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## Digital Photography and the Internet, Rethinking Privacy Law

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# DIGITAL PHOTOGRAPHY AND THE INTERNET, RETHINKING PRIVACY LAW

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## I. INTRODUCTION

Every day it gets easier to get in touch with someone. Not only do most people have phones with them at all times, but many people, with the help of Personal Digital Assistants (PDA's) such as Palm Pilots and Blackberrys, have instant access to the Internet. Almost everyone is regularly connected to the internet; even my technologically challenged mother sends and receives digital photographs. International Data Corporation, a computer industry consultant, estimates that there were 8.5 million camera phones in the United States in 2003, twenty-six million in 2004, and that in 2006, 80% of all mobile phones will have cameras in them, and all will have Internet access.<sup>1</sup> Currently, there are greater than seventy million digital cameras in the United States. Further, the cost of digital cameras and camera phones continues to decline, while at the same time, the devices get smaller and better. With the proliferation of such amazing technology, the opportunity the average person has to take a picture of another average person at any time continues to grow; indeed this is the purpose of the cameras and is how the devices are marketed. In turn, we are less anonymous and necessarily more cautious of what we do in public.

In the fall of 2000, Reggie Love enrolled at Duke University on a football scholarship and later walked on to Duke's highly touted basketball squad.<sup>2</sup> As a high school All-American he was one of the most highly sought-after athletes in the country.<sup>3</sup> In the early part of 2003, Love went to Chapel Hill, North Carolina for a night on the town.<sup>4</sup> He got very drunk and eventually ended up at a fraternity house.<sup>5</sup> After Love fell asleep in the fraternity house, some young men drew on him with a magic marker and pressed their genitalia against his face.<sup>6</sup> Not surprisingly, someone with a camera took a picture of him. Also not surprising, Love's pictures were published on the Internet and widely dissemi-

<sup>1</sup> John P. Mello Jr., [http://bostonworks.boston.com/globe/articles/041104\\_camera.html](http://bostonworks.boston.com/globe/articles/041104_camera.html).

<sup>2</sup> SportsIllustrated.com, Duke's Love Faces Underage DWI, [http://sportsillustrated.com/basketball/college/news/2002/03/06/duke\\_love\\_ap/](http://sportsillustrated.com/basketball/college/news/2002/03/06/duke_love_ap/) (last visited Sept. 15, 2005) (Love also was arrested for DWI about five months earlier).

<sup>3</sup> TicketsofAmerica.com, Green Bay Packer Tickets, [http://www.ticketsofamerica.com/nfl\\_greenbay](http://www.ticketsofamerica.com/nfl_greenbay) (last visited Sept. 15, 2005).

<sup>4</sup> Chapel Hill, NC, is the home of The University of North Carolina, and is only twelve miles from Duke University. The UNC v. Duke basketball rivalry is considered by many to be the fiercest rivalry in college sports.

<sup>5</sup> See TruthaboutDuke.com - Debunking Duke, <http://www.truthaboutduke.com/encyc.php?encycid=7> (last visited Sept. 3, 2005); [www.jodysgarage.com/dook2.htm](http://www.jodysgarage.com/dook2.htm); see also Jim Rome, [http://www.jimrome.com/archives/01042005/article/article\\_2.html](http://www.jimrome.com/archives/01042005/article/article_2.html) (discussing Loves humiliating experience in Chapel Hill).

<sup>6</sup> *Id.*

nated via email.<sup>7</sup> Soon after the incident, Love was suspended from the Duke basketball team for unnamed disciplinary reasons.<sup>8</sup> I received a copy of the email while living in Wyoming, 2,118 miles away.

In 1999, Catherine Bosley, a newscaster at the Youngstown, Ohio CBS affiliate, had open chest surgery to repair a heart defect.<sup>9</sup> In 2002, she was diagnosed with a rare lung disease that was causing her to slowly suffocate.<sup>10</sup> After several surgeries to biopsy and attempt to fix her lung problem, the doctors came up with a workable medicinal remedy.<sup>11</sup> Relieved that she was not dying, Bosley and her husband took a much deserved vacation to celebrate what was, for her, a celebration that she was going to live.

While on vacation, Bosley and her husband went to a nightclub where she, thinking she was amid the anonymity of strangers, entered a wet t-shirt contest.<sup>12</sup> During the contest she took off all of her clothes.<sup>13</sup> Unbeknownst to Bosley, someone filmed the contest and almost a year afterword, on Christmas Eve 2003, someone posted the pictures and video on the Internet.<sup>14</sup> Further, at least two different companies used the images in videos and DVD's.<sup>15</sup> The images of Bosley are coupled with other images of women masturbating and participating in lesbian sex.<sup>16</sup>

In hindsight, both Mr. Love and Mrs. Bosley would likely have forgone their nights on the town in order to spare them the later humiliation. As a result of the publication of these images, Mrs. Bosley lost her job as a newscaster and Mr. Love allegedly was suspended from his basketball team. On first impression, many of us would react that in some way both Mr. Love and Mrs. Bosley got what they deserved. Not that they deserved to be humiliated on the Internet but that they arguably did reckless things and should have known better. But did they really deserve to have everyone see them in what was not their finest moment? My purpose in telling the story of the two digital camera victims is not to further the "press" that the two have received but rather to show how quickly a brief lapse in judgment can permanently destroy someone's reputation.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Connie Schultz, *Bare Facts Don't Tell Whole Story*, PLAIN DEALER, Jan. 1, 2004.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Bosley received an anonymous phone call that Christmas Eve saying, "You prissy little [expletive]. You're finished, you're done!" *Id.* An October 2004 "Google" search of "Catherine Bosley" resulted in greater than 100 hits.

<sup>15</sup> *Bosley v. WILDWETT.COM*, 310 F. Supp. 2d 914, 917 (N.D. Ohio 2004).

<sup>16</sup> *Id.*

Courts are loathe to find violations of privacy when the alleged invasion takes place in public, regardless of whether the plaintiff suffers a lapse in judgment. In *Jarrett v. Butts*, a Georgia court granted summary judgment for the defendant after a fourteen year-old girl was forced to sit in a chair with her legs open and pose for a picture taken by a teacher.<sup>17</sup> The court held that there was no “physical intrusion analogous to trespass, as is required to recover for an intrusion upon seclusion”<sup>18</sup> because the “photographs were taken in the classroom and hallway of a school building during regular school hours when other students were present . . . .”<sup>19</sup> In *Jackson v. Playboy Enterprises, Inc.*, the court dismissed a case where three boys’ pictures were taken without consent on a public sidewalk while they were talking with a policewoman.<sup>20</sup> The photographs of the boys were published alongside nude photographs of the policewoman after she posed for Playboy magazine.<sup>21</sup>

The purpose of this paper is to analyze the laws regarding invasions of privacy with an eye toward modern, everyday technology. My proposal is to describe how the right of privacy, as initially invented and later written into the Restatement (Second) of Torts, is inapplicable to modern threats to privacy.<sup>22</sup> More particularly, this Note will focus on the inadequacy and misguided nature of damages when a private citizen’s privacy has been violated. Under the current law, people with video cameras, cell phones, or personal computers are not deterred by the repercussions they could face, should they publish or disseminate private information.

Part II of this Note discusses the history and current state of privacy law, as well as the remedies for violations of our right to privacy. In part III, I will compare invasions from the past (specifically those that gave rise to or occurred about the time that the tort was being invented) with those of today and will discuss how the remedies of old are not completely applicable to some of today’s privacy invasions. Part IV will discuss several possible solutions to the problems we face as these technological advances meaning are further integrated into our lives, ultimately concluding that the best solution is to redefine privacy.

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<sup>17</sup> *Jarrett v. Butts*, 379 S.E.2d 583 (Ga. Ct. App. 1989).

<sup>18</sup> *Id.* at 704.

<sup>19</sup> *Id.*

<sup>20</sup> *Jackson v. Playboy Enters. Inc.*, 574 F. Supp. 10 (S.D. Ohio 1983).

<sup>21</sup> *Id.*

<sup>22</sup> RESTATEMENT (SECOND) OF TORTS § 652A (1977).

## II. BACKGROUND

## A. THE RIGHT OF PRIVACY

Amid concerns that new technologies such as the camera, the printing press, and the telephone would lead to intrusions in to people's private lives,<sup>23</sup> Louis Brandeis and Samuel Warren "invented" the right of privacy in an 1890 Harvard Law Review article.<sup>24</sup> Warren and Brandeis recognized that in the United States, people wanted, and needed, "to be let alone."<sup>25</sup> In creating the right of privacy, the authors generated a set of guidelines for the courts and legislatures to follow: (1) "The right to privacy does not prohibit any publication of matter which is of public or general interest,"<sup>26</sup> (2) "The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel,"<sup>27</sup> (3) "The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage,"<sup>28</sup> (4) "The right to privacy ceases upon the publication of the facts by the individual, or with his consent,"<sup>29</sup> (5) "The truth of the matter published does not afford a defence,"<sup>30</sup> (6) "The absence of 'malice' in the publisher does not afford a defence."<sup>31</sup>

The authors stated that the right was to "protect the privacy of private life."<sup>32</sup> Further, "[when] a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn."<sup>33</sup> Because the person and character of that person would be important in determining what could and what could not be published, Warren and Brandeis stated that the right must have a certain "elasticity" such that courts could "take into account the varying circumstances of each case . . . ."<sup>34</sup>

Initially, courts did not readily embrace the proposed tort. In *Roberson v. Rochester Folding Box Co.*, the New York Court of Appeals dismissed an invasion

<sup>23</sup> Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1085 (1997).

<sup>24</sup> Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 214.

<sup>27</sup> *Id.* at 216.

<sup>28</sup> *Id.* at 217.

<sup>29</sup> *Id.* at 218.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 215.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

of privacy suit by a woman whose picture had been used without her consent in a flour advertisement.<sup>35</sup> The court held that the right of privacy did not exist.<sup>36</sup>

After *Roberson*, New York passed Section 51 of the Civil Rights Law, which created a civil rights action for “[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without written consent.”<sup>37</sup> Just three years after the *Roberson* decision, in *Pavesich v. New England Life Insurance Co.*, the Supreme Court of Georgia created a common law right of privacy when the defendant used the plaintiff’s name and picture, without consent, to advertise insurance services.<sup>38</sup> The *Pavesich* court noted that personal liberty includes the freedom from physical restraint and “the right to be let alone.”<sup>39</sup> The court thought that people had the right to order their lives as they saw fit, so long as they did not violate the rights of others.<sup>40</sup>

Following in the footsteps of Warren and Brandeis, Dean Prosser attempted to narrow the right of privacy into four different torts. These include: (1) intrusions upon the plaintiff’s solitude, (2) public disclosure of private facts, (3) publicity that places another in a false light, and (4) appropriation of another’s name or likeness for one’s own advantage.<sup>41</sup> The American Law Institute later adopted Prosser’s view in the Restatement (Second) of Torts, section 652A (1977).<sup>42</sup>

The Restatement establishes liability when there is a publication of the private life of another, where (1) a reasonable person would find the publicized material offensive and (2) it is not a matter of legitimate public concern.<sup>43</sup> “The Restatement draws the line when publicity ceases to be the giving of information to which the public is entitled, and becomes no longer appropriate for public

<sup>35</sup> *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (noting that if action were to be taken in the general area of privacy, the legislature, not the courts, should act). Despite *Roberson*, courts have generally recognized the need for a general right of privacy. See George P. Smith, *The Extent of Protection of the Individual’s Personality Against Commercial Use: Toward a New Property Right*, 54 S.C. L. REV. 1, 8 n.28 (2002).

<sup>36</sup> *Roberson*, 64 N.E. at 443, 444.

<sup>37</sup> N.Y. CIV. RIGHTS LAW § 51 (McKinney 2003).

<sup>38</sup> *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>39</sup> *Id.* at 71.

<sup>40</sup> *Id.* at 71, 73.

<sup>41</sup> WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS ch. 20 (2d ed. 1955).

<sup>42</sup> RESTATEMENT (SECOND) OF TORTS § 652A (1977). The Restatement classifies four different causes of action as invasion of privacy:

The right of privacy is invaded when there is (a) unreasonable intrusion upon the seclusion of another . . . or (b) appropriation of the other’s name or likeness . . . or (c) unreasonable publicity given to the other’s private life . . . ; or (d) publicity which unreasonably places the other in a false light before the public . . .

*Id.*

<sup>43</sup> *Id.*

concern, that is, when publicity transforms into an unreasonable and sensational prying into private lives for its own sake.”<sup>44</sup>

The first of these groups is that in which the complainant’s solitude has been invaded. This would include an invasion into someone’s house or private space.<sup>45</sup>

The second category is implicated when private facts are publicly disclosed. Frequently this involves situations in which the facts disclosed were from prior times in the plaintiff’s life. In *Melvin v. Reid*, the plaintiff, a former prostitute, adult film star, and accused murderer (she was acquitted of the crime), sued defendants after they made a movie, “The Red Kimono,” which detailed her “sordid former life.”<sup>46</sup> While not recognizing this as an invasion of her right of privacy per se, the court held that since “eight years before the production of [the movie, plaintiff] had abandoned her life of shame, had rehabilitated herself, and had taken her place as a respected and honored member of society,”<sup>47</sup> the defendants had no right to destroy her new good name, for “no other excuse than the expectation of private gain . . . .”<sup>48</sup>

The third category is that in which publicity places the complainant in a false and public light. *Peay v. Curtis Publishing Co.*,<sup>49</sup> an article in *The Saturday Evening Post*, which depicted cab drivers as “ill mannered, brazen, contemptuous of patrons, and dishonest . . .”<sup>50</sup> used a photograph of the plaintiff. The court held that a “publication of a photograph of a private person without his sanction is a violation of this right. An exception necessarily exists in respect to individuals who by reason of their position or achievement have become public characters.”<sup>51</sup>

The final category involves situations in which unauthorized use of a person’s persona has been used for profit. This is also known as the right of publicity.<sup>52</sup> In *Midler v. Ford Motor Co.*, Bette Midler sued Ford and Young & Rubicam, Ford’s advertising agency, for using a sound-alike voice to endorse Ford automobiles.<sup>53</sup>

<sup>44</sup> Darby Green, Note, *Almost Famous: Reality Television Participants as Limited-Purpose Public Figures*, 6 VAND. J. ENT. L. & PRAC. 94, 96 (2003).

<sup>45</sup> See *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (finding an invasion of privacy where a man intruded upon a woman while she gave birth).

<sup>46</sup> *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931).

<sup>47</sup> *Id.* at 93.

<sup>48</sup> *Id.*

<sup>49</sup> *Peay v. Curtis Publ’g Co.*, 78 F. Supp. 305 (D.D.C. 1948).

<sup>50</sup> *Id.* at 307.

<sup>51</sup> *Id.* at 309.

<sup>52</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability. . . .” *Id.*

<sup>53</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460, 7 U.S.P.Q.2d (BNA) 1398 (9th Cir. 1988). See also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 23 U.S.P.Q.2d (BNA) 1583 (9th Cir. 1992) (finding a violation of right of publicity where defendant produced a robotic doll resembling popular



The court held that this was a violation of Midler's right to publicity, that is, her right to profit from her unique singing voice.<sup>54</sup>

Certain limitations apply to the right of privacy. The publication must be aimed at the public in general, or at least to a large number of people.<sup>55</sup> Further, the right is a personal one and does not survive the infringer's death. Similarly, suit cannot be brought by a next of kin or next friend, unless of course that person's privacy has also been invaded.<sup>56</sup> Finally, there is no need to show any special damages.<sup>57</sup> At least the first three prongs are focused on mental suffering, and since truth is generally a prerequisite for a valid claim, it is not a defense.<sup>58</sup>

In a Restatement illustration, the ALI gives an example where not one but all four categories of the right of privacy are violated.<sup>59</sup> While this may not be the normal case, it is not unlikely that at least two of the different categories of rights could be violated at one time. As such, courts are generally unwilling to classify the tort into one of Prosser's or the Restatement's four groups.<sup>60</sup> Because of these blurry lines, courts continue to struggle in trying to find a balance between personal privacy and the First Amendment freedom of the press.<sup>61</sup>

The law must find a balance between the right to privacy and the media's right to publish newsworthy information. The conflict is obvious since one of the main defenses to a suit for publication of private information is newsworthiness.<sup>62</sup> However, individuals frequently define newsworthiness differently depending on their perspective. For example, in *Melvin*, the court dismissed a defense of newsworthiness by noting that since eight years had passed since the plaintiff had stopped being a prostitute, the movie made about her life ceased being newsworthy.<sup>63</sup>

Most importantly for this Note, almost all courts, and indeed Dean Prosser himself, agree that no actionable invasion of privacy can occur in a public place.<sup>64</sup>

television game show personality).

<sup>54</sup> *Midler*, 849 F.2d at 463.

<sup>55</sup> PROSSER, *supra* note 41, at 641.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 642.

<sup>58</sup> *Id.*

<sup>59</sup> See RESTATEMENT (SECOND) OF TORTS, § 652A, illus. 1 (1977) ("A breaks and enters B's home, steals a photograph of B, and publishes it to advertise his whiskey, together with false statements about B that would be highly objectionable to a reasonable man."). A would be liable to B for intrusion (§ 652B), appropriation of B's likeness (§ 652C), giving publicity to B's photograph (§ 652D), and for violating B's right of publicity (§ 652E). *Id.*

<sup>60</sup> See Smith, *supra* note 35, at 10.

<sup>61</sup> See Green, *supra* note 44, at 96.

<sup>62</sup> *Id.*

<sup>63</sup> See *Melvin v. Reid*, 297 P. 91, 94 (Cal. Dist. Ct. App. 1931).

<sup>64</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

This is to say that the moment we walk out the front door of our houses, we can have no legitimate expectation of privacy. We assume the risk of having our picture taken, if and when we decide to brave the outside world.

To demonstrate this premise, Prosser used the case of *Gill v. Hearst Publishing Co.*<sup>65</sup> The case involved a suit by a couple whose picture was taken at a Los Angeles farmers' market as the couple ate ice cream with their arms around each other.<sup>66</sup> Despite its earlier ruling that this was a valid case of invasion of privacy, the California Supreme Court reversed, holding that "mere publication of the photograph standing alone does not constitute an actionable invasion of plaintiffs' right of privacy."<sup>67</sup>

Because of the limitation that there is no invasion of privacy while in public, most suits and courts tend to focus on Prosser and the Restatement's fourth prong—an invasion of the right of publicity.<sup>68</sup> As mentioned, many violations of privacy involve more than one of the four different types of privacy invasion. Furthermore, because it is difficult to measure the value of a person's reputation, remedies for an invasion of privacy are extremely difficult to calculate. As such, courts frequently measure the damages based on the commercial value of the information. Despite this, courts sometimes separate the right of publicity from the right of privacy.<sup>69</sup>

In 1979, the Wisconsin Supreme Court engages in just such a separation by rejecting the existence of a right of privacy and acknowledging a right of publicity.<sup>70</sup> The distinction for the Wisconsin court was that the appropriation violates the right to the use of one's name and likeness commercially.<sup>71</sup> Now, the Restatement of the Law of Unfair Competition has separate sections defining and addressing the right of publicity, independent of any right of privacy.<sup>72</sup>

Frequently in a right of publicity action, the defendant will claim that there was no violation of the right because the plaintiff was not a celebrity.<sup>73</sup> However, this is not a total defense. To establish a violation of the right of publicity, a non-

<sup>65</sup> *Id.* at 375.

<sup>66</sup> *Gill v. Hearst Publ'g Co.*, 253 P.2d 442 (Cal. 1953).

<sup>67</sup> *Id.* at 443.

<sup>68</sup> RESTATEMENT (SECOND) OF TORTS § 652(A) (1977).

<sup>69</sup> Ann Margaret Eames, *Caught on Tape: Exposing the Unsettled and Unpredictable State of the Right of Publicity*, 3 J. HIGH TECH. L. 41 (2004).

<sup>70</sup> *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979).

<sup>71</sup> *Id.* at 134.

<sup>72</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995); see also Prosser, *supra* note 64, at 389 (1960) (noting that the four different prongs of the right of privacy are distinct, having in common only an "interference with the right of the plaintiff . . . 'to be let alone'").

<sup>73</sup> See *Gritzke v. M.R.A. Holding, L.L.C.*, No. 4:01CV495-RH, 2002 WL 32107540 (N.D. Fla. Mar. 15, 2002); see also *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510 (Ill. App. Ct. 1998) (defendant argued it did not receive benefit from plaintiff's image because of non-celebrity status).

celebrity plaintiff must show that “[d]efendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use, [and d]efendant’s use is likely to cause damage to the commercial value of that persona.”<sup>74</sup>

## B. DAMAGES FOR INVASIONS OF PRIVACY

A successful plaintiff can receive one or more of three types of damages: injunctive, general, and punitive. Each type serves a different purpose.

1. *Injunctions.* In intellectual property cases an injunction is the first and most standard remedy.<sup>75</sup> Because future damages are almost impossible to measure and almost categorically inadequate, an injunction goes with almost every valid action for violations of a right of publicity. Essentially, if a court failed to grant an injunction, it would be forcing the plaintiff to watch as the defendant continually used his image for profit.

An injunction is particularly necessary in right of publicity cases. Traditionally, the purpose of the preliminary injunction is that you stop the bleeding. This is to say that the court stops the offensive use of the plaintiff’s image while the case is being resolved. Courts consider five factors when deciding whether or not to grant a preliminary injunction:

- (1) Can plaintiff show a probability of success at the ultimate trial on the merits?
- (2) Can plaintiff show that it will suffer “irreparable injury” pending a full trial on the merits?
- (3) Will a preliminary injunction preserve the “status quo” which preceded the dispute?
- (4) Do the hardships balance in favor of plaintiff?
- (5) Is a preliminary injunction helpful to protect third parties?<sup>76</sup>

Applying this test, the court in *Ali v. Playgirl, Inc.* granted a preliminary injunction when the magazine published a painting featuring a nude boxer sitting in the corner of a boxing ring.<sup>77</sup> Mohammad Ali’s suit was for violation of his

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<sup>74</sup> See J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:2 (2d ed. 2002). The invasions of privacy that this Note is primarily concerned with are not really right of publicity invasions. However, actions such as upskirting could violate both an invasion of privacy and publicity if the “photographer” were to profit from the photograph, perhaps on a website.

<sup>75</sup> *Id.* § 11:21.

<sup>76</sup> *Id.* § 11:23.

<sup>77</sup> *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 206 U.S.P.Q. (BNA) 1021 (S.D.N.Y. 1978).

right of publicity.<sup>78</sup> While acknowledging Ali's undisputed marketing value, the court commented that, while monetary damages for unjust enrichment were speculative at best, Ali had met his burden for a preliminary injunction.<sup>79</sup> The court commented that it was undisputed that the portrait was Ali, noting that the nose and cheeks were representative of Ali.<sup>80</sup> Further, the court noted that there was no question that the picture featured in the issue of Playgirl magazine was being used for "the purpose of trade" since "the picture [was] a dramatization, an illustration falling somewhere between representational art and cartoon, and [was] accompanied by a plainly fictional and allegedly libelous bit of doggerel."<sup>81</sup> These facts, along with the defendant's concession that Ali had not consented, were enough to warrant a preliminary injunction.<sup>82</sup>

Of course, should a plaintiff succeed on the actual merits of his case, the court would order a permanent injunction. The beauty of an injunction, whether permanent or temporary, is that it can be designed such that it stops the illegal action but does not halt all of the defendant's actions.<sup>83</sup> For example, when Jacqueline Kennedy Onassis sued Christian Dior over a magazine advertisement that featured a look-alike model, the court granted an injunction against the model from "appearing in commercial advertisements masquerading as [Ms. Onassis]."<sup>84</sup> While recognizing a clear right of publicity violation, the court refused to enjoin the model completely. Instead, the court enjoined the model only to the extent that her modeling was a commercial appropriation of Ms. Onassis's publicity.<sup>85</sup>

Finally, when a court issues an injunction against a defendant, the court can do so extraterritorially. This means that the injunction is valid both within that court's jurisdiction as well as outside it.<sup>86</sup> For example, if a New York state court deemed it necessary and appropriate, it could issue the injunction to apply not

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 729-30.

<sup>80</sup> *Id.* at 726.

<sup>81</sup> *Id.* at 727.

<sup>82</sup> *Id.*; see also *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 46 U.S.P.Q.2d (BNA) 1892 (C.D. Cal. 1998) (granting a preliminary injunction in favor of Pamela Anderson and rocker Bret Michaels for the unauthorized release of a self-made video depicting the plaintiffs having oral sex). But see *Hanson v. High Soc'y Magazine*, 76 A.D.2d 812 (N.Y. App. Div. 1980) (denying preliminary injunction where plaintiff failed to show a sufficient risk of irreparable harm and where plaintiff had not established a likelihood of success); see also *Hicks v. Casablanca Records*, 464 F. Supp. 426, 204 U.S.P.Q. (BNA) 126 (S.D.N.Y. 1978) (denying plaintiff's motion for preliminary injunction where a semi-biographical book was written about Agatha Christie and her estate sued to have its publication enjoined).

<sup>83</sup> See MCCARTHY, *supra* note 74, § 11:22.

<sup>84</sup> *Onassis v. Christian Dior-New York Inc.*, 122 Misc. 2d 603, 616 (N.Y. Sup. Ct. 1984).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

only in New York, but all over the country. Despite this, some courts are loathe to extend injunctions beyond their jurisdictions.<sup>87</sup> For example, the New York Appellate Court limited the injunction of the sale of "The Howard Hughes Game" to the state of New York because the sale of such an item might be legal under the publicity or privacy laws of another state.<sup>88</sup>

The nervousness of the courts to impose a complete ban is interesting in the cases where the invasion of privacy occurs in cyberspace. For the most part, the Internet has no geographic bounds, so an injunction in one jurisdiction would be pointless, unless a plaintiff could actually enjoin someone before any destructive conduct had taken place. As our lives continue to entwine themselves with technology and the transfer of information over jurisdictional, state, or national lines continues to increase, the courts will have to reconsider the ideas of jurisdiction and the effects of a jurisdictionally or nationally bounded injunction.

2. *Damages.* General damages are separated into two categories: (1) damages for indignity and mental distress and (2) damages for commercial loss. The methods courts use to measure these damages vary, and the results are not always uniform.

a. *Damages for Injuries of Indignity and Mental Distress.* Regardless of the category of invasion of privacy that has occurred, courts focus upon the injury to "human dignity and peace of mind."<sup>89</sup> Appropriation focuses on the use of people's identity that hurts their dignity or self esteem. Disclosure is the revelation of private facts to the public that are highly offensive.<sup>90</sup> False light claims involve statements that are technically true but cast the plaintiff in a "false light" with the public.

However a claim is stated, all plaintiffs are essentially asking for damages to their dignity, self-esteem, and psyche.<sup>91</sup> To succeed in recovering damages for emotional distress, a plaintiff must show such things as anxiety, shame, humiliation, embarrassment, and feelings of powerlessness.<sup>92</sup> Accordingly, courts sometimes have difficulty ascertaining the extent and value of the injury.<sup>93</sup>

After a showing of injury, a plaintiff is generally allowed to recover both general and special damages.<sup>94</sup> General damages are those that one would expect

<sup>87</sup> MCCARTHY, *supra* note 74, § 11:25.

<sup>88</sup> Rosemont Enter. v. Urban Sys., Inc., 345 N.Y.S. 2d 17 (N.Y. App. Div. 1973).

<sup>89</sup> MCCARTHY, *supra* note 74, § 11:27.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 362-63 (1915).

<sup>93</sup> *Id.*

<sup>94</sup> See MCCARTHY, *supra* note 74, § 11:28; see also DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 138, 531 (1973).

to “flow” from the tort committed by the defendant.<sup>95</sup> Special damages are those specific to the individual plaintiff-damages we would not expect most plaintiffs to suffer.<sup>96</sup> Regardless of how the award is classified, courts and juries are inconsistent.<sup>97</sup>

*b. Damages for Commercial Loss.* In all cases of invasion of privacy, but especially an invasion of a right of publicity where the plaintiff has damage to his commercial viability, the plaintiff is entitled to recover the commercial value of what was damaged.<sup>98</sup> The rationale behind this type of damages is twofold and stems from the ideas behind unjust enrichment.<sup>99</sup> First, the defendant received something that would have been the plaintiff's if not for the defendant's infringement.<sup>100</sup> Second, the defendant profited from the use of the plaintiff's property without permission.<sup>101</sup>

Damages would include not only the fair market value of what was appropriated without permission but also any future damages to plaintiff's career.<sup>102</sup> Unlike the very subjective damages for mental anguish discussed above, damages for commercial loss are much easier to calculate. Courts frequently use economists to estimate the value of the defendant's profits and plaintiff's losses.<sup>103</sup>

In cases where defendants damage a plaintiff's professional standing and publicity value, the wrongful use of identity will allow for compensation for damages beyond the money earned by the defendant.<sup>104</sup> These damages for commercial loss would attempt to repair the damage to the plaintiff's professional standing and future marketability. Damages might arise when the quality of the defendant's work is inconsistent with the quality of the plaintiff's work.<sup>105</sup> Further, if the plaintiff has already marketed similar goods or was planning to

<sup>95</sup> DOBBS, *supra* note 94, at 138, 531.

<sup>96</sup> *Id.*

<sup>97</sup> See MCCARTHY, *supra* note 74, § 11:29 (citing damage awards ranging from \$1,000 to \$500,000 for mental suffering in publicity cases, and awards of \$15,000 to \$650,000 for mental suffering in false light cases).

<sup>98</sup> *Id.* § 11:36.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* § 11:30.

<sup>103</sup> See, e.g., *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 50 U.S.P.Q.2d (BNA) 1195 (C.D. Cal. 1999) (using five factors in determining the value of Dustin Hoffman's image when used to promote clothing: (1) the fame of the plaintiff; (2) the fact that defendant's use was the first time that Hoffman's identity had been commercially used in a nonmovie context; (3) the negative impact on Hoffman's box office drawing power; (4) Hoffman's unique role in the movie *Tootsie*; and (5) the defendants' targeting of the motion picture industry).

<sup>104</sup> MCCARTHY, *supra* note 74, § 11:33.

<sup>105</sup> *Id.*

market similar goods, then the plaintiff might be damaged in the form of being effectively foreclosed from any future profits from such marketing.<sup>106</sup> Judge Posner of the Seventh Circuit Court of Appeals noted that “an important aspect of the ‘right of publicity’ is being able to control the place as well as time and number of one’s public appearances . . . .”<sup>107</sup> For example, if a company put a picture of Lebron James on the front of a box of generic bran flakes, it might destroy his marketability for Wheaties. In these types of cases, the courts will award damages for future losses.<sup>108</sup>

3. *Punitive Damages.* In most states, punitive damages are allowed in privacy suits when the plaintiff shows that the defendant knowingly used the plaintiff’s image.<sup>109</sup> Generally speaking, the purpose of punitive damages is to punish the defendant. The rationale is that by punishing the defendant, he will be deterred from committing such behavior in the future, and an example will be made of him to deter others. The punitive damages must have a “reasonable relationship” to the actual damages.<sup>110</sup> Further, actual damages are a prerequisite for an award of punitive damages.<sup>111</sup>

When deciding the amount of punitive damages to award, courts take into account the financial status of the defendant.<sup>112</sup> If the purpose of punitive damages is to deter like action in the future, the damages must “hurt” the defendant. Since evidence of the defendant’s financial worth is admissible at trial for purposes of determining punitive damages, the damages will likely vary, depending on the wealth of the defendant.<sup>113</sup> The result is that where the defendant has little or no economic worth, the punitive damages will be very small.<sup>114</sup>

<sup>106</sup> *Id.*

<sup>107</sup> *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985).

<sup>108</sup> *See, e.g.,* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104, 23 U.S.P.Q.2d (BNA) 1721, 1727 (9th Cir. 1992) (upholding the jury’s award of damages of \$75,000 for an injury to the professional standing and future publicity value of artist when a sound-alike artist was used in promotions, counter to the outspoken protestations of the plaintiff in regards to performers doing commercial endorsements).

<sup>109</sup> *McCarthy*, *supra* note 74, § 11:35. Note also that courts continually struggle to clearly define what this state of mind must be: malicious, reckless, oppressive, evil, wicked, wanton misconduct, or morally culpable have all been used by the same and different courts. *See DOBBS*, *supra* note 94, at 205.

<sup>110</sup> *DOBBS*, *supra* note 94, at 207.

<sup>111</sup> *Id.*

<sup>112</sup> *MCCARTHY*, *supra* note 74, § 11:36.

<sup>113</sup> *See, e.g.,* *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (“[T]o reduce damages to \$100,000 in this case would be inconsistent with the principal purpose of punitive damages, which is to deter . . . [A]n award of punitive damages reduced to \$100,000 [would] have little effect on [Hustler’s] propensity . . . to invade people’s legal rights.”).

<sup>114</sup> *See, e.g.,* *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978) (noting that “a \$60,000 award may

Courts assess damages for invasions of privacy to protect against invasions that were either done for profit (right of publicity invasions) or were face-to-face (intrusion invasions). With 2005 technology, one's privacy can be invaded anonymously. For example, a picture could be taken and posted on the Internet, and one might have no idea who took it or when. In the past, invading someone's privacy was difficult because of the large, physical size of the technology (camera, tape recorder, etc.) and the amount of labor necessary to reprint the inflammatory material. Because the technology did not exist until recently, the law had no reason to consider privacy in this light. As a result, the available legal recourse is inadequate.

### III. ANALYSIS

There is little question that the world has changed dramatically since Warren and Brandeis invented the tort of invasion of privacy. Nowhere has this change been more dramatic than in technology. While the camera, the printing press, and the telephone are still in use, such devices are now completely portable. The camera and phone (sometimes combined) fit in our pockets and the Internet and computer screen act as printing presses. Along with advances in technology, the average person now also has the ability, due to the relatively low cost of these products, to own a camera and a phone, and most people can access the Internet. Despite these advances, the law has changed very little. The same old remedies are still being applied when invasions occur.

#### A. PRIVACY INVASION: OLD V. NEW

1. *Old Technology, Old Invasions.* As noted earlier, when Warren and Brandeis set out to define the right of privacy, they did so amid concerns that new technologies, such as the telephone and the camera, would erode our privacy and steal our "right to be let alone."<sup>115</sup> In particular, the Boston attorneys were responding to the incredible embarrassment surrounding the Boston Gazette's treatment of Mrs. Warren's society parties and the wedding of Mr. and Mrs.

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bankrupt one person and be a minor annoyance to another").

<sup>115</sup> Warren & Brandeis, *supra* note 24, at 195.



Warren's daughter.<sup>116</sup> Finding little to no help from the law, the two former Harvard Law standouts<sup>117</sup> set out to rewrite it.

It is not difficult to imagine the circumstances surrounding an invasion of a right of privacy in 1890. At that time, "true 'ladies and gentlemen' kept their names and personal affairs out of the newspapers."<sup>118</sup> When the local newspaper ran stories about Mrs. Warren's parties and her daughter's wedding, Mr. and Mrs. Warren were embarrassed.

With the backdrop of the Warren wedding, an analysis of the early cases involving an invasion of privacy show, that, by today's standards, many invasions were not very invasive. In *Byfield v. Candler*, the court held that entering a person's assigned bedroom on a steamship was an improper, unjustified, and unreasonable invasion of privacy.<sup>119</sup> The 1940 New Jersey court in *Bednarik v. Bednarik* found a compulsory blood test to be actionable.<sup>120</sup> Further, following the plaintiff,<sup>121</sup> looking into the plaintiff's windows,<sup>122</sup> and intruding on childbirth<sup>123</sup> have also been found to violate the right of privacy. Common among these cases is the fact that the invasions were personal (i.e., face to face), and almost none of them had to do with the invader sharing the information with the public at large.

Until recently, the effort required to disseminate a compromising photograph of someone was beyond the capabilities of the average person. In 1890, in order to take a picture, the photographer and the person being photographed had to be standing relatively still since most cameras were on a tripod and the camera and flash apparatus were big and bulky. Furthermore, making copies of the photograph was expensive, and disseminating a photograph would require either publication in a newspaper or magazine or handing out copies to individuals.

For this reason, most of the cases involving the technologies that concerned Warren and Brandeis focused more on the fourth prong of the right of Privacy—the right of publicity.<sup>124</sup> In these cases, the defendants were wealthy

<sup>116</sup> See Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1009 (1995). Apparently Mrs. Warren was quite a socialite and her parties were the "talk of the town" in Boston. *Id.* At the time, it was considered low-class to have one's parties and personal life chronicled in the local paper. *Id.* Hence, the creation of the law by her husband. *Id.*

<sup>117</sup> The two finished first and second in the Harvard Law School class of 1877. MCCARTHY, *supra* note 74, § 1.3(B).

<sup>118</sup> *Id.* § 1:12.

<sup>119</sup> *Byfield v. Candler*, 125 S.E. 905, 905 (Ga. 1924).

<sup>120</sup> *Bednarik v. Bednarik*, 16 A.2d 80 (N.J. Ch. 1940).

<sup>121</sup> *Schultz v. Franfort Marine Accident & Plate Glass Ins. Co.*, 139 N.W. 386 (Wis. 1913).

<sup>122</sup> *Pritchett v. Bd. of Comm'rs*, 85 N.E. 32 (Ind. App. 1908).

<sup>123</sup> *De May v. Roberts*, 9 N.W. 146 (Mich. 1881).

<sup>124</sup> See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902); see also *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

businesses who could afford to have the image or photograph reprinted and republished.

2. *New Invasions, New Technology.* Today's invasions of privacy would likely send Mrs. Warren into cardiac arrest. Imagine her shock if her daughter was the victim of "upskirting."<sup>125</sup> One needs little imagination to see the differences and the drastic changes to our understanding of privacy in the last 120 years. In almost every facet of our lives, we are being watched. Employers monitor our workspace, emails, and phone calls.<sup>126</sup> Furthermore, marketers track our movement and habits via the mail, email, and phonebook. We have all seen the video cameras stationed on city street corners and on the highways to monitor traffic. While the rationale of safety and law enforcement is compelling, there is a point at which people would rather "be let alone" than be constantly monitored under the guise of safety.

More importantly, other recent technologies that are part of our daily lives such as the digital camera, cellular phones with built-in cameras, and the seemingly ever-present video camera threaten our privacy in ways that Warren, Brandeis, and Prosser could not have imagined because such technologies allow the everyday person to record, photograph, or video us at little expense and with no expertise.<sup>127</sup>

Despite these advances to the camera, the most dramatic change in this area of technology is the Internet. While Warren and Brandeis were concerned about pictures and stories being copied with a printing press and published in the newspaper, now anybody can "publish" a picture or story on the Internet or through email. Furthermore, the cost of doing this is negligible other than the relatively low cost of the camera. Nearly every public library gives people the free use of computers and free Internet access.<sup>128</sup>

In the situation with Reggie Love mentioned in the introduction, the pictures were taken by college kids. The students were not expert photographers, nor

<sup>125</sup> Upskirting is the practice of using a camera to voyeuristically take pictures up a woman's skirt, which is made particularly easy with camera phones and similarly sized digital cameras.

<sup>126</sup> See A. Michael Froomkin, *The Death of Privacy*, 52 STAN. L. REV. 1461 (2000).

<sup>127</sup> See *id.* (detailing the technologies that are destroying our right of privacy). The author discusses things such as ONSTAR and other G.P.S. (Global Positioning System) based technologies that track our vehicles as well as other technologies not yet in the mainstream, but nearing introduction, such as ITS (intelligent transportation systems). *Id.* ITS promises continuous real-time information about the location of all moving vehicles. *Id.* The author also describes aviation-like "black boxes" for cars, I.D. numbers for every Pentium processor, and terrestrial cameras (cameras aimed at us from outer space). *Id.*

<sup>128</sup> See Gatesfoundation.org, U.S. Libraries Program Evaluation (2004), <http://www.gatesfoundation.org/Libraries/USLibraryProgram/Evaluation/default.htm> (noting that large numbers of minority, unemployed, and lower income groups use computers in public libraries donated by the Bill & Melinda Gates Foundation).

were they likely Internet experts; rather, they were just kids having a good laugh. The only effort required to complete their feat was to whip out the digital camera, snap the photo, and then plug the camera phone into any one of hundreds of computers on the university's campus. Similarly, but probably with slightly more effort, filmers caught Mrs. Bosley. While the videographer undoubtedly put more effort into videotaping her than the photographers of Reggie Love put into snapping photos of him, the videotaping of Bosley was still inconspicuous enough that Bosley did not know she was being filmed.<sup>129</sup>

#### B. DAMAGES: OLD V. OLD

Despite the obvious changes in technology, the ways that the courts punish those who invade another's privacy have not changed; only monetary damages and injunctions are available.

1. *Old Invasions, Old Damages.* When Warren and Brandeis wrote their article and when Prosser solidified the tort in the Restatement (Second) of Torts, they were concerned primarily with two general types of invasions: (1) a face to face invasion, such as someone entering a home or a private place such as a dressing room, boat cabin, or bathroom; and (2) invasions of the right of publicity, where a powerful entity uses a person's image for profit. Ironically, the type of invasion that spurred their writing of the article was relatively rare—a privacy invasion in print or in a photograph. In other words, the only threats to a widespread invasion of privacy were from big, powerful entities, such as life insurance companies or newspapers.<sup>130</sup>

Because of this, the damages and remedies seem to be aimed primarily at right of publicity violations. That is, the remedies are meant to stop the injury with an injunction, repair the harm with money, and deter similar future conduct with possible punitive damages. The damages, while obviously still available, do not seem to be aimed at the more personal, face-to-face invasions. With a face to face invasion, such as bursting into someone's room, an injunction would have been pointless, because you cannot stop something that has already occurred. Secondly, the monetary damages were and are very difficult to calculate. It is very hard to quantify the value of someone caught naked or in an embarrassing situation. So where the invasion was by an ordinary citizen, against another ordinary citizen, courts have difficulty according damages.

For example, assume that in 1900, Mary was a very progressive woman and was doing yoga naked in her hotel room, and Bob, the janitor, burst into Mary's room and saw her. It takes little imagination to see how this could be very

<sup>129</sup> Bosley v. WILDWETT.Com, 310 F. Supp. 2d 914, 917 (N.D. Ohio 2004).

<sup>130</sup> See Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

embarrassing for Mary. Not only was she naked, but she would likely have been in an unflattering position. Despite the embarrassment to Mary, she could rest assured that the embarrassment would not go very far. Because Bob did not have a camera, he would have more difficulty sharing the image of a naked Mary with others. Of course Bob could describe it in writing, but in this type of situation a writing is not as graphic as a photograph. In a situation like this, where the violation is one-on-one, the damage is fairly small, because it is just between two people.

2. *New Invasions, Old Damages.* As time and technology have progressed, the invasions have changed dramatically. No longer are personal invasions relatively private. Because of the nature of new technology, instead of an invasion being between just two people, invaders can easily share the “moment” with countless others. Despite this change, the character of the invader, the person with the video camera, has not changed. The difference today, versus in the past, is the ease with which the invader can share the invasion. Unlike in the past, where the damage stemming from an invasion was short lived, the damage is more permanent because the image can now be disseminated instantly through the Internet or through email.

This dissemination of private information is similar to corporate violations of a person’s right of publicity seen in *Waits v. Frito-Lay, Inc.* and *Ali v. Playgirl, Inc.* because the violation is continuous and ongoing. However, the dissemination is not necessarily being perpetuated by the original invader. Because people who see or receive the information have the ability to share it and forward it to as many people as they like, an injunction would be nearly futile. By the time people find out their privacy has been violated, an injunction would be next to impossible to impose because a court would not know whom to enjoin.

Also, since the perpetrator may not be seeking monetary profit, as a company violating a right of publicity would be, the easily calculated right of publicity damages are unavailable. Furthermore, because the violator is not likely to be wealthy, the traditional monetary damages are not likely to be as effective. First, damages are very difficult to calculate. Just as it was hard to figure out the damages for a face-to-face invasion, it is equally difficult, if not more so, to assess the damage where that invasion is spread electronically. While the invasion of privacy may be less personal, and therefore may be less damaging, the invasion happens many more times as the image is spread via email or as people visit a particular website. Second, because most people, as opposed to large companies have few extra assets, whatever damages are assessed are likely to be very difficult to collect.

For example, assume that in 2005, Bob is a twenty-year-old college student working at a resort hotel in Aspen, Colorado as a janitor and Mary is still doing naked yoga in her hotel room. This time, when Bob comes in the room, he has

his handy camera phone, and while she is not looking, Bob takes a picture of Mary doing naked yoga. Assume further that the next day Bob emails the picture to ten of his friends and that each friend emails it to ten of his friends. At this point, one hundred people now have a digital photograph of Mary naked. It is not unlikely that these two sets of emails could have happened within the course of one day. Finally, assume that one week later, Mary finds out about the emails and visits her attorney to file a lawsuit.

The first thing Mary will do is attempt to prevent the picture from being spread around, by getting an injunction. But who can she enjoin? Not Bob, he only sent the picture once and is really not concerned about the photo or Mary anymore as he was not trying to profit. Also, Mary can not enjoin the other people in the email chain as they too have only sent the picture once. There seems to be no point in the chain where the damage can be stopped.

Mary will have difficulty showing damages. She faces several problems. First, it will be very difficult to show how many different people have seen the photograph. Second, what one juror thinks is very inflammatory might not be inflammatory at all to the next juror. Third, assuming that Mary was not fired from her job, or in any obvious way injured, a jury may find no damage, other than to her pride.

Assume that Mary overcomes these hurdles and she is awarded \$1,000,000. She is likely to have a very hard time collecting the judgment. As a twenty-year-old college student and janitor, Bob is not likely to be flush with cash. Thus, Mary's collection from Bob will be initially small, and any effort to continue to collect could be very time consuming and difficult.<sup>131</sup> Further, Mary is not likely to want to have to continuously rehash all the embarrassing details, so will likely not continue the suit, if she files suit at all.<sup>132</sup>

### C. PROPOSED CHANGES

Now that the problem has been recognized, it becomes necessary to solve it. There are any number of ways to address the problem, but I will focus on four: (1) revision of the tort laws, specifically recognizing that invasions of privacy can take place in a public forum, (2) criminal legislation, (3) a tax on technology that would create a fund from which people who were injured could recover, and (4) changing the way we act, including rethinking our notions of privacy.

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<sup>131</sup> As, for example, in the case of garnishing Bob's future wages.

<sup>132</sup> Like rape victims, invasions of privacy victims, especially where the invasion is in the form of an embarrassing act or circumstance, are hesitant to report the incident because they do not want to revisit the trauma and would prefer to protect their privacy. *See Commonwealth v. Fuller*, 667 N.E.2d 847, 852 (Mass. 1996).

1. *Revising Tort Law: A Recognition of Invasions of Privacy in a Public Place.* The first step that needs to be taken in protecting our privacy from modern invasions is revision of the tort law to replace the misguided notion that invasions of privacy cannot occur in public places. Of course, even if the tort law is changed and more people are found liable for damages, the amounts that can be collected and the deterrent effect of those collections will still be in question.

When Prosser wrote his article defining the four different privacy torts, he thought that there could be no invasion of privacy in a public place. He stated:

On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.<sup>133</sup>

Begging Dean Prosser's pardon, but he is wrong, at least in today's world. Consider this hypothetical: Emily is a ballet instructor, and every day when she leaves work in a leotard there is a man, not unfriendly, who photographs her. Consider also that this man takes notes on what she does and documents them on a notepad. When confronted, he is friendly and apologetic, but will not stop because he is doing research on ballet instructors. I would argue, and I think most people would agree, that Emily's privacy has been invaded.

Most reasonable people would agree that we sacrifice some of our privacy when we walk out our front doors, but this does not mean that we necessarily forgo or want to forgo all solitude, secrecy, and anonymity. Professor Ruth Gavison attempted to redefine our traditional definition of privacy by noting that solitude, secrecy, and anonymity are the three key elements.<sup>134</sup>

The Restatement (Second) of Torts says that invasions are intrusions upon "the solitude or seclusion" of another.<sup>135</sup> Professor Gavison argues that the requirement that invasions take place in private places, or not in public, is premised on a definition of solitude that is too narrow.<sup>136</sup> Gavison thinks that one's solitude is violated if a person is in "physical proximity" to the victim, such

<sup>133</sup> Prosser, *supra* note 64, at 391-92.

<sup>134</sup> Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980) (defining perfect privacy as being "completely inaccessible to others" but noting that it would be impossible to enjoy perfect privacy and still be a functioning member of society).

<sup>135</sup> RESTATEMENT (SECOND) OF TORTS, § 652B (1977).

<sup>136</sup> Gavison, *supra* note 134, at 433.

as where an intruder was close enough to touch or to observe the victim with the use of the intruders eyes and ears.<sup>137</sup> Therefore, constantly watching or monitoring another, even in public, would be an invasion, so long as the person being watched knew about it.

To address the problem that a person could circumvent this solitude element with the use of a telescopic device, Professor Gavison argues that privacy could also be invaded where intimate information about a person is recorded, such as where an anti-abortion activist photographs a person walking into an abortion clinic.<sup>138</sup>

Finally, Gavison argued that anonymity is an essential key to privacy.<sup>139</sup> If no one is paying attention to us, then we are essentially free to do as we please with little risk of disclosing personal facts. The freedom of anonymity disappears when we realize that someone is paying attention to us. If we are being watched and recorded, as in the hypothetical, we are left with two choices, either disclosing our private idiosyncrasies or changing our actions.<sup>140</sup>

Based on Gavison's redefinition of privacy, Professor McClurg suggested that there should be a redefining of the tort of privacy to include invasions of privacy in a public place.<sup>141</sup> McClurg noted that the nearly unanimous agreement of the courts that there cannot be an invasion of privacy in a public place is based on two premises.<sup>142</sup> One, implicit to the rule, is that there is an assumption of the risk of "public inspection" when one goes into a public place.<sup>143</sup> Two, explicit in the comments to the Restatement (Second) of Torts is that there is no difference between being seen by someone and having a photograph taken.<sup>144</sup> However, this second premise is easily refuted, because the first instance of being seen can only be republished or shown with the words and descriptions of the seer, which are subject to memory flaws and prejudices, which necessarily make them less credible. On the other hand, the picture, worth a thousand words, shows in exact detail any particular image.

After noting that some courts have implicitly recognized that invasions of privacy can occur in public places, McClurg proposed a "multifactor redefinition."<sup>145</sup> McClurg proposed that the phrase "solitude or seclusion" should

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 469.

<sup>139</sup> *Id.*

<sup>140</sup> For those readers who do not recognize this, ask yourself whether you change your behavior when you are around someone with a camcorder.

<sup>141</sup> McClurg, *supra* note 116.

<sup>142</sup> *Id.* at 1036.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1036 (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977)).

<sup>145</sup> *Id.* at 1057.

be removed from the original Restatement and that a seven factor test should be used to determine whether the defendant's conduct was highly offensive to a reasonable person.<sup>146</sup> McClurg's tort would read:

A. One who intentionally intrudes, physically or otherwise, upon the private affairs or concerns of another, whether in a private physical area or one open to public inspection, is subject to liability to the other for invasion of her privacy, if the intrusion would be highly offensive to a reasonable person.

B. In considering whether an intrusive act is one which would be highly offensive to a reasonable person, the following factors shall be taken into account:

1. the defendant's motive;
2. the magnitude of the intrusion, including the duration, extent, and means of intrusion;
3. whether the plaintiff could reasonably expect to be free from such conduct under the habits and customs of the location where the intrusion occurred;
4. whether the defendant sought the plaintiff's consent to the intrusive conduct;
5. actions taken by plaintiff which would manifest to a reasonable person the plaintiff's desire that the defendant not engage in the intrusive conduct;
6. whether the defendant disseminated images of the plaintiff or information concerning the plaintiff that was acquired during the intrusive act; and
7. whether the images of or other information concerning plaintiff acquired during the intrusive act involve a matter of legitimate public interest.<sup>147</sup>

Like other solutions, a change in the tort definition would not totally solve the problem. Even assuming that the tort law were rewritten, the issue of collecting damages would still be difficult. As mentioned in section III, the remedies for invasions are an injunction, monetary damages, or both. Again we face the problem of how to make the plaintiff whole and how to punish or deter the nonwealthy defendant.

2. *Criminal Legislation.* Perhaps in recognition of this problem of deterring invasions of privacy, some states, and even the federal government, have begun

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1058-59.



to enact criminal legislation. The idea behind such legislation is that criminalizing the invasion will serve as a greater deterrent. However, in order to write legislation that addresses invasions of privacy, legislators will have to write the laws so to avoid attacks of being overbroad, or violating a person's right to freedom of expression.<sup>148</sup> Hence, each law would have to be very narrow, which would make the law easier to get around. Also, the legislators will have to deal with the fact that courts generally require the invasion to have occurred in a private place, such as a home or bathroom.<sup>149</sup> As such, courts would have to consistently recognize that there is indeed an expectation of privacy in public or recognize a version of the new tort discussed above.

One way that states have slowly begun to address the problem is by filling the gaps left in the law for video voyeurs. Consider "Video Voyeur: The Susan Wilson Story," a Lifetime Channel movie starring Angie Harmon that told the true story of a Louisiana woman whose neighbor installed surveillance cameras in the victim's attic in order to film the Wilsons' bedroom and bathroom. Imagine Mrs. Wilson's surprise when she reported the incident to the police and found that what the neighbor had done was perfectly legal.<sup>150</sup>

In response to this case, Louisiana became the first state to criminalize video voyeurism.<sup>151</sup> Other states have followed suit, but still less than a majority of states have video voyeurism laws.<sup>152</sup> In other words, a majority of states allow a person to video or photograph a person constantly and without that person's permission. Other states have followed Louisiana's lead, but the laws are frequently very narrow and easily avoided.<sup>153</sup> Also, the laws are necessarily very

<sup>148</sup> See *State v. Glass*, 54 P.3d 147, 152 (Wash. 2002) (providing that "[a] law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities" quoting *Seattle v. Webster*, 802 P.2d 1333, 1337 (Wash. 1990)). A discussion of the overbreadth doctrine is beyond the scope of this Note. For a general discussion of the Constitutional principle see SULLIVAN & GUNTHER, *CONSTITUTIONAL LAW* 1334-47 (15th ed.).

<sup>149</sup> McClurg, *supra* note 116, at 991-92.

<sup>150</sup> At the time, Louisiana law only protected against audio not video eavesdropping. See Joanna Weiss, *Voyeur Prompts DA to Purpose Peeping Tom Law*, NEW ORLEANS-PICAYUNE, Jan. 10, 1999, at A1.

<sup>151</sup> Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721, 725 (2004).

<sup>152</sup> *Id.*

<sup>153</sup> 1. California recently passed a statute criminalizing upskirting and like behavior. The statute makes it illegal for a person to use a concealed camera or electric device to photograph or video the body of an unconsenting person, either through or under their clothes. CAL. PENAL CODE § 647(k) (West 2005). The law has two huge gaps: (1) there is a requirement that the victim be identifiable—violators rarely film the face; and (2) the law requires the violator to get personal sexual gratification, so a violator who sells the material for profit would be exempted. See *id.* But see 720 ILL. COMP. STAT. ANN. 5/26-4 (West 2005) (removing the loopholes by outlawing the photographing of another person, under or

specific, focusing on a particular act such as upskirting, as opposed to invasions of privacy as a whole. To protect privacy as a whole, a myriad of laws may need to be written, focusing on many specific deviant acts.

The federal government is getting involved with the Video Voyeurism Act of 2004 (the Act). The Act was introduced to the Senate in 2003 by Senator DeWine of Ohio and Senator Schumer of New York.<sup>154</sup> The Act, which was signed into law in December 2004, criminalizes video voyeurism and punishes the offenders with a fine of up to \$100,000 or up to 1 year in prison or both.<sup>155</sup> The Act was written as a reaction to several incidents of upskirting and downshirting.<sup>156</sup>

In a speech to the Senate promoting the Act, Senator DeWine stated that the law's purpose was:

to close the gap in the law and ensure that video voyeurs will be punished for their acts. Our bill would make it a crime to video-tape, photograph, film, or otherwise electronically record the naked or undergarment-clad genitals, pubic area, buttocks, or female breast of an individual, without that individual's consent.<sup>157</sup>

Several glaring questions arise about how effective the Act will be in protecting people's freedom from personal invasions of privacy. The first question is whether the law will survive questions of freedom of expression, including constitutional attacks on "grounds of" vagueness<sup>158</sup> and overbreadth.<sup>159</sup>

The second, and more important question is whether and how the courts will deal with the fact that the invasions frequently take place in public places. Again, implementation of this law would require a change to the traditional thought that invasions of privacy can only occur in private places.

As the Act is primarily aimed at people stealthily photographing women as they go about their daily routine, the violations will almost certainly take place in a public venue. So in some regards, the law would be expanding the notion that

through their clothing, for the purposes of viewing the body or undergarments without that person's consent).

<sup>154</sup> Senator Mike DeWine, Floor Statement: Video Voyeurism Prevention Act of 2003 (June 19, 2003), <http://www.dewine.senate.gov/pressapp/record.cfm?id=205296>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 163 (1997) (stating that "[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted").

<sup>159</sup> See *State v. Glass*, 54 P.3d 147, 152 (providing that "[a] law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities" (quoting *Seattle v. Webster*, 802 P.2d 1333, 1337 (Wash. 1990))); see also SULLIVAN & GUNTHER, *supra* note 148.

invasions of privacy can only take place in private locations. Of course, this is all a matter of characterization. An easy alternative the courts could adopt is the redefinition of "private place." While courts have traditionally thought of private locations to be places like a residential home where people assume they are alone, or a public bathroom,<sup>160</sup> where although they are in public, people still have an expectation of privacy, courts could re-characterize private places to mean "under one's clothing while in a public place." Under this definition, the person would not have an expectation of privacy as she walks down the street, but would have an expectation of privacy under her skirt while she walks down the street.<sup>161</sup> In a Washington state decision, the court noted that "[p]eople preserve their bodily privacy by wearing clothes in public and undressing in private. It makes no sense to protect the privacy of undressing unless the privacy while clothed is presumed."<sup>162</sup>

Another problem may be that the activities that the Act is attempting to criminalize are done covertly and the perpetrators are very rarely detected. As such, the rate of capture and subsequent punishment is likely to be very low. Because of this, the deterrent effect of the law will likely be particularly small.

Finally, the Act is narrow. The law specifically states that it only criminalizes images of "naked or undergarment clad genitals, pubic area, buttocks, or female breast[s]."<sup>163</sup> Consequently, the Act would not include instances where a person was clothed, or when one of these categories was not met. Similarly, the law seems to be tremendously slanted toward women.

Further, the Act requires that the image be taken "under circumstances in which that individual has a reasonable expectation of privacy" regarding such body part or parts.<sup>164</sup> The Act defines this as places where a reasonable person believes that he or she can disrobe in privacy, and as circumstances where a reasonable person would not expect his or her private parts to be visible to the public.<sup>165</sup> So while the law could be stretched to instances that "go beyond" upskirting and downshirting, those are clearly the law's primary purposes, and the

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<sup>160</sup> See N.Y. PENAL LAW § 250.453(a) (McKinney 2003) (defining, for purposes of its surveillance laws, private places as "bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel or inn, without such person's knowledge or consent").

<sup>161</sup> See Harry A. Valetk, *Keeping Tom from Peeping: New Law Will Not Protect All Victims of High-Tech Voyeurs*, N.Y. L.J., Aug. 5 2003, at 5 (noting that "[m]embers of any civil society understand that privacy expectations go well beyond private [geographical] places").

<sup>162</sup> State v. Glass, 54 P.3d 147, 150 (Wash. 2002).

<sup>163</sup> Video Voyeurism Act of 2004, 18 U.S.C.A. § 1801(b)(3) (West 2004).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

reasonableness standard<sup>166</sup> attached to the law makes it easy for courts to limit the law to such cases.

3. *Tax on Technology.* One possible solution to the difficulty of compensating victims of invasion of privacy would be to create a tax on potentially violative technologies and use the tax revenue, or a portion of the tax revenue to create a fund from which to compensate victims. If there were a one-time two dollar tax on every digital camera, camcorder, and camera phone sold, the revenue from the tax would be hundreds of millions of dollars from which victims could be compensated.

This idea of an “alternate compensation system” (ACS) is not novel. It was proposed by William W. Terry Fisher, III, as a means of dealing with a different but oddly similar problem, of music and video “piracy” on the Internet, namely the mp3 phenomenon which has the music industry so up in arms.<sup>167</sup> The idea behind the ACS is to change the copyright law to adjust for the new technologies, while at the same time, not slowing technological growth.<sup>168</sup> Technologies used to download and copy would be taxed, the managing tax agency would track the percentage or rate at which a particular artist’s product was being used, and the artist would be paid according to the rate at which his or her music was being played.<sup>169</sup>

Fisher explains some of the advantages and disadvantages of the ACS:

The social advantages of such a system, we will see, would be large: consumer convenience; radical expansion of the set of creators who could earn a livelihood from making their work available directly to the public; reduced transaction costs and associated cost savings; elimination of the economic inefficiency and social harms that result when intellectual products are priced above the costs of replicating them; reversal of the concentration of the entertainment industries; and a boost to consumer creativity caused by the abandonment of encryption. The system would certainly not be perfect. Some artists would try to manipulate it to their advantage, it would cause some distortions in consumer behavior, and the officials who administer it might abuse their power. But, on balance, it is the

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<sup>166</sup> *Id.* § 1801(a).

<sup>167</sup> WILLIAM W. TERRY FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199-258 (Stanford Univ. Press 2004).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

most promising solution [to the intensifying crisis in the entertainment industry].<sup>170</sup>

The piracy problem in the music industry is similar to the problem of invasions of privacy in that technology has changed the way that the invasions take place. Because of this, invasions are very difficult to police and even more difficult to punish. On one hand, we do not want to stymie the free exchange of information or art, but on the other we want to protect a person's hard work and privacy.

Obviously a privacy tax would not work exactly the same as the ACS proposed by Fisher. For one thing, people would not register their names or images and then collect based on their rate of use. Indeed, people would not want their images used at all. Instead, the fund would be used as a tool for compensating victims who were unable to collect from an offender, especially in situations where the offender is unknown.

One glaring problem with this system is that it does not in any way deter people from acting irresponsibly in regard to invading privacy. Unlike the tort or the criminal statutes, this mode of reparation is focused totally on the victim. Indeed, one problem might be that victims would stop suing or reporting problems and simply try to collect. This would have the undesired result of eliminating the deterrent effects of civil or criminal penalties. Of course, the law could make a court judgment a prerequisite to collection from the fund.

Another issue to overcome is the fear of fraud. Some people are not at all concerned about having their private images or private information published on the Internet, so there would have to be a safeguard to prevent these people from trying to defraud the tax fund. Again a prerequisite of a guilty verdict might solve this problem.

4. *Change Our View of Freedom and of Privacy.* The world is changing at an incredibly rapid pace. When the United States was founded and the Constitution written, most people traded only with the people and businesses in their community. As such, trade was between neighbors and other members of the local community. The idea of an exchange between two unknown and unseen people was relatively foreign. Now, as often as not, we trade and communicate with people that we neither know nor see. Many people buy and sell on the Internet. The convenience of this type of economy is obvious. A small-time operator can trade internationally with very little additional costs and have a better opportunity to maximize his profits. Likewise, people in nearly all corners of the Earth have the ability to keep up with information and news. This rapid and

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<sup>170</sup> *Id.*

inexpensive exchange of information, while expanding some arenas like sales, has had the effect of making the world a much smaller place.

As technology changes and the ability to exchange information improves, the need to know information about other people grows. Since we are no longer trading with the next door neighbor or borrowing money from the local bank, we are forced to exchange our personal identities with complete strangers. Paradoxically, the technology that allows us to shop in the privacy of our own home, free from the crowded stores, also forces us to share personal information with people who we have never even seen. Clearly, this is a tradeoff that many people are willing to make. We are willing to give some of our privacy in order for life to be a bit more convenient. We are willing to run the risk of identity theft in order to not have to go to the shopping mall.

The same bargain is necessary when we contemplate the use of other new technologies. It is hard to dispute the benefits of a digital camera. They are small and cheap, there is no film to buy, unwanted photographs can be deleted, thousands of images can be effortlessly stored on a computer, and with the use of the Internet, photographs can be shared with other people. But these benefits come with a price. Because the cameras are so small, people are more likely to carry cameras with them at all times. As a result, it is easy for someone to take a picture without anyone knowing it. And because there is no film, it does not cost anything to snap picture after picture.

Like digital cameras and camera phones, video cameras have a tremendous upside. They protect our money at banks. The presence of a video camera helps deter criminals who would otherwise rob a store. They also allow us to capture and save treasured events in our lives. At the same time, the video camera can do incredible damage. The power to immaculately save an image gives us the power to make what would be a small invasion of privacy much worse because the images are so easily shared.

There is little question that when we are aware of the presence of a camera our behavior changes. Once we recognize the scale and power of this technology and the potentially detrimental way that it can be used, we must force ourselves to reconsider how we act in public places and in front of people. It may be that people have not changed and will not change at all. Perhaps these people do not fear the risk of being caught on camera. Most of us, most of the time, are not doing things that anyone would ever want to see on a photograph. Certainly, my everyday life would be quite boring to almost anyone, but the risk of having it documented is there and the risk is greater than it has ever been.

There is little doubt that the upsides to the technological advancements discussed in this Note far outweigh the downside. The practical uses of cameras, computers, and the Internet are immeasurably great. However, with these advancements we must be willing to sacrifice some of who we are. That is, we

must be willing to sacrifice some of our privacy for the conveniences of technology.

#### IV. CONCLUSION

The purpose of this Note is not to condemn the advancement or use of technology. For the majority of the time, the use of this technology is good and advantageous to nearly everyone. It opens markets, allows for quicker and more precise communication, and in many ways allows people to memorialize and cherish their lives and to share these memories with others. The goal is to examine some of the ways that the technology can be abused and how the law would and will address these abuses.

The tort law of privacy is antiquated and the normal remedies for invasions of privacy in tort may not be effective at deterring the invasive conduct or compensating victims. While the government at both the state and federal level has begun to address the issues, it is fair to say that they have not and likely will not be able to keep up with the technology. Ultimately, we may need to simply rethink what our privacy is and realize that the benefits of these technologies come with costs.

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