Compounding the Felony: California's Amended Anti-Paparazzi Statute

By Douglas E. Mirell

Effective January 1, 2010, California's attempt to rein in the conduct of rogue paparazzi will gain added teeth. For the first time, media outlets that initially purchase audio, video or still photos they know to have been taken in violation of this state's 10-year-old anti-paparazzi statute may now be subject to treble general and special damages, punitive damages, disgorgement of profits and a civil fine ranging from $5,000-$50,000 if they publish, broadcast, sell or offer to sell those recordings or images.

Background of Section 1708.8

In response to the tragic death of Princess Diana in 1997, the California Legislature sought to further protect its indigenous celebrities by enacting a law that it hoped would limit the intrusive conduct of aggressive paparazzi. Ignoring the findings of French authorities attributing the car crash that killed Diana to the recklessness of her intoxicated chauffeur, and not to the actions of the paparazzi, the Legislature nevertheless soldiered on. The result was Civil Code Section 1708.8, a statute that had nothing whatsoever to do with the real or imagined circumstances of Diana's death. Instead, Section 1708.8 sought to substantially expand the reach of California trespass law by creating a civil damages cause of action for three distinct types of activity.

First, a "physical invasion of privacy" was made actionable where a "defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass . . . with the intent to capture" (whether successful or not) "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." Civil Code § 1708.8(a).

Second, it created a new statutory tort denominated "constructive invasion of privacy." This so-called "technological trespass" law rendered liable anyone who "attempts to capture" (again regardless of success), "in a manner that is offensive to a reasonable person," the same sort of conduct described in the "physical invasion" tort "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." Civil Code § 1708.8 (b). In short, the Legislature sought to limit the use of parabolic microphones and telephoto lenses to capture sounds and images that could not have otherwise been recorded absent a physical trespass.

Finally, Section 1708.8 also made actionable any assault "committed with the intent to capture" (also regardless of success) "any type of visual image, sound recording, or other physical impression of the plaintiff." Civil Code § 1708.8(c)

The penalties for violating any of these provisions are treble general and special damages, punitive damages and, upon proof that the invasive conduct was "committed for a commercial purpose," disgorgement of "any proceeds or other consideration." Civil Code § 1708.8(d). The phrase "for a commercial purpose" is defined to mean "any act done with the expectation of a sale, financial gain, or other consideration" and includes unsuccessful attempts to sell, publish or transmit the image or recording. Civil Code § 1708.8(k). Liability for some or all of these damages extends to those who direct, solicit, instigate, induce or otherwise cause this conduct to occur. Civil Code § 1708.8(e). In addition, equitable relief is available to preclude future violations of both the "physical invasion" and "constructive invasion" categories of intrusion. Civil Code § 1708.8(h).

In an attempt to limit the impact upon third-party media entities for the wrongful acts of paparazzi from whom they might acquire audio, video or still photos, Section 1708.8, as originally enacted, provided immunity for the "[s]ale, transmission, publication, broadcast or use of any image or recording of the type, or under the circumstances, described in this section" – though this provision also made clear that such immunity did not extend to liability for common law torts such as publication of private facts. Civil Code § 1708.8(f).

Finally, the statute provides exemptions for public law

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enforcement entities as well as for private investigators (including the media) which seek "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." Civil Code § 1708.8(g). The statute does not provide a defense to an ordinary intrusion tort claim, nor to a paparazzo who fails to capture or sell an image or recording. Civil Code § 1708.8(i) and (j).

Cases Implicating Section 1708.8

Over the course of the past decade, Section 1708.8 has not been extensively litigated. Perhaps the most famous attempt to use this statute came in 2003 when Barbra Streisand filed a $50 million lawsuit in state court against Kenneth Adelman, a photographer who captured an aerial image of her Malibu estate and posted that photo on a website that includes over 12,000 frames which form "a scientific photographic database documenting the California coast." In his anti-SLAPP motion, Adelman successfully argued that his aerial photographs did not capture "personal and familial activity" – a term defined by the statute as including, without limitation, "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." Civil Code § 1708.8(l). Thus, Streisand's lawsuit was dismissed and the trial court ordered her to pay over $177,000 in attorneys' fees. *See* http://www.californiacoastline.org/streisand/lawsuit.html.

In another case, ABC was sued in federal district court by a number of actors whose voices and images were surreptitiously captured in connection with "Pay to Play," a 2002 episode of the network's "20/20" news program. The premise of this episode was that aspiring actors and actresses in Hollywood must now pay $25-$45 to meet casting directors. In an attempt to avoid liability under Section 1708.8, ABC brought a summary judgment motion in which it argued that it didn't commit trespass, didn't record personal activity and didn't act in a manner offensive to a reasonable person. The district court denied ABC's summary judgment motion on these grounds and likewise rejected its attempt to avoid the disgorgement remedy on the claim that the First Amendment would not permit the "commercial purpose" language of Section 1708.8(d) to "encompass a news broadcast even if it happens to turn a profit." *See J.P. Turnbull v. American Broadcasting Companies*, 2004 U.S. Dist. LEXIS 24351, 32 Media L. Rep. 2442 (C.D. Cal., Aug. 19, 2004).

Assembly Bill 524

At the urging of the Screen Actors Guild, and with support from the City of Los Angeles and the Los Angeles County Sheriff's Department, State Assembly Speaker Karen Bass (D-Los Angeles) introduced Assembly Bill 524 on February 25, 2009, in an attempt to also hold those who purchase and use paparazzi-generated images and recordings responsible for any invasive conduct the purveyor may have committed in order to obtain audio, video or still photos. The legislation was opposed by, among others, the California Newspaper Publishers Association and the American Civil Liberties Union. Following a number of amendments resulting from conversations with lobbyists for the motion picture and television industries, A.B. 524 was signed into law by Governor Arnold Schwarzenegger on October 22; it will apply to conduct occurring on and after January 1, 2010.

(*See* http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_bill_20091011_chaptered.pdf.)

As signed into law, A.B. 524 contains legislative findings and declarations which recite that "[i]ndividuals and their families have been harassed and endangered by being persistently followed or chased" and that the "legitimate privacy interests of individuals and their families have been violated" by those who use "intrusive modern visual or auditory enhancement devices, such as powerful telephoto lenses and hyperbolic [sic] microphones."

A.B. 524 makes a number of changes to Section 1708.8, including the potential imposition of civil fines ranging from $5,000 to $50,000 upon all those who violate (as well as those who direct, solicit, induce or cause violations of) the statute. County counsel and city attorneys are empowered to bring legal actions to recover these fines.

From the perspective of media entities, perhaps the most significant change is that the former immunity accorded to those who sell, transmit or publish improperly captured images or recordings has now been eliminated if, "in the first transaction" following its taking or capture, a person had "actual knowledge" that the image or recording was obtained

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in violation of Section 1708.8. In turn, the term "actual knowledge" is defined as "actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired" the image or recording that it was taken in violation of the statute; such "actual knowledge" must be proven "by clear and convincing evidence." Another requisite for liability is that rights to the unlawfully obtained image or recording must have been procured through "compensation, consideration, or remuneration, monetary or otherwise."

Notwithstanding the efforts of the California Broadcasters Association and the Motion Picture Association of America, Assembly Speaker Bass refused to include an exemption for "matters of public concern." The opponents of A.B. 524 unsuccessfully argued that such an exemption was mandated by the First Amendment in light of the U.S. Supreme Court's opinion in *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (media is constitutionally protected from liability even for publication of information unlawfully obtained by a third party and then transmitted to the media where that information concerns a matter of public concern and media did not participate in unlawfully obtaining that information).

Nevertheless, A.B. 524 makes clear that any subsequent transmission, publication, broadcast, sale or offer to sell unlawfully obtained images or recordings beyond the "first" usage or transaction remains exempt from liability. This immunity applies to all subsequent publishers – *i.e.*, both those who were not parties to the "first" usage or transaction as well as to the "first" person whose use or acquisition of the image or recording was not unlawful, even if that first user *subsequently* obtains "actual knowledge" that the image or recording was originally captured in violation of 1708.8.

Two final pieces of good news: First, A.B. 524 provides that the entirety of Section 1708.8 "shall not apply to any visual image, sound recording or other physical impression taken or captured outside of California" – a restriction not previously imposed by the statute or case law. Second, the amended statute also make explicit that lawsuits brought under Section 1708.8 are fully subject to California's anti-SLAPP statute, Code of Civil Procedure §§ 425.16-425.18.

Nevertheless, the amended statute continues to pose a host of practical problems. How will a media outlet know with certainty whether a particular image or recording was illegally obtained? Can it rely exclusively upon the word of the paparazzo? What if the subject claims to the contrary? What if the material comes from a stock photo agency under a quitclaim? In future years, how will one be able to prove that a particular image or recording was taken or captured before January 1, 2010? Are aerial photographs or satellite imagery of a California location excluded? Who is the first user if a particular image is simultaneously broadcast or published by multiple media outlets on the very same day (or, on the Internet, at the very same moment)? These and many other questions are sure to provide ample grist for future litigation mills.

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California Governor Signs Libel Tourism Bill

On October 12, California Governor Arnold Schwarzenegger signed into law SB 320, a new state measure to combat libel tourism. The bill had been overwhelmingly approved by the state legislature: 75-0 in the state assembly and 39-0 in the state senate.

The new law amends the state's Uniform Foreign-Country Money Judgments Act so that foreign defamation judgments need not be recognized if obtained under law that provides less protection for speech than the First Amendment and California state constitution. The bill also amends the state long-arm statute to provide for a declaratory judgment action to obtain an order that the foreign judgment is unenforceable.

California is the fourth state to have enacted new legislation against libel tourism, joining New York, Illinois and Florida.

For more information on these and the federal libel tourism proposals see MLRC's website page on Libel Tourism available here.

The California bill was sponsored by the California Newspaper Publishers Association, supported by the California First Amendment Coalition, American Book Sellers Foundation for Free Expression, Californians Aware, and the American Civil Liberties Union; and was authored by Senate Judiciary Committee Chairwoman Ellen Corbett (D-San Leandro).

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