

## **Invasion of Privacy Law © 2001 Student Press Law Center**

The legal right of privacy has been defined as the right to be let alone, the right of a person "to withhold himself and his property from public scrutiny if he so chooses." *Federal Trade Commission v. American Tobacco Co.* 262 U.S. 276 (1923) However, unlike the First Amendment right to free speech, privacy (in the media context) is not a right explicitly guaranteed by the Constitution. Instead, privacy law has developed over the last 100 years. During that time, four separate kinds of privacy invasion have emerged: (1) Public Disclosure of Private and Embarrassing Facts, (2) False Light, (3) Intrusion and (4) Misappropriation.

### **I. Public Disclosure of Private and Embarrassing Facts**

Courts have recognized that certain intimate details about people, even though true, may be "off limits" to the press and public. For example, publishing detailed information about a private person's sexual conduct, medical condition or educational records might result in legal trouble. In order to succeed in this kind of lawsuit, the person suing must show that the information was:

(1) sufficiently private or not already in the public domain, (2) sufficiently intimate, and (3) highly offensive to a reasonable person.

- **The "Newsworthiness" Defense**

A news organization will be protected from a private facts privacy claim if it can show that the material published was "newsworthy." Almost any information about a well-known public figure or a public official will be considered newsworthy. Furthermore, reports of recent involvement in criminal behavior will be considered newsworthy for anyone.

- **Printing the Names of Minors**

In the unanimous 1979 decision, *Smith v. Daily Mail*, 443 U.S. 97 (1979), the U.S. Supreme Court ruled that the First Amendment protects the right of journalists to use the names of minors in newsworthy stories as long as the information is "lawfully obtained" and "truthfully" reported.

### **II. False Light**

A false light claim can arise anytime you unflatteringly portray -in words or pictures- a person as something that he or she is not. A typical "false light" problem can arise where a misleading caption is published with a photo (for example, a caption describes a bystander at an unlawful demonstration as a "participant"). The elements of false light, found in the Restatement (Second) of Torts, Sec. 652E are:

- (1) the portrayal must be found to be "highly offensive to a reasonable person" and
- (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The same legal standards that apply to libel apply to false light. The distinction between false light and libel is that in false light claims one need not prove injury or damage to reputation, but only that the statement was highly offensive. Courts in some states have refused to recognize false light claims because of their similarity to libel.

### **III. Intrusion Upon Seclusion**

Intrusion is a claim often based on the act of news gathering. A reporter can be sued even when the information obtained is never published. It occurs when a reporter gathers information about a person in a place where that person has a reasonable right to expect privacy. However, newsworthiness can also be a defense to this kind of privacy invasion. As a general rule, reporters are allowed to enter privately owned public places, for example, private school campuses or malls. However, also as a general rule, they must leave when they are asked.

### **Three most common types of intrusion**

(1) Trespass: going onto private property without the owner's consent.

(2) Secret Surveillance: using bugging equipment or hidden cameras. The laws vary by state but as a general rule reporters can legally photograph or record anything from a public area, such as a sidewalk, but they cannot use technology to improve upon what an unaided person would be able to see or hear from that public place.

(3) Misrepresentation: invalid or exceeded consent. Undercover reporting is not necessarily an invasion of privacy as long as the disguise is not used as a means to trespass or engage in an activity that would not otherwise be allowed. For example, it would not be an intrusion for a minority student reporter to pose as a potential pledge to investigate a story about racial discrimination inside a fraternity. The reporter has a right to pledge whether he is serious about it or not.

### **Information illegally obtained by a source**

Occasionally, the news media is provided with unsolicited, "confidential" information by an outside source. For example, a box of incriminating documents is left outside the newsroom or a tape of an intercepted and very sensitive cell phone conversation arrives mysteriously by mail. As long as the journalists themselves have not engaged in unlawful conduct to obtain the information or encouraged or assisted others in doing so, they have done nothing wrong. Moreover, if the information concerns a newsworthy topic, the Supreme Court has ruled that the news media will generally be protected from an invasion of privacy lawsuit if they should decide to publish it. *Bartnicki v. Vopper*, 121 S.Ct. 1753 (2001).

### **IV. Misappropriation of Name or Likeness**

Misappropriation is the unauthorized use of a person's name, photograph, likeness, voice or endorsement to promote the sale of a commercial product or service. (For example, using a photo of your school's star athlete in an for a pizza restaurant without her permission.) To avoid problems, publications should routinely have subjects sign a model release form written in simple, straightforward language when using their name or likeness in a commercial ad. Regardless of whether or not a release form has been signed, however, courts have generally allowed the media to reuse editorial photos or clips in its own self-promotion provided there is no suggestion that the person actually endorsed the publication.

### **Consent as a Defense**

With all four forms of invasion of privacy, consent is a valid defense. However, if you intend to rely on consent as your defense to a privacy claim you must make sure that you obtain the consent from someone with a legal right to give it and be candid with your subject about what information you want to use and how you intend to use it. While not necessary to be valid, consent is always easiest to prove when it is in writing.

### **Can a Minor Give Valid Consent?**

Consent is and should be effective if a minor is "capable of appreciating the nature, extent and probable consequences of the conduct (to which he consents)," even if parental consent is not obtained or expressly refused. Restatement of Torts (Second) Sec. 892A. This reasoning is in line with what courts have said when determining whether a child is responsible for the injuries he causes, his crimes and confessions to crimes. When obtaining consent from a minor, it is essential that a student journalist take extra precautions to insure that the minor is fully informed of what is taking place. While most minor high school students probably can provide valid consent, most elementary-aged children, because of their immaturity, probably cannot.