

Chapter 3

JOURNALISTS' RIGHT OF PRIVACY PRIMER

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The law of invasion of privacy is a little bit like a new computer system introduced into a workplace--some people love it, some people fear it, and few people really understand it. The public, on the whole, loves the idea that legal remedies are available for invasions of personal privacy. Working journalists often fear the implications on their work of a broad privacy concept. And often neither side fully understands privacy law, as it has evolved over the years.

Just what are the general principles of the right of privacy as it relates to journalists and writers?

The Different Laws Of Privacy

Privacy is not a separate, distinct, established area of law like contracts, property or securities law. It is more of a name in search of a principle or, more accurately, several different principles, each utilizing the same attractive name. The right of privacy, for example, is often used in political debate as shorthand for the rights of personal reproductive freedom underlying *Roe v. Wade* and related decisions relating to abortion, contraception, and other sexual and child-bearing-related issues. The terminology comes from Justice William O. Douglas's opinion in a forerunner to *Roe v. Wade*, in which he observed that from many enumerated constitutional rights he detected a "penumbra" of a right of personal integrity and privacy.¹

The phrase *right to privacy* is used almost as often in the context of consumer affairs, particularly relating to the desire of consumers to limit or control personal information that is recorded on mailing lists, credit reports, and business data banks. Laws that require notification of consumers when personal data stored in databases is lost are examples. These privacy issues, while important, are quite different from the privacy concerns most relevant to the media business.

Finally, even the media-related right of privacy contains disparate concepts. Journalists are usually taught that there are four prongs to the right of privacy, as it affects them--even though one of those four branches (sometimes known as "appropriation" or the "right of publicity") relates to matters that are usually *not* desired to be kept private by anyone. And other important laws relating to privacy as it affects the media are not included in the standard four branches.

The difficulty in understanding the media privacy torts can be overcome, somewhat, by focusing on two of the primary things journalists do: gather and report the news. The right of privacy relating to media activities really has two entirely separate branches: one for intrusions that occur during the *news-gathering* process, and one for privacy violations caused by *publications* themselves.

News-Gathering-Related Legal Issues

News-gathering activities may violate a person's right of privacy if the journalist unreasonably intrudes (physically, electronically, or otherwise) upon an area in which that person has a reasonable expectation of privacy.

Trespass

An obvious example would be trespassing. Entering into another person's home, without permission, is an unlawful trespass. The owner presumptively has a reasonable expectation of privacy in his own home. Criminal or civil sanctions can be brought against trespassers, even if no specific damage can be attributed to the trespass.

The alleged trespasser may defend himself by demonstrating consent, either explicit or implicit. For example, a reporter entering into a business that is open to the general public can generally assume that the business is open to all persons and all activities (including newsgathering)—but that assumption may be dispelled, by signs, verbal warnings, or other circumstances. The context and circumstances are always important. For example, it may be a stretch to assume that photography for news purposes is permitted in inside sections of a hospital or a medical office, just because it was possible to walk into those areas.

Similarly, consent (or absence of a reasonable expectation of privacy) may be implied under the circumstances, such as property that has traditionally been open to the public. For example, in a so-called ambush interview occurring on business property open to the public, the danger of a trespass violation usually begins only after the business owner overcomes his

surprise from the ambush and utters the magic words, “Get off my property!”²

Until the 1990s, many news organizations participated in “ride-alongs” with law enforcement officials, and assumed that when a reporter accompanies police to a crime scene on private property, the consent of the police to the reporter’s presence would constitute implied consent or official authorization to what would otherwise be a trespass. While a few authorities supported that position,³ the U.S. Supreme Court took a different view in *Wilson v. Layne*,^{3a} holding that the authority of police under a search warrant to enter a home did not give them the right to bring reporters along, too.

Intrusion

Trespassing has been against the law for ages and generally is not classified as part of the law of privacy. But the modern tort of intrusion, usually recognized as the first of the four branches of the law of privacy as it relates to the media, is nothing but trespass law updated to the age of potentially intrusive devices. The techniques of intrusion include hidden cameras, hidden tape recorders, parabolic microphones, and simple human deception. Whatever the means, an intrusion occurs when a journalist breaches a news subject’s (or bystander’s) reasonable expectation of privacy.

Practicalities override technicalities in this area. To determine if an intrusion violation has occurred, it is often necessary to examine the totality of a situation and what is practically understood among the parties. For example:

Even if a news subject invites a reporter into his house or business, an intrusion may nonetheless occur if the reporter uses a concealed camera or recording device during the consented-to interview. In one such case, a court held that the subject’s consent extended only to the face-to-face interview, not the concealed taping and filming, which the court considered unlawful intrusions.⁴

Even if a journalist never trespasses on a subject’s property, an intrusion might occur if he or she obtains a story by intrusive prying with telephoto lenses or parabolic microphones. The issue in such cases is whether, in the circumstances, the devices breached the subject’s reasonable expectation of privacy.

Even in a public place, intrusion can occur if inappropriate cameras, lights, or techniques are used. A court found a violation, for example, when a television crew, with film rolling and lights glaring, barged uninvited into a dark restaurant, prompting many customers to leave.⁵

But a concealed filming even in a private place may not constitute an intrusion, depending on the circumstances. In an unusual Illinois case, an undercover police officer was surreptitiously filmed in a massage parlor. Because he was on duty and because of a warning he received but did not believe, the court found he had no reasonable expectation of privacy.⁶ Some journalists have argued that their intrusions should not be considered unlawful because of their news-gathering purpose. But arguments like this, based either on the First Amendment’s provision for freedom of the press or the “necessity” for reporters to record or film interviews in order to protect themselves, have so far been rejected by the courts.⁷

Surveillance

Extended surveillance of a news subject--a technique seen more in movies than in real life, but occasionally used by investigators and journalists--is usually not considered an invasion of privacy. The test here is simply whether the surveillance is conducted in a reasonable and unobtrusive manner. For example, if the surveillance was conducted in such a way as to be deliberately bothersome to the subject and apparent to others with whom he or she associated, it might be considered an unlawful intrusion.⁸

Recording of Conversations

Both federal and state statutes regulate electronic eavesdropping, including tape-recording of conversations. Although these laws are not taught as part of the traditional four-part media privacy tort, they are among the most important privacy laws affecting journalists.

The federal eavesdropping statute is generally considered a “one-party-consent” statute. That is, if one party to a conversation (e.g., the reporter) consents to recording it, it is lawful to record it even without the other party’s consent.⁹ However, the federal statute and some state statutes also ban concealed recording if the person doing the recording had a criminal or tortious purpose.¹⁰ Some creative plaintiffs have claimed that journalists who recorded their conversations did so as part of a tortious scheme--a scheme to libel them. So far, courts have rejected this argument, and allowed journalistic recordings under the federal law.¹¹

State laws present a more serious problem, because 11 states, including some large and important states such as California, Illinois, and Florida, have two-party-consent eavesdropping statutes. All parties to a conversation must consent, or the conversation cannot be recorded.¹² The Illinois eavesdropping statute is part of the state criminal code, and violations may subject violators to both criminal penalties and civil lawsuits. It effectively prohibits recording of telephone conversations or other concealed tape-recording in the state.¹³ Missouri’s eavesdropping statute allows recording with the consent of only

one party,¹⁴ although there may be a special two-party consent requirement when a wireless microphone is used.¹⁵

All of the news-gathering-based privacy claims--trespass, intrusion, and eavesdropping--require serious attention by the media. In each case, the law allows imposition of damages and penalties even where the claimant may not be able to prove any out-of-pocket loss or damage.

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Some facts about people are so intimate, embarrassing and private, or so misleading and offensive, that they should not be published. That proposition, at any rate, is the foundation of the law relating to publication-based right of privacy claims.

Publication-Related Violations

Publication-related privacy violations are of broader concern than the news-gathering-related privacy claims, which generally apply only to journalists. They affect all writers who write truthful accounts about real people. The two key publication-related privacy torts are public disclosure of private facts and false light.

Public Disclosure of Private Facts

This tort is designed to protect individuals from the embarrassment that would result from public disclosure of intimate and offensive--but true--facts about themselves. It is unusual, if not unique, in publications law in that it imposes sanctions on truthful and non-misleading publications.¹⁶

The private facts tort comes closest of all the privacy-based legal claims to most people's ordinary understanding of privacy. It is based on the premise that certain information about a person is so intimate or offensive, and of so little legitimate public interest and concern, that it can and should be removed totally from public discourse.

The danger in this tort, however, stems from this very subjectivity. It requires courts (and juries) to make difficult judgments as to the offensiveness of the publication and the *legitimacy* of the public's interest in it. Although courts and juries are instructed to follow the standard of the sensibilities of *a reasonable person*, this standard merely emphasizes the inherent subjectivity.

One of the leading private facts cases--and still one of the best illustrations of the concept--is a Missouri case, *Barber v. Time*.¹⁷ It arose when a wire service learned that Dorothy Barber, a compulsive overeater, had been admitted to General Hospital in Kansas City. A reporter and photographer visited Mrs. Barber in her hospital room, interviewed her, and took her photograph--against her consent. *Time* magazine picked up the story and published it. *Time*'s story, headlined "Starving Glutton," treated Mrs. Barber's affliction humorously, referring to the candy bars she ate as she described her hunger and inability to stop eating. A photo ran with the story, above the cutline, "Insatiable-Eater Barber: She Eats for Ten."

Mrs. Barber sued *Time* and won. The judgment was appealed to the Supreme Court of Missouri, which, in 1942, grappled with the relatively new concept of the private facts tort. The Court upheld the jury verdict, reasoning that facts and information about a person's medical treatment lay at the core of the right to privacy. And the court had little difficulty in determining that the photographs of Mrs. Barber, taken without her consent while she was ill and in bed for medical treatment, were also well within her right of privacy.

Later cases have applied the private facts tort in many other fact situations, but disclosures about a person's medical condition and treatment continue to be one of its prime applications. Plaintiffs have successfully sued over disclosures about such things as their mental retardation, use of plastic surgery, and participation in in vitro fertilization. Similarly, photographs of a person in an embarrassing state of undress, disclosures of a person's homosexuality, and reports of personal failures of private persons may all be recognized as private facts violations.¹⁸

Courts are given broad discretion in making the two key determinations in a private facts case: whether the publication is highly offensive to a reasonable person and whether it is a matter of legitimate concern to the public. Even defenses, like consent, are susceptible to different interpretations. Consequently, few, if any, generalizations can be made, and it is often difficult to predict whether a publication will cause a private facts violation.

For example, in a case from St. Louis, a court recognized a private facts case brought by a couple who were filmed at a reunion for participants in a hospital's in vitro fertilization program, even though the reunion was held in public and a television station was invited.¹⁹ Yet the disclosure of the homosexuality of Oliver Sipple, who saved President Ford's life during an assassination attempt, was held to be a matter of legitimate public concern, even though he kept his sexual preference private and it had nothing to do with the actions that brought him into the limelight.²⁰

False Light

This tort is designed to cover published statements that give an inaccurate and offensive picture of a person. As with private facts, false light is measured by what is highly offensive to an ordinary person. Private facts claims are based on *truthful* publications that are so offensive; false light deals with *false* publications that are so offensive.²¹

One problem with false light is that it is often used as a privacy-law analog to libel. Sometimes courts permit this, not

only confusing two much different concepts but also disregarding the constitutional safeguards and defenses that have been imposed in libel cases. This has not been a problem in Missouri since 1986, however, when the Supreme Court of Missouri expressly prohibited use of false light claims in situations of classic defamation.²²

In *Meyerkord v. The Zipatoni Co.*, the Missouri Court of Appeals for the first time recognized the false light tort. In *Meyerkord*, the plaintiff claimed he had been put in a false light by being listed as responsible for a website that he did not in fact create or control. The Court of Appeals held that this assertion fit the opening left by Sullivan for a “classic case” of false light. The court found the tort potentially appropriate for situations where a false but non-defamatory statement is sufficiently serious “that serious offense may reasonably be expected to be taken by a reasonable person in his or her position.” The court added that the existence and widespread use of the Internet also factored into its decision to recognize the false light tort: “[W]e note that as a result of the accessibility of the internet, the barriers to generating publicity are quickly and inexpensively surmounted. Moreover, the ethical acceptability of certain discourse have been diminished. Thus, as the ability to do harm grows, we believe so must the law’s ability to protect the innocent.”

The combination of *Meyerkord* and *Sullivan* leaves Missouri with what one may call “classical” false light—not recognized in classic defamation situations, but recognized in classic false light situations. The situations most likely to lead to false light include publications placed in an offensive context, and publications making a false but favorable attribution.

Placement of a truthful publication in a highly offensive context may constitute false light. The classic case involved a cute story about a trained pig. Nothing was wrong or inaccurate about the story—but the woman involved found it highly offensive for the story to be placed in *Chic* magazine, a sex publication, amid stories of bizarre sexual exploits.²³

Statements that are praiseworthy but false also seem to fall within classic false light. Perhaps not surprisingly, these cases arise infrequently. In one case, Warren Spahn sued over an article that incorrectly credited him for many good works.²⁴ Claims like this are most likely when the credit and the person credited just don’t fit—for example, a statement praising a liberal *Daily Kos* columnist for supporting the Bush-Cheney foreign policy.

Other Publication-Related Claims

One other kind of publication-related claim is sometimes classified as a “privacy” claim, although it really has little to do with privacy. These cases involve use of a person’s name, photographs, or other personal attributes for commercial purposes and are known variously as “appropriation,” “commercialization,” or “right of publicity” claims. The essence of these claims is really the right of the person whose name, photograph, or other attribute is used to control and profit from the commercial use of these attributes (which, of course, are not private, embarrassing, or offensive). Hence, these claims are more analogous to claims of intellectual property rights than to the right of personal privacy. They are covered in Chapter 10, Use of Intellectual Property in the Media.

Endnotes

1. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
2. *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D. N.Y. 1982), *aff’d in relevant part*, 801 F.2d 46, 13 Media L.Rptr. 1369 (2d Cir. 1986).
3. *Florida Publishing Co. v. Fletcher*, 340 So.2d 914, 2 MEDIA L.RPTR. 1088 (Fla. 1977) and *Wood v. Fort Dodge Messenger*, 13 Media L.Rptr. 1610 (Iowa Dist. Ct., Humbolt Co. 1986); *but see Ayeni v. CBS Inc.*, 848 F. Supp. 362, 22 MEDIA L.RPTR. 1466 (E.D. N.Y. 1994), *aff’d in part, Ayeni v. Mottola*, 35 F.3d 680, 22 Media L.Rptr. 2225 (2d Cir. 1994).
- 3a 526 U.S. 603, 119 S.Ct. 1692 (1999).
4. *Dietemann v. Time, Inc.*, 449 F.2d 245, 1 MEDIA L.RPTR. 2417 (9th Cir. 1971).
5. *Le Mistral, Inc. v. Columbia Broadcasting Sys.*, 61 A.D.2d 491, 402 N.Y.S.2d 815, 3 MEDIA L.RPTR. 1913 (1978).
6. *Cassidy v. American Broadcasting Cos.*, 60 Ill.App.3d 831, 377 N.E.2d 126, 3 MEDIA L.RPTR. 2449 (1978).
7. *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723, 3 MEDIA L.RPTR. 1317 (Fla. 1977).
8. *McLain v. Boise Cascade Corp.*, 593 P.2d 343, 346 (Ore. 1975).
9. 18 U.S.C. §§ 2510-2520.
10. 18 U.S.C. § 2511(2)(d).
11. *Boddie v. American Broadcasting Cos.*, 881 F.2d 267, 16 MEDIA L.RPTR. 2038 (6th Cir. 1989).
12. See Francis J. Flaherty, Rules Unclear on Single-Party Taping, Nat’l L.J., Jan. 23, 1984.
13. 720 Ill. Comp. Stat. 5/14.
14. Sections 542.400-542.424.
15. Section 542.402.1(2).
16. See generally Diane Zimmermann, *Requiem for a Heavyweight: A Farewell to the Warren and Brandeis Privacy Tort*, 68 CORNELL L. REV. 291 (1983).
17. 159 S.W.2d 291, 1 Media L.Rptr. 1779 (Mo. 1942).
18. *Deaton v. Delta Democrat Publishing Co.*, 326 So.2d 471 (Miss. 1976) (mental retardation); *Vassiliades v. Garfinkel’s*, 492 A.2d 580, 11 Media L.Rptr. 2057 (D.C. 1985) (use of plastic surgery); *Y. G. v. Jewish Hospital of St. Louis*, 795 S.W.2d 488 (Mo. App. 1990) (participation in in vitro fertilization); *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So.2d 474 (1964) (photographs of a person in an embarrassing state of undress).
19. *Y. G. v. Jewish Hospital of St. Louis*, above.
20. *Sipple v. Chronicle Publishing Co.*, 154 Cal.App. 3d 1040, 201 Cal.Rptr. 665, 10 Media L.Rptr. 1690 (1984).
21. See generally Diane Zimmermann, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. Rev. 364 (1989).
22. *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 12 MEDIA L.RPTR. 2187 (Mo.banc 1986).
23. *Braun v. Flynt*, 726 F.2d 245, 10 MEDIA L.RPTR. 1487 (5th Cir. 1984).
24. *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840, 30 ALR 3d 196 (1967).