COMMENT

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Pursuing Paparazzi: Privacy and Intrusive Photography

Amid the recent controversy generated by the *Oriental Daily*'s personal attacks on the presiding judges, and its resulting indictment for contempt of court, the actual decision of the Court of Appeal[1] appears to have escaped attention. Pop star, Faye Wong, while waiting for her luggage at Beijing airport, was surreptitiously photographed. The picture, published on the front cover of the plaintiff's newspaper, confirmed rumours that Ms Wong was pregnant. Without the plaintiff's consent, the defendant republished the photograph on the cover page of the entertainment section of its own newspaper.

Rogers J, after hearing arguments about the propriety of photographs of Deng Xiaoping on his deathbed, a pregnant Madonna, and the late Princess of Wales in the arms of a lover, regarded the plaintiff's contention that the 'scoop value' of the picture of Ms Wong justified significant 'infringement damages.' He awarded the sum of $5,000 under this head.

The Court of Appeal dismissed the appeal 'without reluctance.'[2] Godfrey JA, expressing the temper of the time, declared:

> [T]he taking of photographs of public figures on *public* occasions ... is and must remain legitimate. But the taking of photographs of public figures on *private* occasions without their consent is quite another matter ... Public sentiment has turned, or seems to be turning, against those who are guilty of invasion of privacy of public figures by taking their photographs and then selling those photographs for large sums which reflect the cupidity of the publishers and the prurience of their readers. The time may come when, if the legislature does not step in first, the court may have to intervene in this field ... for example by holding that the protection of copyright will not be extended to photographs of public figures taken on private occasions without their consent.[3]

The death of Diana inevitably raised renewed calls for legal protection against the onslaughts of the paparazzi. Though their intrusive conduct is often conflated with the publication of its fruits, there is general recognition that our law is inadequate on both counts.[4] A number of solutions have therefore been advanced.

1 *Oriental Press Group Ltd v Apple Daily Ltd* [1997] 2 HKC 515.
2 Ibid, p 529, per Godfrey JA.
3 Ibid, pp 529–30.
4 While the torts of trespass and nuisance are normally of limited utility in the case of intrusion (for long lenses normally obviate the need for propinquity), an expansive interpretation of the equitable remedy for breach of confidence may assist in certain cases, as well as in disclosure. There is also some potential relief for victims of the latter under recent development of the tort of intentional infliction of emotional distress. See R Wacks, *Privacy and Press Freedom* (London: Blackstone, 1995), passim.

The first seeks to criminalise the activities of intrusive photographers and journalists. So, for example, the state of California (whose constitution explicitly protects 'privacy') has just published a bill designed to protect individuals (Hollywood stars?) against harassment, defined as persistent following or chasing persons in a manner that occasions reasonable fear of bodily injury. A sub-committee of the Law Reform Commission of Hong Kong has recently endorsed proposals to introduce legislation on 'stalking' which, though not intended to snare paparazzi, would almost certainly achieve that object.[5]

The second line of attack would seek to cajole or compel the media to adopt a variety of forms of self-regulation. The long — and continuing — attempts in Britain to achieve this compromise, and so avoid legislative controls, have been conspicuously unsuccessful.[6]

A third approach is to enact a remedy, along the lines of the American tort of the intentional intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.[7] Liability is distinct from that which may attach to public disclosure, if any, of the information obtained as a result of the intrusion.[8]

Now Godfrey JA, echoing proposals presently under discussion in England, has suggested a fourth strategy: hitting paparazzi where it hurts — in their pockets. By denying them copyright in the photographs or films they take or make, the argument goes, the urge both to snoop and publish may be resisted;

5 The Law Reform Commission of Hong Kong, Privacy Sub-Committee, *Report on Stalking* (December 1997). It recommends that a person who pursues a course of conduct amounting to harassment which he knows or ought to know constitutes harassment is guilty of an offence. 'Harassment' includes causing alarm or distress; a 'course of conduct' requires that it take place on at least two occasions. Among the defences is that the course of conduct was reasonable in the circumstances. The report is soon to be made available for a two-month public consultation period. The sub-committee will be publishing reports in the near future on civil liability for invasion of privacy, privacy and the media, and electronic surveillance. See too the Commission's *Report on Privacy: Regulating the Interception of Communications* (December 1996). I am a member of the sub-committee. It may be important to acknowledge the distinction between surveillance and the actual photographing of individuals. In the case of intrusive photographers, of course, the two are almost inseparable, but our law affords some protection to the latter, under the Personal Data (Privacy) Ordinance, but, as yet, none to the former. See note 19 below.

6 Most of this sorry saga is related in R Wacks, *Privacy and Press Freedom* (note 4 above), pp 5–10, 35, 140–2. In 1985 the establishment of a media council was proposed and rejected. The Hong Kong Journalists Association (which represents only some 20 per cent of journalists) has adopted a code of conduct which includes an oblique prohibition of intrusion into private grief. In respect of the broadcast media, the Broadcasting Authority Ordinance provides for codes of practice on programme, advertising, and technical standards for television and radio services, but the codes of practice issued by the Authority are silent on the subject of privacy-invading conduct. The more detailed Commercial Television Code of Practice on Programme Standards also fails to deal directly with the question of intrusive conduct.

7 See W Prosser and W P Keeton, *The Law of Torts* (St Paul, Minn: West Publishing Co, 5th ed,1984), p 855. See too Restatement (Second) of the Law of Torts, § 652B. The dividing line between public and private occasions is more perplexing than the dictum by Godfrey JA may suggest. The Lord Chief Justice, Lord Bingham of Cornhill, has recently expressed sympathy for the approach of the German Supreme Court which adopts the test of whether the subject relies on the fact of seclusion and acts in a way that he would not have done in public. This avoids some of the difficulties of distinguishing between public and private places, but is not innocent of its own problems. See Lord Bingham, 'The Way We Live Now: Human Rights in the New Millennium' The Earl Grey Memorial Lecture, University of Newcastle upon Tyne, 29 January 1998.

8 See Wacks (note 4 above), pp 142–3.

the images will not be theirs to sell.[9] Thus if a newspaper could re-publish a surreptitiously shot photograph of a pop star, without having to pay a fee, the market for such pictures would drop dramatically. Paparazzi would be out of business.

There is already a thin, but rather quaint, line of authority that denies copyright to immoral , deceptive, blasphemous, or defamatory material,[10] but this is unlikely to be invoked today.[11] The current proposal would enlarge the scope of turpitude that might induce a court to refuse protection.

But the idea is artificial, unwieldy, and conceptually problematic. If privacy is to be subsumed under copyright, in most cases what the law would be protecting is less the plaintiff's right of privacy than his right of publicity: the right to control the circumstances under which his image may be bought and sold.[12] The attraction of this proprietary approach to the paparazzi problem is understandable, indeed property interests were among the midwives at the very birth of the legal idea of privacy.[13] The first American judgment to recognise that the common law provided protection to privacy involved the tort of appropriation of name and likeness: the use, for the defendant's benefit, of the plaintiff's identity.[14]

While this tort normally takes the form of the unauthorised use of the plaintiff's identity for commercial, usually advertising, purposes, conceiving the exploitation of the image of public figures as an infringement of copyright comes very close to this kind of appropriation and, hence, to a violation of the plaintiff's right of publicity.[15]

9 One proposal currently being considered by a group of lawyers in London (of whom I am one — long distance) is to suggest an amendment to s 85 of the Copyright, Design and Patents Act 1988 by adding to the list of those who have a right in a commissioned photograph or film, a person who is the subject of an intrusive photograph or film. 'Intrusive' would be defined to include the non-consensual depiction of its subjects engaged in lawful activities on private premises. Section 15 of the Copyright Ordinance 1997 provides that a person who commissions a work has the right to restrain 'any exploitation of the commissioned work for any purpose against which he could reasonably take objection.'

10 *Stockdale v Onwhyn* (1826) 5 B & C 173; *Murray v Benbow* (1822) Jac 474n; *Lawrence v Smith* (1822) Jac 471.

11 W R Cornish suggests that these early nineteenth century decisions be treated with caution: *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 3rd ed 1996), p 384. See *Glyn v Weston Feature Film* [1916] 1 Ch 261, 269-70. But the principle is not dead. In *Stephens v Avery* [1988] 2 WLR 1280 at 1284, Browne-Wilkinson VC said that the law of confidence and copyright would not protect 'matters which have a grossly immoral tendency.' See too *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 WLR 776 at 818 (Peter Wright's conduct in disclosing confidential material in *Spycatcher* 'reeked of turpitude' and could therefore be copied with impunity: copyright would not attach to it (per Lord Jauncy)); *Hubbard v Vosper* [1972] 2 QB 84, 101.

12 See R Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989, reprinted with new preface and corrections, 1993).

13 Warren and Brandeis based much of their argument (that a right of privacy was immanent in the common law) upon cases in which relief was founded on an interest in property, especially *Prince Albert v Strange* (1849) 2 De Gex & Sm 652, 64 ER 293; (1849) 1 Mac & G 25, 41 ER 1171.

14 See *Pavesich v New England Life Ins Co* 120 Ga 190; 50 SE 68 (1905); *Roberson v Rochester Folding Box Co* 171 NY 64; 64 NE 442 (1902).

15 Cf J T McCarthy, *The Rights of Publicity and Privacy* (New York: Clark Boardman Callaghan, 1994), para 1.6 ff.

But the protection of an individual's privacy ought to be acknowledged in its own right as worthy of protection. Backdoor remedies will, in the end, prove counter-productive.[16]

There is, in any event, a more congenial weapon to hand. At the heart of the Personal Data (Privacy) Ordinance is the principle that personal data shall be collected by means that are 'lawful and fair in the circumstances of the case.'[17] In respect of the use and disclosure of such data, they may be used or disclosed for the purposes for which the data were collected or for some directly related purposes, unless the data subject consents. 'Personal data' means any data '(a) relating directly or indirectly to a living individual; (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable.'[18] Photographs and films are therefore covered.[19]

While the administrative regime established under the ordinance was not fashioned to afford relief or restrain threatened misconduct of this kind,[20] in the absence of more explicit remedies it could easily be amended to assist victims of both unfair intrusion and disclosure.

16 For this argument see, perhaps, R Wacks, *The Protection of Privacy* (London: Sweet & Maxwell, 1980); R Wacks, 'The Poverty of "Privacy"' (1980) 96 LQR 73; R Wacks, *Personal Information: Privacy and the Law* (note 12 above); R Wacks (ed), *Privacy* Volume I: *The Concept of Privacy*, Volume II: *Privacy and the Law*, The International Library of Essays on Law and Legal Theory (London: Dartmouth, 1993; New York: New York University Press, 1993); Wacks (note 4 above).

17 Section 2(1). See R Wacks, 'Data Privacy: Reforming the Law' (1996) 26 HKLJ 149.

18 Among the important limitations of the ordinance is that it is confined to data in a recorded form. There is no protection of the data subject unless the data user converts the data into a form in which access to or processing of them is practicable: s 2(1). Moreover, the data protection principles are just that; they are not rules. The burden is also placed on the data subject to show that the data are indeed 'personal data' as defined. He must therefore demonstrate, to the satisfaction of the Privacy Commissioner, that the data are not covered by one of the exemptions in the ordinance. None of these shortcomings is incapable of simple amendment if specific legislation is not passed. Indeed, there is a good deal to be said for addressing the central problems of privacy protection (or what I prefer to call the protection of 'personal information') under the rubric of fair information practices, including the growing challenges of privacy of e-mail and on the Internet. See R Wacks, 'Privacy in Cyberspace: Personal Information, Free Speech, and the Internet' in P Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997). See generally M Berthold and R Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: FT Law & Tax Asia Pacific, 1997).

19 The Privacy Commissioner for Personal Data recently ruled that surreptitious videos taken of the complainant in her hostel were a contravention of data protection principle 1(2)(b) which requires that personal data be collected 'by means which are lawful and fair in the circumstances' and data protection principle 3 which provides that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than that for which it was collected. He considered the conduct of the photographer 'a serious intrusion on an individual's privacy' and issued an enforcement order under s 50 of the ordinance. He concluded: 'The act of observing the private actions of someone in a private place does not come within the coverage of the Ordinance. This is because observation alone does not result in the collection of personal data, which by definition must involve recorded information. However, a recorded image of a living individual from which it is practicable to identify that person and in a form to which access to or processing of the data is practicable is personal data of that individual. Hence, a recorded image of an individual held in any format, whether it is captured on a roll film [sic], printed on a [sic] photographic paper, or embodied on a video tape, so as to be capable of being reproduced may fall within the definition of personal data.' Office of the Privacy Commissioner for Personal Data, *Report Published under Section 48(2) of the Personal Data (Privacy) Ordinance*, Report No R97-1948, 13 October 1997.

20 As currently under discussion by the Law Reform Commission Privacy Sub-Committee of which I am a member.

The preferable answer to the paparazzi problem remains explicit, carefully drafted legislation that creates criminal and civil sanctions for seriously offensive, intentional, or reckless intrusion upon an individual's solitude or seclusion or into his private affairs.[21] But the swiftly developing acceptance by numerous jurisdictions[22] of the principles of 'fair information practice' embodied in the European Directive on Data Protection of 1995, and our own legislation, offer a promising, workmanlike alternative by which to curb the worst excesses of the media.

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The State of Hong Kong's Legal Literature: Law Reports, Legislation, and Current Awareness

The range and nature of legal literature available in Hong Kong has undergone a remarkable transformation in the past few years. We have seen the emergence of two new series of law reports, one of which bids fair to swallow up the competition, a rescue bid for one series apparently mounted by the publishers of a digest, the birth of a new 'current awareness' publication, the emergence of the unblissful BLIS and its replacement by a much improved version, and the publication of two CDs — of publications otherwise in paper format; not to mention the first appearance of Hong Kong material on LEXIS.

Law reports — in paper format

The Hong Kong Law Reports

Having first of all bifurcated into two series (in addition to the long-standing Hong Kong District Law Reports sub-division) — with the emergence of the Hong Kong Criminal Law Reports — it almost seemed that, exhausted with the effort, the Hong Kong Law Reports were to disappear entirely. No individual parts appeared at all in 1996, but towards the end of the year two bound volumes appeared under the imprint of Pearson Professional. In 1997 the reincarnation was complete when 'The Authorized Hong Kong Law Reports and Digest' began to appear. The full structure of this is discussed below.

[21] The sub-committee's mind is currently running along these lines, but I dare not say more until our recommendations enter the public domain, which ought to be soon.

[22] There are several signs that even in the recalcitrant United States a belated recognition is emerging that a comprehensive legal regime is required to provide individuals with the right to control the collection and use of their personal data. See, for example, Susan E Gindin, 'Lost and Found in Cyberspace: Informational Privacy Rights in the Age of the Internet' (1997) <http://www.info-law.com/articles.html>.

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