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Using copyright as a privacy tool

By Eric Boorstin

All people, celebrities included, have a compelling interest in expressing themselves in private to their loved ones. But as recent well-publicized events illustrate, once a celebrity's private photos exist there is no guarantee they will stay private. A hacker or a disgruntled ex might well leak a celebrity's intimate photos. Before long, those photos may be posted everywhere from AnonIB to Reddit to TMZ. What can a lawyer representing such a celebrity do to curtail the dissemination of these private images?

You might turn to common law and statutory rights of privacy for a remedy. But if your client is a celebrity, his or her privacy rights may be limited by the public's interest in his or her affairs. *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 228 (1953). Further, the Communications Decency Act (CDA) may shield a website from liability if the photos were posted by a user instead of the website itself. 47 U.S.C. Section 230(c)(1). But even more fundamentally, it is neither efficient nor practical to identify and sue everyone who posts private photos or every website where the photos appear.

Enter copyright law. Although some courts have stated broadly that the protection of privacy is not a function of copyright law, there is no requirement that a copyright plaintiff's primary motivation align with the statute's primary purpose. *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003). And there is a good argument to be made that copyright law is concerned with privacy interests, not just with property rights. Copyright law explicitly protects unpublished works, and the fact that a work is unpublished may weigh heavily against finding that dissemination of a copy is fair use. *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 550-55 (1985). The intellectual foundation of a separate right to privacy was based on the argument that copyright law already recognized that the peace of mind in preventing publication of a private document is something more than a property right. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

In practice, copyright law has many features that could make it a useful tool to combat the dissemination of private images on the Internet.

First, copyright liability is not limited to the party that posts infringing copies of the private material; it may also extend to a party who knowingly links to those copies. *Perfect 10 Inc. v. Amazon Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007).

Second, First Amendment concerns regarding the public's right to access newsworthy information generally play a larger role in privacy tort cases than they do in copyright cases. Compare *Virgil v. Time Inc.*, 527 F.2d 1122 (9th Cir. 1975) with *Monge v. Maya Magazines Inc.*, 688 F.3d 1164 (9th Cir. 2012).

Third, the CDA's liability shield does not apply to intellectual property claims. 47 U.S.C. Section 230(e)(2).

Fourth, statutory damages for willful copyright infringement can reach \$150,000 per work infringed. 17 U.S.C. Section 504(c).

Fifth, the court may award attorney fees to the prevailing party in a copyright infringement suit. 17 U.S.C. Section 505.

These features lend weight and credibility to a copyright holder's threat to sue a solvent party who posts or even links to the private photos.

It is also significant that the Digital Millennium Copyright Act (DMCA) provides an efficient way to reduce the public's access to private media without the need to file a lawsuit. Many websites will claim that the DMCA safe harbor protects them from copyright liability for content posted by their users. However, to maintain a claim to this safe harbor, a website must designate an agent to receive notifications of copyright infringement and must expeditiously remove or disable access to infringing content. Many websites have notice and takedown procedures in place to quickly remove content claimed to infringe copyrights. These procedures are triggered only by claims of copyright infringement and not by claims based on the violation of other laws.

To succeed in asserting a copyright claim, a celebrity client must prove a copyright interest in the private photos. But it is easy to show that a photo demonstrates the minimal creative spark required for copyright protection. *Ets-Hokin v. Skyy Spirits Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000).

If the private photo is a selfie, the client's copyright claim will likely be strong. A difficulty may arise, however, if the client is not the person who took the private photo. This is because under Section 201(a), copyright ownership initially lies with the author of the copyrighted work, and in the case of a photograph, the author is often the photographer because the photographer forms the picture by putting the subject and surroundings into position. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000). A party who has posted a private photo may argue that a celebrity client cannot assert a copyright claim based on a photo where the client was the subject rather than the photographer.

An easy way to overcome this argument is to ask the photographer to assign the copyright to the subject. If that is not feasible, then the 9th U.S. Circuit Court of Appeals' recent and controversial decision in *Garcia v. Google Inc.*, 766 F.3d 929 (9th Cir. 2014), may provide support for the client's copyright claim based on creative contributions the client may have made as the subject of the private photographs. In *Garcia*, the court held an actor might have an independent copyright interest in her brief performance in a film because her body language and facial expressions evinced a minimal degree of creativity. The court held the actor could have a separate copyright interest even though another person wrote her dialogue and managed all aspects of the production, and even though the Copyright Office refused to register a copyright in her performance. The 9th Circuit is currently deciding whether to rehear the case en banc, but if *Garcia* remains good law, it will strengthen a client's copyright claim based on private photos taken by someone else.

The law cannot erase something from the Internet. Once the genie is out of the bottle, there is no magic demand letter to put it back in. But there is value in demanding that websites remove a client's private images. Reputable websites will often comply, pushing the images to the more obscure corners of the Internet where they will not be the first thing the public sees when searching for the client's name. Copyright law is not a perfect tool to get private photos out of circulation. After all, protecting a client's privacy by sending an intimate photo of the client to the federal government, as required to register a copyright, is a bit counterintuitive. But copyright law may be the best legal tool available.

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