

Chapter 2

INVASION OF PRIVACY

Joseph E. Martineau
Lewis, Rice & Fingersh, L.C.
St. Louis, Missouri

I. (§2.1) PREFACE

The tort of invasion of privacy protects the individual's right to be secure from intrusion into and publicity about his private affairs. Unlike defamation which has existed for centuries, invasion of privacy is a development of more recent case law. Under longstanding case law, English and American courts had protected an individual's right against reputational damage caused by defamation. The courts apparently were not concerned with, and did not address, a person's right to be free from unwanted intrusion into, and undesired publicity about, his or her private affairs. In large part, the emergence and growth of the tort of invasion of privacy appears to result from the growth of the mass media and increased technology.

The origin of invasion of privacy is almost universally attributed to an 1890 Law Review article urging the need to control infringements by the "yellow journalists" of the day on "the sacred precincts of private and domestic life."¹ Subsequent to the Warren and Brandeis article, some states, most notably New York,² enacted statutes designed to protect the right of privacy. Other states adopted the tort by judicial decision, with Georgia apparently being the first.³ Missouri first recognized the tort in *Munden v. Harris*.⁴

The tort of invasion of privacy should be distinguished from those privacy rights which are protected from state infringement and which emanate from interpretations given to the United States Constitution.⁵ The tort of invasion of privacy does not emanate from the constitution; it is not a constitutional right. Instead, it is a creature of the common law.⁶ Just as there exists no constitutional right preserving one's reputation from private interference, there exists no constitutional right preserving one's privacy from non-governmental intrusions. As with defamation law, the First Amendment provides limitations on the state created tort of invasion of privacy.⁷

II. (§2.2) FOUR DISTINCT TORTS

Invasion of privacy as it currently exists consists of four distinct and only somewhat related torts, and while the four torts bear the same name and are subject to similar defenses, they have "almost nothing in common."⁸ These four distinct torts described by Prosser are recognized in the RESTATEMENT (SECOND) OF TORTS §§ 552A-E (1977), and three of them have been almost universally adopted. The fourth (false light), of which even Prosser was critical, has met with resistance in Missouri and other states, as will be discussed below.⁹

The four invasion of privacy torts are: (1) intrusion upon seclusion;¹⁰ (2) publication of private embarrassing facts;¹¹ (3) appropriation of name or likeness;¹² and (4) publicity placing one in a false light.¹³

A. (§2.3) Intrusion Upon Seclusion

The tort of intrusion provides a remedy for unreasonable and offensive, but not necessarily physical, intrusions into the solitude of another. It is distinguishable from trespass by its elimination of the physical intrusion requirement. The type of information obtained from the unwarranted intrusion is not important; it is the offensive manner in which the information is obtained which forms the nucleus of the tort, and unlike the remaining three privacy torts, intrusion does not require a publication.¹⁴ The publication of information derived from an unwarranted intrusion, however, may constitute another distinct tort or enhance the damages suffered.

The RESTATEMENT (SECOND) OF TORTS § 652B (1977) defines the intrusion tort as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Missouri has adopted the approach set forth in the RESTATEMENT. In Missouri, the elements of such a cause of action are: "(1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about the subject matter by defendant through some method objectionable to

a reasonable man.”¹⁵

Minor and annoying excursions into the plaintiff’s private affairs are insufficient to support a claim for intrusion. As stated in *Biederman’s of Springfield, Inc. v. Wright*:¹⁶

Liability exists only if the defendant’s conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues.

As should be readily perceived from this quotation, sometimes the facts allegedly supporting a claim for unreasonable intrusion may also support a claim for intentional or negligent infliction of emotional distress.¹⁷

A newspaper or broadcaster does not commit intrusion by mere receipt of tortiously obtained information, even though it has actual knowledge of the impropriety.¹⁸ In fact, the United State Supreme Court has held that journalists may receive and publish information derived through someone else’s illegal interception, provided that information is of public concern and provided the journalist is not a party to the illegal act.¹⁹ However, if the information obtained is of a private, embarrassing nature and not a subject of legitimate public interest, then publishing that information could constitute public disclosure of private embarrassing facts.²⁰

On the other hand, the news media has been held to possess no special First Amendment protection with respect to the tort of intrusion.²¹ In other words, the news media has no greater right to intrude on an individual’s privacy than anyone else. This is true even if the information sought to be obtained is newsworthy or a matter of public interest.²²

Liability for intrusion has been found where a person gains entry to a private place, usually the plaintiff’s residence, without permission or by deception. For example, in *Engman v. Southwestern Bell Telephone Co.*,²³ allegations that a telephone company employee entered plaintiff’s home, without permission while plaintiff was sleeping in order to remove a telephone for delinquent payment of telephone bills were held sufficient to withstand a motion for summary judgment. In *Buller v. Pulitzer Publishing Co.*,²⁴ the court held that a psychic stated a claim for intrusion sufficient to withstand a motion to dismiss when a reporter obtained entry to her home after misidentifying herself and misrepresenting her true purpose for seeking to have her fortune read. (Buller can also be characterized as a disclosure of private facts case.)²⁵ Likewise, in *Hester v. Barnett*,²⁶ the plaintiffs were held to have stated a cognizable claim against a minister, who, through a pretense of seeking to counsel the plaintiffs, gained access to their home, when in fact his true motive was to harm them by discovering and disclosing information obtained through the guile.

In *Barber v. Time, Inc.*,²⁷ the court sustained a claim for invasion of privacy where reporters entered the plaintiff’s private hospital room, apparently with permission, but then exceeded the permission by taking photographs of her. The court stated: “Certainly, if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity. . . .”²⁸ *Barber* was analyzed generally as an invasion of privacy case and was decided before Prosser’s demarcation of the four distinct invasion of privacy torts. Because the photographs were published, *Barber* has been analyzed as a case of public disclosure of private embarrassing facts in addition to intrusion.

Unreasonable and offensive methods of gathering information about a person may support a claim for unreasonable intrusion. In *Corcoran v. Southwestern Bell Telephone Co.*,²⁹ a verdict for the plaintiff was upheld on appeal where the individual defendant had obtained the plaintiff’s telephone bill by deception; opened the sealed, first-class mail addressed to the plaintiff; and then read its contents without any authorization. Other examples of situations wherein someone might get in trouble include surveillance activities and video and audio recordings when surreptitiously made while the plaintiff is in a place he would reasonably expect to be private.³⁰

On the other hand, the courts have held that there can be no intrusion upon seclusion where surveillance takes place of a person while at a public place, even if the surveillance is secretly conducted and recorded.³¹

Surreptitiously recording communications to which the person doing the recording is not a party raises both statutory and tort problems.³²

If a recorded conversation is oral, the issue of whether a tortious intrusion has occurred is dependent upon whether a reasonable expectation of privacy exists and whether that expectation of privacy was interfered with in some highly objectionable manner.³³ In one case, an attorney who had been arrested for DWI was verbally abusive in his jail cell. A radio news reporter recorded and later broadcast the incident. The attorney filed suit for invasion of privacy among other claims. The Eighth Circuit affirmed a summary judgment for the radio station stating that the attorney’s obnoxious behavior in a public place was not subject to a “reasonable expectation of privacy.”³⁴

Where a recording is made of a conversation which is by telephone or other similar device, the law seems to presume both a reasonable expectancy of privacy and that a deliberate, non-consensual interception of such a communication by a non-party constitutes a highly offensive intrusion.³⁵

Whether a conversation is oral or by telephone, both statute and tort law hold that a party to the conversation has the absolute right to secretly record that conversation or to consent to a third party’s secret recording of that conversation.³⁶

However, while the law in most places permits a party to an event or conversation to record that event or conversation without the consent or knowledge of the other participants, this type of newsgathering is sometimes negatively perceived by the public and juries. ABC discovered this when it sent reporters undercover to discover improper food handling techniques by the Food Lion grocery chain. While ABC's undercover reporting was, in all practical respects, vindicated by an appellate court,³⁷ undercover reporting requires careful consideration.

Another issue that sometimes arises is where the police invite members of the media onto private property for newsgathering purposes. The United States Supreme Court has ruled that the fact that the police may lawfully be on the premises does not make it lawful for them to invite the news media onto the premises and that the police may be subject to liability under applicable civil rights laws for permitting such an intrusion.³⁸ But can the news media be held liable? That question has not been answered by the Court, but some courts have held that they can, especially if the information obtained is highly private.³⁹

There has been no clear resolution whether damages for intrusion include damages arising from the subsequent publication when the publication would not otherwise be actionable as a libel or under another branch of the invasion of privacy tort. *Dietemann v. Time, Inc.*⁴⁰ holds that subsequent publication constitutes a permissible item of damage. However, the better rule would seem to be that damages for the publication should be limited to any independent torts that arise from the publication.⁴¹

B. (§2.4) Publication of Private Embarrassing Facts

1. (§2.5) Preface

Intrusion deals with intrusive methods used to obtain information about the plaintiff. The tort of publication of private embarrassing facts deals with the disclosure of truthful information once obtained. In the context of the news media, intrusion is a "news gathering" tort, whereas a public disclosure of private embarrassing facts claim is a "news reporting" tort.

The First Amendment protects the right of free speech. Thus, one might argue that while States have a compelling interest in regulating false speech through defamation law, they have no legitimate interest in regulating truthful speech. Thus far, the Supreme Court has stayed away from the issue.⁴² Consequently, in dealing with this tort, the RESTATEMENT (SECOND) OF TORTS § 652D (1977) contains a special note stating: "It has not been established with certainty that liability for publication of private embarrassing, but truthful facts is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution."

2. (§2.6) Elements of a Publication of Private Facts Claim

The elements of the tort of "public disclosure of private facts" are: (1) a publication to the general public absent any waiver or privilege; (2) of private matters; (3) in which the public has no legitimate concern; and (4) such as to bring humiliation or shame to a person of ordinary sensibilities.⁴³

"The manner in which information is acquired is not relevant in assessing whether the publication of private facts constitutes an actionable invasion of privacy."⁴⁴ The manner of acquiring the information is relevant only in an action based upon unreasonable intrusion.⁴⁵

(a) (§2.7) Publication

Unlike intrusion, public disclosure of private facts requires publication.⁴⁶ Unlike defamation wherein a communication to a single person can constitute sufficient publication, the publication requirement in an invasion of privacy case "means publicity in the sense of communication to the public in general or to a large number of persons, as distinguished from one individual or a few."⁴⁷ This widespread publicity must be proximately caused and directed by the defendant.⁴⁸

(b) (§2.8) Private Facts

There is no action for public disclosure of private, embarrassing facts unless the facts disclosed concern the private, as opposed to the public life of the individual.⁴⁹ Thus, there can be no liability for giving publicity to facts that are a matter of public record or matters of legitimate public interest and concern.⁵⁰ Similarly, there is no liability if the allegedly private matters are already in the public domain through someone else's publication.⁵¹ Finally, "privacy is not invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public."⁵² It is for the court to decide whether the occasion or incident is one of proper public interest as to an actionable private matter.⁵³

A lengthy discussion of the private facts requirement can be found in *Y.G. v. Jewish Hospital of St. Louis*.⁵⁴ In that case, the plaintiffs were participants in a hospital's in vitro fertilization program. While attending a hospital function commemorating the program, the plaintiffs were filmed by a television news crew. The plaintiffs alleged that they had previously told no

one except immediate family of their participation in the program and before attending the event had been assured that no publicity would occur. The plaintiffs further alleged that they had repeatedly denied interviews about their involvement in the program and had refused to go on camera when requested, making every “reasonable effort” to avoid being filmed.⁵⁵ After the newscast in which they were pictured, plaintiffs alleged that they were subjected to telephone calls and embarrassing questions by persons who recognized them from the television report. Under such circumstances, the appellate court held that the plaintiffs stated a claim for invasion of privacy sufficient to withstand a motion to dismiss. The court did not believe that the plaintiffs’ appearance at a private gathering where others were present made it a public matter. The court also noted that “the right of privacy has been held to apply particularly to sexual matters or matters of procreation,” and the court concluded: “The *in vitro* program and its success may well have been matters of public interest, but the identity of plaintiffs participating in the program was, we conclude, a private matter.”⁵⁶

In *Barber v. Time, Inc.*,⁵⁷ the court held that plaintiff’s hospitalization for a non-contagious illness was a private matter and that the publication of a picture of the plaintiff in her hospital bed with an article chronicling her eating disorders were not matters of legitimate public concern. The court noted that the matters disclosed concerned medical treatment where the ethics of the medical profession require confidentiality and where the patient has a privilege of preventing disclosure without consent even in a court of law. Language in the opinion indicated that a different ruling might have prevailed had the plaintiff’s ailment been “contagious or dangerous to others.”⁵⁸ Further, the plaintiff was not otherwise a celebrity or known to the public. Had she enjoyed such a status, a different ruling may have resulted, inasmuch as the court specifically recognized “the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims.”⁵⁹

An issue which sometimes comes up in private facts claims is the publication of a once public matter which through the passage of time has been largely forgotten. Though the issue does not appear to have come up in Missouri, according to the RESTATEMENT (SECOND) OF TORTS, § 652D comment k (1974), the passage of time cannot convert a public fact into a private fact. However, where new information of a private nature is disclosed about a person who once occupied a place in the public eye, but who has now been largely forgotten, such as the plaintiff’s new name or whereabouts, a private facts claim may be viable.⁶⁰ According to the RESTATEMENTS, the passage of time may be “a factor to be considered, with other facts, in determining whether publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community.” This much seems certain, however, if the information remains in some official public record, the passage of time is meaningless.⁶¹

Another issue which has come up from time to time is publicity given to information mistakenly disclosed to the media by governmental officials which by law is supposed to remain confidential. In *Florida Star v. B.J.F.*,⁶² the Supreme Court held “once the government has placed confidential information in the public domain, `reliance must rest upon those who decide what to publish or broadcast,’ ... and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy...”⁶³ In other words, providing the media is simply a willing recipient of such information, then it may have no liability for publishing it.

Related to this is the effect of an expungement of what was once a public record, such as an arrest record. Missouri has a statute which allows for the expungement of criminal records in certain instances.⁶⁴ While this statute would require destruction of records ordered expunged, it cannot erase history, and persons who have knowledge of the prior criminal proceedings may publish them.⁶⁵

(c) (§2.9) Public Records and Matters of Public Interest

By definition, the public disclosure of private facts claim excludes publicity given to matters already publicized or in the public record and matters of legitimate public interest and concern. “Where, however, events occur which affect the individual alone, and do not touch the sphere of public concern, they are not within the public interest.”⁶⁶

“The determination of what is a matter of public concern is similar in principle to qualified privilege in libel. It is for the court to say in the first instance whether the occasion or incident is one of proper public interest” and to dismiss the petition if it is.⁶⁷

In *Y.G. v. Jewish Hospital of St. Louis*,⁶⁸ the court listed some circumstances under which an invasion of privacy action would not exist as a matter of law because of the public interest involved. Such circumstances included:

1. “Where the operation of laws and the activities of the police or other public bodies are involved. . . .”
2. Open court records.
3. Police arrests, even if no charge is filed.
4. Criminal action of which the police should be informed.
5. An event which occurs in public view because there can be no invasion of privacy in giving further publicity to a matter which is already public.⁶⁹

In *Williams v. KCMO Broadcasting Division Meredith Corp.*,⁷⁰ a telecast of the plaintiff, an innocent man, being arrested, searched, handcuffed and led from a court house in police custody, was held a matter of legitimate public interest. The court said:

The privilege of giving publicity to matters of general public interest applies even though the individual publicized may have been drawn out of his seclusion and become involved in a noteworthy event involuntarily and against his will and over his protest. Thus, PROSSER, LAW OF TORTS, 3rd Ed., §112, page 847, says:

‘Caught up and entangled in this web of news and public interest are a great many people who have not sought publicity, but indeed, as in the case of any accused criminal, have tried assiduously to avoid it. They have nevertheless lost some part of their right of privacy. The misfortunes of the frantic victim of sexual assault, the woman whose husband is murdered before her eyes, or the innocent bystander who is caught in a raid on a cigar store and mistaken by the police for the proprietor, can be broadcast to the world, and they have no remedy. Such individuals become public figures for a season; and “until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims.” * * * ⁷¹

In *Langworthy v. Pulitzer Publishing Co.*,⁷² the court said that a “report and the resulting action of the police was properly a matter of public interest and defendant could comment thereon in its newspaper.”⁷³ Similarly, in *Hagler v. Democrat-News, Inc.*,⁷⁴ the court held that a newspaper report about a drug raid conducted on the plaintiff’s property did not invade the plaintiff’s privacy. In *McNally v. Pulitzer Publishing Co.*,⁷⁵ a federal court, applying Missouri law, held that a newspaper’s publication of psychiatric reports, portions of which had already been read in open court, was not an invasion of privacy.

The absence of legitimate public concern is not only a required element of the tort itself, but also is a First Amendment prerequisite to the maintenance of any action for invasion of privacy by public disclosure of private facts. In *Cox Broadcasting Co. v. Cohn*, the Supreme Court held that under the First Amendment, there can be no recovery for accurate disclosure of, and publicity to, facts which are a matter of public record.⁷⁶ In *Cox*, the plaintiff’s daughter was the victim of a rape who did not survive the incident. A television station learned the victim’s name from an examination of the indictments and broadcast the name as part of news reports on its television station. A statute made it a crime to report the name of a rape victim. In rejecting the plaintiff’s claim, the court stated:

At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully published information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information Once true information is disclosed in public court documents opened to public inspection, the press cannot be sanctioned for publishing it.⁷⁷

In *Florida Star v. B.J.F.*,⁷⁸ the Court expanded on *Cox* and found that a Florida statute which made it unlawful to print, publish or broadcast the name of a victim of a sexual offense, was unconstitutional when applied to “lawfully obtained truthful information.” The Court held that where “a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”⁷⁹

(d) (§2.10) Shame and Humiliation

Another requirement of the tort of disclosure of private facts is that the material published must bring shame to a person of ordinary sensibilities. In this regard, the publication must be highly offensive.⁸⁰ Minor, moderate annoyance is not enough. As is the case with libel actions, ridicule alone is not sufficient.⁸¹ Only a serious, unreasonable and offensive interference with another’s private affairs will suffice.⁸² Missouri cases seem to place a “heavier burden” on the plaintiff to show a “serious, unreasonable, unwarranted and offensive invasion of private affairs, than do most other jurisdictions.”⁸³ “It is only where the intrusion has gone beyond the limits of decency that liability accrues.”⁸⁴ As recognized by the RESTATEMENT:

Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. Thus, he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen down stairs and has broken his ankle, is not sufficient to give him a cause of action⁸⁵

Whether a disclosure is sufficiently offensive is a question of law to be decided by the court.⁸⁶

C. (§2.11) Appropriation of Name or Likeness

The tort of appropriation concerns the appropriation of a person’s name or likeness for the defendant’s economic benefit.⁸⁷

This branch of invasion of privacy law recognizes an individual's right to privacy from commercial exploitation. It also recognizes a person's property right to exploit his or her own name or image for his or her own economic benefit, and in such contexts, courts and commentators frequently, and more accurately, have described the tort not as an "invasion of privacy," but rather as an interference with the "right of publicity."⁸⁸ For this reason, this subject is also covered in the Intellectual Property chapter of this handbook.

1. (§2.12) Appropriation of Privacy

The tort of appropriation was first recognized by Missouri in *Munden v. Harris*.⁸⁹ In *Munden*, a 5 year old child's picture was published along with an advertisement of defendant's merchandise. On appeal from a successful demurrer, the appellate court held that "one has an exclusive right to his picture," for the invasion of which injunctive relief or damages are available.

In *Haith v. Model City's Health Corp.*,⁹⁰ plaintiffs-doctors alleged that even after they were terminated by a health care institution, the institution continued to use their names in connection with applications for various government grants. They argued that this constituted an unwarranted appropriation. The defendant argued that the use of the plaintiffs' names constituted an incidental business use and therefore was not a commercial appropriation. The appellate court held that there existed a genuine issue of material fact which prohibited the entry of a summary judgment on the issue of whether the defendant wrongfully appropriated the plaintiffs' names to its advantage.

In a similar case, however, a court ruled that an employer had implied consent to use an employees name in connection with a government grant request. In *Nemani v. St. Louis University*⁹¹, the Missouri Supreme Court rejected an appropriation claim by a physician whose name was used without his consent on a grant application, but at a time when the physician remained employed by the University. Even though the physician was eventually discharged and not used in connection with the grant when awarded, because of the employment relationship, the court found that the plaintiff had impliedly consented to the use of his name on the grant application. The opinion strongly suggests that an employer has the right to promote specific business endeavors by touting the reputation of its employees.

The mere publishing of a picture of a physical feature (e.g., nose, mouth, legs, etc.) or item (e.g., house, car, animal, etc.) that belongs to the plaintiff without consent does not constitute an actionable appropriation if the matter photographed is not readily "identified with the plaintiff." "As in defamation, there must be some reasonable grounds for concluding that it is the plaintiff whose privacy has been invaded."⁹² For instance, in *Bayer v. Ralston Purina Co.*,⁹³ the owner of a registered horse sought damages for the taking of a photograph of the horse and then using the photograph in an advertisement. The Supreme Court of Missouri rejected the plaintiff's appropriation claim.

Similarly, there is no appropriation where the plaintiff's name or likeness is published as a matter of newsworthy concern.⁹⁴ THE RESTATEMENT (SECOND) OF TORTS § 652C, comment d (1977), states:

No one has the right to object merely because his name or his appearance is brought before the public since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.

2. (§2.13) Appropriation of Publicity

In *Munden v. Harris*,⁹⁵ the court said:

We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty. . . .

This quotation from *Munden* recognizes the dual aspect of the appropriation tort. In one instance, the appropriation deprives the plaintiff of his right to be let alone. In the other instance, the plaintiff is deprived of economic benefits that he may otherwise derive from his own exploitation. This distinction was also recognized in *Haith v. Model City's Health Corp.*:⁹⁶

Plaintiffs do not claim to be celebrities having a right to publicity in the exclusive use of their names . . . citation omitted. The cause of action for use of a celebrity's name differs at least in the rules for measure of damages - value of the use by defendant of a celebrity's name as against the measure of the injury to plaintiff in privacy actions.

In other words, appropriation interfering with the right of privacy is different from appropriation of the right of publicity, not only in the solicitude which the former is designed to protect, but also in the damages which may be awarded. In the true privacy action, the damages awarded are for the embarrassment, anxiety and humiliation that may result from the

defendant's breach, whereas in a right of publicity case, the measure of damages is either a disgorgement of the profits to the defendant or the loss of profits suffered by the plaintiff as a result of the unwarranted appropriation.

The right of publicity recognizes the individual's right to regulate and obtain the benefits from the commercial exploitation of his name;⁹⁷ likeness;⁹⁸ identifying characteristics;⁹⁹ and actual performances.¹⁰⁰

In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court recognized that the right to publicity provides a performer with a property right in his performance and that this right is not inconsistent with the principles of the First Amendment. This property right is protected by law from unauthorized appropriation or commercial exploitation by others.¹⁰¹

Like all property rights, the right of publicity is transferable; in other words, a person can contractually assign these rights to others.¹⁰² Also, these rights, unlike defamation and other forms of invasion of privacy, are generally held to survive and, as such, are descendible and devisable.¹⁰³

The courts have perceived that the scope of the right of publicity should be balanced against the First Amendment interests in free expression. Accordingly, exceptions have developed to this right of publicity. These exceptions generally have been found where the defendant's activity has consisted of the dissemination of such information as newsworthy events or matters of public interest.¹⁰⁴ In the *Zacchini* case, the Supreme Court recognized that "entertainment, as well as news, enjoys First Amendment protection and entertainment itself can be important news."¹⁰⁵ This, however, did not authorize a showing of an entire performance.

The *Zacchini* case recognizes the similarity between the right of publicity and the copyright laws. In it, the Supreme Court noted that the protection afforded the right of publicity rests upon more than a mere desire to compensate the performer for the time and effort invested in his act. The protection provides an economic incentive for the performer to make the investment required to produce a performance of interest to the public. The same considerations underlie the patent and copyright laws. This close similarity has prompted some courts to note that the copyright doctrine of "fair use"¹⁰⁶ may provide guidance as to what types of appropriations may be permitted without an infringement upon the right of privacy.¹⁰⁷

Where the persona of a celebrity is used in something which has no utility independent of expression, most courts have found that it cannot be actionable unless the use is purely or primarily for trade or advertising purposes. Thus, using a celebrity in a fictional account is ordinarily not considered an infringement of the right of publicity.¹⁰⁸ The rule in Missouri, however, is somewhat different. In *Doe v. TCI Cablevision, Inc.*,¹⁰⁹ the Missouri Supreme Court held that if the use is *predominantly* for commercial reasons, then the First Amendment is not availing. In that case, a comic book artist used the name of a professional hockey player for an evil character in the comic. Claims sounding in libel were dismissed because no reasonable reader would assume that the comic book was conveying actual facts about the hockey player. However, a commercial appropriation claim was permitted to stand because the court found that the way in which the comic book was marketed showed that the use of the hockey player's name was not primarily for a protected expressive reason, but predominantly to derive a commercial advantage. The case remains pending on appeal, however, and the decision has been frequently questioned.

D. (§2.14) Publicity Placing One in a False Light

The RESTATEMENT (SECOND) OF TORTS § 652E (1977) provides:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) 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.

Despite the almost universal recognition of the three privacy torts previously discussed, the false light tort, has met with considerable resistance. In fact, the inception and development of the false light tort appears to be somewhat of a mystery. The Warren and Brandeis article, on which the invasion of privacy tort has its foundation, did not even deal with false light. Instead, the "tort" envisioned by Warren and Brandeis was the unwarranted publication of truthful, but private, embarrassing facts. The authors recognized "obviously this branch of the law should have no concern with the truth or falsehood of the matters published," and specifically opined that the publication of false statements was sufficiently dealt with by the law of libel and slander.¹¹⁰

Some Missouri cases, dealing with other branches of the invasion of privacy tort, seemed to recognize the existence of all four privacy torts. However, early cases, such as *Barber v. Time, Inc.*¹¹¹ and *Langworthy v. Pulitzer Publishing Co.*,¹¹² in dealing with invasion of privacy, held that recovery for false statements is the province of defamation law and not privacy law.

Based on the recognition that the tort of invasion of privacy is a tort dealing with actionable truthful statements, and not false statements, the viability of false light in Missouri is of considerable question. In *Sullivan v. Pulitzer Broadcasting*

Co.,¹¹³ the Missouri Supreme Court declined to recognize the tort of false light invasion of privacy in a case which was “nothing more than the classic defamation where one party alleges that the other published a false accusation concerning a statement of fact” The court did not entirely shut the door to a false light claim, however, stating:

It may be possible that in the future, Missouri courts will be presented with an appropriate case justifying our recognition of the tort of “false light invasion of privacy.” The classic case is when one publicly attributes to the plaintiff some opinion or utterance whether harmful or not, that is false, such as claiming that the plaintiff wrote a poem, article or book which plaintiff did not in fact write. citation omitted. This “classic case,” however, could be adequately dealt with under the tort of appropriation.¹¹⁴ Another situation, although possibly actionable under defamation law, is when one uses another’s likeness in connection with a story that has no bearing on the plaintiff.¹¹⁵

In a footnote, the *Sullivan* court recognized another variety of false light claim which can overlap a defamation claim—“defamation by fiction.”¹¹⁶

One area where false light would not appear to overlap with defamation is in the context of a non-defamatory fictionalized account. This is what occurred in *Time, Inc. v. Hill*,¹¹⁷ where the plaintiffs were made to look like heroes they were not. “Docu-dramas” or fictionalized accounts of true events which are not defamatory, but contain certain false matters, could conceivably be actionable under an appropriation theory, but, if the matter were newsworthy or a matter of legitimate public concern, then there would appear to be no appropriation remedy. One might question whether non-defamatory falsehoods should be actionable in the first place. Does this type of matter—false heroism—highly offend a reasonable person? What would be the measure of damages to a person made to look better than he or she really is?

Missouri cases subsequent to *Sullivan* have refused to recognize or allow claims of false light invasion of privacy.¹¹⁸ Other states also have refused to recognize the false light tort.¹¹⁹

In the event that Missouri does eventually recognize false light in the limited fashion set forth in *Sullivan*, supra, the privileges and restrictions that have developed in the law of defamation should apply.¹²⁰

III. (§2.15) DEFENSES GENERALLY APPLICABLE TO ALL INVASION OF PRIVACY CLAIMS

A. (§2.16) Consent

As with the defamation claim, consent is a defense to an action for invasion of privacy.¹²¹ However, the courts have held that even though a plaintiff voluntarily provides private information, consent may then be withdrawn so long as the revocation is given sufficiently in advance of publication.¹²² Consent may also be qualified, limited or conditioned.¹²³

B. (§1.39) Statutory Privileges

In Missouri, a statutory privilege exists for reports by an employer to the Division of Employment Security.¹²⁴

A physician may advise the legal guardian of a minor concerning the examination, treatment, hospitalization, medical and surgical care given or needed by the minor and such disclosure is privileged from a defamation action or an action for invasion of privacy.¹²⁵ Similarly, reports of child abuse or neglect are privileged under § 210.185, RSMo 1986. The privilege is overcome if the defendant “intentionally” makes a false report.¹²⁶ Section 191.656.7 provides a qualified privilege for “good faith” reports made by health care providers to the department of health “about a person reasonably believed to be infected with HIV.”

Television and radio stations are statutorily privileged from defamation (and presumably privacy) actions brought by any person for republication of any statement uttered over the facilities of such TV or radio station by or on behalf of any candidate for public office where such statement is not subject to censorship or control by reason of any federal statute or any ruling or order of the Federal Communications Commission.¹²⁷

C. (§2.18) A Right Unique to Natural Persons

The essence of privacy law is the offensiveness of the invasion and the emotional distress resulting. A corporation cannot be offended and cannot suffer emotional distress. For this reason, the courts and the RESTATEMENT have held that a corporation may not bring an action for invasion of privacy.¹²⁸

Given the alienability of the “right of publicity,” the appropriation tort probably lies in favor of a corporation. Many cases in other states have permitted corporations to pursue such actions.¹²⁹

IV. (§2.19) PROCEDURAL ISSUES

A. (§2.20) Statute of Limitations

Missouri has no specifically delineated limitations period for filing an invasion of privacy action. In *Sullivan v. Pulitzer Broadcasting Co.*,¹³⁰ the Missouri Supreme Court held that the appropriate statute of limitations for an invasion of privacy action which was “nothing more than the classic defamation action” was the two year statute of limitations for defamation.¹³¹ In *White v. Fawcett Publications*,¹³² a district court held that the two year statute of limitations for libel and slander barred an action for invasion of privacy. However, in *Tureen v. Ecrufax, Inc.*,¹³³ an action for invasion of privacy was permitted to proceed to trial even though the statute of limitations had expired on libel counts which had accrued at the same time.

Case law from most other jurisdictions supports application of the libel and slander statute of limitations to an action for invasion of privacy absent a contrary legislative mandate.¹³⁴

B. (§2.21) Jury Instructions

There are no Missouri Approved Instructions dealing with invasion of privacy actions. Given Missouri’s adherence to the principles set forth the Restatement, it would seem that this would be a good place to start.

Footnotes

1 Warren and Brandeis, *The Right to Privacy*, 4 HARV.L.REV. 193, 196 (1890). See *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 476-77 (Mo. 1986).

2 N.Y.Civ.Rights Law, §§50 and 51 (McKinney 1976).

3 *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

4 153 Mo.App. 652, 134 S.W. 1076 (1911).

5 See, e.g., *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

6 *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76 (8th Cir. 1976).

7 See, e.g., *Time Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

8 W. Prosser, *THE LAW OF TORTS*, §117, p. 804 (4th ed. 1974).

9 See §2.14 *infra*.

10 See §2.3 *infra*.

11 See §2.4-§2.10 *infra*.

12 See §2.11-§2.13 *infra*.

13 See §2.14 *infra*. See *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473, 480 (Mo.App.E.D. 1984).

14 *Corcoran v. Southwestern Bell*, 572 S.W.2d 212, 215 (Mo.App.E.D. 1978); *Sofka v. Thal*, 662 S.W.2d 502, 510 (Mo. banc 1983).

15 *Engman v. Southwestern Bell Telephone Co.*, 631 S.W.2d 98 (Mo.App.W.D. 1982); see also *Brown v. Mullarkey*, 632 S.W.2d 507, 510 (Mo. App.E.D. 1982); *Corcoran v. Southwestern Bell Telephone Co.*, 572 S.W.2d at 215.

16 322 S.W.2d 892, 896 (Mo. 1959).

17 *Id.*; RESTATEMENT (SECOND) OF TORTS §46 (1965).

18 *Tureen v. Equifax, Inc.*, 571 F.2d 411, 417 n.7 (8th Cir. 1978); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 79 n.14 (8th Cir. 1976).

19 *Bartnicki v. Vopper*, 149 L.Ed.2d 787 (2000).

20 See §2.4 *infra*.

21 *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 291, 295 (1942); see also R. Sack, *LIBEL, SLANDER AND RELATED PROBLEMS*, §IX.7, (1980); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Galella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973).

22 *Id.*

23 591 S.W.2d 78 (Mo.App.W.D. 1979).

24 684 S.W.2d 473, 482 (Mo.App.E.D. 1984).

25 See §2.4 *infra*.

26 723 S.W.2d 544, 563 (Mo.App.W.D. 1987).

27 348 Mo. 1199, 159 S.W.2d 291 (1942).

28 159 S.W.2d at 295.

29 572 S.W.2d 212, 215 (Mo.App.E.D. 1978).

30 See, e.g., *Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1427 (8th Cir. 1991) (Missouri law) (Intrusion found where guard service used security surveillance cameras to videotape models in changing booths because models enjoyed an expectation of privacy); *Tureen v. Equifax, Inc.*, 571 F.2d 411, 416 (8th Cir. 1978) (Missouri law) (the court, while rejecting a claim for intrusion, stated: “certain objectionable snooping techniques . . . could be considered an intrusion violative of the right of privacy.”).

31 See, e.g., *Turner v. General Motors Corp.*, 750 S.W.2d 76, 79 (Mo.App. E.D. 1988) (person videotaped masturbating in factory parking lot “had no reasonable expectation of privacy”); see also RESTATEMENT (SECOND) OF TORTS §652B, Illus. 6 (1977); *Stressman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685 (Iowa 1987).

32 See, e.g., Federal Wire Tap Act, 18 U.S.C. §§ 2510-2520; §§ 542.400, RSMo, et seq. (both of which prohibit third party surreptitious recordings of wire communications or oral communications made with a justifiable expectation that such communication is not subject to interception); *Annbar Associates v. American Express Co.*, 565 S.W.2d 701, 710 (Mo.App.W.D. 1978).

33 See, e.g., *Holman v. Central Arkansas Broadcasting*, 610 F.2d 542 (8th Cir. 1979).

34 *Id.* at 544.

35 18 U.S.C. §§ 2510-2520; §§ 542.400, RSMo, et seq.

36 *Id.*; *Annbar Associates v. American Express Co.*, 565 S.W.2d 701, 710 (Mo.App.W.D. 1978) (“Each party to a conversation, telephonic or otherwise, takes the risk that the other party may divulge contents of that conversation, and should that happen there has been no invasion of privacy.”).

37 *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (1999).

38 *Hanlon v. Berger*, 119 S.Ct. 1706 (1999).

39 *Ayeni v. CBS News, Inc.*, 848 F.Supp. 362 (1994) (“CBS had no greater right than that of a thief to be in the home, to take pictures and to remove the photographic record.”).

40 449 F.2d 245 (9th Cir. 1971).

41 See, e.g., *Costlow v. Cusimano*, 311 N.Y.S.2d 92 (App. Div. 1970); *Cassidy v. American Broadcasting Cos.*, 377 N.E.2d 126, 131 32 (Ill. App. 1978).

42 See, e.g., *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 491, 95 S.Ct. 1029, 1044, 43 L.Ed.2d 328 (1975) (the court refused to address the “question whether truthful publications may be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwarranted publicity in the press. . . .”).

43 *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385, 389-90 (Mo. 1963); *Mason v. Williams Discount Center, Inc.*, 639 S.W.2d 836, 838 (Mo. App. W.D. 1982); *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473, 482 (Mo. App. E.D. 1984); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

44 *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 79 (8th Cir. 1976).

45 *Id.* at 79 n.14. (see §2.3, *supra*).

46 *Corcoran v. Southwestern Bell Telephone Co.*, 572 S.W.2d 212, 215 (Mo.App.W.D. 1978).

47 *Corcoran v. Southwestern Bell Telephone Co.*, 572 S.W.2d at 215; *Childs v. Williams*, 825 S.W.2d 4 (Mo. App. W.D. 1992) (the court refused to recognize an invasion of privacy where a doctor had transmitted information about plaintiff’s medical condition to her employers, but had not transmitted it to the “general public”); *Tureen v. Equifax, Inc.*, 571 F.2d 411, 418 (8th Cir. 1978) (“Each Missouri case has involved publicity in the form of an advertisement, newspaper, magazine, or television account, or language spoken to a sizeable group of people in a public place”).

48 *Corcoran v. Southwestern Bell Telephone Co.*, 572 S.W.2d at 215.

49 RESTATEMENT (SECOND) OF TORTS §652D, comment b (1977).

50 *Id.* *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 77 (8th Cir. 1976).

51 *Boeke v. Williams*, 721 S.W.2d 794, 795 (Mo. App. E.D. 1986).

52 RESTATEMENT (SECOND) OF TORTS § 652D, comment b (1977).

53 *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385, 389 (Mo. 1963).

54 795 S.W.2d 488 (Mo. App. E.D. 1990).

55 *Id.* at 492.

56 *Id.*

57 348 Mo. 1199, 159 S.W.2d 291 (1942).

58 159 S.W.2d at 295.

59 159 S.W.2d at 295.

60 See, e.g., *Melvin v. Reid*, 297 P. 91 (1931).

61 *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

62 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989).

63 491 U.S. at 538.

64 Section 610.123, RSMo, et seq.

65 See, e.g., *Oden v. Cahill*, 398 N.E.2d 1061 (Ill. App. 1979) (publication of expunged arrest records cannot be the basis for a private facts claim).

66 *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473, 482 (Mo. App. E.D. 1984); *Hagler v. Democrat-News, Inc.*, 699 S.W.2d 96, 99 (Mo. App. E.D. 1985).

67 *Hagler v. Democrat-News, Inc.*, 699 S.W.2d 96, 99 (Mo. App. E.D. 1985).

68 795 S.W.2d 488.

69 *Id.* at 500.

70 472 S.W.2d 1 (Mo. App. W.D. 1979).

71 *Id.* at 4.

72 368 S.W.2d 385 (Mo. 1963).

73 *Id.* at 389-90.

74 699 S.W.2d 96, 100 (Mo. App. E.D. 1985).

75 532 F.2d 69 (8th Cir. 1976).

76 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

77 *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 496, 95 S.Ct. at 1046. See also *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) (held unconstitutional a state statute which made it a crime for a newspaper to identify a juvenile offender where the identity was learned through lawful reportorial activities).

78 491 U.S. 524 (1989).

79 491 U.S. at 541.

80 See RESTATEMENT (SECOND) OF TORTS § 652, comment c (1977).

81 *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385, 389-90 (Mo. 1963).

82 *Id.* at 389.

83 *Williams v. KCMO Broadcasting Division - Meredith Corp.*, 472 S.W.2d 1, 4 (Mo.App.W.D. 1979) (Television newscast showing plaintiff, an innocent man, being arrested and led away in handcuffs held non-actionable).

84 *Barber v. Time, Inc.*, 348 Mo. 1199, 1202, 159 S.W.2d 291, 293 (1942).

85 RESTATEMENT (SECOND) OF TORTS § 652D, comment c (1977).

86 *Williams v. KCMO Broadcasting Division - Meredith Corp.*, 472 S.W.2d at 4.

87 See RESTATEMENT (SECOND) OF TORTS § 652C (1977).

88 See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 565, 97 S.Ct. 2849, 2852, 53 L.Ed.2d 965, 970 (1977).

89 153 Mo.App. 652, 134 S.W. 1076 (1911).

90 704 S.W.2d 684 (Mo. App. W.D. 1986).

91 33 S.W.3d 184, 185 (Mo. banc 2000).

92 A. Hanson, LIBEL AND RELATED TORTS, p. 204 (1969).

93 484 S.W.2d 473, 475 (Mo. 1972).

94 See, e.g., *Williams v. KCMO Broadcast Division - Meredith Corp.*, 472 S.W.2d 1 (Mo. App. W.D. 1971) (telecast showing plaintiff being arrested, handcuffed and led to court).

95 134 S.W.2d at 1079.

96 704 S.W.2d at 688.

97 *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969) (use of Orlando Cepeda's signature on baseballs, baseball gloves and baseball bats).

98 *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (nude picture of model with features similar to Muhammad Ali); *Memphis Development v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (use of likeness of deceased entertainer Elvis Presley).

99 *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (identifying characteristics of Johnny Carson, "Here's Johnny" to refer to portable toilet facilities); *Ali v. Playgirl, Inc.*, *supra* (use of the term "The Greatest," an identifying characteristic of Muhammad Ali).

100 *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) ("human cannonball act").

101 *Id.* at 574-75, 97 S.Ct. at 2857.

102 See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969).

103 See, e.g., *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Memphis Development Foundation v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 441 U.S. 908 (1979). (Each of these cases upholds the rights of the Elvis Presley estate to regulate and transfer the rights to manufacture and sell Presley memorabilia.)

104 See, e.g., *Paulsen v. Personality Posters, Inc.*, 59 Misc.2d 44, 299 N.Y.S.2d 501 (Sup. Ct. 1968); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc.2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969).

105 433 U.S. at 578, 97 S.Ct. at 2858.

106 See 17 U.S.C. §107.

107 See, e.g., *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1358 n.18 (D.N.J. 1981).

108 See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (holding that the use of a celebrity's name in a film title did not infringe the celebrity's right of publicity); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (holding that use of Dustin Hoffman's image from a poster for the movie "Tootsie" in conjunction with a computer overlay of a designer dress was not an infringement); *Winters v. D.C. Comics*, 69 P.2d 473 (Ca. 2003) (holding that use of look-alike comic figures "Edgar and Johnny Autumn" in a comic book did not infringe on the rights of Johnny and Edgar Winter).

109 110 S.W.3d 363 (Mo. 2003).

110 Warren and Brandeis, *The Right To Privacy*, 4 HARV.L.REV. 193, 218 (1890).

111 348 Mo. 1199, 159 S.W.2d 291, 296 (1942).

112 368 S.W.2d 385, 390 (Mo. 1963).

113 709 S.W.2d 475, 480 (Mo. banc 1986).

114 See §2.11 2.13, *supra*.

115 *Id.* at 480 (emphasis added).

116 *Id.* at 480 n.6.

117 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

118 See, e.g., *W.C.H. of Waverly v. Meredith Corp.*, 13 Med. L. Rptr. 1648 (W.D. Mo. 1986); *Hester v. Barnett*, 723 S.W.2d 544, 563 (Mo. App. W.D. 1987) ("where the claim for recovery on either theory the publication of private facts or a false light invasion of privacy involves untrue statements, the appropriate remedy is by defamation"); *Shurn v. Monteleone*, 769 S.W.2d 188 (Mo. App. E.D. 1989); *Deupree v. Iliff*, 860 F.2d 300 (8th Cir. 1988); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 317 (Mo. banc 1993); *Henry v. Taft Television & Radio Co.*, 774 S.W.2d 889, 891 92 (Mo. App. W.D. 1989); *Shurn v. Monteleone*, 769 S.W.2d 188, 191 (Mo. App. E.D. 1989); *Klien v. Victor*, 903 F. Supp. 1327 (E.D.Mo. 1995).

119 See, e.g., *Renwick v. News & Observer*, 310 N.C. 312, 312 S.E.2d 405 (1984); *Arrington v. New York Times*, 55 N.Y.2d 433, 449 N.Y.2d 941, 434 N.E.2d 1319 (1982); *Falwell v. Penthouse International, Inc.*, 521 F. Supp. 1204, 1206 (W.D. Va. 1981); *Brink v. Griffith*, 65 Wash. 2d 253, 396 P.2d 793 (1964).

120 See, e.g., *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963); *Berry v. National Broadcasting Co., Inc.*, 480 F.2d 428, 431 (8th Cir. 1973); RESTATEMENT (SECOND) OF TORTS § 652E, comment e (1977).

121 *Barber v. Time, Inc.*, 348 Mo. 1149, 159 S.W.2d 291, 294 (Mo. 1942).

122 *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

123 See, e.g., *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

124 Section 288.250, RSMo 1986; *Tucker v. Delmar Cleaners, Inc.*, 637 S.W.2d 222 (Mo. App. E.D. 1982).

125 Section 431.062.

126 *Id.* See also *Hester v. Barnett*, 723 S.W.2d 544, 557-58 (Mo. App. W.D. 1987).

127 Section 537.105.

128 See, e.g., *W.C.H. of Waverly v. Meredith Corporation*, 13 Med. L. Rptr. 1648 (W.D. Mo. 1986); see also, RESTATEMENT (SECOND) OF TORTS §652I, comment c (1977); R. Sack, LIBEL, SLANDER AND RELATED PROBLEMS, IX.3.1.6. (1980).

129 See cases cited in §2.13, *supra*.

130 709 S.W.2d 475, 481 (Mo. banc 1986).

131 Section 516.140, RSMo 1986.

132 324 F. Supp. 403 (W.D.Mo. 1971).

133 571 F.2d 411, 414 (8th Cir. 1978).

134 See, e.g., *Wiener v. Superior Court for the County of Los Angeles*, 58 Cal. App. 3d 525, 130 Cal. Rptr. 61 (1976); *Coe v. Statesmen-Journal Co.*, 277 Or. 117, 560 P.2d 254 (1977); *Maloney v. Tribune Publishing Co.*, 26 Wash. App. 357, 613 P.2d 1179 (1980); *Rolfshus v. Time, Inc.*, 5 Med. L. Rptr. 1443 (Minn. D. Ct. Hennepin County 1979); *Smith v. Esquire, Inc.*, 494 F. Supp. 967 (D. Md. 1980); *Wildmon v. Hustler Magazine, Inc.*, 508 F. Supp. 87 (D. Md. 1980); *Gashgai v. Liebowitz*, 703 F.2d Or. 12 (1st Cir. 1983).