

**Reining in the California Paparazzi: An Analysis of the 2014
California Legislature's Attempts to Safeguard Celebrity Privacy**

Joshua Azriel
Kennesaw State University

The media's nonstop, obsessive interest in celebrities and other public figures is not a twenty-first century phenomenon. In the 1960s and 1970s, self-proclaimed "paparazzo" photographer Ron Gallela used a simple film camera to build a career focused on his constant photography of Jacqueline Kennedy Onassis and her family. Onassis and the Secret Service sued him for invasion of privacy when he physically placed himself in front of the former First Lady and her children to take their photos.

In two separate court cases, Gallela unsuccessfully argued a First Amendment freedom of the press right to photograph Onassis.¹ A federal appellate court judge granted a physical zone of privacy for Onassis and her children.² The court protected her from "any blocking of her movement in public places and thoroughfares" and her children were guaranteed a right to attend their schools without Gallela's physical interruptions into their lives.³ This was a legal victory for Onassis in an earlier era before our current, online celebrity-crazed culture. Today, paparazzi use advanced photo and video technology to obtain photo or video clips that can sell for thousands of dollars.

With today's paparazzi, it is not just one photographer celebrities need to fear but a hoard of them. There are numerous websites and magazines devoted to providing the public with photos of celebrities such as Britney Spears, Justin Bieber, or Rebel Wilson.⁴ Following, photographing, and recording video of celebrities is an industry worth millions of dollars.⁵ One photographer can earn tens of thousands of dollars from a single photo of an in-demand celebrity.⁶ Websites such as TMZ.com rely on informants around Hollywood to provide information about celebrity

¹ See *Gallela v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

² *Id.* at 998. Onassis was given a 25-foot protective zone from Gallela, and her children were provided 30 feet.

³ *Id.*

⁴ See e.g. Callie Mills, *The 20 Funniest Celebrity Paparazzi Pics of the Week That Will Make You LOL! 11.28.15*, CELEBUZZ, <<http://www.celebuzz.com/2015-11-28/the-20-funniest-paparazzi-pics-of-the-week-that-will-make-you-lol-11-28-15/>>.

⁵ *The Paparazzi Industry*, The Paparazzi Reform Initiative, <<http://www.paparazzi-reform.org/industry/>>.

⁶ *Id.*

whereabouts.⁷ TMZ often pays informants at Los Angeles area hotels, airports, local police departments, and restaurants to offer tips about celebrity comings and goings.⁸

Celebrities living in California have testified before the state legislature in recent years asking elected officials to pass laws protecting their privacy and their children's privacy from paparazzi's physical intrusions. In 2013, Jennifer Garner and Halle Berry were instrumental in convincing the legislature to take action to tighten state privacy laws.⁹ Starting in 1998 the California Legislature took an active approach in limiting the power of paparazzi to invade peoples' lives.¹⁰ These laws focused on banning the use of drones and other advanced photo and video technology in order to safeguard against invasion of the privacy of celebrities. The laws imposed fines on the paparazzi that sold photos and the media companies that purchased them.

This article argues that the specific provisions Sections 1708.8 and 1708.7 that include the use of technology and focus on the intrusion tort within privacy law are legal because they are content neutral focusing on time, place, and manner restrictions. However, the elements of the laws that contain provisions against the media (including fines) may not withstand First Amendment scrutiny. The parts of the laws directed specifically at punishing the media could be interpreted as content-based and an informal form of prior restraint and, therefore, not pass the U.S. Supreme Court's strict scrutiny test.

I. Applying Privacy Law to Paparazzi Intrusion on Celebrities

The origins of privacy law date back to 1890 when Samuel Warren and Louis Brandeis published an article in the *Harvard Law Review* urging a right to privacy.¹¹ As with today's critiques of paparazzi, Warren and Brandeis pointedly criticized the media's encroaching on individuals' privacy rights: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops."¹²

Warren and Brandeis were both shocked by the press of their time in the late nineteenth century. The concerns from their era parallel today's criticism against the paparazzi:

The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade pursued with industry as well as effrontery. To satisfy prurient taste, the details of sexual relations are broadcast in the

⁷ Nicholas Schmidle, "The Digital Dirt: How TMZ Gets the Videos and Photos that Celebrities Want to Hide," *The New Yorker*, February 22, 2013, <<http://www.newyorker.com/magazine/2016/02/22/inside-harvey-levins-tmz>>.

⁸ *Id.*

⁹ Reuters, *California bill protecting children of celebrities from paparazzi signed into law*, Daily News, <<http://www.nydailynews.com/news/national/halle-berry-jennifer-garner-supported-california-bill-protecting-children-paparazzi-signed-law-article-1.1467192>>. Garner and Berry testified that paparazzi should not be allowed to follow their children who are out of the public eye. Berry stated her daughter feared going to school due to the daily presence of paparazzi.

¹⁰ See Cal. Civ. Code §1708.8 (1998).

¹¹ Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹² *Id.* at 195.

columns of daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.¹³

The newspaper gossip columns of Warren and Brandeis's era are our modern day celebrity-focused television networks, cable shows, websites, Twitter feeds, and Facebook postings. A simple website search using the phrase "paparazzi photos" or "celebrity photos" yields an unlimited number of salacious stories and photos from websites such as TMZ.com, Celebuzz.com, and eonline.com.

In 1960, seventy-five years after Warren and Brandeis's writing, William Prosser, who is considered one of the foremost experts in privacy law, outlined four areas of the modern day invasion of privacy tort: intrusion on an individual's physical solitude or seclusion; appropriation of one's name or likeness for financial benefit or harm; public disclosure of private facts; and placing someone in false light before the public.¹⁴ California Civil Code Sections 1708.7 and 1708.8 focus on two of those torts: intrusion and disclosure of private facts. The laws' focus on the tort of intrusion is a means of limiting the disclosure of private facts about a celebrity's life and family.

Most legal commentary on paparazzi and the need for California laws to protect privacy were published before Governor Jerry Brown in 2014 signed into law the updated amendments to Sections 1708.8 and 1708.7 of the civil code. In 2010 Christina Locke analyzed the origins of California's antipaparazzi laws since 1998.¹⁵ Locke noted that an earlier version of Section 1708.8 prevented paparazzi from using enhanced cameras or video recorders to invade celebrity privacy.¹⁶ In 2005 the California Legislature expanded 1708.8 to include fines for any photos sold that showed paparazzi assaulting celebrities.¹⁷

The law contained a provision punishing media outlets with fines if they publish the photos.¹⁸ Locke correctly noted this runs afoul of the First Amendment because the Supreme Court in *Bartnicki v. Vopper*,¹⁹ protected the media (as a third party) from publishing information originally recorded in an illegal way.²⁰ She noted that the Court in its *Bartnicki* ruling relied on *Florida Star v. BJF*²¹ and *Smith v. Daily Mail*,²² two cases that held the media had a First Amendment right to republish information obtained legally even if the information invaded someone's privacy.²³

¹³ *Id.* at 195–96.

¹⁴ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

¹⁵ Christina M. Locke, *Does Anti-Paparazzi Mean Anti-Press? First Amendment Implications of Privacy Legislation for the Newsroom*, 20 SETON HALL J. SPORTS & ENT. L 227 (2010).

¹⁶ *Id.* at 237.

¹⁷ *Id.* at 240.

¹⁸ *Id.*

¹⁹ 532 U.S. 514 (2001).

²⁰ Locke, *supra* note 17, at 241.

²¹ 491 U.S. 524 (1989). In *Florida Star v. BJF*, the Supreme Court upheld the right of the *Florida Star* newspaper to publish the identity of a sexual assault victim since it obtained her identity in a legal manner, from the newspaper's public file.

²² 443 U.S. 97 (1979). In *Smith v. Daily Mail Publishing Co.*, the Supreme Court ruled that the media could publish the identity of a minor involved in a shooting even though it obtained the name through investigative reporting of witnesses.

²³ Locke, *supra* note 17 at 242.

In 2011 Cameron Danly suggested a two-part test to protect celebrity privacy while not infringing on press rights.²⁴ Part one of her test is whether there is any overt interference with a person's independence or their physical ability to conduct their lives.²⁵ The second part of the test determines if their independent movements are a matter of public interest.²⁶ An invasion of privacy would occur if there is some sort of physical interference with someone's ability to conduct their day-to-day lives, or if the celebrity movements are not in the public interest. For example, if a celebrity must use the back door of a restaurant to exit or enter, employ decoy vehicles to confuse the paparazzi, or wear a wig to move about in public, there is interference with that person's independence.²⁷ It would only be acceptable to follow a celebrity if there is a public interest matter at hand. Danly admitted that defining the "public interest" is not easy, but a photo of a celebrity buying coffee at Starbucks may not qualify as public interest.²⁸

The idea of a paparazzi "free zone" in California was proposed by Tara Sattler in 2010.²⁹ She argued it is a content neutral approach to protecting celebrities from the physical intrusion often associated with a hoard of paparazzi. Similar to the physical protection Jackie Onassis received from the courts in 1973, California law could guarantee a physical space of movement for everyone. The clear space between anyone and paparazzi would be a "personal safety zone, and"³⁰ the California Legislature could determine the physical properties of the zone.

Sattler argued this would not violate the First Amendment.³¹ It would be content neutral, narrowly tailored to meet a specific public need (physical safety for all Californians), and not more restrictive than necessary.³² She pointed out that the Colorado Supreme Court upheld a similar law in 1999³³ and the U.S. Supreme Court upheld one even earlier in 1997.³⁴ Both court decisions created a legal precedent for physical zones of privacy, and Sattler noted that both courts were concerned with a government interest in public safety.

II. Limiting Press Activity While Driving

In 2015, in *Raef v. Superior County of Los Angeles*, a state appeals court had to review the arrest of paparazzo photographer Paul Raef who was charged with violating Section 40008 of the California Vehicle Code for endangering motorists by pursuing a celebrity in a high speed vehicle chase to obtain a photo while driving.³⁵ Section 40008 is similar to Sections 1708.8 and

²⁴ Cameron Danly, *Paparazzi and the Search for Federal Legislation*, 38 W. ST. U. L. REV. 161 (2011).

²⁵ *Id.* at 170.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Tara Sattler, *Comment, Plagued by the Paparazzi: How California Should Sharpen the Focus on Its Not-So Picture Perfect Paparazzi Laws*, 40 SW. L. REV. 403 (2010).

³⁰ *Id.* at 415.

³¹ *Id.* at 416. Sattler stated that proposed law would be constitutional for three reasons: "(1) the paparazzi-free zone law is a content neutral law; (2) the paparazzi-free zone law is narrowly tailored to serve a significant government interest; and (3) the paparazzi-free zone law leaves open ample alternative means for communication."

³² *Id.*

³³ *See Hill v. Thomas*, 973 P.2d 1246, 1255 (Colo. 1999).

³⁴ *See Schenck v. Pro Choice Network*, 519 U.S. 357 (1997).

³⁵ 240 Cal. App. 4th 1112 (2015).

1708.7 of the state civil code in that it targets the potential physical actions of the paparazzi.³⁶ The law criminalizes any reckless driving with the intent of capturing an image for a commercial purpose.³⁷ Since there are no case decisions to date regarding sections 1708.8 and 1708.7 of the California Civil Code, the only state jurisprudence available on the legal limits placed on the media in pursuit of a photos and videos comes from the *Raef* decision.

The California appeals court ruled that Section 40008 of California's Vehicle Code was constitutional and not an infringement of Raef's First Amendment rights.³⁸ Raef violated the law by driving recklessly in 2012 to capture images of celebrity Justin Bieber who was speeding on a California highway. He was arrested for willfully driving in disregard for the safety of other motorists with the intent of capturing a photo of Bieber for a "commercial purpose."³⁹ Raef argued that Section 40008 abridged his First Amendment rights as a member of the media disputing the court's ruling that the law was a content-based restriction. In 2012, a California trial court ruled for Raef, but the Appellate Division of the Los Angeles County Superior Court reversed the decision in 2013 and convicted him.⁴⁰

The Court of Appeal for California's Second Appellate District upheld the Los Angeles County Superior Court's decision. The court's three judges agreed that Section 40008 is not an infringement of press rights. It is a time, place, and manner law that focuses on the safety of California drivers and, therefore, not a content-based speech or press restriction.⁴¹

In the decision Judge Norman Epstein wrote the law is not aimed specifically at any media including the paparazzi: "On its face, section 40008 is not limited to paparazzi chasing celebrities or reporters gathering news. Instead, the statute targets 'any person' who commits an enumerated traffic offense with the intent to capture the image, sound, or physical impression of 'another person' for a commercial purpose."⁴² He noted that the law's intent was not aimed at newsgathering activities.⁴³ Instead, the law applies to anyone who disrupts traffic to obtain images for commercial or private use.⁴⁴

Raef also argued that Section 40008 burdens the media's speech rights when a reporter speeds to a breaking news story. The court disagreed. Judge Epstein said the law is narrowly tailored to keep drivers safe from anyone who may try to obtain photos while driving recklessly.⁴⁵ It is the physical act of taking photos or video while driving that is a safety concern, not the idea of gathering images.⁴⁶ The decision by the appeals court in 2015 provides some legal analysis of the constitutionality of Sections 1708.8 and 1708.7 of California's civil code.

³⁶ CAL VEH. CODE §40008 (2010). "any person who violates Section 21701, 21703, or 23103, with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose, is guilty of a misdemeanor and not an infraction and shall be punished by imprisonment in a county jail for not more than six months and by a fine of not more than two thousand five hundred dollars (\$2,500)."

³⁷ *Id.*

³⁸ 240 Cal. App. 4th 1112 (2015).

³⁹ *Id.* at 1119.

⁴⁰ *Id.*

⁴¹ *Id.* at 1125.

⁴² *Id.* at 1121.

⁴³ *Id.* at 1122.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1138.

⁴⁶ *Id.* at 1140.

III. Applying the Intrusion Tort to Paparazzi Activities

On September 30, 2014 Governor Brown signed two bills aimed at the paparazzi by amending Sections 1708.8 and 1708.7 of the civil code to enhance privacy protections of state residents, including celebrities. California Assembly Bill 2306 Section 1708.8, focuses on the heart of paparazzi activities. It encompasses issues related to invasion of privacy stemming from the intrusion tort.⁴⁷ The law uses intrusion to criminalize capturing someone’s image either in-person or with advanced photo technology. It also extends the tort of intrusion to employer-employee business relationships with regard to paparazzi.⁴⁸

The law has two overall components: physical and constructive invasion of privacy. A physical invasion of privacy occurs when the “defendant commits a physical trespass in attempting to capture the image or recording.”⁴⁹ Constructive invasion applies when using technology if in-person physical intrusion is not possible: “the defendant captures the image or recording without a physical trespass through the use of a ‘visual or auditory enhancing’ device to capture an image or recording that could only have been obtained by a physical trespass in the absence of the device.”⁵⁰

An intrusion-based invasion of privacy crime occurs when victims are on their own property and engaged in “personal or familial activity.”⁵¹ The intrusion prohibits anyone—ostensibly paparazzi—from using any device including drones to capture images above private property. It is illegal to violate one’s privacy “through the use of any device, regardless of whether there is a physical trespass.”⁵²

While the goal of protecting the privacy of one’s family is laudable, this provision of the law is problematic and at odds with federal law. The California Assembly’s Floor Analysis prior to passage of the law, referred to the potential use of a drone as a means to invade a subject’s privacy: “A drone with a standard (as opposed to ‘enhanced’) camera or microphone could achieve the same (or even more detailed) images than could an enhanced device used from afar.”⁵³ California cannot legislate drone usage rules even to protect privacy.

⁴⁷ CAL CIV CODE §1708.8 (2014).

⁴⁸ *Id.*

⁴⁹ CAL CIV CODE §1708.8 (l)(1) (2014). According to this part of the law, any form of advanced technology from telephoto lenses to heat-based infrared sensors to drones may not be used to impede on someone’s invasion of privacy on their property while engaged in “personal or familial activity.”

⁵⁰ *Id.*

⁵¹ CAL CIV CODE §1708.8 (1) (a) (2014). The law states “A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another person 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.”

⁵² CAL CIV CODE §1708.8 (1) (b) (2014). While not specifically mentioning the use of drone, the law infers it, “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 any 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 device was used.

⁵³ AB 2306 CHAU Concurrence in Senate Amendments, 2014 Leg. Sess. (CA 2014).

The Federal Aviation Administration has jurisdiction over air space used for commercial purposes, including the use of drones for media operations.⁵⁴ Only the FAA can regulate air space. Any media organization in California that may want to use a drone must contract a company licensed with the FAA⁵⁵ or seek a Section 333 exemption from the FAA to fly a drone.⁵⁶ The FAA encourages all private (noncommercial) drone operators to respect state privacy laws.⁵⁷

Section 1708.8's punishment for invasion of privacy using any technology to gather images, commit assault, or using false imprisonment based on a "commercial purpose" can draw a fine from \$5,000 to \$50,000.⁵⁸ The commercial purpose of the law is problematic with the First Amendment freedom of press clause. It is defined as "any act done with the expectation of a sale, financial gain, or other consideration."⁵⁹ A commercial purpose can include anyone who "directs, solicits, actually induces, or actually causes another person" to violate the first parts of the law.⁶⁰ If a member of the paparazzi works full time for a media firm or is hired on a freelance basis, that company becomes financially liable for the actions performed by its contract employees.

The commercial purpose section of 1708.8 (1)(e) could be interpreted as content-based, where a court would then apply the strict scrutiny test to determine if it violates the First Amendment. The U.S. Supreme Court defines a content-based law as one where the government (local, state, or federal) censors content it views unfavorably.⁶¹ Laws that pass strict scrutiny must use the least restrictive means possible to ban the speech and advance a compelling government interest.⁶² 1708.8's imposition of fines on the media might not pass the strict scrutiny test as a less restrictive means of censoring speech. Punishing media companies for the unknown actions of freelance photographers is a content-based restriction. Previous U.S. Supreme Court decisions protect the media from publishing or transmitting any material that is initially and unknowingly recorded illegally and then provided to the media.⁶³

⁵⁴ See *Sovereignty and Use of Airspace* 49 U.S.C. §40103 (2015). The United States Government has exclusive sovereignty of airspace of the United States, and the FAA has the authority to prescribe air traffic regulations on the flight of aircraft, including unmanned aircraft system, drones.

⁵⁵ Federal Aviation Administration, *Unmanned Aircraft Systems (UAS) Frequently Asked Questions* (2016) <https://www.faa.gov/uas/faq/#qn20>.

⁵⁶ Federal Aviation Administration, *Section 333* (2016), <https://www.faa.gov/uas/legislative_programs/section_333/>. Section 333 exemption "allows the Secretary to determine which types of UAS, as a result of their size, weight, speed, operational capability, proximity to airports and populated areas, and operation within visual line-of-sight, do not pose a hazard to NAS users or to national security, and whether an airworthiness certificate or COA is required for operation. A Section 333 grant of exemption is required for any civil UAS operation that is not for hobby or recreational purposes."

⁵⁷ Federal Aviation Administration, *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet* (2015) <http://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf>.

⁵⁸ CAL CIV CODE §1708.8 (1) (d) (2014).

⁵⁹ CAL CIV CODE §1708.8 (7)(k) (2014).

⁶⁰ CAL CIV CODE §1708.8 (1)(e) (2014).

⁶¹ See *e.g.* *U.S. v. Johnson*, 491 US 397 (1989) and *U.S. v. Eichman*, 496 US 310 (1990). In both cases, the Supreme Court ruled that state and federal laws prohibiting the desecration of the American flag were content based, an unconstitutional violation of the First Amendment free speech clause.

⁶² ROBERT TRAGER, JOSEPH RUSSOMANNO, SUSAN DENTE ROSS, AND AMY REYNOLDS, *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 71 (4th ed.2014).

⁶³ See *e.g.* *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Section 1708.8(1)(e) may also be an informal form of prior restraint. By imposing fines on the media for publishing images or audio recorded from a suspected invasion of privacy, the California Legislature chilled free speech and press coverage. While not an overt form of prior restraint, California government is endorsing, through a levying of fines, what kind of content it believes the public has the right to receive, a form of government power over the media.⁶⁴

Under Section 1708.8(2) any plaintiff would have to prove “actual knowledge” that the media firm directed the paparazzi employee to break the law to capture a photo or record video.⁶⁵ For the media company to be fined, the law requires that the plaintiff show proof of actual knowledge by proving “awareness, understanding, and recognition,” obtained prior to the time the photo or video was sold to a media company, a tough hurdle to meet.⁶⁶ In addition to actual knowledge, the plaintiff would have to prove that the paparazzi were compensated for the materials that are published, another difficult burden to prove.⁶⁷

IV. Using Antiharassment Law to Limit Paparazzi Activities

The second law Governor Brown signed into law in 2014 was Assembly Bill 1356, Section 1708.7.⁶⁸ It does not have as many detailed provisions as Section 1708.8. On its surface 1708.7 protects victims from harassment, but the statute could be interpreted to reduce paparazzi activities and violate the profession’s First Amendment rights. Based on California’s stalking tort, 1708.7 focuses on any alleged perpetrator who places a victim under near constant surveillance, as paparazzi often do.⁶⁹ Victims must provide evidence they were followed, harassed, or placed

⁶⁴ See *Near v. Minnesota*, 283 U.S. 697 (1931). In this case, the U.S. Supreme Court outlined the components of government-imposed prior restraint: government oversight of speech or publication; government chooses what speech or content is acceptable; and provides government with power to ban the content. The Court ruled that prior restraint is presumptively invalid except in an unusual circumstance such as war.

⁶⁵ CAL CIV CODE §1708.8 (1)(f)(1) (2014). “The transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of subdivision (a), (b), or (c) shall not constitute a violation of this section unless the person, in the first transaction following the taking or capture of the visual image, sound recording, or other physical impression, publicly transmitted, published, broadcast, sold, or offered for sale the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subdivision (a), (b), or (c), and provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.”

⁶⁶ CAL CIV CODE §1708.8 (1)(f)(2) (2014). Actual knowledge means “actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of subdivision (a), (b), or (c). The plaintiff shall establish actual knowledge by clear and convincing evidence.”

⁶⁷ *Id.* The victim must prove that paparazzi were “provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.”

⁶⁸ CAL CIV CODE §1708.7 (2014).

⁶⁹ California Legislative Counsel’s Digest AB 1356 (2014).

under surveillance,⁷⁰ feared for their personal or their family's safety, and suffered emotional distress.⁷¹

The defendant must make a "credible threat" either verbally or through actions such as reckless disregard for the victims or their family's safety.⁷² A credible threat is defined as verbal, written, or patterns of conduct via:

any action, method, device, or means, follows, harasses, monitors, surveils, threatens, or interferes with or damages the plaintiff's property, or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.⁷³

Paparazzi actions often include following, monitoring, and surveillance of celebrities. Celebrity victims may view these actions as harassment, but the counter argument may be that the victim's accusation of harassment are the paparazzi's reporting on the comings and goings of their subjects, even from a distance.

The law's prohibition against stalking someone by using electronic communications includes cell phones and video cameras, devices often used by paparazzi.⁷⁴ It may run into First Amendment challenges by celebrity-focused media operations such as TMZ.com. They could argue they have a right to keep tabs on celebrities whose lives are in the public eye. TMZ.com founder Harvey Levin has stated he believes the constant monitoring of celebrities is a newsworthy activity.⁷⁵

The Harvey Levins of the world may find another provision of the law problematic. Section 1708.7 defines what it means to follow a person, moving "in relative proximity" to the victim, and including any "newsgathering conduct connected to a newsworthy event."⁷⁶ In the 1960s and

⁷⁰ CAL CIV CODE §1708.7 (1) (2014).

⁷¹ CAL CIV CODE §1708.7 (2) (A) – (B) (2014). "(A) The plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this subparagraph, "immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household. (B) The plaintiff suffered substantial emotional distress, and the pattern of conduct would cause a reasonable person to suffer substantial emotional distress."

⁷² CAL CIV CODE §1708.7 (3)(A) (2014). "The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with either (i) the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member, or (ii) reckless disregard for the safety of the plaintiff or that of an immediate family member. In addition, the plaintiff must have, on at least one occasion, clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct unless exigent circumstances make the plaintiff's communication of the demand impractical or unsafe."

⁷³ CAL CIV CODE §1708.7 (3)(B)(2)(2014).

⁷⁴ CAL CIV CODE §1708.7 (3)(B)(3)(2014). "Electronic communication device includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers."

⁷⁵ Nicholas Schmidle, *The Digital Dirt: How TMZ Gets the Videos and Photos that Celebrities Want to Hide*, *The New Yorker*, February 22, 2013, <<http://www.newyorker.com/magazine/2016/02/22/inside-harvey-levins-tmz>>.

⁷⁶ CAL CIV CODE §1708.7 (3)(B)(4)(2014).

1970s, Ronald Galella moved within “proximity” to Jackie Onassis and her family (arguably newsworthy subjects) even after the court had approved restrictions against him.⁷⁷

Other vague parts of Section 1708.7 are the terms harass, annoy, alarm, and torment, in relation to victims.⁷⁸ They must prove emotional distress.⁷⁹ Paparazzi certainly annoy their subjects at times. But how would a celebrity victim prove emotional distress from being annoyed or harassed? This portion of the law is vague because it does not provide definitions of the terms.

Section 1708.7 requires victims to prove they communicated with the plaintiff to stop the harassment.⁸⁰ This makes sense for anyone threatening physical harm to a victim. In the case of paparazzi, they are often told to stop their harassment. The fundamental legal issue comes down to whether paparazzi are considered reporters, reporting and producing newsworthy stories as defined by this statute. Harassment may then not apply to their activities.

California’s shield law in the state constitution recognizes a member of the media as: “a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service.”⁸¹ A California appellate court even recognized the shield law as including online media who produce content.⁸² If state courts recognize the works of TMZ.com and celeb Buzz.com as media under the shield law, then Section 1708.7’s antiharassment measure simply may not apply to paparazzi. Either the state legislature or the courts need to provide clarification of media for Section 1708.7.

V. Conclusion

TMZ.com’s founder Harvey Levin says he runs a news operation, not a paparazzi firm.⁸³ If that’s the case, his reporters, who often act as paparazzi in pursuing celebrity stories, could not be prosecuted under parts of Sections 1708.8 and 1708.7 of California’s civil code. He could argue the laws are unconstitutional as written since they bar the physical activities his reporters do: record, monitor, and conduct surveillance on celebrities’ activities. TMZ hires personnel to conduct these activities and pays informants who assist in gathering information.⁸⁴ If TMZ is considered a news operation, these informants are the equivalent of paid freelance staff and are exempt.

As the article shows, specific provisions of California laws 1708.8 and 1708.7 that focus on the intrusion tort within privacy law are legal because they are content neutral on time, place, and

⁷⁷ Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

⁷⁸ CAL CIV CODE §1708.7 (3)(B)(5)(2014). “Harass” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

⁷⁹ *Id.*

⁸⁰ CAL CIV CODE §1708.7 (3)(A)(2014). “...[T]he plaintiff must have, on at least one occasion, clearly and definitely demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct. . . .”

⁸¹ CAL. CONST. art. 1 §2(b).

⁸² O’Grady v. Superior Court, Cal. Ct. App. (2006).

⁸³ Nicholas Schmidle, *The Digital Dirt: How TMZ Gets the Videos and Photos that Celebrities Want to Hide*, The New Yorker, February 22, 2013, <<http://www.newyorker.com/magazine/2016/02/22/inside-harvey-levins-tmz>>.

⁸⁴ *Id.*

manner regulations. The laws do not violate First Amendment rights of the press in a similar way that Section 40008 of California's vehicle code is a time, place, and manner restriction on physical activities of the press.⁸⁵ Yet, the elements of the laws that contain provisions against media publication rights may not withstand First Amendment scrutiny. Celebrity-focused media operations could argue their conduct is based on celebrity news and they have a First Amendment right to pursue these stories.

Any attempt to place limits on the media poses a burden on the First Amendment's guarantee of free speech and press. Any law that restricts these rights must pass the Supreme Court's strict scrutiny test. The law must ban as little speech as possible while advancing a compelling government interest. Portions of Section 1708.8 of the California's civil code are content-based, and courts often strike down content-based laws⁸⁶ that punish the media with a fine for publishing a photo, video, or audio clip of a celebrity taken by someone (possibly paparazzi) who may or may not have invaded that celebrity's privacy via physical or technological means.⁸⁷ The media is protected when it publishes and broadcasts information it receives from third parties whether or not that third party obtained the information legally.

If the California Legislature and governor want to protect celebrities' privacy, the best and most solid legal approach may be imposing time, place, and manner restrictions on the paparazzi similar to Tara Sattler's proposal of a "safe zone" for the public.⁸⁸ She advocated for physical space within public access areas such as sidewalks and streets where anyone, including celebrities, can physically move about without physical interference.

This "safe zone," whether it's 10 to 20 feet or some other measured space, could guarantee a zone of privacy as the state's civil code seeks to do. While not a perfect solution for protecting one's personal and family privacy, it is a start. Paparazzi could conduct their jobs without literally placing themselves in front of a subject.

A safe zone does not solve the harassment struggle that many celebrities complain about. But it does provide a sense of personal space and the ability to conduct one's life without physical interference. The safe zone would apply to children of celebrities as well.

As minors and private figures, children would have greater privacy guarantees than their well-known parents. Celebrities and other public figures often conduct themselves within the public eye and whether it is fair or not, the press, including the paparazzi, do have a right to publish and broadcast their stories.

⁸⁵ Raef v. Superior Court, 240 Cal. App. 4th 1112 (2015).

⁸⁶ ROBERT TRAGER, JOSEPH RUSSOMANNO, SUSAN DENTE ROSS, AND AMY REYNOLDS, *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 71 (4th ed.2014).

⁸⁷ CAL CIV CODE §1708.8 (1)(1) (2014).

⁸⁸ Tara Sattler, Comment, *Plagued by the Paparazzi: How California Should Sharpen the Focus on Its Not-So Picture Perfect Paparazzi Laws*, 40 Sw. L. Rev. 403 (2010).