Understanding the Shortcomings and Limitations of Current Tort Laws in Protecting Public Figures Against Invasions by the Press

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Imagine the following Hollywood hypothetical:

Polly Paparazza is out following her favorite movie star, Marilyn, around Los Angeles one evening. She tracks her to a small, intimate restaurant and waits outside for Marilyn to leave. Marilyn emerges, holding hands with a handsome, dark-haired man, and they hurriedly duck into a car before Polly has a chance to get a good look at him. Since Marilyn’s husband is blond, Polly thinks she might have just caught the famous actress cheating.

Polly tails the car and decides that she will attempt to capture a snapshot of Marilyn with her mystery man. Realizing she is being followed, Marilyn makes a quick turn down a residential street, and speeds up to 70 miles per hour to elude her tail. Polly also manages to make the turn, speeds up, and pulls alongside Marilyn’s car. She gets excited when she recognizes Dean, another married actor who also has two young children, in the passenger seat. She readies her camera. Racing down the narrow street, just as Polly is about to take the picture, Marilyn’s car hits a pothole, causing Marilyn to lose control of her car. The car jumps the curb before crashing into a large tree in someone’s front lawn.

Polly dials 911 to report the accident. Never one to pass up the opportunity to obtain an exclusive photo, she snaps some pictures of the wreck before driving away. Anxious to know whether Marilyn and Dean are okay, Polly waits down the block for some time, surveying the scene from a distance.
Right after the paramedics and tow truck clear out, a limousine passes Polly with a window partially rolled down. She catches a glimpse of Marilyn and Dean inside the car and is relieved that neither one is injured. Polly decides to keep following them, but she keeps her distance this time, and no one in the limo realizes they’re being tailed. The limo eventually pulls up to a house that Polly recognizes as belonging to Janis, a famous musician, and she sees Marilyn and Dean go inside.

Polly’s curiosity is piqued since Janis was once married to Marilyn’s husband, and there was recently a highly-publicized feud between the two women. Polly parks down the street, grabs a video camera from her trunk, and ventures off to find a spot outside where she can hopefully see what’s going on inside the house. Although the back yard is fenced in, Polly climbs a tall tree in the neighbor’s yard and finds that she has a perfect view of Janis’ living room. She sees Marilyn, Janis, and several other big-name stars smoking what looks to be marijuana. Dean, who has always had a squeaky-clean reputation and who has publicly denounced Hollywood’s indulgences and excesses, snorts what appears to be cocaine off of the coffee table. Polly turns on her camera and proceeds to record the party. Several minutes pass, and Dean collapses suddenly, going into convulsions. The partygoers frantically call the paramedics, who arrive shortly thereafter. Unable to revive Dean, the paramedics pronounce him dead at the scene.
Realizing how much her video is worth, Polly sprints back to her car, grabs her cell phone, and immediately begins calling every media outlet she can think of to solicit offers for the recording. TMZ buys the video from her for $500,000 and airs it, despite protests from Dean’s family members and other Hollywood stars.

At first blush, the above scenario seems outrageous. Unfortunately, however, public figures regularly suffer indignities identical to many of the ones outlined above. The current system intended to protect them from these types of abuses is no longer adequate in an age in which information can be collected and disseminated instantaneously. Paparazzi are essentially independent contractors, who work on spec. They go out on their own to gather photos and recordings of celebrities, subsequently shopping them around to different media outlets. Few, if any, are actually employed by television programs or magazines, which means that any internal checks the industry may once have had on the behavior of its “photojournalists” are now nonexistent. In addition, paparazzi cannot make money unless they can provide tabloids with exclusive footage. No longer does a photographer have to wait until he arrives home to upload and distribute the fruits of his labor - with the advent of wireless internet cards and smartphones, a photo can be snapped in one instant and emailed to countless media outlets in the very next. A scene from Adrian Grenier’s recent HBO documentary, *Teenage Paparazzo*¹, shows the red-carpet scene in reverse from the celebrity’s vantage point. It depicts a cluster of frenzied paparazzi pushing and shoving each other, dangling over the metal barricades, all while balancing cameras and laptops so that their footage can be dispatched to the media as they obtain

¹*Teenage Paparazzo*, directed by Adrian Grenier (Reckless Productions/JLoar/Bert Marcus Productions 2010)
it. Because the turnaround is now instantaneous, paparazzi face mounting pressure to be the first ones to snap and submit an exclusive shot. Consequently, in order to get a leg up on their competition, many have resorted to increasingly aggressive tactics to guarantee that their photos are the most exclusive and are therefore the ones chosen by producers and publishers. Los Angeles detective Jeff Dunn remarked in *People Magazine* that “over the last 12 years, we've gone from guys who sit outside the home of the mother-to-be of Michael Jackson's children to the paparazzi willing to force celebrities off the road for a photo.”

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**Galella v. Onassis: The Beginning of the End to Privacy**

One of the most famous cases involving the persistent abuse of a celebrity by a photographer is that of *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), involving paparazzo Ronald Galella and former first lady Jacqueline Kennedy Onassis. For over a decade, Galella followed Onassis and her two minor children obsessively, subjecting them to a litany of abuses and manufacturing situations that endangered their physical safety.

The suit was initially brought by Galella against Onassis and the Secret Service agents assigned to protect her and her children. Galella filed for damages and injunctive relief, alleging “false arrest and malicious prosecution and damages for, and an injunction against, the

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3 On one occasion, Galella attempted to capture a photo of John Kennedy Jr. in Central Park by jumping into his path, causing the boy to swerve his bicycle. In addition, he “interrupted Caroline 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.
interference with his business by the alleged acts of defendant Onassis in resisting his efforts to photograph her, and by the alleged acts of defendant Agents in obstructing these efforts.”

He claimed damages of $1.3 million. Onassis counterclaimed and sought an injunction and damages for “violations of her common law, statutory and constitutional rights of privacy and intentional infliction of emotional distress, assault, harassment and malicious prosecution.” The government also sought an injunction against Galella to enjoin him from obstructing the Secret Service Agents’ abilities to effectively protect Onassis’ children. The court dismissed Galella’s claims against the Agents, finding that they were immune from suit because their attempts to protect Onassis and her children were within the scope of their employment. Galella’s remaining claims against Onassis were dismissed, and the court found that he repeatedly perjured himself on the stand and concluded that “[e]vidence so bereft of truth cannot uphold any claim for relief whatever.”

The court found Galella liable to Onassis for the commission of myriad torts, including: civil assault; harassment (for subjecting her to physical contact and threats of physical contact and for persistently shadowing her in public); invasion of privacy for his “endless snooping;” tortious infliction of emotional distress for harassing them, threatening them, and denying them privacy; and for invasion of privacy, among others.

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5 Id.
6 Id.
7 Id.
8 Id. at 206.
9 Id. at 225-31
The court’s analysis of Onassis’ privacy claim\textsuperscript{10} hinged on the definition of privacy as articulated in \textit{Nader v. General Motors Corp.}, 25 N.Y.2d 560 (1970): that “[a]lthough acts performed in ‘public,’ especially if taken singly or in small numbers, may not be confidential, at least arguably a right to privacy may nevertheless be invaded through extensive or exhaustive monitoring and cataloguing of acts normally disconnected and anonymous.” \textit{Id.} at 572. The trial court also dispelled the notion that they could not offer relief to Onassis on the grounds that the constitutional right to privacy only protects individuals from governmental actions. As a governmental entity, the court stated, it was actually compelled to grant her relief because the refusal to do so would constitute a state action depriving her of a guaranteed right to privacy.\textsuperscript{11} It is also significant that the court concluded that Onassis was able to establish tortious infliction of emotional distress, since emotional distress is typically difficult to prove in celebrity cases. The court again relied on \textit{Nader} and reasoned that “where severe mental pain and anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, a remedy is available in the form of an action for the intentional infliction of emotional distress.”\textsuperscript{12} Malice could potentially be defined as “such a wanton and reckless disregard of the rights of another as is ill-will's equivalent.”\textsuperscript{13} The \textit{Galella} court ultimately concluded that by his unrelenting behavior, “Galella has insinuated himself into the very fabric of Mrs. Onassis' life and the challenge to this Court is to fashion the tool to get him out.”\textsuperscript{14} The court clearly recognized the inadequacies of existing legal remedies to protect Onassis and her children from Galella’s persistent invasions,

\textsuperscript{10} \textit{Id.} at 228.
\textsuperscript{11} \textit{Id.} at 234.
\textsuperscript{12} \textit{Id.} at 230.
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} \textit{Id.} at 225.
and it granted both Onassis and the government permanent injunctions against him because “Galella's surveillance and harassment of Mrs. Onassis has already gone on for a number of years and will continue, by his own account, for “another four or five years.””\(^\text{15}\)

The trial court’s injunction was affirmed on appeal because “Galella has stated his intention to continue his coverage of defendant so long as she is newsworthy, and his continued harassment even while the temporary restraining orders were in effect indicate that no voluntary change in his technique can be expected.”\(^\text{16}\) The court struggled to strike a balance between providing for the safety and peace of Onassis and her children and allowing Galella to continue to practice his craft without stepping on the toes of his First Amendment freedoms. Judge Timbers, however, concurring in part and dissenting in part, felt that the majority “overlooked the fact that…Galella in the past has jeopardized the lives and safety of Mrs. Onassis and her children and has done so in the teeth of previous restraining orders…deliberately and in full knowledge of the fact of his violation.”\(^\text{17}\) He clearly acknowledged that, even back in 1973 when the case was decided, the law afforded insufficient protection to victims of an unrelenting press.

II

To What Extent Would Polly and TMZ be Liable?

An analysis of the Hollywood hypothetical presented above and the potential liabilities of both Polly Paparazza and TMZ illustrates the extent to which the current civil laws aimed at protecting public figures are inadequate. Because the majority of paparazzi live and work in the state of California, for purposes of this discussion, California law is the primary focus.

\(^{15}\) Id. at 236.

\(^{16}\) Galella v. Onassis, 487 F.2d 986, 999 (2d Cir. 1973).

\(^{17}\) Id. at 1002
Though altercations between celebrities and paparazzi attempting to take their photographs have become increasingly frequent, Marilyn would likely have no legal recourse against Polly regarding the automobile chase and subsequent crash if she were to sue under a theory of assault or battery. Under the Restatement, one is liable to another for assault or battery only if he acts intentionally. For both assault and battery, he must “act intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact.”\(^{18}\) Even assuming that the vehicles that Polly and Marilyn were driving could be considered so closely connected to their persons that intentional contact between the two would be sufficiently offensive to qualify as battery or assault, Polly’s sole objective in chasing Marilyn was merely to obtain a snapshot of her and her male companion. Marilyn would find it impossible to prove that Polly acted intending to cause harmful or offensive contact. Even if she attempted to argue that Polly meant to cause an imminent apprehension of harmful contact, a court would likely dismiss her claim. While some courts have found that a vehicular collision constitutes assault or battery, they generally do so when the defendant deliberately causes a collision and manifests an unequivocal intent to harm his target.\(^{19}\) Knowing that Polly is a photographer who was following her to capture a picture, any such fear on Marilyn’s part would likely be seen as unreasonable since, although paparazzi engage celebrities in car chases regularly, few, if any, do so in order to intentionally cause harm.

\(^{18}\)Restatement (Second) of Torts § 21, § 13 (1965)

\(^{19}\)See, e.g., *State v. Jones*, 2004 WL 2425819 (Ohio App. 8 Dist. 2004), where defendant struck the victim’s idling car with a brick, and where defendant crashed her own car into the victim’s after the victim put her car in gear and attempted to flee. *See also State v. Jaynes*, 2002 WL 2009680 (Ohio App. 9 Dist.), where the court found defendant guilty of felonious assault with a deadly weapon for knowingly attempting to physically harm another by means of a deadly weapon and that an automobile constitutes a deadly weapon when the driver attempts to run someone over. *And see Smith v. State*, 316 S.W.3d 688 (Tex. App. 2010), *petition for discretionary review refused* (Sept. 22, 2010), where defendant was convicted of aggravated assault for chasing the victim at speeds in excess of 70 mph and ramming his vehicle into the victim’s several times during the chase.
Furthermore, because Polly’s car never actually collided with Marilyn’s, she would probably have a difficult time convincing a court that Polly’s chasing her rose to the level of assault.

The most famous celebrity car chase involving photographers resulted in the death of Princess Diana on August 31, 1997 and prompted a public backlash against the paparazzi. Even in this most severe instance of paparazzi misconduct, the photographers involved were only found liable for “breaching France’s privacy laws” and fined a single Euro each for their role in the princess’ death.\(^{20}\) Since then, potentially life-threatening car crashes involving celebrities and paparazzi have become commonplace. Lindsay Lohan was involved in two car crashes, and Scarlett Johansson was involved in a single crash in 2005\(^{21}\) after being chased by overzealous photographers. One of Lohan’s crashes was with photographer Galo Ramirez, who rammed the side of her vehicle while she was attempting to make a U-turn after being chased down a dead-end street. Though Ramirez was taken into custody and booked on suspicion of assault with a deadly weapon, charges were never filed because “it appear[ed] that, although the suspect was most likely driving carelessly when he collided with the victim's car, it was not an intentional assault.”\(^{22}\) Lohan herself never pressed charges against Ramirez, possibly because the district attorney had already concluded that there was insufficient evidence to show that he intended to cause her any harm. Had she done so at the time, she would probably have been limited to attempting to prove that Ramirez acted negligently in pursuing her. Yet upon hearing the facts, one would instinctively assume that he committed some sort of battery or assault, yet Ramirez


suffered no legal ramifications for creating what could have been a deadly situation. Furthermore, because the *Galella* court made it clear that the primary reason for their issuing an injunction against the photographer was on account of his persistent harassment of Onassis, a court would not likely have issued an injunction against Ramirez for a one-time offense where there is no indication that he is likely to engage in similar behavior in the future.

Though theories of assault and battery provide no cause of action in the Hollywood hypothetical, Marilyn may be able to make the argument that Polly is liable for intentional or negligent infliction of emotional distress for her actions during the car chase. Under the Restatement, “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” 23 If a court believed that Polly’s behavior rose to the level of “extreme and outrageous” and that she acted “intentionally or recklessly” to cause Marilyn severe emotional distress, Marilyn could recover damages from Polly for her mental anguish and for any injuries she sustained in the car accident. IIED, however, is traditionally very difficult to prove, and the *Galella* court suggested that the primary reason Onassis was able to successfully allege it successfully was because Galella’s constant surveillance of Onassis taught him which behaviors of his would cause her to feel threatened or scared and because he nevertheless continued to behave in a threatening manner toward her. It is unlikely that this isolated incident would be found to be part of a “deliberate and malicious campaign of harassment” such that a court would consider the requirements for IIED met. Alternatively, Marilyn could try to argue negligent infliction of emotional distress (NIED) if she was unable to prove the intent required under IIED. At a minimum, the plaintiff is required to be

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23 Restatement (Second) of Torts § 46 (1965)
within the “zone of physical danger” and fear for another person’s safety, suffer some physical trauma himself, or qualify as a bystander. In this case, Marilyn was certainly within the zone of physical danger when her car crashed, would have feared for both her own safety and for Dean’s, and may have suffered some physical trauma as a result of the crash for which Polly would be liable.

And what about the video? Upon first glance, it would seem that because Polly sold the video of Dean’s death to TMZ, which would not only be traumatic for his friends and family to watch but would completely tarnish his reputation, she could potentially be held liable by his relatives for intentional infliction of emotional distress (IIED). The two main obstacles to proving IIED under these circumstances are the requirements of “intentionally or recklessly” and “extreme and outrageous.” In selling the video, Polly only intended to make a profit. Even if she acted recklessly in distributing the video and should have known that the video would cause emotional distress to Dean’s family, the plaintiff would have a difficult time proving that her conduct was extreme and outrageous. Even in instances where the defendant does intend to cause distress and the plaintiff is subjected to threats of violence, his conduct may not rise to the level of extreme and outrageous. Furthermore, no one would be able to recover under a theory of negligent infliction of emotional distress since Polly’s taping of the video did not create a zone of physical danger in which the partygoers were placed.

Janis may be able to prevail on a claim of invasion of privacy, though intrusion upon seclusion would likely be Janis’ one and only privacy claim. One is liable for invasion of privacy where he “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

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24 Restatement (Second) of Torts § 34 (1965)
privacy, if the intrusion would be highly offensive to a reasonable person.\textsuperscript{25} Here, Polly certainly intended to intrude upon Janis’ private affairs when she climbed the tree to get a video of the party that would otherwise have been blocked by a fence. A physical trespass onto Janis’ own property is not required, and there is no question that a reasonable person would find it highly offensive to be recorded by a complete stranger in the privacy of his own home and without his knowledge or permission. Invasion of privacy also encompasses appropriation of another’s name or likeness, unreasonable publicity given to another person’s private life, and publicity that unreasonably places another in a false light before the public. Neither Polly nor TMZ could likely be accused of giving unreasonable publicity to another person’s private life since the video depicting Dean’s final moments would be not only relevant but of great interest to the public in the wake of his death. Nor does the video place Dean, Marilyn, or Janis in a false light before the public. Though the scenes depicted are at odds with Dean’s stellar reputation, they nevertheless have not been falsified, and truth provides a complete defense to a false light claim. This discussion does not address the privacy issue of appropriation of another’s name or likeness. For an analysis of misappropriation, see Elsie Washington’s seminar paper.\textsuperscript{26}

California’s Anti-Paparazzi Statute\textsuperscript{27} is a modified version of the common law invasion of privacy tort and gives a celebrity his best chance of imposing liability on a paparazzo who oversteps his bounds. The statute has three main variants under which a celebrity could establish liability: physical invasion of privacy, constructive invasion of privacy, and a provision prohibiting assault (which was recently amended to include false imprisonment) where the

\textsuperscript{25} Restatement (Second) of Torts §652(B)

\textsuperscript{26} http://www.kentlaw.edu/perritt/courses/seminar/entertainment-law-fall2010.htm

\textsuperscript{27} CA CIVIL § 1708.8, nicknamed the “Anti-Paparazzi Statute”
defendant’s objective is to capture “any type of visual image, sound recording, or other physical impression of the plaintiff.” A photographer commits a physical invasion of privacy when he knowingly trespasses with the intent to capture a visual image, sound recording, or physical impression of his subject engaging in personal or familial activity and when that invasion occurs in a manner offensive to a reasonable person. Regardless of whether there is a physical trespass, a constructive invasion of privacy occurs when a photographer attempts to capture, in a manner offensive to a reasonable person, footage of his subject engaging in personal or familial activity where the subject had a reasonable expectation of privacy if the footage couldn’t have been captured without the trespass unless visual or auditory enhancing devices were used. The statute goes on to explain, however, that familial and personal activity does not include any criminal or illegal activity.

The Anti-Paparazzi Statute also imposes hefty damages on photographers who knowingly violate its terms and on media outlets which knowingly induce their employees to do so. The plaintiff has the burden of proving that the defendant had actual knowledge of the violation at the time the footage was acquired. The photographer himself can be held liable for three times the amount of general and special damages incurred by the violation, disgorgement of all proceeds where the footage was sold for profit, and an additional civil fine ranging from $5,000-$50,000. A media outlet which directs employees to disregard the statute or airs footage that it knows was obtained illegally will also be held liable for damages and subjected to the same civil fine.

Under the statute, however, it is still unlikely that anyone involved in the Hollywood hypothetical could collect against either Polly or TMZ. Polly may be liable to Janis’ neighbor for trespass, but for little else. If Janis attempted to bring a suit against her for either physical or

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28 Id.
constructive invasion of privacy, the fact that the partygoers were using drugs would place their actions in her home outside the protected realm of personal or familial activity. Because the statute requires a conscious violation as a precursor to liability, it may also shield Polly where she was ignorant either of its existence or its components. TMZ, being an entertainment company that likely deals with legal issues on a regular basis, would probably be more versed in the law governing the collection and publication of video footage, yet they too are probably shielded from liability under the statute. Even if Janis or any of the other partygoers could successfully show that TMZ had actual knowledge that the footage was obtained in violation of the statute, it nevertheless depicts them engaging in illegal activity and is therefore not protected material under the statute. One final impediment to recovery can be found in California’s interpretation of their surveillance laws. Where a recording displays images, the court in *People v. Drennan*, 101 Cal. Rptr. 2d 584 (Cal. App. 3d Dist. 2000), found that surveillance footage only violates a prohibition on intrusion upon communication where it also contains sound. At 588.

### III

**Beyond Torts: Additional Built-In Shortcomings of the Anti-Paparazzi Statute**

Traditional common law torts like invasion of privacy, assault, and intentional infliction of emotional distress developed long before the advent of computers, the internet, and mass media. Only within the last several decades has the protection afforded by the traditional common law torts become insufficient. Not long ago, it would be difficult to imagine a situation in which one individual would want to engage another in a high speed car-chase, not intending to harm, frighten, or even make contact with him, but merely to snap a series of photographs and...
then quickly flee the scene. Information and images are now collected and distributed in ways that would have been utterly inconceivable at the time these common law torts first arose. As a result, the same laws that have been in place for decades and even centuries now permit paparazzi to get away with behavior which we instinctively know is abusive but to which a law has never been specifically tailored. Absent the ability to prove intent under the current laws, celebrities may only be able to fall back on theories of negligence and recklessness when they are interested in filing suit. A career photographer who strategically employs dangerous and underhanded tactics to obtain exclusive footage cannot possibly be incognizant of the lines he crosses in doing so, but neither negligence nor recklessness seem to accurately describe his level of mental awareness. Simply because he doesn’t intend to physically or emotionally harm a public figure does not mean that he isn’t interested in inflicting on him some measure of distress or discomfort in the pursuit of exclusive footage. Because the framework for ways in which photographers are able to invade a public figure’s comfort zone has shifted so dramatically over time, so should the framework which legislatures employ to combat the problem. Rather than attempting to shove the ever-expanding boundaries of privacy invasion into the rigid box of age-old tort law, state and federal legislatures need to retool the law in order to accommodate the advances in technology that make those invasions possible.

A popular defense of photographers, even among legal scholars who have argued that the anti-paparazzi statute is unconstitutional, is that laws restricting the movements and activities of paparazzi violate the First Amendment rights of freedom of speech and the press, but this argument overlooks the fact that, in this context, there is no actual First Amendment conflict.29 That is because it is not the type or the dissemination of information being gathered that is

objectionable. The problem, rather, is merely that the current methods of gathering information have becoming increasingly offensive and dangerous. In response to a First Amendment challenge, the Galella court reiterated the long-accepted principle that “there is no threat to a free press in requiring its agents to act within the law.”^30

While several articles have criticized the anti-paparazzi statute’s ineffectiveness, the majority focus on the often insurmountable intent requirement that generally precludes celebrities from recovering against abusive photographers. Lisa Vance’s law review article, *Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi*, does just that.\(^31\) Vance ultimately concludes that the legislature would solve the problem by lowering the statute’s liability standard to negligence rather than intent. She provides a thorough analysis of the law’s inability to adequately protect celebrities, and while a lower threshold would certainly aid in some instances, she ignores the many other ways in which the statute seems tailored to defeat a public figure’s cause of action.

Although the California statute is a step in the right direction, and the legislature clearly acknowledges that paparazzi are employing increasingly abusive tactics, it is largely ineffective. The statute is mostly superfluous in that it overlaps entirely with other laws. Where it does impose liability, a photographer will already be liable for a host of other torts. One cannot violate the physical trespass provision of the statute without instantly being liable for both the common law torts of trespass and invasion of privacy (intrusion upon seclusion). Constructive invasion of privacy, again, necessarily encompasses intrusion upon seclusion, and where visual or auditory enhancing devices are used, a photographer could be liable for violating a number of

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^30 Galella v. Onassis, 487 F.2d 986, 996 (2d Cir. 1973)

state and federal laws against eavesdropping and surveillance.\textsuperscript{32} Thus, the only real advantages that the statute confers over traditional tort laws are enhanced damages and greater fines.

Another limitation of the Anti-Paparazzi statute is that paparazzi are liable for invasions only in situations in which their targets have a “reasonable expectation of privacy.” California defines a reasonable expectation of privacy as existing only in instances where the subject does not expect to be observed by the media.\textsuperscript{33} The statute, therefore, does little to combat the most egregious offenses by the paparazzi, which tend to occur in public. Aside from breaking into, wiretapping, or planting hidden cameras in their targets’ homes and vehicles (already punishable offenses under other civil and criminal statutes), paparazzi can realistically do little to violate the statute – which they already seem to know. Said Frank Griffin, a celebrity photographer, “To actually break this law, we would have to put our cameras down, punch a celebrity in the face and then take pictures of them afterwards…No one would do that.”\textsuperscript{34} Public figures have little to be concerned about while in the comfort of their own homes, and any encounters between celebrities and paparazzi occur when the celebrity is already out being followed. Ironically, even though the statute was enacted in response to Lindsay Lohan’s encounter with Galo Ramirez\textsuperscript{35} and other celebrity car chases, the version of the statute signed into law as a result of the incident would have afforded her no protection. The encounter between Lohan and Ramirez occurred on a public street, in broad daylight, for which the statute did not fashion a remedy. A recent amendment to the statute, however, also amends the California Vehicle Code and makes it a


\textsuperscript{33} See Sanders v. American Broadcasting Cos., Inc., 978 P.2d 67 (Cal. 1999)


misdemeanor punishable by fine and imprisonment to “wilfully interfere with the driver of a vehicle or with the mechanism thereof in such manner as to affect the driver's control of the vehicle” in pursuit of visual images or sound recordings of another person for a commercial purpose.\textsuperscript{36} Again, however, in order to violate this statutory provision, a photographer would already be in violation of the California Vehicle Code, albeit subjected to much higher penalties.

Furthermore, a photographer and media outlet are only liable for selling or airing illegally obtained footage if they were actually aware at the time the footage was acquired that it was taken in violation of one or more components of the Anti-Paparazzi Statute. Though media publishers and broadcasters should be expected to keep themselves apprised of the laws affecting dissemination of information, individual photographers are unlikely to do the same. A photographer who is diligent and takes care to know the law governing his profession likely already treats his subjects with respect and is probably not going to be one who employs dangerous or invasive tactics in the first place. Rather, it is the paparazzi who already engage in objectionable behavior who are least apt to either know or care enough about the law to be aware of when they violate it. Rather than require the plaintiff to show that the defendant knowingly and intentionally violated the statute, the legislature could easily amend the California statute by substituting and objective standard that imposes liability where a reasonable photographer would have believed that his behavior violated his subject’s privacy interests.

Although the statute imposes treble damages, disgorgement, and even punitive damages when a recording is obtained illegally and with an eye toward financial gain, the reality is that even when a public figure has a cause of action, there are still many obstacles to overcome before a judgment can be granted. Conscious of the fact that they might be subjected to lawsuits, many paparazzi employ tactics which make it difficult or even impossible for public figures to

\textsuperscript{36} CA ST § 40008, amending Cal. Veh. Code § 21701.
identify them. Photographers have been known to wear disguises and to obscure their license plate numbers in order to avoid being recognized. In addition, many celebrities may simply feel that the time and effort required to press charges and are not worth what little they are likely to obtain from a lawsuit, and even those who would consider pressing charges might be “hesitant to act or complain publicly lest they be ridiculed as hypocrites for wanting to enjoy their freedom of expression while curtailing it for others.”37 Even assuming a court grants a celebrity an injunction or restraining order against a photographer, the ruling is unlikely to have a significant impact on the photographer’s livelihood where it does not halt the use of abusive tactics across the board. Few photographers employ the Galella method of fixating on a single celebrity, so a photographer against whom one celebrity procures a restraining order is free to take his abusive tactics elsewhere and can continue to profit from the footage he obtains until every last celebrity procures a restraining order against him. Even Galella, subject to injunctions and restraining orders with respect to Onassis and her family, profited freely from his photos of other celebrities.

Yet another one of the California law’s shortcomings is that it employs a “reasonable person” standard instead of a “reasonable public figure” standard. In a society where millions of people maintain blogs and social networking sites like Facebook and MySpace are ubiquitous, the type of information that the reasonable person now feels comfortable sharing with complete strangers has become increasingly more intimate. For instance, phone applications like Foursquare, Yelp, and Facebook allow users to “check in” at restaurants, theaters, and stores around town and to keep their network of friends apprised of their every move. While a perfectly reasonable Average Joe may see no harm in letting a network of friendly acquaintances know the exact GPS coordinates of the Chili’s where he is currently eating lunch, it is difficult to

imagine that any prudent public figure whose actions are under constant scrutiny would feel the same. The threshold for which information the reasonable person finds to be too intimate to share has likely become higher in recent years, such that anyone attempting to prevail on an invasion of privacy claim would need to show much more outrageous and extreme behavior on the defendant’s behalf than in the past.

Finally, legislators need to figure out a way to impose meaningful sanctions on the tabloids and media outlets themselves for choosing to publish illegally-obtained footage or snapshots. As evidenced by the Supreme Court decision in, *Bartnicki v. Vopper, supra*, 532 U.S. 514 (2001), courts are already quick to protect publishers and broadcasters from liability where they lawfully obtain illegal recordings, provided the publication is truthful.38 Here, the Supreme Court rejected the possibility that while a state may have an interest in deterring individuals from attempting to obtain illegal recordings, no such interest existed in attempting to deter its publication where the publisher legally obtained the recordings. Cases in the *Bartnicki* vein, however, do not involve celebrities.39 While some of the plaintiffs may have attained local fame or notoriety, none have belonged to that class of individuals which is traditionally subjected to systematic invasions and abuses by the press. Should a court attempt to rely on *Bartnicki*-type decisions to shield publishers from liability for broadcasting illegally obtained material, a celebrity may be able to distinguish the facts of his case from prior decisions. While a state government may not have a compelling interest in deterring the publication of illegally obtained recordings of citizens who have never before lived in the public eye, an important interest may exist when the plaintiff belongs to a class of people whose lives are relentlessly exploited by the press and when those

38 *Id.* at 529-532.

39 *See, e.g., Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679 (Cal. 2004).
photographers who obtain illegal recordings of them typically realize large profits from invading their privacy, such that they are willing to engage in increasingly risky behavior to obtain footage.

As the anti-paparazzi statute is written, media outlets are only liable when they “induce” a photographer to violate the statute, rendering the provision almost entirely irrelevant. Since virtually all paparazzi operate as independent contractors and few, if any, are actually employed by a specific media outlet, even where a photograph was obtained in violation of the statute, the photographer will be the only one exposed to liability – particularly where he does not disclose that the footage was captured illegally. When a publisher obtains illegally obtained footage but is unaware of the manner in which it was procured, the statute essentially confers on him a holder-in-due-course status, and it appears that he is free to both publish and profit from the footage. By failing to account for the way in which paparazzi and tabloids actually conduct business, the legislature provides an incentive for photographers to conceal the origin of their footage. It is not difficult to imagine how the potential to turn a significant profit from exclusive footage could outweigh what risk a photographer runs of being hauled into court by a celebrity. On the other hand, the statute simultaneously strips publishers of any incentive they might have had for attempting to investigate whether the photos they publish were obtained in compliance with the law. Were the legislature to impose a duty on media outlets to first conduct a reasonable investigation into the origin of the material it receives, publishers and broadcasters could help police the paparazzi, and some of the old internal checks that are currently missing from the industry could be restored.

Yet even if the California legislature amends the statute to impose liability on media outlets for using illegally obtained material, it only pertains to material gathered within the state.
of California. The wording of the statute strongly implies that it would be entirely permissible for a photographer to travel to New York, take steps to obtain exclusive footage, which, if taken within the state, would violate the California statute, and still be able to send that footage back to California and turn a profit. Celebrities who live in California are constantly required to leave the state to film movies, record music, give interviews, and attend events; paparazzi can easily travel as well, which seems to put the in-state limitation at odds with the purpose of the statute itself. To protect public figures whose pictures are taken outside of California but published or broadcast inside the state, the legislature should amend the statute to add a provision stating that where a photographer who procures footage as a result of actions taken outside of the state of California which, if taken within the state, would violate the statute, he will be subject to the same civil liability and fines as for those taken within the state.

Amending the in-state limitation then begs the question of which state’s law would govern in such an action against the photographer. If the legislature did amend the statute to extend liability for photos taken outside of the state, and if a photographer did travel to New York, snap a photograph of a celebrity which would have violated the Anti-Paparazzi Statute had it occurred in California, email it to a California-based publication, and receive compensation when it was published, which law would govern?

California law seems an obvious choice from a celebrity’s perspective because it affords greater protection and higher monetary awards for public figures than the laws of any other state. Since it is rare for choice-of-law to be governed by statute, courts must generally weigh a variety of considerations in deciding which forum’s law to apply. According to the Restatement (First)

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40 Factors considered by a court include: “(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and
of Conflict of Laws, “the place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.” Consequently, a celebrity wishing to sue the photographer could theoretically choose either New York law or California law. The Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984) explained that the greatest injury to a plaintiff arising from a publication “would be felt in the state in which she lives and works and in which [the publication] has its largest circulation.” At 790. Since a photographer who captures footage in violation of the Anti-Paparazzi statute is almost always committing other common law torts in the process, a celebrity who lives and works in New York could choose to sue under New York law. On the other hand, if California law is available, she could sue in California (the state in which a California-based publication would, presumably, have its largest circulation) and potentially be awarded treble damages.

As information becomes easier to collect and disseminate electronically, adverse consequences of an action taken in California may be felt not only throughout the country but also across the entire globe. As a result, it makes an increasing amount of sense to develop a federal law that targets abuses by the media and spans all fifty states. Several laws have been proposed in recent years but have failed to garner sufficient support. Though California’s Anti-Paparazzi statute provides a basic template, its chief weakness is in its failure to provide much

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41 Restatement (Second) of Conflict of Laws §6 (1971). One test often chosen by states in determining which law to apply under § 6 is the “most significant contacts test,” which provides that the law of the state which has the most significant contacts with the parties to the suit or the event in question ought to be applied. Whether significant contacts exists is determined by considering: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. *Id.* at § 145.

additional protection beyond that which already existed prior to its enactment. The statute could easily be fixed to eliminate its existing loopholes and to lessen the degree of actual knowledge and intent required to impose liability on a defendant. Due to a general rise in the number of incidents of paparazzi misconduct, the issue is a pressing one, particularly in California where the population of celebrities and paparazzi is concentrated, and the legislature ought to take greater steps to curb the paparazzi’s abuse of public figures by fashioning a law that directly responds to the media’s most flagrant offenses.