1998 Significant Developments Part II

Legislation Aimed at "Paparazzi" Places All Journalists at Risk
New Laws May Restrict Newsgathering and Influence Publication

PART II.  Introduction ................................................................. i

• The Federal “Anti-Paparazzi” Bills: An Unfocused Shot at the Media
  I. The Proposed Laws ........................................................... 1
  II. Constitutional Analysis .................................................... 10
  III. State Privacy Laws ......................................................... 16
  IV. Conclusion ................................................................. 25

• California’s Anti-Paparazzi Statute: How Does it Change the Law? .......... 27
  by Amy Hogue and Anthony Stanley

• Appendix
  The Federal anti-Paparazzi Bills
  S. 2103 (Feinstein-Hatch) .............................................. 37
  H.R. 4425 (Conyers bill) ................................................. 44
  H.R. 3224 (Gallegly bill) ................................................. 47
  H.R. 2448 (Bono bill) .................................................... 50

  California Law
  Civil Code Section 1708.8 .................................................. 53
INTRODUCTION

After the death of Princess Diana in August 1997, and the literal and figurative accusations against the media for causing her death, e.g., the Paris crash investigation and Earl Spencer’s “blood on their hands” eulogy, it is not surprising that an anti-media sentiment has developed, expressing itself in calls for legislation. Public shock in the United States over Diana’s death combined with longstanding complaints of celebrities against photographers and other members of the media fueled a “there outta be a law” reaction, regardless of the actual facts of the accident, and notwithstanding that a substantial body of existing state law already protects against dangerous or unreasonably invasive conduct, regardless of whether a camera is involved.

Just weeks after Diana’s death, a federal bill was introduced providing for criminal and civil penalties against media photographers. Three other federal bills targeting media photographers were introduced in 1998. At the state level, on September 30, 1998 California enacted a law creating a cause of action against photographers for invasion of privacy, subjecting media photographers to a disgorgement of profits penalty. Upon signing the bill into law, California Governor Pete Wilson, intoned that under the new law “the so-called stalkerazzi will be deterred from driving their human prey to distraction - or even death.” See Governor’s Office Press Release, Wilson Signs Legislation to Protect Privacy Rights, Sept. 30, 1998.

The California statute and the federal bills are ill thought out, likely unconstitutional and, most basically, unnecessary. It is not clear what problem the bills are attempting to address. Some supporters of legislation cite dangerous conduct by media photographers, others cite intrusive conduct, including everything from bad taste in reporting certain stories to annoying conduct in obtaining a photograph or by using modern technology. The so-called “paparazzi,” commonly cited as the problem, are at the same time, in the words of one bill supporter, “a legitimate part of the Hollywood publicity mill.” The federal bills reflect this lack of clear purpose. They create a federal harassment law that unconstitutionally singles out the media and that applies as much to photographers at accident and crime scenes, on the courthouse steps, and other newsworthy locations, as to any dangerous altercation with a celebrity.

In addition, these bills are not necessary. The Senate bill, for example, declares that federal legislation is necessary because harassment by media photographers “is not directly regulated” by state law. But a general examination of existing law shows that states have taken great care to provide protection against unreasonable invasions of privacy, either through the legislative process or through the application of traditional common law principles.

This legislative reaction in the wake of the death of Diana poses many other interesting issues well beyond the scope of this article, including the public’s fascination with celebrity, the media’s coverage of celebrities, and the apparent hypocrisy of the public who want to crack down on the media coverage they themselves sustain; and celebrities, who when media coverage pleases them, seek to promote. In this sense, though, the bills are broadly anti-First Amendment. They implicitly express the idea that the public cannot make good choices in the market place of ideas and that, aside from matters of falsity, the government should, for the public good, play a greater role in enforcing standards of taste and decency.
The Federal "Anti-Paparazzi" Bills: An Unfocused Shot at the Media*

I. The Proposed Laws

Four federal anti-paparazzi bills were introduced in the 105th Congress -- H.R. 2448 (the "Bono bill"); H.R. 3224 (the "Gallagher bill"); S. 2103 (the "Feinstein-Hatch bill"); and H.R. 4425 (the "Conyers bill") (referred to collectively as the "anti-paparazzi bills"). The full text of these bills is set out in the appendix hereto.

A. The Bono Bill

The first bill was introduced on September 10, 1997, by the late Congressman Sonny Bono of California. Entitled the "Protection from Personal Intrusion Act," this bill provides for criminal and civil penalties against "harassment" defined as:

persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to insure that privacy, for the purpose of capturing by a camera or sound recording instrument of any type a visual image, sound recording, or other physical impression of the victim for profit in or affecting interstate or foreign commerce.

The criminal penalties under the bill are:

if death results, not less than 20 years imprisonment and a fine ...; (2) if bodily injury results, not less than 5 years' imprisonment and a fine ...; and (3) if neither death nor bodily injury results, imprisonment for not more than 1 year or a fine under this title, or both.

Under the bill, liability is limited to:

Only a person physically present and pursuing or assisting in pursuing the plaintiff at the time a violation of this section occurred is subject to criminal charge or civil liability based on this section. A person shall not be subject to such liability by reason of the conduct of an agent, employee, or contractor of that person, or because images or recordings captured in violation of this Act were solicited by, bought by, used by, or sold by that person.

The other bills include similar language limiting the harassment cause of action to participants and not extending liability to agents or employers. In contrast, the California anti-paparazzi law extends liability to employers and others who induce another to violate the law. See Amy Hogue and

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Anthony Stanley, *California’s Anti-Paparazzi Statute: How Does it Change the Law?* at 33-34.

Civil actions may be brought in any district court in the U.S. for “any appropriate relief.” In addition, jurisdiction extends to actions based on acts committed abroad.

The Bono bill, like all the other bills, specifically provides that it does not affect the right to sell, publish, broadcast, or otherwise use images or recordings obtained in violation of the bill -- although its purpose is obviously to deter the creation of such images.

**B. The Gallegly Bill**

On February 12, 1998, another California Congressman, Elton Gallegly introduced the “Privacy Protection Act of 1998.” The Gallegly bill is similar to the Bono bill, but it requires, in addition, that the followed individual have a reasonable fear of death or bodily injury.

(a) Whoever persistently follows or chases any individual in the United States for the purpose of obtaining a visual image, sound recording, or other physical impression of that or another individual, shall be punished as provided in subsection (b), if—

1. The image, recording, or impression was intended to be, or was in fact, sold, published, or transmitted in interstate or foreign commerce, or the person attempted to capture such image, recording, or impression moved in interstate or foreign commerce in order to capture such image, recording, or impression,
2. The individual has a reasonable expectation of privacy from such intrusions and has taken reasonable steps to ensure that privacy,
3. The individual has a reasonable fear that death or bodily injury will result from that following or chasing; and,
4. The obtaining of the image, recording, or other impression is for commercial purposes.

The Gallegly bill provides for similar criminal punishments as the Bono bill and its scope is likewise limited to persons physically present and engaging or assisting in the prohibited conduct. In civil actions, it provides for the prevailing party to recover reasonable attorney’s fees and other reasonable litigation costs.

In August, in response to the First Amendment concerns expressed at the House hearing, Congressman Gallegly proposed to completely revise his bill, limiting it to increased civil damages for assault and battery. The proposed revision reads:

Whoever knowingly assaults or batteries any person in the course of attempting to obtain a recorded image of any person shall be liable to the person assaulted or battered for threefold the damages arising from the assault or battery. The court shall also order the defendant to pay to the person assaulted or battered any profits made by the defendant from the recorded image.

Gallegly’s revision was never formally submitted because his bill never made it to the mark-up stage in the Judiciary Committee. Congressman Gallegly’s press spokesman has stated that the Congressman is considering introducing the revised bill in 1999.
C. The Feinstein-Hatch Senate Bill

In February 1998, Senator Dianne Feinstein of California and Senator Orrin Hatch, Utah, introduced the "Personal Privacy Protection Act" in the Senate. The Feinstein-Hatch bill is similar to Bono and Gallegly in scope of liability and criminal penalties. And like the Gallegly bill it provides for the prevailing party to recover attorney's fees. Feinstein-Hatch adds civil causes of action for trespass and "constructive trespass," allowing plaintiffs to recover compensatory damages, punitive damages, injunctive and declaratory relief.

Before examining the substance of the bill, it is worth noting its dramatic, media-hostile "Findings and Purposes" section:

S. 2103 § 2 (a) Findings.--Congress makes the following findings:

(1) Individuals and their families have been harassed and endangered by being persistently followed or chased in a manner that puts them in reasonable fear of bodily injury, and in danger of serious bodily injury or even death, by photographers, videographers, and audio recorders attempting to capture images or other reproductions of their private lives for commercial purposes.

(2) The legitimate privacy interests of individuals and their families have been violated by photographers, videographers, and audio recorders who physically trespass in order to capture images or other reproductions of their private lives for commercial purposes, or who do so constructively through intrusive modern visual or auditory enhancement devices, such as powerful telephoto lenses and hyperbolic microphones that enable invasion of private areas that would otherwise be impossible without trespassing.

(3) Such harassment and trespass threatens not only professional public persons and their families, but also private persons and their families for whom personal tragedies or circumstances beyond their control create media interest.

(4) Federal legislation is necessary to protect individuals and their families from persistent following or chasing for commercial purposes that causes reasonable fear of bodily injury, because such harassment is not directly regulated by applicable Federal, State, and local statutory or common laws, because those laws provide an uneven patchwork of coverage, and because those laws may not cover such activities when undertaken for commercial purposes.

(5) Federal legislation is necessary to prohibit and provide proper redress in Federal courts for trespass and constructive trespass using intrusive visual or auditory enhancement devices for commercial purposes, because technological advances such as telephoto lenses and hyperbolic microphones render inadequate existing common law and State and local regulation of such trespass and invasion of privacy.

(6) There is no right, under the First Amendment to the Constitution of the United States, to persistently follow or chase another in a manner that creates a reasonable fear of bodily injury, to trespass, or to constructively trespass through the use of intrusive visual or auditory enhancement devices.

(14) The activities regulated by this Act, and the amendments made by this Act, substantially affect interstate commerce by threatening the careers, livelihoods, and rights to publicity of professional public persons in the national and international media, and by thrusting private persons into the national and
international media.

(15) The activities regulated by this Act, and the amendments made by this Act, substantially affect interstate commerce by restricting the movement of persons who are targeted by such activities and their families, often forcing them to curtail travel or appearances in public spaces, or, conversely, forcing them to travel in interstate commerce in order to escape from abuses regulated by this Act, and the amendments made by this Act.

According to this, the problem is sweeping, extending not just to notorious anecdotes about paparazzi hounding celebrities, but also to the bulk of local news reporting where coverage of crime, accidents, and natural disasters invariably involves reports and pictures of "private persons and their families" involved in "personal tragedies or circumstances beyond their control."

Substantively, the bill prohibits harassment, defined as follows:

The term 'harasses' means persistently physically follows or chases a person in a manner that causes the person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of the person for commercial purposes. S. 2103, § 3(a).

The Feinstein-Hatch bill eliminates the requirement that the followed person have a reasonable expectation of privacy, requiring only a reasonable fear of bodily injury. In this respect, the cause of action is similar to stalking and harassment laws, although the bills seem to confuse fear of injury with fear (or more accurately, distaste) of being photographed. Stalking and harassment laws generally focus on conduct that can lead to bodily injury. Such conduct can and does occur in public and in other areas where there is no reasonable expectation of privacy. The particular setting in which conduct occurs and a person's expectation of privacy in that setting may be relevant to determining whether conduct is objectively threatening, but it is not a necessary element of a claim. Thus, the Feinstein-Hatch harassment cause of action may be easier to satisfy than the Bono and Gallegly actions since a plaintiff would not have to show an expectation of privacy.

Perhaps the most notable feature of the bill is the creation of federal civil actions for "trespass" and "constructive trespass." Both causes of action are more akin to common law intrusion claims than to trespass since they do not protect a property interest in land -- the sine qua non of common law trespass -- but an interest in not being photographed or recorded. The trespass section of the bill provides:

(1) Trespass for commercial purposes.--It shall be unlawful to trespass on private property in order to capture any type of visual image, sound recording, or other physical impression of any person for commercial purposes.

There is no requirement that the subject have an expectation of privacy or fear of injury, merely that the trespass be for the specific purpose of obtaining a photograph or other image for a commercial purpose. Feinstein-Hatch and the other bills define commercial purpose as "expectation of sale, financial gain, or other consideration." Moreover, unlike the common law of trespass, a plaintiff need not have any interest in the property trespassed upon. The bill provides, for both the
trespass and constructive trespass actions, that:

A person obtaining relief may be either or both the owner of the property or the person whose visual or auditory impression has been captured.

As discussed in more detail in Section III below, entry onto private property may be permitted by custom, usage and, certainly, consent. As worded, this bill might allow a person to sue for being photographed on private property even when the property owner has no objection to the presence of a photographer. Although it is contrary to the common law of trespass, this bill may be construed so that the photographed subject stands in the shoes of the property owner for purposes of determining consent to be on private property. Even if the property owner must object as well, as a practical matter, property owners may assent to the desires of celebrities and other high-profile people, especially where the celebrity brings the action. If so, the bill could presumably result in restricted media access to many publicly accessible areas, such as hotels, businesses, malls and even stadiums.

The new tort of constructive trespass is defined as follows:

(2) Invasion of legitimate interest in privacy for commercial purposes.--It shall be unlawful to capture any type of visual image, sound recording, or other physical impression for commercial purposes of a personal or familial activity through the use of a visual or auditory enhancement device, even if no physical trespass has occurred, if-- (A) the subject of the image, sound recording, or other physical impression has a reasonable expectation of privacy with respect to the personal or familial activity captured; and (B) the image, sound recording, or other physical impression could not have been captured without a trespass if not produced by the use of the enhancement device.

Under this section, a constructive trespass is committed when, instead of entering onto private property, a visual or sound enhancement device is used to record images of a person on private property engaged in “personal or familial” activity that would otherwise have required a physical trespass to capture. The person must have “a reasonable expectation of privacy with respect to the personal activity captured.” Personal or familial activity is not defined in the bill. This is broader than the common law where a reasonable expectation of privacy depends on many circumstances and not merely on the activity captured. Many activities may be “personal or familial,” ranging from a solitary walk to a large wedding ceremony. In both situations, a person may have an expectation of privacy regarding the activity -- such as excluding others from participating -- but the person may be in open view of other people and have no reasonable expectation that he or she will not be photographed.

This section also does not define “enhancement device.” The Findings section specifically mentions telephoto lenses and hyperbolic microphones, equipment that can be used to capture images from a distance, but the term “visual or auditory enhancement device” may also cover less sophisticated equipment, such as an ordinary camera lens or a photo enlarger. The photo enlarger is by definition an enhancement device. Other media production equipment, a sound board, for instance, has the ability to enhance audio recordings. Thus, this cause of action is not necessarily limited to those in proximity to a subject, but it may also apply to studio and newsroom personnel.
who routinely enhance visual and sound images and who may, in fact, bring out images that were not previously audible or visible.¹

D. Conyers Bill

The Conyers bill was introduced in the House on August 6, 1998. It closely follows the substantive sections of the Feinstein-Hatch bill, but with several language changes. Instead of “harassment” the bill refers to “reckless endangerment” defined as:

Whoever, in or affecting interstate or foreign commerce and for commercial purposes, persistently follows or chases a person, in a manner that causes that person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person shall --(1) if death or serious bodily injury results, be fined under this title or imprisoned not more than 30 years, or both; and (2) be liable in a civil action for any appropriate relief.

The trespass causes of action are referred to here as “tortious invasion of privacy” defined as:

(b) Tortious Invasion of Privacy.--Whoever, in or affecting interstate or foreign commerce and for commercial purposes, engages in a tortious invasion of the privacy of another person in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person shall in a civil action be liable to any party injured for any appropriate relief.

(c) Definitions.--For the purposes of this section-- (1) the term ‘for commercial purpose’ means with the expectation of sale, financial gain, or other consideration; (2) the term ‘tortious invasion of privacy’ means-- (A) a capture of any type of visual image, sound recording, or other physical impression of a personal or familial activity through the use of a visual or auditory enhancement device, if (i) the subject has a reasonable expectation of privacy with respect to that activity; and (ii) the image, recording, or impression could not have been captured without a trespass if not produced by the use of the enhancement device, or (B) a trespass on private property in order to capture any type of visual image, sound recording, or other physical impression of any person; and (3) the term ‘any appropriate relief’ may include compensatory damages, punitive damages, and injunctive and declaratory relief.

The bill provides that one who violates this act be “liable to any party injured,” a formulation that is not as specific as Feinstein-Hatch but is probably to the same effect of allowing a plaintiff to bring a trespass-like action even when they have no interest in the affected property.

E. House Hearing

The House Judiciary Committee held one hearing on May 21, 1998, covering the Bono and Gallegly bills and also including the trespass and constructive trespass actions developed in the Feinstein-Hatch bill. Actors Michael J. Fox, Paul Reiser and Richard Masur, President of the Screen Actors Guild, testified in support of the bills. Also testifying in support were Hollywood publicist

¹ Under the bill liability is limited to persons “physically present at the time of, and engaging or assisting another in engaging in, a violation of this section.” Newsroom employees manipulating images could be within this scope if the violation of law is deemed to occur in the newsroom.
Dick Guttman, Ellen Levin, a victims’ rights advocate, and Harvard Law Professor Lawrence Lessig. Paul McMasters testified against the bill on behalf of the Society of Professional Journalists and other organizations; Paul Tash, American Society of Newspaper Editors; David R. Lutman, President of the National Press Photographers Association, Barbara S. Cochran, President of the Radio-Television News Directors Association, and Professor Robert D. Richards of Pennsylvania State University. Transcripts of the prepared statements are available on the web site of the Society of Professional Journalists at www.spj.org. A transcript of the actual hearing session will be published by the General Publications Office sometime in 1999.

Opponents of the bills raised both constitutional and practical objections to the bills; themes that are further developed in this article. Paul McMasters, for example, discussed these issues in light of the key role photo journalism plays in bringing important issues to public attention.

Supporters of legislation raised a number of issues and complaints, including personal incidents with photographers and other members of the media, a concern over the impact of new technology on privacy, the content of what is published and broadcast and issues of taste and sensitivity in media coverage. Often all of these concerns were mixed together in a general request for legislation “to send a message.” To be fair, many complaints centered on egregious behavior by media photographers. These incidents, some of which are reviewed below, are troubling, but even as to these complaints there was no firsthand testimony that existing state remedies were inadequate or even tried. Furthermore, the desire to “send a message” raises the real danger that under the guise of protecting personal safety, federal powers will be applied to regulate, or at least improperly influence, the content of what is published and broadcast.

In his opening statement, Judiciary Committee Chairman Henry Hyde framed the issue as “the proper balance between the press’ ability to engage in news gathering and an individual’s right to privacy and personal safety” (emphasis added) adding that “when in the guise of getting a story, the press puts someone at risk of death or serious injury, the First Amendment is no shield.” But he quickly strayed from the issue he framed to a content-based criticism of the media. Conceding that “the role of the media in the Princess’ death has now been disputed,” he cited media feeding frenzies and television tabloid shows as other grounds for legislation, specifically condemning the “sensationalist coverage of the so-called ‘inside story’ about Frank Sinatra’s death.”

Similarly, victim’s rights advocate Ellen Levin complained of the media “frenzy” outside her apartment building on the night of her daughter’s murder, in the notorious New York “preppie murder” case. She complained that the media dragged her daughter’s reputation through the mud; that someone, presumably a reporter, went through the family’s trash; that crime scene photos were repeatedly shown on television; and that a television reenactment of the crime on A Current Affair caused her great pain. Without disputing Ms. Levin’s tragedy, not one of these incidents is within the scope of the proposed laws. One incident did involve a photographer. At the murder trial, the victim’s sister was “pushed by a photographer and almost fell down in their fury to get a shot of us.” As to this, it is not clear whether this single incident would amount to persistent following or chasing to constitute harassment, as defined in any of the bills, although it might well be conduct actionable
under state civil law.

As for complaints centered on photographers, actor Michael J. Fox testified about what he described as “the intrusive, harassing and mercenary tactics of tabloid photographers.” Among other things, he recounted that photographers intruded into his wedding and tracked him and his wife down on their island honeymoon, where photographers “parked a boat within camera range of our suite and fired away with high-powered cameras.” Moreover, he relayed that “for years, we have spotted photographers around the edges of our personal property and trailing us in the streets and parks with high-powered lenses, taking pictures of private moments and of our children . . . In 1989, they tried to pose as medical personnel at the hospital where Tracy was giving birth to our son . . . In 1990, they intruded upon my father’s funeral under false pretenses, carrying cameras . . . They also pretended to be mourners and snuck into the wake at my mother’s home.”

Fox testified about an unusual incident not involving photographers. According to Fox, a false tabloid story that he was receiving death threats inspired a disturbed woman to send him and his family thousands of threatening letters. In this case, the fan was arrested and convicted under California’s anti-stalking law.

Actor Paul Reiser testified about similar incidents with photographers: “Cars began to follow us on our daily errands . . . Strangers with video cameras camped outside our home . . . One resourceful photographer gained access to a house down the street from us and with a telescopic lens was able to get a photo of my son in the privacy of our backyard.” In an incident with a tabloid journalist, Reiser testified that, “Someone pretending to be our pediatrician called up family members and extracted details of our son’s medical records, which were subsequently printed in the tabloids.”

These incidents, involving both photographers and journalists, illustrate the intense, perhaps, excessive, interest of the public in the lives of celebrities. The boundaries between the personal and the public in this area are not easy lines to draw. Celebrity status exists by virtue of public attention. Even Hollywood publicist Dick Guttman in testimony to the House Judiciary Committee in support of legislation described paparazzi as “a legitimate part of the Hollywood publicity mill.”

Speaking more generally, Reiser noted that “the code of decency we all aspire to seems to be vanishing. We live in a climate in which people’s lives are regularly served up as mass entertainment, and the acquisition of this entertainment has become a perverse sport.” With respect to legislation, he urged the committee to “take the first step . . . and send forth the message that there is a distinction to be made between public and private.”

One message of these bills, made explicit in testimony of some supporters of legislation, is that First Amendment protections of the press, as currently recognized, are one of the causes of the

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2 He contrasted paparazzi to “stalkerazzi” — “tabloid predators who conduct guerilla warfare through acts of pursuit and provocation rather than acts of newsgathering.”
problem. Richard Masur, President of the Screen Actors Guild, bluntly stated: “Absent Congress’
guidance to the contrary, the courts have, quite properly, leaned in favor of press freedoms when
deciding state-law-based harassment and trespass cases. . . . Exemptions are often explicitly made for
‘constitutionally protected activity.’ Congress . . . must decide if we are to adjust the balance . . . .”
Harvard Law School Professor Lawrence Lessig developed an analogy between the media and a
police state. Testifying in support of the new constructive trespass actions, he referred to new
technology, such as telephoto lenses, parabolic microphones, security cameras and the Internet, as
cauing a “Sovietization of our personal and private life.” Continuing with his analogy to a police
state, he added that we do not live under the Soviet army to enforce these invasions of privacy.
According to Lessig: “Our constitution is no Politburo. The free speech clause does not render us
hostage to the invasions of new technologies.”

Other than this one day hearing, there was little Congressional activity on the bills. The bills
remained in the House and Senate Judiciary Committees. Inaction on the bills was the result of the
House Judiciary Committee’s other business rather than a lack of interest in the subject matter of the
bills. With the end of the Congressional session approaching, federal legislation will not be passed
this year, but similar or identical bills will likely be reintroduced in 1999. The recently enacted
California law, discussed in the accompanying article, may influence the substance and development
of new federal bills. There is a strong California hand in the federal bills, and the new state law may
take some pressure off the drive for federal legislation. The state law may also allow Congress to
take a wait-and-see approach, although it may also encourage Congressional supporters to introduce
even tougher bills, perhaps extending liability to employers and agents.

In general, these bills would create new federal causes of action directed against media
photographers, cameramen, soundmen, reporters with recording devices and others engaged in
newsgathering and, perhaps, even to conduct in newsrooms. The causes of action for harassment,
trespass and constructive trespass created in the bills bear some similarity to existing causes of action,
but in many crucial respects their scope and application is ambiguous. Based on the hearing,
supporters of legislation are concerned not only with aggressive newsgathering and personal safety,
but unrelated issues concerning the media and society that are generally not subject to legislation.
The observations about vanishing decency and our mass entertainment culture may be correct, but
the proposed federal remedy is both extreme and ill-focused.

As discussed in Section III, state statutes already regulate dangerous and unreasonably
intrusive conduct. Moreover, the anti-paparazzi bills are rife with constitutional problems. As the
discussion below demonstrates, the proposed bills, if passed, are susceptible to challenge on
constitutional grounds, including unfairly singling out the press and undue vugueness.3

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3 This analysis examines potential constitutional problems raised by differential treatment of the press and vugueness.
The bills are also susceptible to constitutional challenge on overbreadth and Tenth Amendment grounds. It is worth
noting, for example, that the United States Court of Appeals for the Fourth Circuit, in a decision that may affect the fate
of the proposed anti-paparazzi bills, held that the Drivers Privacy Protection Act (“DPPA”) unconstitutionally
encroaches on the prerogatives of the states under the Tenth Amendment. See Condon v. Reno, No. 97-2554 (4th Cir.
Sept. 29, 1998); but see Oklahoma v. U.S. No. 97-6389 (10th Cir. Dec. 3, 1998) (holding DPPA a valid exercise of
II. Constitutional Analysis

The process by which journalists gather the news is protected by the First Amendment's guarantee of freedom of the press. Justice White made this clear in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), when he cautioned that "without some protection for seeking out the news, freedom of the press could be eviscerated." To strip away the right of members of the press to collect the news is, in effect, to deprive the press of its clearly established right to publish and disseminate the news.4

Since Justice White's pronouncement more than twenty-five years ago, First Amendment jurisprudence has offered little insight into the practical meaning of the protection for newsgathering. There can be no doubt, however, that conduct that is fundamental to newsgathering – obtaining photographs, shooting video footage, taking audio tape or recording notes while interviewing a source – qualifies as constitutionally-protected activity.

As the following analysis demonstrates, recent proposals for federal legislation restricting the behavior of the so-called "paparazzi" are unlikely to pass constitutional muster. They duplicate existing legislation of general applicability (as for example, stalking statutes) but, in an effort to give emphasis to its distaste for certain newsgathering practices, recraft the statutes of general applicability to focus on journalists alone. In so doing, they violate the constitutional prohibition on singling out the press for punishment. In the effort to improve upon existing laws of general application, the proposals also creates unwieldy statutes that are under-inclusive (punishing some physically aggressive photographers, but excluding all who do not act in a professional capacity) while introducing concepts of unbounded vagueness ("persistently physically following"). The legislation

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Justice Stewart, in his dissent in *Branzburg*, stated:

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. . . . No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.

*Branzburg*, 408 U.S. at 727-28 (citations omitted).
also takes concepts drawn from existing stalking laws ("reasonable fear of bodily injury") and focuses them on journalists whose interest is, unlike a "stalker," wholly unintended to cause physical injury or the apprehension of physical injury. It thus eliminates the requirement of intent (sometimes criminal intent) to harm that undergirds those other statutes. These flaws, serious in any proposed statute, take on constitutional dimensions when the statute in question is aimed only at the press.

The result: the so-called "anti-paparazzi" bills, as drafted, are susceptible to challenge on a number of constitutional grounds, including (1) differential treatment of the press and (2) vagueness.

A. Differential Treatment of the Press

One of the chief characteristics of the anti-paparazzi bills is that they are directed solely at the press. These bills, by focusing on activities whose sole end result is taking pictures or obtaining sound recordings, single out what is at core expressive activity. That alone renders them constitutionally suspect. But the bills focus in tighter still by seeking to punish those who engage in these fundamentally expressive activities when they do so for commercial purposes and gain: the press.5

The Feinstein-Hatch bill (and the Gallegly, Bono and Conyers bills) is explicit: it imposes penalties on the obtaining of visual images, sound recordings or other physical impressions of a person "for commercial purposes." (S. 2103, § 3(a)) (emphasis added). The proposed revised Gallegly bill implies as much by going after that activity which is engaged in interstate commerce and by providing for damages in the amount of "any profits made by the defendant from the recorded image."6

The bills draw a dividing line between the casual, camera-crazed fan, who makes a hobby of chasing and photographing celebrities for personal amusement, and the for-profit photojournalist who will ultimately seek publication and distribution of his work product as an element of media expression. In effect, the proposed legislation exempts the former photographer, but imposes civil and/or criminal penalties on the latter photographer, i.e., the press, in instances where the two engage in precisely the same aggressive, intrusive, and potentially harmful conduct.

In announcing her sponsorship of the "Personal Privacy Protection Act," Senator Feinstein

5 Like the tax regulation in Arkansas Writers’ Project, 482 U.S. at 228, which "targeted a small group of newspapers," the proposed bills are intended to single out the tabloid press. In fact, the extraordinary vagueness of the terms of these bills may result in their application (or at least, attempts to apply them) to the widest range of media and subject matter. Celebrities today testify of tabloid photographer excesses, the claimant of tomorrow may be an alleged white collar criminal or government official being covered aggressively.

6 Ironically, the constitutionality of the anti-paparazzi bills hinges on the "commercial purposes" language, since this language is designed to bring the bills within the scope of the Commerce Clause, empowering Congress to regulate in an area where state law already regulates conduct such as harassment, stalking and trespass.
was hardly subtle in acknowledging that her proposed law is designed to punish members of the press: "The legislation is aimed at punishing threatening and harassing abuses of personal privacy by the stalker press." See Press Release of Senator Dianne Feinstein, dated May 21, 1998 (emphasis added). 7 Congressman Gallegly stated his bill is aimed at "a new type of press known as paparazzi." Statement of Elton Gallegly Regarding H.R. 3224 to Committee on the Judiciary, May 21, 1998. It is clear from the "commercial purposes" and "affecting commerce" language – not to mention the climate in which the bills were introduced and the testimony in the hearing on the House bills – that these bills are aimed at the press. 8

The Supreme Court of the United States has taken the position that newsgathering may be subject to laws of general applicability when the enforcement of such laws would have only "incidental effects on its ability to gather and report the news." Cohen v. Cowles Media Co., 501 U.S. 663 (1991) But, the Supreme Court has clearly held that differential treatment of the press is presumptively unconstitutional. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983). 9 In Minneapolis Star, the Court ruled that Minnesota's enactment of a special use tax that applied only to the cost of ink and paper consumed in producing newspapers violated the First Amendment:

A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment.

7 A copy of which is available online at http://www.senate.gov/feinstein/releases. In another press release, Feinstein writes that the proposed law is aimed at "an increasingly aggressive cadre of fortune seekers with cameras."

8 Even laws which are ostensibly neutral in form will be subjected to strict scrutiny if they would have "the inevitable effect of singling out those engaged in expressive activity." Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986). See also, in the analogous area of free expression law, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), in which the Supreme Court analyzed the practical impact and actual practice of the laws at issue, as well as the legislative history, in determining that laws otherwise neutral in form would single out a religious organization for application and thus were unconstitutional.

9 See also Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (state sales tax exemption scheme, targeting a small group of newspapers, violated First Amendment's guarantee of free press); Turner Broadcasting System v. FCC, 512 U.S. 622, 660 (1994)("[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State.'") (quoting Arkansas Writers Project, Inc. v. Ragland); Arcara v. Cloud Books, Inc., 478 U.S. 697, 704-705 (1986) ("We have also applied First Amendment scrutiny to some statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities.") (citing Minneapolis Star & Tribune Co. Minnesota Comm'r of Revenue). The taking of pictures and the obtaining of sound recordings, of course, do have expressive components, arguing even more strongly for the application of First Amendment scrutiny to laws that single them out for criminal and civil penalties.
Id. at 592-93. The Court reasoned that a regulation that treats the press differently carries with it the implicit suggestion that the regulation is based on a censorial motive: "[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." Id. at 585.

Regulations such as Minnesota’s special use tax, the Court held, are subject to strict scrutiny: “Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.” Minneapolis Star, 460 U.S. at 585. The anti-paparazzi bills cannot meet this high threshold for constitutionality.

Indeed, the Congress has not even tried to do so. There is nothing in the legislative history or purposes of the bills that give any indication that the sponsors gave the matter any thought at all, let alone developed a theory of compelling importance for the differential treatment accorded the press under these proposals. It is illogical to suggest that there is a more compelling need to prohibit harassment by journalists or commercial photographers than harassment by zealous fans, or individuals seeking to obtain photographs or tape recordings merely as a hobby.10

As Justice Antonin Scalia stated in his concurring opinion in Florida Star v. B.J.F., 491 U.S. 524, 542 (1989): “This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest ‘of the highest order.’”

Moreover, it is clear that the goal of prohibiting harassment, invasions of privacy, assaults and batteries can be achieved without legislation that unfairly singles out the press. Despite pronouncements to the contrary in the Feinstein-Hatch bill preamble, state laws governing harassment, stalking and trespass are relatively extensive. There is no rationale offered for why those who feel abused by the press could not avail themselves of that law without demanding special provisions that single out newsgathering.11

A compelling state interest required to meet the strict scrutiny test is intended to put the legislative branch to the test, to require that rigorous analysis and evidence be given to support that which the First Amendment, by its terms, would otherwise prohibit. Congress has not and cannot begin to pass that test.

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10 See Section III D., infra, at 24 , noting that anti-stalking laws were inspired by the an obsessive fan’s murder of an actress.

11 See Section III, infra, describing use of generally applicable laws against newsgatherers.
B. Vagueness

The anti-paparazzi bills are susceptible to a facial constitutional challenge on the ground that they are unduly vague. None of the bills draw a clear boundary between unlawful behavior and reasonable newsgathering conduct.

The “vagueness” doctrine is derived from the Due Process clauses of the Fifth and Fourteenth Amendments. The underlying premise is that a law should be drafted clearly enough to give an ordinary citizen the opportunity to understand what behavior the law prohibits, so that he or she knows how to behave lawfully. A statute is unconstitutionally vague if it (1) fails to give individuals sufficient notice of what conduct is prohibited, or (2) creates a risk of arbitrary or discriminatory law enforcement. See Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); see also Connally v. General Constr. Co. 269 U.S. 385, 391 (1926).

The anti-paparazzi bills are unduly vague for both of the above reasons. First, the language of the bills is riddled with ambiguities. For example, they offer no meaning to the phrase “persistently physically follow,” a key phrase in the defining of “harassment.” It is impossible, then, for a tabloid photographer, for example, to know when he or she is persistently physically following a movie star under the proposed laws. Is walking beside someone for five yards on a public sidewalk “following”? What about ten yards? Twenty yards? Is following a Solicitor General down the steps of the Supreme Court with a video camera every week of the Supreme Court term “persistent”? Or does “persistent” mean tagging behind someone twice in a day or constantly for twenty minutes?

Even the proposed revised Gallegly bill is unduly vague. For one, it fails to define “recorded image.” Does a drawing qualify as a recorded visual image? But more central, Gallegly’s bill prohibits “assault and battery,” terms left undefined. While it would be possible under First Amendment analysis to prohibit the physical assault or fear of physical assault of a victim by anyone, and enforce such a law against a photographer, such laws already exist in state criminal and civil laws. The failure to define the terms and provide clear and precise standards for the behavior that is sanctioned under the proposed legislation offers the perhaps irresistible temptation and opportunity to a news subject to seek legal remedy when what the victim fears upon seeing that his pursuer wields a camera or recording machine is less physical harm than an unwanted photo opportunity or sound bite. Such is the case, however, when a term such as “assault” is unhooked from its traditional moorings and left to find its own definition.

As a result, the bills do not provide clear standards for officers who will enforce anti-paparazzi laws. A second aspect of the vagueness doctrine is that a statute should be worded in such a manner that it will prevent inconsistent enforcement of the law. See Kolender v. Lawson, 461 U.S. 352, 357-58 (1983). In Kolender, the Court held that a California statute requiring persons suspected of loitering to present identification when approached by a peace officer was unconstitutionally vague because it vested complete discretion in the officers to determine whether or not the identification was “credible and reliable.” Id. at 358.
The anti-paparazzi bills are similar to the California statute at issue in *Kolender*. The imprecise wording of the bills will leave too much to the discretion of the officers who will enforce them. Without sufficient guidance or direction, officers will inevitably rely on arbitrary, subjective judgments about, for instance, what constitutes mere “following” and what constitutes “persistent physical following.” They would allow celebrities to target or threaten with law enforcement those journalists and photographers whose coverage they simply do not like. Given the risk of arbitrary and discriminatory law enforcement, the proposed anti-paparazzi legislation is unlikely to survive a vagueness challenge.

Another consideration in analyzing a law for vagueness is the intent, or scienter, requirement. The Supreme Court has held that “a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Other statutes have passed the vagueness test where the language of the acts included a scienter requirement. *See United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963) (statutory language prohibiting unreasonably low sale prices was not void for vagueness because it was restricted to sales with the specific intent to destroy competition); *see also Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (regulation requiring certain vehicles to use uncongested thoroughfares withstood vagueness challenge because it contained an intent standard).

Indeed, state laws prohibiting stalking, which are drafted in language very similar to the anti-paparazzi bills, have been upheld on vagueness challenges where they include an intent or scienter element. *See, e.g., People v. Falck*, 52 Cal. App. 4th 287, 297 (1997) (rejecting the contention that a California stalking statute was vague and over broad, and noting the importance of the intent element in overcoming potential vagueness). An Alabama statute, for example, includes within the definition of stalking the “intentionally and repeatedly follow[ing] or harass[ing] another person ... with the intent to place that person in reasonable fear of death or serious bodily harm.” *Culbreath v. State*, 667 So. 2d 156, 158 (Ala. Crim. App. 1995). The court in *Culbreath* upheld the Alabama statute, noting the importance of the intent requirement and analogizing to Florida and California stalking statutes, both of which include intent requirements. The court also noted that a Connecticut court upheld Connecticut’s stalking law, pointing out that the language “willful and repeated ‘following’” was not unduly vague, in part because “[t]he statute does not encompass ‘following’ that is aimless, unintentional, accidental or undertaken for a lawful purpose.” *Culbreath*, 667 So. 2d at 160 (citing *State v. Culmo*, 642 A.2d 90, 98-99 (Conn. Super. 1993)).

In contrast, the anti-paparazzi bills lack any intent requirement. None of the bills require that harassment be “willful,” “intentional,” or “malicious.” As drafted, the Feinstein-Hatch bill could, conceivably, impose a prison term for harms caused unintentionally. Unlike the Connecticut statute cited in *Culbreath*, the proposed anti-paparazzi bills prohibit following that is “unintentional,

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12 Under California’s anti-stalking law, “any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place the person in reasonable fear of death or bodily injury is guilty of the crime of stalking.”
accidental or undertaken for a lawful purpose,” — namely, following another individual with the intent of capturing photographs or video or audio footage. Thus, even individuals who act aggressively or negligently, but without the intent to cause another person to fear bodily injury, may be subject to liability. The legislative confusion as to scienter is emphasized by the retention of reference to “a reasonable fear of bodily injury” on the part of the victim without reference to any intent to cause such fear. This focuses liability entirely on the subjective state of mind of the alleged victim — a formula very much at variance with traditional First Amendment analysis. The lack of a scienter requirement, and the lack of specific language, therefore, makes the proposed anti-paparazzi bills susceptible to constitutional challenge on vagueness grounds.

C. Conclusion

The anti-paparazzi bills are unlikely to withstand constitutional challenge if passed into law. Each is subject to attack on the ground that it unfairly targets members of the press, and makes unlawful activities that are reasonable and necessary aspects of the newsgathering process. Moreover, the language of the proposed anti-paparazzi bills is unduly vague, leaving citizens and law enforcement officers to speculate as to the actual meaning of the bills’ prohibitions. To the extent that these bills actually seek to ferret out the behaviors they purport to regulate, one would expect them to target harassment, assault or intrusive conduct by all individuals, rather than singling out the media for special regulation. The fact that the bills are aimed at the “stalker press” suggests that the bills are motivated by animus towards a defined group of journalists, rather than an interest in prohibiting the behavior itself. To single out the press as a group — on the basis of newsgathering conduct or the content of a news story — is presumptively unconstitutional.

Newsgathering is essential to the ability of a free press to assemble and disseminate the news. Hence, if the courts are to abide by the promise set forth in Branzburg — that the press is entitled to protection for newsgathering — then the anti-paparazzi bills simply cannot survive constitutional challenge.

III. State Privacy Laws

A separate related argument against the enactment of federal anti-paparazzi legislation is that state law adequately deals with the legitimate problems the bills purport to address. Opponents of the anti-paparazzi bills made this point at the House Judiciary Committee hearing, but it is worthwhile to expand upon it to show that states have taken great care to protect privacy interests while at the same time balancing, as they must, First Amendment concerns. The review of state laws set out here is not intended to provide a comprehensive analysis; that would require at least an entire textbook. But a review of key aspects of the law does show that there is no “gap” to be filled.

As for privacy law in general, the observation in the Feinstein-Hatch bill that state law is an “uneven patchwork” may be true, but this is more a reflection of the underlying interests than a fault of law. Numerous interests make up the concept of privacy, interests ranging from one’s identity,
dignity, solitude and safety to a wide variety of social concerns over the access and use of financial, medical, educational and other personal information. As one commentator has noted, "the word 'privacy' has taken on so many different meanings and connotations in so many different legal and social contexts that it has largely ceased to convey any single coherent concept." McCarthy, The Rights of Publicity and Privacy, § 1.1[B][1] (Clark Boardman 1994).

This section examines the common law claims of intrusion and trespass, as well as related causes of action such as criminal trespass, stalking and harassment. Intrusion and trespass claims are asserted against the media for conduct arising in the course of newsgathering. Principles developed under the law give some understanding to the concept of "privacy" as it applies to the relationship between the media and the public and the laws applicable to newsgathering.

A. Intrusion

In general terms, the tort of intrusion provides a remedy for unreasonable and highly offensive prying, physical or otherwise, into another's private affairs or concerns. As the court in Shulman v. Group W Productions, Inc. recently stated, "the tort of intrusion into private places, conversations or matters is perhaps the one that best captures the common understanding of an 'invasion of privacy'... It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity." 18 Cal. 4th 200, 955 P.2d 469, 489 (1998). In the media context, claims are most often based on physical intrusions, or visual and sound recordings, made during newsgathering. A substantial number of nonmedia intrusion claims are based upon issues of informational privacy, such as the access to and use of employment, medical and financial records.

Forty-eight states and the District of Columbia explicitly or implicitly recognize the tort of intrusion. A common formulation for the tort of intrusion, and one that nineteen states and the

13 Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii (dicta in Mehan v. Reed, 76 Hawaii 101, 869 P.2d 1320 (1994) strongly suggest that Hawaii will recognize this tort), Kentucky (has not explicitly rejected or accepted but McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882 (Ky. 1981) approved the listing of types of invasion or privacy set out in § 652A of the Restatement (Second) of Torts), Idaho, Illinois (there is some conflict among appellate and federal court decisions over recognition of tort), Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota (the Minnesota Supreme Court recognized the tort of intrusion for the first time on July 20, 1998 in Lake v. Wal-Mart Stores, Inc., 26 Media L. Rep. 2175 (1998)), Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota (discussed in dicta by state Supreme Court in Hougun v. Valley Memorial Homes, 1998 WL 25585 (N.D. Jan. 27, 1998), Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota (does not have any formal decision in which an individual tort sounding in intrusion has been explicitly accepted or rejected but has clearly indicated that the tort of invasion of right of privacy includes an intrusion element), Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming (no intrusion cases, but Supreme Court has addressed invasion of privacy generally in a handful of cases). New York does not recognize common law privacy torts, although it does recognize actions for trespass and other crimes and torts committed during the course of newsgathering. See Galella v. Onassis, 487 F.2d 986, 1 Media L. Rep. 2425 (2d Cir. 1973). Virginia recognizes a cause of action for certain limited forms of intrusion, namely for any violation of Virginia's Interception of (continued...)

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District of Columbia have adopted, is set out in the Restatement (Second) of Torts §652B which provides that:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or in his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Determining what is "private" and what is "highly offensive" is a balancing process that takes into account customs and standards, both social and legal, including the purpose of the alleged intrusion. There are many complexities involved in these determinations but "privacy" and "offensiveness" (the former contributing to the understanding of the latter) in this context are subject to certain generalizations. For example, on public streets, the general view is that a person is open to public observation by others, including being photographed or videotaped. See, e.g., C.T. Dienes, L. Levine, R. Lind, News Gathering and the Law, §12-2 (a) (Michie 1997) (and cases cited therein); Restatement (Second) of Torts, 652D, comment b (photograph taken on public street is not an invasion of privacy).

The "public streets" rationale also applies generally to areas where the public is welcome, such as sporting events, airports, restaurants and businesses, and to other areas that are within public view, such as a residence and driveway. See, e.g., Aisenson v. American Broadcasting Co., 220 Cal. App. 3d 146, 162, 269 Cal. Rptr. 379, 17 Media L. Rep. 1881 (1990) (no intrusion as a matter of law in videotaping with a zoom lens a judge in his driveway and car); Deteresa v. American Broadcasting Co., 25 Media L. Rep. 2038 (1997), cert. denied, 118 S.Ct. 1840 (1998) (video and sound recording of plaintiff at her door not intrusive); Mark v. Seattle Times, 96 Wn.2d 473, 635 P.2d 1081, 7 Media L. Rep. 2209, cert. denied, 457 U.S. 1124 (1982) (videotaping through the window into a closed pharmacy did not sustain intrusion claim); Russell v. American Broadcasting Co., 23 Media L. Rep. 2428 (N.D. Ill. 1995). These decisions acknowledge that use of hidden cameras is a standard technique in investigative reporting.

Hidden camera filming and sound recording is generally not actionable in circumstances where there is no expectation of privacy. See, e.g., Desnick v. Capital Cities/ABC, 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995); Sanders v. American Broadcasting Co., 60 Cal. Rptr. 2d 595 (Ct. App. 1997); Russell v. American Broadcasting Co., 23 Media L. Rep. 2428 (N.D. Ill. 1995). These decisions acknowledge that use of hidden cameras is a standard technique in investigative reporting.

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Wire, Electronic or Oral Communications Act.

In Desnick, the court recognized a more general point with respect to newsgathering and privacy, namely that confrontational or ungentlemanly tactics do not create a cause of action, especially when the subject is sophisticated, or conversely, not a novice, “child or vulnerable person.” *Id.*

In contrast, a person has a general expectation of privacy in his or her home and may have a cause of action against the media for unauthorized entry and picture taking. *Dietemann v. Time, Inc.*, 449 F.2d 245, 250, 1 Media L. Rep. 2417 (9th Cir. 1971) (“The First Amendment is not a license . . . to intrude by electronic means into the precincts of another’s home or office.”). Similarly, a person may have a reasonable expectation of privacy while receiving medical care or in settings where people are ill or dying. *See Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200 (1998); *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986). Even an unusual outdoor “unwedding” was held to be private enough to support a claim against an uninvited reporter and photographer. *Rafferty v. Hartford Courant*, 36 Conn. 239, 416 A.2d 1215 (Conn. Super. 1980) (ceremony on open hill at a distance from passers-by).

Thus, a cause of action for intrusion may lie if a photographer wrongfully enters, either physically or through the use of surveillance equipment, into a private home or private setting to take pictures or sound recordings. This principle of existing state law covers some of the complaints voiced at the House Judiciary Committee hearing, and it does so without creating confusing and untested new torts. Several incidents relayed by Michael J. Fox and Paul Reiser appear to be actionable, such as impersonating medical personal or family members to gain access to private settings such as hospitals, funerals or closed wedding ceremonies. As noted below, such conduct may also be actionable under state criminal law. Picture taking of other private moments may be actionable if there is reasonable expectation of privacy. Being secretly photographed from afar while on “an island honeymoon” may be within this category, depending on the circumstances regardless of the equipment used or whether a trespass was committed.

In these circumstances, state and federal wiretap laws may also apply, especially in connection with sound recordings. Every state except South Carolina and Vermont has enacted a wiretap statute and these laws protect against the unauthorized interception or recording of private conversations and many of these state laws are modeled on the federal statute. Private

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15 In *Miller*, the court rejected the defense that custom permitted a news crew to follow paramedics into a home to observe and record their treatment of a heart attack victim. Media “ride alongs” have led to a number of claims and conflicting fact intensive decisions. *Compare Ayeni v. CBS, Inc.*, 35 F.3d 680 (2d Cir. 1994), cert. denied, 115 S. Ct. 1689 (1995) to *Florida Publishing Co. v. Fletcher*, 340 So.2d 914, 2 Media L. Rep. 1088 (Fla. 1976) and *Wood v. Fort Dodge Messenger*, 13 Media L. Rep. 1610 (Iowa D. Ct. 1986). This issue bears little or no relationship to the issues the anti-paparazzi bills purportedly address since the media’s coverage of celebrities is not likely to occur in conjunction with public agents executing their official duties. However, media ride alongs might get swept up if trespass is alleged.

16 The Federal Wiretap Statute, 18 U.S.C. §§ 2510-2520 prohibits the (1) intentional (2) interception, disclosure, or use, (3) of an oral, wire or electronic communication or (4) intentional use of a device to intercept an oral communication. For more information on this subject and a catalogue of state law see *Hidden Cameras Hidden Microphones, At the Crossroads of Journalism, Ethics and the Law* (1998) published by the Radio and Television News Directors (continued...)
conversations are in very general terms those that occur with an "expectation of privacy." As mentioned above, conversations in public places or businesses are generally not considered private. Moreover, the federal law and the majority of state laws permit a party to a private conversation to record without liability so long as they are not doing so for the purpose of committing a crime or tortious act. Although there are important differences in the law over whether recordings made by a participant to a conversation violate an expectation of privacy, no such disagreement exists with respect to eavesdropping by third-parties -- the scenario most applicable to celebrity complaints.

A cause of action may also lie if a photographer exceeds certain bounds of conduct even on the public streets. This was demonstrated in the well known case of Galella v. Onassis, involving an infamous photographer who hounded Jacqueline Onassis and her children. 487 F.2d 986, 1 Media L. Rep. 2425 (2d Cir. 1973) (decided under New York’s harassment statute) Although recognizing that Jacqueline Onassis was a public figure subject to news coverage, the court enjoined Galella from approaching her and her children in public, blocking their movement in public places and streets and performing any act jeopardizing their safety or which would harass or frighten them. Galella’s conduct went far beyond any reasonable grounds of newsgathering by, among other things, physically touching Onassis and her daughter, causing fear of physical contact in frenzied attempts to get their pictures, following Onassis and her children too closely in a car, and endangering the safety of her children while they were swimming, water skiing and horseback riding.

A more recent case also involved invasive conduct within the public sphere, including the use of technologically advanced equipment such as powerful zoom cameras and directional microphones capable of picking up distant conversations. Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996). In Wolfson, a court enjoined a television news program’s stakeout of two business executives and their families. Although the recordings made were of activities in public places and places within public view, the court, citing to Galella, concluded that the surveillance amounted to hounding and harassment, particularly so because the news crew trained so-called shot gun microphones onto family homes capable of picking up sounds not otherwise audible to bystanders and attempted to follow plaintiffs and their children to work and school in unmarked cars.

These last two factors appear to distinguish Wolfson from other cases, like Aisenson, that have found no intrusion in stakeout or confrontational “ambush” interviews. The court appeared to act with heightened caution to protect plaintiffs’ children who were incidental to the subject matter of the story pursued -- the high salaries of health care company executives -- but who were nevertheless in the "line of fire." Second, the court was acutely troubled by the defendants’ use of high powered microphones with the potential to pry into private conversations. Although the plaintiffs may have been in public view, the microphones had the capacity to pick up conversations which would not be audible to bystanders.

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Galella and Wolfson demonstrate that state law is sensitive to the privacy interests of people even in public places. Persistent trailing of persons and their families may be actionable. Not enough facts were adduced at the House hearing to determine whether any specific complaints would be actionable under this standard. Depending on circumstances, Paul Reiser's complaint that "cars began to follow us on our daily errands" may be actionable if this following constitutes a course of hounding and harassment. The law recognizes, though, that celebrities are newsworthy and subject to media coverage and a court would distinguish between media coverage that is annoying and conduct that realistically threatens a subject.

B. Trespass

The tort of trespass is related to the physical prying aspect of intrusion and a trespass claim may be brought together with an intrusion claim. The interest protected, though, is more finite, one's possessory interest in land. An expectation of privacy is generally irrelevant. At common law, "every unauthorized entry upon the soil of another was a trespass, for the law bounds every man's property and his fence." W. Prosser & W. Keeton, Prosser & Keeton on the Law of Torts § 13 (5th ed. 1984). The modern view is that trespass encompasses intentional, unauthorized entry onto another's property or remaining on another's property after one has been asked to leave. Restatement (Second) Torts §158.

Because physical entry onto property is essential in this tort, "constructive trespass," through visual or sound recording equipment, as described in the Feinstein-Hatch and Conyers bills, is not recognized. However, as discussed above, the use of such equipment to capture sound or visual images of private moments may be actionable as an intrusion regardless of the location of the photographer.

As to physical trespass, in the media context, reporters, or photographers, who enter onto private property in the course of news gathering may face liability for trespassing. In one notable case, a media defendant was held liable for trespass when a camera crew burst into a restaurant "in a noisy and obtrusive fashion" with the camera rolling. Le Mistral v. CBS, 3 Media L. Rep. 1913 (1978). Trespass was found where a television camera crew accompanied paramedics into the home of a man who had suffered a heart attack. Miller v. National Broadcasting Company, 187 Cal. App. 3d 1463 (1986). In concluding that the entry into the home was unauthorized, the court noted that the alternative would be staggering: to create a "climate of fear" where one might expect the most seclusion. In a similar fashion, a Wisconsin court found television reporters potentially liable for trespass when they entered private property, without permission, to film a police investigation. Prahl v. Brosamle, 98 Wis.2d 130, 295 N.W.2d 768 (Ct. App. 1979).

These cases demonstrate that courts recognize and protect the possessory interest in property against physical invasions. In Prahl, the court rejected the media photographer's argument that a First Amendment privilege entitled him to have access to a newsworthy crime scene. That is not to say that the First Amendment plays no role in trespass jurisprudence. In the 1940's when trespass and anti-peddling laws were used to prosecute religious proselytizers, the Supreme Court struck
down an anti-peddling law stating: “For centuries it has been common practice in this and other
countries for persons not specifically invited to go from home to home and knock on doors or ring
doorbells to communicate ideas to the occupants or to invite them to political, religious, or other

The important issue identified in *Martin* is that of consent, an issue conceptually akin to the
expectation of privacy issue in intrusion law. Entry onto the property of another is not actionable
if done with permission, which may be implied from custom, usage or conduct. “Custom entitles
everyone to assume that a possessor of land is willing to permit him to enter for certain purposes until
a particular possessor expresses unwillingness to admit him.” *Restatement (Second) of Torts* § 330.

For example, a news crew’s ambush interview on the premises of a private business was not an
actionable trespass where no signs prohibited entry, the crew entered peacefully and were not asked
to leave. *Machelder v. Diaz*, 801 F.2d 46, 59 (2d Cir. 1986). Implied consent permitted the media
to enter the premises, and the interview subject’s anger at being filmed and questioned did not negate
this consent. *Id.* (citing *Restatement (Second) Torts* §332, comment b).

Thus, custom and practice allow the general public and the media to have access to many
private premises and locations without liability for trespass. As a general matter, the intent to gather
information or pictures does not by itself diminish implied consent even if these intentions, if known,
would cause the possessor to withdraw consent. *Desnick v. Capital Cities/ABC*, 44 F.3d 1345, 23
Media L. Rep. 1161 (7th Cir. 1995). In *Desnick*, the court held that reporters did not commit a
trespass by posing as patients to gain access to a doctor’s office. Even though they misrepresented
their purpose, their entry “was not invasive in the sense of infringing the kind of interest of the
plaintiffs that the law of trespass protects; it was not an interference with the ownership of possession
of land.” *Id.* at 1353; *but see Special Force Ministries v. WCCO Television*, 26 Media L. Rep. 2490
(Minn. Ct. App. 1998) (hidden camera taping may exceed consent to enter private property).

Additional circumstances may change this result, as seen in the recent and much publicized
*Food Lion* case. Here, media personnel obtained employment as food handlers in a supermarket,
gaining access to nonpublic areas of the business. *Food Lion, Inc. v. Capital Cities/ABC Inc.*, 25
Media L. Rep. 1161 (M.D.N.C. 1996). With respect to plaintiff’s trespass claim, the court held that
the consent which expressly allows employees to be at their work site could be negated if the
employment was wrongfully secured. Food Lion alleged that beyond the mere intent to obtain
information, the media defendants secured employment by submitting false employment applications,
constituting fraud and breach of fiduciary duty. The jury found for plaintiff on claims of fraud,
trespass and breach of fiduciary duty, awarding $1,500 compensatory damages but $5.5 million in
punitive damages.

These cases highlight the underlying complexities in using trespass law to protect against
unwanted media coverage. An additional point developed in *Food Lion* concerns the damages
recoverable in a trespass case. The court held that damages caused by the expose of Food Lion’s
practices, *i.e.*, reputational damages, were not recoverable on a trespass claim, notwithstanding that
the trespass was the vehicle for obtaining the embarrassing and damaging information and images.
A trespass -- especially in the course of newsgathering -- may cause only nominal damages to the possessory interest in land. *But see Miller v. National Broadcasting Company*, 187 Cal. App. 3d 1463 (1986) (media's entry into home also stated cause of action of infliction of emotional distress).

This limitation on damages also has a constitutional component. Under the Supreme Court's decision in *Husler Magazine, Inc. v. Fahwell*, 485 U.S. 46 (1988), any claim sounding in reputational injury must be governed by the heightened First Amendment standards developed in defamation law regardless what tort claim is alleged. The confusing and untested trespass and constructive trespass actions may be subject to this limitation.

**C. Related Criminal Violations**

State criminal trespass laws may also apply to situations where one refuses to leave private premises. Most, if not all, states have criminal trespass laws. New York's criminal trespass law, for example, applies where a person “knowingly enters or remains unlawfully in a building or upon real property.” N.Y. Penal Law §140.10. In one Oklahoma case involving the media, a court upheld the conviction of reporters for criminal trespass where they entered closed sections of a nuclear power plant to cover a protest, rejecting argument that a First Amendment defense applied. *Stahl v. Oklahoma*, 665 P.2d 839, 9 Media L. Rep. 1945 (Okla. Ct. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984). *See also Woff v. Regardie*, 16 Media L. Rep. 1780 (D.C. 1989) (First Amendment does not shield a media defendant from liability for trespass).18

More recently, reporters who “crashed” a Republican Party fundraiser in a New York City hotel and who refused to leave when requested were charged with criminal trespass under New York law. *See E. Burton, Where Are All the Angry Journalists? The Use of Criminal Statutes and Tactics to Limit Newsgathering*, 16 Communications Lawyer, 19, 22 (1998) (reporting incident and that charges were ultimately dropped). Overall, criminal trespass cases against the media appear to be rare, perhaps foremost because the media recognizes that newsgathering is not a license to break down doors. But newsgathering often takes place in areas where consent arguably applies, mitigating against the initiation of criminal process. Finally, a course of dealing between the parties may weigh against pursing a criminal complaint. For example, a political party may choose not to pursue a criminal complaint against established political “beat” reporters for crashing a political, albeit private, event.

This last example also applies to the symbiotic relationship between celebrities and the media. As Hollywood publicist Dick Guttman testified before the House, even “paparazzi,” as opposed to the self-defined “stalkerazzi,” are “a legitimate part of the Hollywood publicity mill.” Nevertheless, there is no question that conduct in the relationship may be so egregious as to appropriately result in civil and criminal liability. One recent example is the criminal conviction of two celebrity

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18 One state trial court applied a heightened First Amendment standard for trespass claims against media defendants, requiring knowledge or recklessness and damages resulting. *Allen v. Combined Communications Corp.*, 7 Media L. Rep. 2417 (Colo. Dist. 1981) This standard has not been expressly adopted by any jurisdiction.
photographers for false imprisonment, and one for reckless driving, stemming from an incident in which the photographers used their car to pin Arnold Schwarzenegger, his wife Maria Shriver and their young son in their car to obtain photographs. See B. Weinraub, 2 Paparazzi Convicted of Stalking Celebrities, New York Times, Feb. 4, 1998 at C1; LDRC Libel Letter Feb. 1998 at 13.

Such threatening conduct may implicate numerous other criminal laws, including assault and battery, criminal negligence, and disorderly conduct. See, e.g., New Jersey v. Lashinsky, 404 A.2d 1121 (N.J. 1979) (affirming disorderly conduct conviction of press photographer who refused police order to leave accident site); City of Oak Creek v. King, 436 N.W.2d 285 (Wis. 1989) (same). Criminal liability may also apply to newsgathering performed in less overtly threatening ways. For example, a reporter who roamed a hotel filled with grief-stricken relatives of air crash victims and who falsely claimed to be a relative of a victim was charged with the crime of criminal impersonation. The reporter pled guilty and completed a community service sentence. In another case, a reporter was convicted of criminal impersonation by pretending to be a public officer to obtain crime information from the mother of a homicide victim. See E. Burton, supra, at 22.

D. Anti-Stalking & Harassment Statutes

Conduct which is invasive and physically threatening is also subject to state stalking and harassment laws. In Galella, the court applied New York’s harassment statute to conduct that included following in public places, physical contact and annoying conduct without legitimate cause. 487 F.2d 986, 1 Media L. Rep. 2425, 2429 n.11 (2d Cir. 1973) (citing New York Penal Law §240.25). Anti-stalking laws generally add to this litany a course of willful conduct which causes reasonable fear of injury.

Anti-stalking statutes arose following the 1989 murder of actress Rebecca Schaefer by an obsessed fan. The problem also gained attention at about the same time by the actions of an obsessed fan of talk show host David Letterman who repeatedly broke into his home, falsely claiming to be his wife. The first anti-stalking bill was passed in California in 1990 and since then every other state has either enacted a specific anti-stalking law or amended existing law to create a remedy against stalking.19 Stalking is typically defined as willful, malicious, and repeated following or harassing of...
another person so as to cause in the person a reasonable fear of physical injury. See Regional Seminar Series on Developing and Implementing Antistalking Codes, Bureau of Justice Assistance (June 1996) at 11.

Although these laws gained attention in connection with harassment of celebrities, antistalking laws are applied most commonly in connection with domestic violence, abusive relationships and in the commission of other crimes. These laws target dangerous conduct. The New York legislature recognized that “stalking behavior creates anguish and fear for the victim, and sometimes culminates in profound and lasting physical injury.” Legislative Memorandum for L.1992, c. 345, quoted in Practice Commentary to NY Penal Law §120.15 and §240.25 (McKinney 1995).

Celebrity stalkers have also been punished under the law. Michael J. Fox testified before the House Judiciary Committee that a women who sent him thousands of threatening letters was convicted and sentenced to jail under California’s law. Other recently reported incidents involving Madonna and Steven Spielberg resulted in stalkers receiving substantial jail sentences.

There are no reported stalking cases brought against the media, but the language of these laws could encompass threatening conduct in pursuit of obtaining a photograph, provided the required elements of scienter and “reasonable fear” are met. In this sense, these laws already provide substantial protection and remedies against conduct that threatens physical injury. On the other hand, the language of these laws would exclude frivolous complaints about newsgathering that results in unwanted or annoying attention but otherwise poses no serious harm.

IV. Conclusion

Although the Bono, Gallegly, Feinstein-Hatch and Conyers bills are referred to here and elsewhere as “anti-paparazzi” legislation, it is clear that they apply to the media as a whole. In fact, there does not seem to be any agreement as to the meaning of the term “paparazzi” beyond serving as shorthand criticism of the media. What is clear is that these bills are not limited to some vaguely defined group of rogue photographers. They target members of the media who use cameras and recording equipment, photojournalists, and every reporter who uses a dictaphone. Even newsroom

(continued)
editors may be subject to liability under a constructive trespass theory for manipulating photographic or other images.

The background and surrounding circumstances of these bills show that they are designed more to “send a message” than to achieve any clear purpose. As discussed above, state laws already address a range of privacy interests, covering intrusive and prying conduct as well as physically threatening conduct. If a photographer or reporter wrongfully enters, either physically or by using surveillance equipment, a private home or private setting to take pictures or sound recordings, a cause of action will lie. Physically threatening conduct is likewise subject to state civil and criminal laws. In addition, state law takes account of the important and unavoidable First Amendment issues involved in newsgathering and, more generally, in understanding the notion of privacy and the public sphere.

The bills are also likely unconstitutional. They single out the media for civil and criminal punishment under vague standards that potentially criminalize activities that are reasonable and necessary aspects of the newsgathering process. This sort of “message sending” is presumptively unconstitutional. As Paul McMasters noted to the House Judiciary Committee, “the First Amendment is a constitutional contract between the government and the people; it is not a movie script.” We should all beware “when Hollywood calls for a rewrite.”
California’s Anti-paparazzi Statute: How Does It Change The Law?

By Amy D. Hogue and Anthony J. Stanley

California has joined the anti-paparazzi fray with a new Civil Code section designed to deter "intrusive" conduct by photographers and reporters. At the close of its 1998 session, the California Legislature adopted Senate Bill 262, adding Section 1708.8 to the state’s Civil Code, effective January 1, 1999. The text of the law is set out in the Appendix. Section 1708.8 creates liability for "physical" and "constructive" invasions of privacy, providing remedies such as treble compensatory damages, punitive damages, disgorgement of proceeds, and equitable relief.

The question for the media is whether Section 1708.8 materially changes the standards governing liability for newsgathering. Although there are open questions regarding the interpretation of Section 1708.8, it should not materially change existing standards based on the law of trespass, invasion of privacy and infliction of emotional distress. The new law, though, does expand available remedies, adding treble compensatory awards and disgorgement of proceeds against the media as potential awards. In addition, the law may expand vicarious liability beyond the basic principles of agency law, causing the media to be more cautious in dealing with freelance photographers and reporters.

I. Legislative History

State Senator John Burton (D-San Francisco) authored Senate Bill 262 in order to deter what he described as "paparazzi-like" behavior by photographers, reporters, and the press. Signed by Governor Pete Wilson on September 29, 1998, Senate Bill 262 expressly targets photographers and journalists and, in this fashion, parallels recent federal proposals that similarly target the press. Senator Burton designed the bill to increase damage awards in privacy cases because, in his view, existing law gave only "de minimis" recovery, providing "no deterrent value to suit." Senate Floor Session, Analysis of Senate Bill 262, at page 3 (Aug. 20, 1998).

The Screen Actors Guild sponsored the bill and various actors and celebrities supported it. Billy Crystal, for example, told the Legislature that "tabloid journalism" and technological advances in cameras and listening devices have created a "national problem," justifying adoption of the bill.¹ Virtually all of the letters sent to the Legislature in support of the bill voiced this common theme.

The broadcast networks, print media, the American Civil Liberties Union, newspaper publishers, and private investigators unsuccessfully opposed the bill,² arguing that it would have a chilling effect on newsgathering activities, and that existing remedies were sufficient to deter intrusive

¹ See Assembly Committee on Judiciary, Analysis of Senate Bill 262, at page 6-7 (July 28, 1998). Bill text, vote records, and analyses are available through the State Senate web page at www.sen.ca.gov.

² A complete list of supporters and opponents of SB 262 appears in the Senate Floor and Assembly Judiciary analyses of the bill at, respectively, pages 2-3 and 8-9.
II. Pre-existing California Law

Section 1708.8 largely duplicates common law torts such as trespass, invasion of privacy, and infliction of emotional distress. As explained below, these torts already provide substantial remedies for intrusive newsgathering activities.

A. Trespass

Trespass, which is generally defined as an entry or interference with the plaintiff's possessory interest in property, applies to photographers and journalists. *Miller v. NBC*, 187 Cal. App.3d 1463 (1986). In *Miller*, California appellate court upheld the plaintiff's right to prosecute the media for a newsgathering trespass. In *Miller*, a news camera crew rode along with Los Angeles paramedics into plaintiff Brownie Miller's apartment and videotaped their unsuccessful efforts to revive her husband after he suffered a heart attack. Mrs. Miller admitted that the camera crew's entry into her apartment caused her no distress. Indeed, she was entirely unaware of the camera crew's presence, and voiced no objection to their entry. Nevertheless, the appellate court upheld Mrs. Miller's trespass claim based on NBC's unconsented entry into her home, finding that under the circumstances the First Amendment did not immunize NBC's conduct.

As the California Supreme Court recently confirmed in *Shulman v. Group W*, 18 Cal. 4th 200 (1998), California law provides that photographers who trespass in the course of newsgathering may be liable for consequential, emotional distress, and punitive damages, arising out of the trespass.

B. Intrusion on Seclusion / Invasion of Privacy Claims

The *Shulman* and *Miller* decisions similarly confirm a plaintiff's right to recover consequential, emotional distress, and punitive damages for intrusions into any place where the plaintiff has a reasonable expectation of privacy, regardless whether the plaintiff has any possessory interest in the property.

Under common law, an action for intrusion requires proof that (1) defendant intruded into a private place, conversation or matter (2) in a manner that is highly offensive to a reasonable person. *Shulman*, 18 Cal.4th at 230-231; *Miller*, 187 Cal. App.3d at 1482-1483. The tort encompasses both the physical invasion of a legally recognized private place, and sensory intrusion through eavesdropping or image-recovering devices. *Shulman*, 18 Cal.4th at 230-231.

To satisfy the first element of intrusion, a plaintiff must prove that he or she had an objectively reasonable expectation of seclusion or solitude in the place that the defendant entered. California courts have evaluated this element in light of laws protecting an area or medium of communication, as well as history, custom, and whether under the particular facts of a case, the plaintiff could reasonably expect that onlookers would not discern the communication. *Id.* at 232-235.
Journalists and photographers may be held liable for intruding into places where the plaintiff has a reasonable expectation of privacy. For example, in Shulman, the California Supreme Court concluded that there was a reasonable expectation of privacy in conversations between a severely injured automobile accident victim and an emergency medical care provider that occurred within the private confines of a medical helicopter. It found no expectation of privacy, however, in the roadside accident scene as recorded and videotaped by the defendants. Id. at 232-233. The Shulman court acknowledged that a newsgathering motive is a factor to consider when reviewing the alleged “offensiveness” of the conduct. Id. at 238-240.

C. Infliction of Emotional Distress

California common law also provides remedies against anyone who intentionally causes emotional distress by engaging in conduct that is “outrageous,” i.e., beyond the bounds of human decency. See, e.g., Miller, 187 Cal. App.3d at 1487. By upholding plaintiff’s cause of action for intentional infliction of emotional distress, the Miller court squarely applied this tort to photographers and broadcasters. Miller, 187 Cal. App.3d at 1487-1488. See also Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (allowing recovery of emotional distress damages for intrusion by journalists who secured consent to enter plaintiff’s home office by subterfuge).

Similarly, in Vescovo v. New Way Enterprises, Ltd., 60 Cal. App.3d 582 (1976), a court permitted both intentional and negligent infliction of emotional distress claims to proceed against a media defendant who published the plaintiff’s name and address in an lascivious newspaper advertisement submitted without the plaintiff’s consent. Readers who saw the advertisement telephoned plaintiff and her family, and intruded onto her property. Id. at 588-599.

Thus, under Miller and Vescovo, and other similar cases, California’s common law emotional distress cause of action provides substantial protection against emotional distress resulting from intrusions “caused by” broadcasters and publishers.

D. Agency Law

The camera crews in Miller and Shulman were employees of the defendant broadcasters. Under the basic principle of respondeat superior, NBC and Group W were responsible for their conduct. However, at common law, the question whether publishers who merely purchase photographs from independent photographers are responsible for the photographer’s conduct turns on whether the photographer acted as an agent for the publisher. To be deemed responsible for an independent photographer’s conduct, a publisher must have the right to control the photographer’s conduct “by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times.” Restatement (Second) of Agency §14.

In determining whether to impute liability to a publisher based on the conduct of a photographer, courts applying agency principles consider factors such as (a) the extent of the publisher’s control over the details of the person’s work; (b) whether the person is engaged in a
distinct business or occupation; (c) whether the work involved is work usually done by a specialist without supervision; (d) whether the person’s work requires skill; (e) whether the person supplies tools and instrumentalities for his work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; and (h) whether the work is part of the regular business of the employer.

In the case of a freelance photographer who offers to sell photographs to a publisher after the photography is complete, all of these common law factors militate against a finding that the publisher is responsible for the photographer’s conduct in obtaining the photographs.

Thus, under common law, a publisher who simply purchases photographs after the fact, without prescribing the conduct of the photographer who took the photographs, would not be liable for trespass, intrusion, or infliction of emotional distress committed by the photographer. The unanswered question is whether these same common-law principles will guide the determination of vicarious liability under Section 1708.8.

III. New Civil Code Section 1708.8

Section 1708.8 defines two forms of wrongful conduct: (1) “physical invasion of privacy” and (2) “constructive invasion of privacy,” and imposes liability on third parties who cause or induce someone to engage in such conduct.

A. Physical Invasion of Privacy

Under Section 1708.8 a physical invasion of privacy occurs when a defendant:

knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

§ 1708.8(a).

This subdivision of Section 1708.8 imposes liability on trespassers who enter land intending to photograph or otherwise record the residents. Liability attaches regardless of whether the residents have a reasonable expectation of privacy. Indeed, Section 1708.8 liability for physical intrusion would arguably attach to defendants who photograph plaintiffs engaging in “personal or familial” activities in the front yard of their home, in plain view of the public, if the photographer entered their

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3 Because SB 262 has now been approved by the Legislature and Governor, this article will cite to the provisions of Section 1708.8 to appear in the California Civil Code beginning January 1, 1999. Unless otherwise noted, all future statutory citations will be to the California Civil Code.
property “in order to physically invade the [plaintiff’s] privacy.”

Thus, unlike common law intrusion, which focuses on the plaintiff’s “reasonable expectation of privacy” at the time of the intrusion, Section 1708.8 focuses on the photographer’s physical location and state of mind -- a trespass committed with an “intention to invade privacy.”

It is conceivable that in deference to the “reasonable expectation of privacy” required under common law, courts may construe this language to exclude liability for photographing public activity by reasoning that there can be no “intention to invade privacy” in photographing events visible to the public. On the other hand, because common law privacy rights have sometimes been defined as “the right to be left alone,” courts may decide to infer the requisite “intention to invade privacy” from any effort to interrupt “familial or personal” activities -- even if those activities are conducted in plain view of the public thoroughfare.

Section 1708.8 rejects the definition of “private” that courts apply to claims for publication of private facts, where publications of very personal matters, such as sexual relations and embarrassing illnesses, have been found actionable. In contrast, Section 1708.8 introduces the much broader concept of “personal or familial” activities, which includes but is not limited to, “intimate” details of the plaintiff’s personal life, “interactions” with family members or significant others, and “other aspects” of the plaintiff’s “private affairs or concerns.” §1708.8(k) (the definition also includes “activities of victims of crime,” but excludes illegal conduct or criminal activity).

On the other hand, the new statute tracks common law intrusion by focusing liability on the intruding conduct rather than the fruits of that conduct. While it is not a defense that the efforts were unsuccessful or that no image, recording or other physical impression was captured or sold, §1708.8(i) liability does not automatically attach solely because an image or recording is sold, broadcast or published. § 1708.8(e).

Although Section 1708.8 also tracks common law intrusion by requiring proof of “offensive” conduct, it waters down the common law requirement that it be “highly offensive to a reasonable person.” Under Section 1708.8, the conduct need only be “offensive to a reasonable person.”

The new law adds treble damages as an element of recovery and provides for punitive damages if the elements of fraud, oppression or malice are proven under existing California law. §1708.8(c).

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4 The Legislative history includes a recognition that the courts do not recognize an expectation of privacy in public places. Assembly Committee on Judiciary, Analysis of SB 262 at 4 (July 28, 1998). However, as the committee analysis impliedly acknowledges, the reasonable expectation of privacy element only appears in the statute’s definition of constructive invasion of privacy, subdivision (b). The reasonable expectation of privacy element does not appear in subdivision (a) which governs liability for physical invasion of privacy.

If an intrusion is committed for a “commercial purpose,” the defendant is subject to disgorgement of any proceeds obtained as a result of the intrusion. §1708.8(c). “Commercial purpose” is defined in subdivision (j) as: “any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted.” In addition to these damage remedies, Section 1708.8(g) authorizes the grant of equitable relief, including an injunction or restraining order against future commissions of physical and constructive invasions of privacy.

Although recovery of profits has long been an element of damages for using celebrity photographs or recordings “for commercial purposes” such as advertising, there is no precedent for imposing a recovery of all proceeds or consideration for photographs taken by “trespassing” professional photographers. Unlike California’s right of publicity laws, the statute makes no exception for “newsworthy” material. The statute plainly targets professional newsgatherers and journalists rather than advertisers by broadly defining “commercial purpose” as a purpose involving any remuneration.

B. Constructive Invasion of Privacy

Section 1708.8 also imposes liability for “constructive invasion of privacy” on photographers or reporters who capture images or recordings using sensory enhancing devices, if the images or recordings could not otherwise be obtained without trespassing:

[W]hen the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

§ 1708.8(b).

In contrast to the common law, which focuses on the “reasonable expectation of privacy,” Section 1708.8(b) focuses on the tools of the trade -- sensory enhancing devices, such as telephoto lenses and recording devices -- and equates such tools with a “trespass” if they are used to obtain photographs of persons engaging in personal or familial activities in circumstances where there is a reasonable expectation of privacy.

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6 See, e.g., § 3344 (imposing liability for commercial appropriate of name or likeness, but also providing, in subdivision (d), a defense if image was used in context of news account); see also Eastwood v. Superior Court, 149 Cal.App.3d 409 (1984) (applying section 3344).
Under the common law, courts have recognized that the use of sensory enhancing devices may demonstrate “offensiveness” or intrude into otherwise “private” places without regard to plaintiffs' possessory interest in land. See, e.g., Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971); Shulman, 18 Cal.4th at 233 & 237-238 (recording plaintiffs’ statements to nurse with hidden microphone worn by nurse).

In this respect, the law is arguably narrower than the common law. It may make recovery more difficult in some cases by apparently including all common law elements and then adding the element that the recording could not have been captured without a trespass. However, Section 1708.8 specifically provides that its provisions are in addition to all existing rights and remedies. See §1708.8(h).

This action also provides for recovery of treble compensatory damages, disgorgement of proceeds, and equitable relief.

C. Third Party Liability

Unlike similar federal proposals, California’s Section 1708.8 extends liability beyond the unwitting reporter or photographer. Subdivision (d) extends liability to any person who:

directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate subdivision (a) or (b) or both.

One who “directs, solicits, actually induces, or actually causes” another to violate Section 1708.8 can be held liable for any general, special, and consequential damages, but not for the treble damage and disgorgement provisions contained in subdivision (c). Liability for punitive damages is separately imposed where a person “directs, solicits, instigates, induces, or otherwise causes” a violation.

The interesting question is whether the courts will interpret the language of Subdivision (d) more broadly than the traditional requirements for vicarious liability under agency law. Certainly, one who “solicits, directs, actually induces, or actually causes” another to take action would be vicariously liable for the agent’s conduct provided that Section 1708.8's notion of “causation” is interpreted to mean “prescribing what the agent shall or shall not do before the agent acts or at the time when he acts.” See Restatement (Second) of Agency §14. Conversely, the “otherwise cause” language included in Subdivision (d) may imply an intent to widen the scope of potential liability.

Section 1708.8 (e) does provide that the publication of photographs that were improperly obtained should not, standing alone, be a basis for liability. Under Subdivision (e) there is no liability for any “sale, transmission, publication, broadcast, or use of any image or recording of the type, or

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7 Courts consider it an open question whether a sanction may be imposed for the publication of information which is unlawfully acquired. See, Shulman, 18 Cal.4th at 230, fn.11.
under the circumstances, described in this section.”

Whether this provision will insulate a publisher who purchases photographs from a photographer with a known history of trespassing, or a publisher’s “willful blindness” to a photographer’s improper newsgathering techniques, remains to be seen. This uncertainty may cause cautious publishers not to publish a photograph if its content suggests that it was taken in a private home or on private property and that the photographer may have trespassed to obtain it or used sensory enhancing devices directed at a private home.

The Legislature relied on California Civil Code section 3294(b) to define the extent of publisher liability for punitive damages. Section 3294(b) provides that an employer is not liable for punitive damages “unless the employer had advance knowledge of the unfitness of the employee and employed him or her with conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct.” Whereas Section 1708.8 permits liability regardless of whether an employer-employee relationship exists, Section 3294 would direct a court to look at the prior relationship between a publisher and an independent photographer or reporter to determine whether “advance knowledge” and “conscious disregard” exists. A court may not, therefore, permit use of Subdivision (e)’s innocent publication defense where the publisher consciously disregards a photographer’s history.

IV. Constitutional Issues

Section 1708.8 is vulnerable to constitutional challenge for vagueness and overbreadth, and for its impermissible targeting of media defendants.

To survive a vagueness challenge, a statute must provide sufficient notice of what constitutes prohibited conduct, and must not create a risk of arbitrary or discriminatory enforcement. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972); Winters v. New York, 333 U.S. 507, 509 (1948). As noted in Shulman, courts must “strive for as much predictability as possible . . . lest we unwittingly chill First Amendment freedoms.” Shulman, 18 Cal.4th at 222. Terms such as “actually induces” or “otherwise causes” an intrusion, or “familial” and “personal activities” may be vulnerable to challenges for vagueness.

Section 1708.8 is also vulnerable because unlike the common law of intrusion and trespass, it targets newsgathering entities with enhanced penalties while exempting others who engage in the same conduct from such penalties. Such laws are presumptively unconstitutional and require a compelling state interest to be upheld. See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 592-593 (1983); United Artists Communications, Inc. v. City of Montclair, 209 Cal. App.3d 245, 248-249 (1989). A statute can be found to impermissibly target the press where exemptions are included in the law which produce a disproportionate application to First Amendment activities. Minneapolis Star, 460 U.S. at 591.

As noted above, Section 1708.8 imposes enhanced damages -- disgorgement of proceeds --
when intrusions occur for "commercial purposes." As defined, this element plainly targets only professional photographers and newsgatherers. To protect the police and private investigators, Section 1708.8 exempts law enforcement personnel or any other public or private person who, acting in the course of employment, investigates illegal activity, fraudulent insurance claims, or "any other suspected fraudulent conduct or activity involving a violation of law or pattern of business practices adversely affecting the public health or safety.” § 1708.8(f). In other words, private investigators, insurance fraud investigators, and law enforcement personnel are exempt from its enhanced civil penalties; journalists and media defendants are not.

The Legislature apparently hoped to avoid constitutional challenges by focusing on intrusive conduct, rather than expressly penalizing publication or overtly targeting journalists. See Assembly Committee on Judiciary, Analysis of Senate Bill 262, at page 5 (July 28, 1998). This approach finds support in Shulman, which distinguishes between newsgathering and publication rights on the one hand, and generally intrusive conduct, on the other. However, because Section 1708.8 effectively imposes enhanced penalties only on the professional media, and specifically exempts law enforcement and private investigators in Subdivision (f), it is arguably not a law of general applicability. In addition, recording crime-victim “activities” through constructively or physically invasive means exposes a defendant to the enhanced penalties of Section 1708.8, while investigating activities by others does not. While there certainly could be cases where the means of secretly recording crime victims would amount to common law intrusion, Section 1708.8 targets media defendants who do so with treble damages, disgorgement of proceeds, and punitive damages for such activities.

V. Conclusion

Although Section 1708.8 generally overlaps and duplicates existing common law, it expands the available remedies and leaves open the question whether publishers can be held vicariously liable for conduct of photographers and reporters who are neither employees nor agents of the publisher.

Amy D. Hogue is a partner with Pillsbury Madison & Sutro LLP in Los Angeles. Anthony J. Stanley is an associate with the firm.

8 The effect of this exception appears limited to the expanded remedies. Trespassing, wiretapping, and unconsented recording of confidential communications are unlawful under existing law. See, e.g., Penal Code § 602 (trespass), and § 632 (recording confidential communications without consent).

9 See Shulman, 18 Cal.4th at 215-216, 238-239 (newsworthiness complete defense to publication of private facts but no newsgathering defense in cases asserting intrusion as it is a law generally applicable to media and non-media defendants).
APPENDIX
The Feinstein-Hatch Bill

105th CONGRESS
2d Session
S. 2103

To provide protection from personal intrusion for commercial purposes.

IN THE SENATE OF THE UNITED STATES

May 20, 1998

Mrs. Feinstein (for herself, Mr. Hatch, and Mrs. Boxer) introduced the following bill, which was read twice and referred to the Committee on the Judiciary

A BILL

To provide protection from personal intrusion for commercial purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Personal Privacy Protection Act".

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings.--Congress makes the following findings:

(1) Individuals and their families have been harassed and endangered by being persistently followed or chased in a manner that puts them in reasonable fear of bodily injury, and in danger of serious bodily injury or even death, by photographers, videographers, and audio recorders attempting to capture images or other reproductions of their private lives for commercial purposes.

(2) The legitimate privacy interests of individuals and their families have been violated by photographers, videographers, and audio recorders who physically trespass in order to capture images or other reproductions of their private lives for commercial purposes, or who do so constructively through intrusive modern visual or auditory enhancement devices, such as powerful telephoto lenses and hyperbolic microphones that enable invasion of private areas that would otherwise be impossible without trespassing.
3. Such harassment and trespass threatens not only professional public persons and their families, but also private persons and their families for whom personal tragedies or circumstances beyond their control create media interest.

4. Federal legislation is necessary to protect individuals and their families from persistent following or chasing for commercial purposes that causes reasonable fear of bodily injury, because such harassment is not directly regulated by applicable Federal, State, and local statutory or common laws, because those laws provide an uneven patchwork of coverage, and because those laws may not cover such activities when undertaken for commercial purposes.

5. Federal legislation is necessary to prohibit and provide proper redress in Federal courts for trespass and constructive trespass using intrusive visual or auditory enhancement devices for commercial purposes, because technological advances such as telephoto lenses and hyperbolic microphones render inadequate existing common law and State and local regulation of such trespass and invasion of privacy.

6. There is no right, under the first amendment to the Constitution of the United States, to persistently follow or chase another in a manner that creates a reasonable fear of bodily injury, to trespass, or to constructively trespass through the use of intrusive visual or auditory enhancement devices.

7. This Act, and the amendments made by this Act, do not in any way regulate, prohibit, or create liability for publication or broadcast of any image or information, but rather use narrowly tailored means to prohibit and create liability for specific dangerous and intrusive activities that the Federal Government has an important interest in preventing, and ensure a safe and secure private realm for individuals against intrusion, which the Federal Government has an important interest in ensuring.

8. This Act protects against unwarranted harassment, endangerment, invasion of privacy, and trespass in an appropriately narrowly tailored manner without abridging the exercise of any rights guaranteed under the first amendment to the Constitution of the United States, or any other provision of law.

9. Congress has the affirmative power under section 8 of article I of the Constitution of the United States to enact this Act.

10. Because this Act regulates only conduct undertaken in order to create products intended to be and routinely transmitted, bought, or sold in interstate or foreign commerce, or persons who travel in interstate or foreign commerce in order to engage in regulated conduct, the Act is limited properly to regulation of interstate or foreign commerce.

11. Photographs and other reproductions of the private activities of persons obtained through activities regulated by this Act, and the amendments made by this Act, are routinely
reproduced and broadcast in interstate and international commerce.

(12) Photographers, videographers, and audio recorders routinely travel in interstate commerce in order to engage in the activities regulated by this Act, and the amendments made by this Act, with the intent, expectation, and routine result of gaining material that is bought and sold in interstate commerce.

(13) The activities regulated by this Act, and the amendments made by this Act, occur routinely in the channels of interstate commerce, such as the persistent following or chasing of subjects in an inappropriate manner on public streets and thoroughfares or in airports, and the use of public streets and thoroughfares, interstate and international airports, and travel in interstate and international waters in order to physically or constructively trespass for commercial purposes.

(14) The activities regulated by this Act, and the amendments made by this Act, substantially affect interstate commerce by threatening the careers, livelihoods, and rights to publicity of professional public persons in the national and international media, and by thrusting private persons into the national and international media.

(15) The activities regulated by this Act, and the amendments made by this Act, substantially affect interstate commerce by restricting the movement of persons who are targeted by such activities and their families, often forcing them to curtail travel or appearances in public spaces, or, conversely, forcing them to travel in interstate commerce in order to escape from abuses regulated by this Act, and the amendments made by this Act.

(b) Purposes.--The purposes of this Act are--

(1) to protect individuals and their families against reasonable fear of bodily injury, endangerment, trespass, and intrusions on their privacy due to activities undertaken in connection with interstate and international commerce in reproduction and broadcast of their private activities;

(2) to protect interstate commerce affected by such activities, including the interstate commerce of individuals who are the subject of such activities; and

(3) to establish the right of private parties injured by such activities, as well as the Attorney General of the United States and State attorneys general in appropriate cases, to bring actions for appropriate relief.

SEC. 3. CRIMINAL OFFENSE.

(a) In General.--Chapter 89 of title 18, United States Code, is amended by adding at the end the following:

"Sec. 1822. Harassment for commercial purposes
"(a) Definitions.--In this section:

"(1) For commercial purposes.--

"(A) In general.--The term 'for commercial purposes' means with the expectation of sale, financial gain, or other consideration.

"(B) Rule of construction.--For purposes of this section, a visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been, captured for commercial purposes unless it was intended to be, or was in fact, sold, published, or transmitted in interstate or foreign commerce, or unless the person attempting to capture such image, recording, or impression moved in interstate or foreign commerce in order to capture such image, recording, or impression.

"(2) Harasses.--The term 'harasses' means persistently physically follows or chases a person in a manner that causes the person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of the person for commercial purposes.

"(b) Prohibition and Penalties.--Whoever harasses any person within the United States or the special maritime and territorial jurisdiction of the United States--

"(1) if death is proximately caused by such harassment, shall be imprisoned not less than 20 years and fined under this title;

"(2) if serious bodily injury is proximately caused by such harassment, shall be imprisoned not less than 5 years and fined under this title; and

"(3) if neither death nor serious bodily injury is proximately caused by such harassment, shall be imprisoned not more than 1 year, fined under this title, or both.

"(c) Cause of Action.--Any person who is legally present in the United States and who is subjected to a violation of this section may, in a civil action against the person engaging in the violation, obtain any appropriate relief, including compensatory damages, punitive damages, and injunctive and declaratory relief. In any civil action or proceeding to enforce a provision of this section, the court shall allow the prevailing party reasonable attorney's fees as part of the costs. In awarding attorney's fees, the court shall include expert fees as part of the attorney's fees.

"(d) Limitation on Defenses.--It is not a defense to a prosecution or civil action under this section that--

"(1) no image or recording was captured; or
"(2) no image or recording was sold.

"(e) Use of Images.--Nothing in this section may be construed to make the sale, transmission, publication, broadcast, or use of any image or recording of the type or under the circumstances described in this section in any otherwise lawful manner by any person subject to criminal charge or civil liability.

"(f) Limitation.--Only a person physically present at the time of, and engaging or assisting another in engaging in, a violation of this section is subject to criminal charge or civil liability under this section. A person shall not be subject to such charge or liability by reason of the conduct of an agent, employee, or contractor of that person or because images or recordings captured in violation of this section were solicited, bought, used, or sold by that person.

"(g) Law Enforcement Exemption.--The prohibitions of this section do not apply with respect to official law enforcement activities.

"(h) Savings.--Nothing in this section shall be taken to preempt any right or remedy otherwise available under Federal, State or local law.".

(b) Technical Amendment.--The analysis for chapter 89 of title 18, United States Code, is amended by adding at the end the following:

"1822. Harassment for commercial purposes.".

SEC. 4. PERSONAL INTRUSION FOR COMMERCIAL PURPOSES.

(a) Definition of For Commercial Purposes.--

(1) In general.--In this section, the term 'for commercial purposes' means with the expectation of sale, financial gain, or other consideration.

(2) Rule of construction.--For purposes of this section, a visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been, captured for commercial purposes unless it was intended to be, or was in fact, sold, published, or transmitted in interstate or foreign commerce, or unless the person attempting to capture such image, recording, or impression moved in interstate or foreign commerce in order to capture such image, recording, or impression.

(b) Trespass for Commercial Purposes and Invasion of Legitimate Interest in Privacy for Commercial Purposes.--

(1) Trespass for commercial purposes.--It shall be unlawful to trespass on private property in order to capture any type of visual image, sound recording, or other physical
impression of any person for commercial purposes.

(2) Invasion of legitimate interest in privacy for commercial purposes.--It shall be unlawful to capture any type of visual image, sound recording, or other physical impression for commercial purposes of a personal or familial activity through the use of a visual or auditory enhancement device, even if no physical trespass has occurred, if--

(A) the subject of the image, sound recording, or other physical impression has a reasonable expectation of privacy with respect to the personal or familial activity captured; and

(B) the image, sound recording, or other physical impression could not have been captured without a trespass if not produced by the use of the enhancement device.

(c) Cause of Action.—Any person who is legally present in the United States who is subjected to a violation of this section may, in a civil action against the person engaging in the violation, obtain any appropriate relief, including compensatory damages, punitive damages and injunctive and declaratory relief. A person obtaining relief may be either or both the owner of the property or the person whose visual or auditory impression has been captured. In any civil action or proceeding to enforce a provision of this section, the court shall allow the prevailing party reasonable attorney's fees as part of the costs. In awarding attorney's fees, the court shall include expert fees as part of the attorney's fees.

(d) Limitation on Defenses.—It is not a defense to an action under this section that—

(1) no image or recording was captured; or

(2) no image or recording was sold.

(e) Use of Images.—Nothing in this section may be construed to make the sale, transmission, publication, broadcast, or use of any image or recording of the type or under the circumstances described herein in any otherwise lawful manner by any person subject to criminal charge or civil liability.

(f) Limitation.—Only a person physically present at the time of, and engaging or assisting another in engaging in, a violation of this section is subject to civil liability under this section. A person shall not be subject to such liability by reason of the conduct of an agent, employee, or contractor of that person, or because images or recordings captured in violation of this section were solicited, bought, used, or sold by that person.

(g) Law Enforcement Exemption.—The prohibitions of this section do not apply with respect to official law enforcement activities.
(h) Savings.--Nothing in this section shall be taken to preempt any right or remedy otherwise available under Federal, State, or local law.

SEC. 5. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.
The Conyers Bill

105th CONGRESS
2d Session

H. R. 4425

To provide protection from personal intrusion for commercial purposes.

IN THE HOUSE OF REPRESENTATIVES

August 6, 1998

Mr. Conyers (for himself and Mr. McCollum) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide protection from personal intrusion for commercial purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Personal Privacy Protection Act".

SEC. 2. CRIMINAL OFFENSE.

(a) In General.--Chapter 89 of title 18, United States Code, is amended by adding at the end the following:

"Sec. 1822. Reckless endangerment; tortious invasion of privacy

"(a) Reckless Endangerment.--Whoever, in or affecting interstate or foreign commerce and for commercial purposes, persistently follows or chases a person, in a manner that causes that person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person shall--

"(1) if death or serious bodily injury results, be fined under this title or imprisoned not
more than 30 years, or both; and

"(2) be liable in a civil action for any appropriate relief.

"(b) Tortious Invasion of Privacy.--Whoever, in or affecting interstate or foreign commerce and for commercial purposes, engages in a tortious invasion of the privacy of another person in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person shall in a civil action be liable to any party injured for any appropriate relief.

"(c) Definitions.--For the purposes of this section--

"(1) the term 'for commercial purposes' means with the expectation of sale, financial gain, or other consideration;

"(2) the term 'tortious invasion of privacy' means--

"(A) a capture of any type of visual image, sound recording, or other physical impression of a personal or familial activity through the use of a visual or auditory enhancement device, if

"(i) the subject has a reasonable expectation of privacy with respect to that activity; and

"(ii) the image, recording, or impression could not have been captured without a trespass if not produced by the use of the enhancement device, or

"(B) a trespass on private property in order to capture any type of visual image, sound recording, or other physical impression of any person; and

"(3) the term 'any appropriate relief may include compensatory damages, punitive damages, and injunctive and declaratory relief.

"(d) Limitation on Defenses.--It is not a defense to a prosecution or civil action under subsection (a) that--

"(1) no image or recording was captured; or "(2) no image or recording was sold.

"(e) Use of Images.--Nothing in this section makes the sale, transmission, publication, broadcast, or use of any image or recording of the type or under the circumstances described in this section in any otherwise lawful manner by any person subject to criminal charge or civil liability.

"(f) Limitation.--only a person physically present at the time of, and engaging, or assisting another in engaging, in a violation of this section is subject to criminal charge or civil liability under this section. A person shall not be subject to such charge or liability by reason of the conduct of an
agent, employee, or contractor of that person or because images or recordings captured in violation of this section were solicited, bought, used, or sold by that person.

"(g) Law Enforcement Exemption.--The prohibitions of this section do not apply with respect to official law enforcement activities.

"(h) Nonpreemption.--Nothing in this section shall be taken to preempt any right or remedy otherwise available under Federal, State or local law.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 89 of title 18, United States Code, is amended by adding at the end the following new item:

"1822. Reckless endangerment; tortious invasion of privacy.".
The Gallegly Bill

105th CONGRESS
2d Session

H. R. 3224

To amend title 18, United States Code, to provide protection from personal intrusion for commercial purposes.

IN THE HOUSE OF REPRESENTATIVES

February 12, 1998

Mr. Gallegly (for himself, Mr. Coble, Mr. Berman, and Mr. Smith of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to provide protection from personal intrusion for commercial purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Privacy Protection Act of 1998". SEC. 2. PROTECTION FROM PERSONAL INTRUSION FOR COMMERCIAL PURPOSES.

(a) In General.—Chapter 89 of title 18, United States Code, is amended by adding at the end the following:

"Sec. 1822. Harassment

  "(a) Whoever persistently follows or chases any individual in the United States for the purpose of obtaining a visual image, sound recording, or other physical impression of that or another
individual, shall be punished as provided in subsection (b), if--

"(1) the image, recording, or impression was intended to be, or was in fact, sold, published, or transmitted in interstate or foreign commerce, or the person attempted to capture such image, recording, or impression moved in interstate of foreign commerce in order to capture such image, recording, or impression.

"(2) the individual has a reasonable expectation of privacy from such intrusions and has taken reasonable steps to ensure that privacy;

"(3) the individual has a reasonable fear that death or bodily injury will result from that following or chasing; and

"(4) the obtaining of the image, recording, or other impression is for commercial purposes.

(b) The punishment for an offense under this section is--

"(1) if death is caused by the offense, the punishment provided under section 1111 or 1112 for a like offense under that section;

"(2) if serious bodily injury is caused by the offense, the punishment provided in section 113 for a like offense under that section; and

"(3) in any other case, a fine under this title or imprisonment for not more than 1 year, or both.

(c) (1) A person who is subjected to a violation of subsection (a) may, in a civil action against the person engaging in that violation, obtain any appropriate relief.

"(2) In any civil action under this section, the court shall allow the prevailing party a reasonable attorney's fee and other reasonable litigation costs as part of the costs.

(d) It is not a defense to a prosecution or civil action under this section that--

"(1) no image or recording was captured; or "(2) no image or recording was sold.

(e) Nothing in this section may be construed to make the sale, transmission, publication, broadcast, or use of any visual image, sound recording, or other physical impression in any otherwise lawful manner by any person subject to criminal charge or civil liability.

(f) Only a person physically present at the time of, and engaging or assisting another in engaging in, the following or chasing that constitutes a violation of this section is subject to a Federal
criminal charge or civil liability under this section, or section 2, 3, 4, or 371 of this title, based on a violation of this section. A person shall not be subject to such charge or liability by reason of the conduct of an agent, employee, or contractor of that person or because any visual image, sound recording, or other physical impression captured in violation of this section was solicited, bought, used, or sold by that person.

"(g) The prohibitions of this section do not apply with respect to official law enforcement activities.

"(h) Nothing in this section shall be taken to preempt any right or remedy otherwise available under Federal, State, or local law.

"(i) As used in this section--

"(1) the term 'for commercial purposes' means with the expectation of financial gain or other consideration from the sale or other transfer of the visual image, sound recording, or other physical impression; and

"(2) the term 'State' includes the District of Columbia and each other commonwealth, territory, or possession of the United States."

(b) Clerical Amendment.--The table of sections at the beginning of chapter 89 of title 18, United States Code, is amended by adding at the end the following new item:

"1822. Harassment."
The Bono Bill

105th CONGRESS
1st Session

H. R. 2448

To provide protection from personal intrusion.

IN THE HOUSE OF REPRESENTATIVES

September 10, 1997

Mr. Bono introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide protection from personal intrusion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection From Personal Intrusion Act".

SEC. 2. CRIMINAL OFFENSE.

(a) In General.--Chapter 89 of title 18, United States Code, is amended by adding at the end the following:

"Sec. 1822. Harassment

"(a) In General.--Whoever harasses any person within the United States or the special
maritime and territorial jurisdiction of the United States, or a citizen of the United States outside the United States shall--

"(1) if death results, not less than 20 years imprisonment and a fine under title 18, United States Code;

"(2) if bodily injury results, not less than 5 years' imprisonment and a fine under title 18, United States Code; and

"(3) if neither death nor bodily injury results, imprisonment for not more than 1 year or a fine under this title, or both.

"(b) Definition of 'Harass'.--As used in this section, the term 'harass' means persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to assure that privacy, for the purpose of capturing by a camera or sound recording instrument of any type a visual image, sound recording, or other physical impression of the victim for profit in or affecting interstate or foreign commerce.

"(c) Limitation on Defenses.--It is not a defense to a prosecution under this section that--

"(1) no image or recording was in fact captured; or

"(2) no image or recording was in fact sold for profit.

"(d) Cause of Action.--

(I) Any person who is legally present in the United States and is the victim of a violation of this section may, in a civil action against the person engaging in the violation, obtain any appropriate relief.

"(2) Any district court of the United States shall have jurisdiction over a claim asserted under this section, notwithstanding that the claim arises out of events that occurred outside of the territorial or special jurisdiction of the United States.

"(e) Use of Images.--Nothing in this section may be construed to make the sale, transmission, publication, broadcast, or use of any image or recording of the type or under the circumstances described herein in any otherwise lawful manner by any person subject to criminal charge or civil liability.

"(f) Limitation.--Only a person physically present and pursuing or assisting in pursuing the plaintiff at the time a violation of this section occurred is subject to criminal charge or civil liability based on this section. A person shall not be subject to such liability by reason of the conduct of an
agent, employee, or contractor of that person, or because images or recordings captured in violation of this Act were solicited by, bought by, used by, or sold by that person.

"(g) Law Enforcement Exemption.--The prohibitions of this section do not apply with respect to legitimate law enforcement activities.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 89 of title 18, United States Code, is amended by adding at the end the following new item:

"1822. Harassment.".
California Civil Code Section 1708.8

(a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

(c) A person who commits physical invasion of privacy or constructive invasion of privacy, or both, is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294. If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section.

(d) A person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate subdivision (a) or (b) or both is liable for any general, special, and consequential damages resulting from each said violation. In addition, the person that directs, solicits, instigates, induces, or otherwise causes another person, regardless of whether there is an employer-employee relationship, to violate this section shall be liable for punitive damages to the extent that an employer would be subject to punitive damages pursuant to subdivision (b) of Section 3294.

(e) Sale, transmission, publication, broadcast, or use of any image or recording of the type, or under the circumstances, described in this section shall not itself constitute a violation of this section, nor shall this section be construed to limit all other rights or remedies of plaintiff in law or equity, including, but not limited to, the publication of private facts.

(f) This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected
illegal activity, the suspected violation of any administrative rule or regulation, a suspected fraudulent
insurance claim, or any other suspected fraudulent conduct or activity involving a violation of law or
pattern of business practices adversely affecting the public health or safety.

(g) In any action pursuant to this section, the court may grant equitable relief, including, but not
limited to, an injunction and restraining order against further violations of subdivision (a) or (b).

(h) The rights and remedies provided in this section are cumulative and in addition to any other
rights and remedies provided by law.

(i) It is not a defense to a violation of this section that no image, recording, or physical
impression was captured or sold.

(j) For the purposes of this section, "for a commercial purpose" means any act done with the
expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other
physical impression shall not be found to have been, or intended to have been captured for a
commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted.

(k) For the purposes of this section, "personal and familial activity" includes, but is not limited
to, intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant
others, or other aspects of plaintiff's private affairs or concerns. Personal and familial activity does
not include illegal or otherwise criminal activity as delineated in subdivision (f). However, "personal
and familial activity" shall include the activities of victims of crime in circumstances where either
subdivision (a) or (b), or both, would apply.

(l) The provisions of this section are severable. If any provision of this section or its application
is held invalid, that invalidity shall not affect other provisions or applications that can be given effect
without the invalid provision or application.