography.[78] Moreover, the *Virgil* court added that the public's mere general interest in an individual's activity "does not render every aspect of their lives subject to public disclosure."[79]

B. California's Invasion of Privacy Statute

California common law recognizes four distinct torts for invasion of privacy: "(1) intrusion upon a plaintiffs [sic] seclusion or solitude, or into the plaintiffs [sic] private affairs; (2)

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76. *Id.*

77. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975) (quoting Restatement (Second) of Torts § 652D, cmt. h (1977)).

78. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973) (offering, as one guideline for subsequent considering obscenity matters, "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest") (quotations omitted).

79. *Virgil v. Time, Inc.*, 527 F.2d at 1131.

public disclosure of embarrassing facts about the plaintiff; (3) publicity which places plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness."[80]

Finding that these common law torts were insufficient to curb aggressive paparazzi, in 1998 California passed its anti-paparazzi statute, § 1708.8, and then amended it in 2006.[81] Section 1708.8 establishes civil causes of action for invasion of privacy in order to capture a physical impression;[82] constructive invasion of privacy;[83] and assault with the intent to capture a physical impression.[84] The statute has since been amended again, effective January 1, 2010, creating liability for the first person that publishes a physical impression captured illegally under the statute.[85] The following section of this paper is devoted to discussing the changes the amendment will bring.

C. Section 1708.8 Amendment

On October 11, 2009, California Governor Arnold Schwarzenegger signed into law California Assembly Bill No. 524, An Act to Amend Section 1708.8 of the Civil Code, Relating

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80. *Turnbull v. ABC*, 2004 U.S. Dist. LEXIS 24351, at *36, n.6 (C.D. Cal. Aug. 19, 2004) (citing Prosser, Privacy, 48 Cal. L. Rev. 383 (1960); *Kapellas v. Kofman*, 459 P.2d at 921, n.16; *Shulman v. Group W Productions, Inc.*, 955 P.2d at 477-78).

81. *See* Cal. Civ. Code § 1708.8.

82. *Id.* at (a).

83. *Id.* at (b).

84. *Id.* at (c).

85. *See* A.B. 524 § 2(f)(1).

to Privacy.[86] The amendment to § 1708.8 becomes effective January 1, 2010.[87] Its stated goal is to "deter invasive paparazzi conduct by attaching liability to publishers who use paparazzi, thereby removing the financial incentive for paparazzi to continue pursuing and photographing celebrities."[88]

The amendment makes two important changes to the existing statute. First, it establishes procedures for fining persons found to violate the statute.[89] Persons found to have violated the statute are subject to civil fines of not less than $5,000 and not more than $50,000.[90] The amendment stipulates that half of the fines collected are to be allocated to the agency that prosecuted the fine.[91] The other half of the fines collected are to be deposited in the Arts and Entertainment Fund, which the statute creates.[92]

The second important change to the existing statute comes in subdivision (f). Currently, the statute provides, "Sale, transmission, publication, broadcast, or use of any image or recording of the type, or under the circumstances, described in this section shall not itself constitute a violation of this section."[93] The amendment creates an exception to this provision, decreeing that someone is in violation of the statute upon the

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86. A.B. 524.

87. *Id.*

88. Bass, Bill Analysis of AB 524, Senate Judiciary Committee, at 5, July 14, 2009.

89. *See* A.B. 524 § 2(m).

90. *See id.* §§ 2(m), (d), (e).

91. *Id.* § 2(m)(2)(A).

92. *Id.* § 2(m)(2)(B) (Cal. 2009). The bill further states, "Funds in the Arts and Entertainment Fund . . . may be expended by the California Arts Council, upon appropriation by the Legislature, to issue grants." *Id.* § 2(m)(3).

93. Cal. Civ. Code § 1708.8(f).

> first transaction following the taking or capture of the visual image, sound recording, or other physical impression, publicly transmitted, published, broadcast, sold or offered for sale, the visual image, sound recording or other physical impression with actual knowledge that it was taken or captured in violation of [the statute], and provide compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.[94]

Put another way, the subdivision makes illegal the first instance where someone publishes a paparazzi photograph of a celebrity in violation of the statute, and pays money for it when the person has actual knowledge that it was captured in violation of the statute.[95] This subdivision aims to detract magazine publishers from purchasing photographs from freelance paparazzi by making it illegal for the publishers to resell or print in their magazines the illicit photographs. As a practical matter, the exception applies only to the first transaction after the taking of the photograph: if any subsequent publications of the photograph also violated the statute, there would be a nigh-endless supply of civil defendants for wronged celebrities to sue, as photographs originally published in print media are often quickly disseminated through blogs and online-only sites.[96] Finally, although it was likely added for jurisdictional matters, subsection (f)(5) provides that the statute will apply only to images or sound recordings taken or captured within California.[97]

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94. A.B. 524 § 2(f)(1).

95. *Id.*

96. Indeed, this is made explicit in paragraph (3), which states, "Any person that publicly transmits, publishes, broadcasts, sells or offers for sale, in any form, medium, format or work, a visual image, sound recording, or other physical impression that was previously publicly transmitted, published, broadcast, sold or offered for sale, by another person, is exempt from liability under this section." *Id.* § 2(f)(3). Thus, blogs that merely reprint celebrity photographs already published elsewhere would not be subject to liability.

97. *Id.* § 2(f)(5).

While the amendments to § 1708.8 are a nice effort by the California legislature to address the problem of aggressive paparazzi, they will still ultimately fail in their goal. The newsworthiness factor is likely too difficult for celebrities to defeat; while celebrities may argue, perhaps rightly, that the mere fact they walk down the street is not "news," courts have been leery of impinging on First Amendment rights of the press. As such, celebrities cannot win against paparazzi on a right of privacy action. However, the right of publicity may provide them with a way to go on the offensive against paparazzi.

IV. TWITPICS

Social networking and "microblogging" Web sites like Twitter have exploded in popularity recently.[98] This is no doubt thanks in part to the adoption of Twitter by many celebrities.[99] While many celebrities use Twitter like typical users and post their random musings, others attempt to monetize the service by "tweeting" advertisements for their shows and movies.[100] Moreover, some celebrities post candid photographs of themselves online through Twitter.[101] These photographs often serve as de facto celebrity-endorsed paparazzi

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98. Twitter grew an astonishing 1382% from February 2008 to February 2009. *See* Adam Ostrow, *Twitter Now Growing at a Staggering 1382 Percent*, MASHABLE, Mar. 16, 2009, http://mashable.com/2009/03/16/twitter-growth-rate-versus-facebook/.

99. Actor Ashton Kutcher, for instance, is a prominent Twitter user, and has over four million followers on the site. *See* http://twitter.com/APlusK (last visited Apr. 13, 2010).

100. A typical tweet from Director Kevin Smith, for example, advertising his appearance on a radio show: "KANSAS CITY! I'm gonna whisper FCC-friendly dirty things to you via @johnnydare on KQRC. Listen to me do so: http://www.989therock.com/." http://twitter.com/ThatKevinSmith/status/6267923900.

101. *E.g.*, the rock band Muse. http://twitpic.com/photos/muse [hereinafter *Muse*] (last visited Apr. 13, 2010).

photographs, showing the celebrities in candid positions and situations that paparazzi strive to capture.[102] Other celebrities choose to monetize the photographs themselves, such as Brad Pitt and Angelina Jolie, who gave to W Magazine exclusive pictures of Jolie breastfeeding her newborn twins.[103] The photographs, twenty-one in all, were taken by Pitt; the couple also granted W Magazine an exclusive interview accompanying the photographs.[104] Such candid photographs likely would fetch thousands for any paparazzo who took them.[105]

Jolie clearly has a right of publicity interest in the photographs.[106] The photographs depict her identity; because of the monetary value in the photographs, another's exploitation (assuming also lack of consent) of the pictures would be to that person's commercial advantage.[107] But what if a paparazzo had used a telephoto lens to peer into Jolie's house and take the pictures, rather than Pitt? Although one could argue that photographs of Jolie breastfeeding her newborn twins is as newsworthy as photographs of Alyssa Milano waiting for a flight in the airport, the questions becomes whether such photographs would give the paparazzo a commercial advantage, and whether there is any resulting injury to Jolie.[108]

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102. *See, e.g.*, http://twitpic.com/jqpux; http://twitpic.com/jqi2r; http://twitpic.com/jeltt; http://twitpic.com/a5hl9.

103. *See* W Magazine Cover of Angelina Jolie Breastfeeding Twins, Stupid Celebrities Gossip, Oct. 9, 2008, http://stupidcelebrities.net/2008/10/09/w-magazine-cover-of-angelina-jolie-breastfeeding-twins-photo/ [hereinafter *W Magazine*].

104. *See id.*

105. *See* Civil Assault, *supra*, note 5, at 4.

106. To say nothing of Pitt's copyright interests in them, but that is outside the topic of this paper.

107. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413-14, *supra* note 22.

108. *See id.*

The first question is answered easily: clearly, a paparazzo taking a candid photograph of Jolie breastfeeding her twins would give the paparazzo a substantial commercial advantage, based on the likely sale price of such photographs.[109] In answering the second question, it is important to consider whether Jolie could have monetized the photographs.[110] In this situation, Jolie obviously could have, and in real life may have. This may be sufficient to meet the injury element of the right of publicity cause of action: in the hypothetical, Jolie might have monetized the breastfeeding photographs, if not for the snooping paparazzo; therefore, the paparazzo's unconsented-to photographs of Jolie brought the paparazzo clear commercial advantages, and injured Jolie's ability to monetize the photographs herself.[111] This analysis, along with § 1708.8, might be sufficient to ward paparazzi off from using telescopic lenses to peer into celebrities' homes. However, § 1708.8 does nothing to prevent paparazzi from harassing celebrities on the street; here, the right of publicity may provide an answer.

As discussed above, § 1708.8 does nothing to prevent paparazzi from photographing celebrities on the street.[112] Paragraph (b) establishes a cause of action for constructive invasion of privacy, but limits the cause of action to situations when the celebrity has a reasonable

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109. *See* Civil Assault, *supra*, note 5, at 4. It is not clear whether Pitt and Jolie received any compensation for the photographs in W Magazine, but at any rate the question is not whether the plaintiff has a commercial *disadvantage*, but whether the *defendant* has a commercial advantage. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413-14, *supra* note 22. Because of the amount of money he could expect to realize from the photographs, and the fact that such photographs, in this hypothetical, were gained without Jolie's consent, the paparazzo clearly realizes a commercial advantage by virtue of snapping the photographs.

110. Again, it is unknown whether Jolie and Pitt actually received compensation from W Magazine for the photographs, but even if they gave the magazine the photographs for free, they could have charged for them.

111. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413-14, *supra* note 22.

112. *See* Cal. Civ. Code § 1708.8.

expectation of privacy.[113] This would surely not apply to situations where a celebrity, like Alyssa Milano, *supra*, was photographed while waiting in a public area of an airport. Section 1708.8(c) permits celebrities to bring suit when paparazzi assault them in the process of taking photographs.[114] This, likewise, would have no bearing on someone like Milano or any other celebrity who were photographed on the street from afar. As such, the provisions in the amendment to § 1708.8 establishing liability for publishers who disseminate paparazzi photographs are inapplicable in these situations.[115] Nevertheless, celebrities may find some relief in the common law right of publicity.

As evidenced by Pitt and Jolie giving exclusive breastfeeding photographs to W Magazine, celebrities are beginning to market and control their likenesses in more candid situations.[116] Although this is new for "mainstream" celebrities, reality show, and the show-made celebrities, are designed to give the public candid looks into the celebrities' supposedly private lives.[117] Indeed, reality shows often merely follow around their subjects around on their day-to-day activities, such as shopping, going to dinner, and interacting with family members at home.[118] These activities are often, in fact, identical in subject matter to many paparazzi

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113. *Id.* at (b).

114. *Id.* at (c).

115. *See* A.B. 524 § 2(f)(1) (establishing liability for someone who is the first to disseminate a paparazzi photograph, but only when such photograph violations paragraphs (a), (b), or (c)).

116. *See* W Magazine, *supra* note 103.

117. *See, e.g.*, MTV's The Osbournes, http://www.mtv.com/shows/osbournes/series.jhtml. The show had cameras follow around rock musician Ozzy Osbourne and his family, showing intimate and candid moments in a pseudo-documentary style.

118. *See, e.g.*, TLC's Jon & Kate Plus 8, http://tlc.discovery.com/tv/jon-and-kate/jon-and-kate.html (last visited Apr. 13, 2010). The show, about a married couple and their eight children, has the family pick pumpkins in an orchard, hire a maid to help Kate with the house cleaning,

photographs. Entertainment Web site TMZ recently published a photograph of Kate Gosselin, from the reality show Jon & Kate Plus 8, loading her car after shopping at Target.[119] Although Gosselin was apparently not being filmed for the reality show at the time, the subject matter of the photograph—Gosselin's day-to-day activities, showing how she's "just like us"—is exactly what a viewer of Jon & Kate Plus 8 would expect to see on any given episode. In the context of her show, there can be no doubt that Gosselin enjoys a right of publicity in her identity: her identity is "commercially exploitable."[120] The TMZ photograph of Gosselin shopping is an appropriation of her identity, presumably without her consent, for TMZ's commercial advantage.[121] Gosselin's injury is that the TMZ photograph is one she likely would have otherwise been able to exploit commercially and sell to TLC or elsewhere.[122] Indeed, Gosselin has apparently done just that with similar photographs: on the TLC Web site, there is a Photos section for Jon & Kate Plus 8, where candid photographs are posted of Gosselin and her family.[123] Although some of the photographs posted are clearly posed, many appear to be of the

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and reorganize the garage to make room for their stuff. Jon & Kate Plus 8: Season 1 Episodes, http://tlc.discovery.com/tv/jon-and-kate/season-1-episodes.html (last visited Apr. 13, 2010).

119. Hollywood's Holiday Shoppers, TMZ, http://photos.tmz.com/galleries/holiday_shoppers#tab=hot_photos&id=56380 (last visited Apr. 13, 2010).

120. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413.

121. *See id.* (quotations omitted) (quoting *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 347).

122. *See id.* at 413-14 (quotations omitted) (quoting *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 347).

123. Gosselin Family Photos, TLC, http://tlc.discovery.com/tv/jon-and-kate/slideshows/slideshows.html (last visited Apr. 13, 2010).

candid "they're just like us!" genre.[124] For example, under Camping Out, there is a photograph of Gosselin lying down on the ground with her daughter.[125] Although it is unclear whether Gosselin is in public or on private property, the photograph would be functionally identical if it were taken while Gosselin was lying down outside in a public park, in full view of TMZ paparazzi like in the shopping photograph. Were that the case—i.e., had a paparazzo taken the Camping Out photograph and sold it to TMZ—Gosselin would have a right of publicity cause of action: the photograph, which uses her likeness, would have been taken without her consent; it would commercially advantage the paparazzo; and it would result in injury to Gosselin in the form of denying her the ability to commercially exploit or control that same photograph.[126] Moreover, the photograph, in this hypothetical, was taken "merely to attract attention" to TMZ's Web site, which generates revenue through advertising sales.[127] That is, the photograph would be used "in the context of an [entertainment] advertisement, not in a news . . . account."[128] Therefore, for the photograph, while possibly being minimally "newsworthy," "its use is not automatically privileged."[129]

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124. *See generally id.*

125. Camping Out, TLC, http://tlc.discovery.com/tv/jon-and-kate/slideshows/camping-out.html (last visited Apr. 13, 2010) (click "next" to view photograph number 2 in the series).

126. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413-14 (quotations omitted) (quoting *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 347).

127. *See Grant v. Esquire, Inc.*, 367 F. Supp. at 881 (remanding right of publicity suit for determination whether actor Cary Grant's photograph was used "merely to attract attention" to an article about fashion trends).

128. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 416.

129. *Id.*

While Gosselin would have a valid cause of action for violation of her right of publicity, many other celebrities would not because they would lack the injury element. As discussed above, Gosselin is injured by the TMZ photograph because it is something that she could conceivably market or control and place on the TLC Web site for Jon & Kate Plus 8. This is on account of the fact that she already does this in other contexts. Jennifer Garner would not be as lucky; she apparently does not regularly release photographs of herself like the paparazzi picture of Garner and her daughter.[130] While she could establish an injury for future paparazzi photographs if she began to release such photographs on her own, she would not have sufficient injury in the present to warrant suit. Other celebrities, however, may be positioning themselves for redressibility through their use of Twitter.

As previously discussed, the rock band Muse posts candid "paparazzi-esque" photographs online through Twitter.[131] By doing so, the band is controlling its image as permitted under the right of publicity.[132] Paparazzi photographs that are similar enough in subject matter to the photographs the band has itself posted may violate the band's right of publicity: assuming lack of consent, the photographs would depict the band members' likenesses; give the paparazzo a commercial advantage on account of not having to compensate the band as well as reaping a bounty[133] from an entertainment magazine; and would injure the band on account of depriving the band of its ability to control and exploit the photographs.[134]

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130. Affleck, *supra* note 54.

131. *See* Muse, *supra* note 101.

132. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413.

133. *See* Civil Assault, *supra*, note 5, at 4.

134. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 413-14 (quotations omitted) (quoting *Eastwood v. Sup. Ct. for Los Angeles County*, 198 Cal. Rptr. at 347).

Moreover, in such a situation, any defense that the paparazzi photographs were privileged as newsworthy would be defeated they were used merely to attract the public to entertainment magazines, for the magazines' commercial advantage, rather than any particular news story related to the band or its members.[135]

V. CONCLUSION

This tack could go a long way toward giving celebrities back their privacy, by targeting paparazzi's and publishers' economic incentive to hound celebrities.[136] Although it first requires celebrities to already be exploiting their identities with respect to paparazzi-esque candid photographs, many celebrities are already moving in that direction.[137] Magazines may attempt to counter this by establishing a greater connection between the photographs and actual news reporting.[138] However, the typical "they're just like us!" photographs would likely still be endangered under this scenario; celebrities might finally be able to walk down the street without practically being mugged.[139]

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135. *See id.* at 416; *Grant v. Esquire, Inc.*, 367 F. Supp. at 881.

136. *Cf.* A.B. 524 (creating an economic disincentive for publishers to offer paparazzi money for celebrity photographs).

137. *See, e.g.*, *supra* notes 99-103.

138. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d at 416 (distinguishing between real news, which is privileged, and "information [used] in the context of an . . . advertisement," which is not privileged).

139. *See, e.g.*, The Paparazzi Reform Initiative, *supra* note 3.

I, Max Kimbrough, certify that I have read the Rules Governing the Competition and agree to comply in all respects with those Rules.

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Max Kimbrough