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## Privacy and Anonymity

Does the Personal Data (Privacy) Ordinance protect me against gratuitous photography in a public place? The ordinance, it is true, was not fashioned to provide comprehensive protection for individual privacy, but personal data must be collected by means that are both lawful and fair. Is it fair to take my picture without my knowledge or consent? There is little doubt that the law extends to the media, a fact I recently supported in these pages,<sup>1</sup> but does it apply to an unsolicited snap? The Court of Appeal has just replied in the negative.

In the Court of First Instance the Privacy Commissioner for Personal Data recently survived the first challenge to the exercise of his powers. That decision has been reversed.<sup>2</sup> Attentive readers will recall that the defendant, a popular Chinese magazine, published a photograph of a young woman to illustrate an article on fashion. Her image, taken with a long-range lens as she stood at a busy intersection, was used as an example of poor dress sense. She consented neither to the photograph nor to its subsequent unkind publication. Her successful complaint to the Privacy Commissioner was based on a breach of the first data protection principle (DPP 1) in Schedule 1 of the Personal Data (Privacy) Ordinance requiring, inter alia, that personal data be collected by means that are 'fair in the circumstances of the case.'

Keith JA (sitting as an additional judge in the Court of First Instance) rejected the magazine's argument that, since it wanted to capture the complainant's picture in a 'natural pose', its non-consensual long-range photograph was justified. He also had little sympathy for its claim that, since the Commissioner had accepted that it would have been impractical to obtain the complainant's prior consent to a candid photograph, such a picture could be taken without her *knowledge*. This, he held, was an erroneous construction of the Commissioner's decision, for he had not found the taking of the photograph to have been unfair solely on this ground, but that that it was taken without the complainant's knowledge or consent when the photographer had no reasonable grounds to believe that he would be able to obtain her consent to its publication, and that the magazine did not have a policy of publishing such gratuitous photographs in such a way that the person could not be identified.

<sup>1</sup> Raymond Wacks, 'Media Intrusion: An Expanded Role for the Privacy Commissioner?' (1999) 29 HKLJ 341. I draw here on Raymond Wacks, 'What has Data Protection to do with Privacy?' (2000) 6 Privacy Law and Policy Reporter 143. See also Raymond Wacks, 'Pursuing Paparazzi: Privacy and Intrusive Photography' (1998) 28 HKLJ 1.

<sup>2</sup> *Eastweek Publisher Ltd v Privacy Commissioner of Personal Data* [2000] 1 HKC 692. See generally Mark Berthold and Raymond Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: Sweet & Maxwell, 1997).

The Court of Appeal (by a majority) has now held that the facts fell outside of the ambit of the legislation.<sup>3</sup> Neither DPP1 nor any of the data protection principles were 'engaged'. The Privacy Commissioner had therefore been wrong to rule against the magazine.

The judgment rests on four main grounds. First, that the act of photographing the plaintiff did not constitute an act of data collection. This was because:

[T]he essence of the required act of personal data collection [is] that the data user must thereby be compiling information about *an identified person* or about a person whom the data user intends or seeks to identify. The data collected must be an item of personal information attaching to the identified subject ... This is missing in the present case. What is crucial here is the complainant's anonymity and the irrelevance of her identity so far as the photographer, the reporter and Eastweek were concerned. Indeed, they remained completely indifferent to and ignorant of her identity right up to and after publication of the offending issue of the magazine. She would have remained anonymous to Eastweek if she had not lodged a complaint and made her identity known. In my view, to take her photograph in such circumstances did *not* constitute an act of personal data collection relating to the complainant.<sup>4</sup>

Secondly, to apply DPP1 to the facts of the case would unduly inhibit press freedom since a newspaper may wish to publish photographs of unidentified persons to illustrate some social phenomenon such as teenagers smoking. Thirdly, other provisions of the ordinance (such as access rights and the use limitation requirement in DPP3) point to the necessity for a data subject whose identity is known or sought to be known by the data user as an important item of information. In other words, the right of access, for example, makes sense only if the data user holds the data collected in relation to each *identified* data subject. This was of course not the case here. Fourthly, the ordinance protects only personal data; it is not intended to create a general right of privacy against all forms of intrusion into the private domain.

The court stressed that it was not deciding that that taking someone's photograph could never be an act of personal data collection. It depended on the circumstances. Thus, if someone's photograph is taken with a view to its inclusion as part of a dossier being compiled about him as an identified subject, the act of photography would clearly be an act of personal data collection. For example, the portfolio of photographs of particular actors, entertainers or fashion models maintained by a theatrical impresario or fashion modelling

<sup>3</sup> In his dissenting judgment, Wong JA thought that a purposive construction yielded a wider view of the legislative intent.

<sup>4</sup> At 700. Emphasis in original.

agency would clearly constitute personal data collected in relation to the individuals in question. Similarly, law enforcement agencies are likely to have databases including photographs of wanted persons whose identities may or may not be known. If unknown, their identities would be considered important and sought-after items of information. Such photographs clearly would constitute part of the personal data collected in relation to such wanted persons.<sup>5</sup>

Moreover, none of the three judges doubted either that a photograph could constitute 'personal data' (an issue upon which the trial judge had expressed uncertainty)<sup>6</sup> or that the press or other media organizations fell beyond the scope of the ordinance. 'On the contrary, it is clear that they are caught by its provisions if and to the extent that they engage in the collection of personal data.'<sup>7</sup>

What was the complainant's grievance? She was in a public place when her photograph was taken without her knowledge or consent. It is doubtful that the 'privacy' laws of any jurisdiction would regard her as having, on these facts, a reasonable expectation of privacy. Even the American common law tort of 'intrusion' would be of little help—unless perhaps she exhibited by her conduct a desire to preserve her privacy and that this was reasonable in the circumstances.<sup>8</sup>

Ironically, therefore, DPP1 (which requires the collection of personal data to be 'fair') may provide greater protection to 'privacy' than the American tort that exists for this very purpose. But the matter is not so simple. First, as already mentioned, the court rejected the view that this was collection of personal data at all. Secondly, the relationship between what may be called (even in the present context) 'intrusion' and 'disclosure' is problematic.

I shall not here deal with the first point;<sup>9</sup> the second issue has long bedevilled the literature of 'privacy'; its analysis is, however, neglected in the data protection setting. In short, there is normally little point in taking my photograph unless it is to be used for some purpose. My objection to being photographed, whether in a public or private place, usually resides in the frustration of my legitimate expectation that my image should not be *used*

<sup>5</sup> At 704.

<sup>6</sup> In my earlier comment (see note 2 above) I suggested that a closer reading of the ordinance would have revealed that the term 'document' is defined in s2 to include 'a film, tape or other device in which visual images are embodied ...' A photograph is plainly included. The Court of Appeal accepted this view.

<sup>7</sup> At 704.

<sup>8</sup> Is her real complaint one of libel? The judgment refers to her being embarrassed and teased by her friends and that the article sought to provide 'a degree of malicious amusement' to readers of the magazine at the complainant's expense. This, it is submitted, is unlikely to form the basis of a cause of action in defamation. But see Wong JA's dissenting judgment (at 709–710).

<sup>9</sup> The Court of Appeal acknowledged that the complainant was 'entirely justified in regarding the article and the photograph as an unfair and impertinent intrusion into her sphere of personal privacy. However, unfortunately for her, the Ordinance does not purport to protect "personal privacy" as opposed to "information privacy"'. (At 704–705, per Ribeiro JA). This is a common assertion, but it fails to recognise the potential of data protection regulatory regimes to reach the parts other laws cannot, perhaps more effectively.

without my consent.<sup>10</sup> There is therefore a symbiotic relationship between use and disclosure or, to use the language of data protection, collection and use. The Court of Appeal proceeds on the (common) assumption that the two are, in effect inseparable. But caution is required.

A similar presumption is to be found in common law 'privacy' cases and literature where there is a tendency to conflate the *intrusion* practised by the prying journalist or photographer with the *publication* of the information thereby acquired. The two activities should, as far as possible, be kept separate.<sup>11</sup>

Hence, to make an obvious point, the intruder may not always be the 'discloser'. Thus in *Pearson v Dodd*,<sup>12</sup> employees and ex-employees of a US Senator surreptitiously removed papers from his files, copied them and handed the duplicates to two newspaper columnists. The journalists, with full knowledge of the circumstances of its acquisition, included the information in their column. The court held, dealing separately with disclosure and intrusion, that, in respect of the former, the First Amendment protected the revelation of such information and, as to the latter, the columnists could not be liable for the intrusion merely upon proof of their knowledge of its occurrence.

First Amendment protection extends only to disclosure. Hill points out, in regard to the protection afforded to the media by the newsworthiness defence to otherwise actionable disclosures of private facts, that '[t]he values of the First Amendment would be seriously subverted if such protection were withdrawn on the ground of knowledge on the part of the media that the truth had come to light through legally reprehensible means employed by others.'<sup>13</sup>

Should such protection be accorded to intrusion? I think not. The justifications for free speech do not apply to cases of intrusion. Thus, as *Dietemann* correctly held, the media should be liable for intrusive investigative activities. Accordingly, the central question becomes whether mere *knowledge* on the part of the columnists in *Pearson* ought to have been sufficient to hold them liable for the tort of intrusion.

<sup>10</sup> See Raymond Wacks, *Personal Information: Privacy and the Law*, (Oxford: Clarendon Press, 1993) Chapter 3; Raymond Wacks, *Privacy and Press Freedom*, (London: Blackstone Press) Chapter 5.

<sup>11</sup> There is much, I think, in the approach adopted by A Hill, 'Defamation and Privacy under the First Amendment' (1976) 76 *Columbia Law Review* 1205; Note, 'The Right of the Press to Gather Information' (1971) 71 *Columbia Law Review* 838. In *Dietemann v Time, Inc*, 449 F 2d 244 (9th Cir 1971) two reporters of *Life* magazine tricked the plaintiff into allowing them access to his home and there set up hidden surveillance devices to monitor the plaintiff, a virtually uneducated plumber, who purported to diagnose and treat physical ailments. The resulting article informed the public about a newsworthy topic—the unlicensed practice of medicine—but the court had to consider whether this would grant immunity to the reporters in respect of their surreptitious news gathering techniques. On appeal, the judgment in the plaintiff's favour for invasion of privacy was upheld. In answer to the defendant's claim that the First Amendment's shield extended not only to publication, but also to investigation, the court remarked that the amendment 'has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering.' (At 249). It added that 'there is no First Amendment interest in protecting news media from calculated misdeeds [thus] damages for intrusion [may] be enhanced by the fact of later publication.' (At 250).

<sup>12</sup> 410 F 2d 701 (DC Cir), *cert denied*, 395 US 947 (1969).

<sup>13</sup> Hill (note 11 above) 1380.

Where the 'discloser' is also the intruder, liability should be imposed for the intrusion even though the disclosure is safeguarded by free speech considerations. *Dietemann* protects the journalists' disclosure of newsworthy information to the public at large, while reproofing their intrusive newsgathering. This seems a sensible approach.<sup>14</sup>

In most mixed intrusion/disclosure cases, but for the reprehensible newsgathering techniques, the defendants would not have got their story. And equally, but for those techniques, not only would the plaintiff not have suffered a violation of his seclusion but he also would have been spared the trauma of being named in the newspaper. However, in *Barber* the Missouri Supreme Court declined to protect the journalist, and thus the plaintiff recovered damages for both intrusion and disclosure.

Does this approach have any purchase in respect of the data protection principles regulating collection and use of personal data? Each is, of course, targeted at a rather different mischief than the privacy considerations deployed in the cases mentioned above. Thus, the latter, for example, includes not merely 'disclosure' of information, but *any* use of it. Moreover, and perhaps more significantly, it embodies the principle that data collected for one purpose should be used for another purpose only with the prescribed consent of the data subject. I have argued that this is a core 'privacy' right, but this view may not be widely shared.<sup>15</sup>

In any event, the reference in DPP3 to 'the purpose for which the data were to be used at the time of the collection of the data' demonstrates a similar interconnectedness between this principle and DPP1. Nevertheless, the argument in support of treating the wrongfulness of each form of conduct discretely remains. This means that the act of data collection should be evaluated independently of the use to which the data are put.

In addition, though the complainant's objection was to the use rather than the collection of the data,<sup>16</sup> where a data protection regime is applied to the media, it may be necessary to treat the notion of collection in a less restrictive manner.

It is hard to dispute the reasoning of Ribeiro JA that led him to conclude that if no complaint had been made to the Commissioner and, a year later, *Eastweek* had been requested to provide any information that it had relating to the complainant, the magazine would have responded that it had no records relating to such an individual, even if the offending photograph and article remained available in its electronic and print archives. The information 'would

<sup>14</sup> See *Barber v Time, Inc* [348 Mo 1199; 159 SW 2d 291 (1942)] where the plaintiff, a woman with a serious eating disorder was surreptitiously photographed in hospital by a newspaper reporter, and the picture was published by the defendant.

<sup>15</sup> See Raymond Wacks, note 10 above.

<sup>16</sup> Though DPP3 does, as stated in the text, somersault back to DPP1. Moreover, if, as the court held, there was no act of data collection, DPP3 could not come into play.

not have been collected in or intended to be retrievable from such archives as personal data relating to the complainant.<sup>17</sup>

But there may well be circumstances in which a data subject may seek access to data that identify him only by his image. Suppose, for example, that my activities in public are, as is increasingly the case, monitored by means of a closed circuit television camera. I fear that the video recording may have captured me in an embarrassing position and I wish to obtain a copy of this piece of personal data. Leaving aside the nice question of how access might operate in practice, the mere fact that on the tape I am identified only by my image is not conclusive of the question whether the law does protect my right of access. Though it could presumably be argued that the collector of these data may intend to establish the identity of those surreptitiously recorded. Similarly, if I know that my photograph has been taken, even if my name is not revealed in the accompanying article (as occurred in this case), the offending newspaper, though it has no interest in my identity, ought to be able to retrieve the picture when I inform them when and where it was shot. Anonymity of the data subject need not be the death knell of fair collection. It is also true that those who manage Web sites increasingly collect the e-mail addresses of visitors to their sites. In most cases, their identity is of no relevance to the data user.

The motives of the photographer should not determine whether the photograph is an act of data collection. This seems to be the consequence of Ribeiro JA's dictum:

It should be stressed that the fact that the photograph, when published, is capable of conveying the identity of its subject to a reader who happens to be acquainted with that person, just as the complainant's teasing colleagues were able to identify her from the picture in the magazine, does not make the act of taking the photograph an act of data collection if the photographer and his principals were acting without knowing or being at all interested in ascertaining the identity of the person being photographed.<sup>18</sup>

Godfrey JA acknowledged that the ordinance does not expressly require the identification or intention to identify the data subject by the collector of the data, but held that the legislation was not intended to apply in the absence of them. Since the statute defines 'personal data' *objectively*, to consider the knowledge or intention of the collecting party as a relevant factor would, in effect, render the definition a *subjective* one.<sup>19</sup>

<sup>17</sup> At 700.

<sup>18</sup> At 702.

<sup>19</sup> I am grateful to former Deputy Privacy Commissioner, Robin McLeish, for alerting me to this point.

Privacy is, of course, a frustratingly protean concept. The ordinance was, as the Court of Appeal observes, designed to protect 'information privacy'. But this is not an easy line to draw. Is it unreasonable to expect to be able to cross a busy intersection without having your picture taken for use in a magazine? Perhaps it is. But the decision may exclude from the ordinance's ambit the collection of personal data that it ought to regulate. So, for example, it is now a common (and disquieting) practice for Web-based companies to collect millions of e-mail addresses or, through the use of cookies, to maintain databases of surfing behaviour. They care not a jot about the identity of the subjects. They want the data largely for marketing purposes. Is this fair collection? The Court of Appeal's ruling could result in such activities falling outside DPP1 if, for it to bite, a data user must collect information 'about *an identified person* or about a person whom the data user intends or seeks to identify.'<sup>20</sup>

Being a face in a crowd may be no guarantee of anonymity. But we need to ensure that this conclusion is treated with circumspection when applied to online identities in our brave new digital world.

*Raymond Wacks\**

<sup>20</sup> Whether or not those who decided to take her photograph were concerned to ascertain her identity, they chose *her* as their subject, not anyone else. The examples given by Ribeiro JA of 'photographs illustrating a social phenomenon' (at 701) are not pertinent to the case of an individual who is not part of 'a crowd jostling in a queue for an initial public offering of shares' or of 'teenagers smoking cigarettes' (*ibid*). Both examples relate to groups of individuals undertaking an activity that is likely to be in the public interest. The respondent was merely crossing the street, engaging in a quotidian pursuit of no interest to anyone—except, of course, the magazine.

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