OPEN BOOK: AN ANALYSIS OF THE CELEBRITY'S RIGHT TO PRIVACY*

Jenny Jean B. Domino[**]
Arvin Kristopher A. Razon[***]

The subject of privacy is as old as Adam and Eve and as contemporary as mass protests, computer technology and the space age.
- Justice Irene Cortes,
CONSTITUTIONAL FOUNDATIONS OF PRIVACY (1970)

ABSTRACT

The proliferation of video-sharing websites such as YouTube and Facebook has not only democratized the channels by which public information is disseminated but has also facilitated the mode through which private facts are disclosed. This phenomenon has resultantly created a new platform on which public figures promote or advance their particular affairs. It has also created new ways for enterprising individuals to commit violations of privacy, which put to the fore the question of whether or not public figures are still entitled to such right given this new contextual landscape.

The paper reexamines the delicate balance between public interest and the right to privacy of public figures, specifically, celebrities. This paper asserts that, despite the easier accessibility of private facts relating to celebrities, there are still certain situations that remain within the mantle of protection accorded by the right to privacy.

The paper proposes that in instances where videos of private affairs are uploaded for public consumption, two distinct violations of privacy are committed: (1) the act of obtaining the private fact, and (2) the act of uploading it on the Internet. The paper will then test the efficacy of the existing legal framework on the right to privacy as applied to recent privacy controversies concerning celebrities. Using the first two torts propounded by William L. Prosser, the paper submits that the violations of privacy committed

against celebrities are commonly done in a two-tiered process: (a) by intrusion upon personal space and (b) by public disclosure of embarrassing private facts. The paper, however, emphasizes that the applicability of these two torts has been modified in light of the current social, technological, and cultural milieu. The scope of the protection of the right to privacy with respect to intrusion upon personal space of celebrities in particular inevitably indicates whether or not a privacy violation has been committed. However, given the unique position of celebrities, where their personal affairs contribute as much as their professional abilities to their fame and success, the scope of protection must be determined by looking, not into the content of the private fact disclosed, but rather, into the means by which such information was accessed, as well as the context or surrounding circumstances of the incident giving rise to a privacy issue.

Lastly, the paper will discuss possible remedies under Philippine law as well as articulate their discrepancies. Particular focus will be given to issues of liability in the context of videos anonymously uploaded online.

I. INTRODUCTION

Since the publication of the seminal article of Warren and Brandeis[1] over a century ago, the concept of privacy has not only gradually evolved into an independent right divorced from property,[2] but has also branched out into various classifications.[3] The right to privacy is premised on the assertion that the right to life necessarily includes the right to live life as one chooses, which

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** Chair, PHILIPPINE LAW JOURNAL (2012). J.D., University of the Philippines (2014 Expected). A.B. Literature (English), *cum laude* and Program Awardee, Ateneo de Manila University (2010).

*** Editor, PHILIPPINE LAW JOURNAL (2012). J.D., University of the Philippines (2014 Expected). B.A. Organizational Communication, *magna cum laude*, University of the Philippines-Manila (2010).

[1] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 5 HARV. L. REV. 193, 193-220 (1890).

[2] *Id.* at 200.

[3] For a full disquisition of the right to privacy in the Philippines *see* IRENE CORTES, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY (UP Law Center, 1970). *See also* Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J 78 (2008).

includes, among others, the right to be let alone.[4] In the landmark case, *Griswold v. Connecticut*, the United States ("US") Supreme Court acknowledged the right to privacy[5] even if it is not specifically provided for in their fundamental law:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[6]

Along with legal recognition came an expansion of its coverage. As it exists today, the right to privacy protects personal space[7] and information,[8] individual decision-making,[9] and freedom from unwarranted governmental intrusions,[10] among others.[11] Intrusions upon personal space can be further

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[4] Warren & Brandeis, *supra* note 1, at 193. *See also* THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 29 (2d ed. 1888).

[5] Although this case concerns decisional privacy, not informational privacy, the citation of this case is meant to underscore that the right to privacy has already been recognized as emanating from other rights protected under the Bill of Rights, which in Philippine jurisdiction is enshrined in Article III of the 1987 Constitution.

[6] Griswold v. Connecticut, 381 U.S. 479 (1965).

[7] *See* Katz v. United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438 (1928).

[8] *See* Ople v. Torres, G.R. No. 127685, Jul. 23, 1998; Morfe v. Mutuc, G.R. No. 20387, Jan. 31, 1968.

[9] *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003).

[10] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); White Light Corporation v. City of Manila, G.R. No. 122846, Jan. 20, 2009; City of Manila v. Laguio, G.R. No. 118127, Apr. 12, 2005; Ermita-Malate Hotel & Motel Operators Association, Inc. v. City Mayor of Manila. G.R. No. 24693, Jul. 31, 1967.

divided into unwarranted access to private information and unauthorized disclosures of private facts,[12] with both instances overlapping or even complementing each other.

On the surface, this categorization of possible interferences on one's right to privacy seems to paint a picture of clarity and neatness. However, the advent of social media and video-sharing websites, as well as the culture that this phenomenon has brought about, effectively dismantled this seemingly neat categorization and complicated the factual context on which the legal structure of the privacy of personal space operates.

The last few years has seen a change in social and cultural milieu brought about by developments in technology. Today, the Internet contains all kinds of speech "over every possible subject and mode of expression, including the serious, the frivolous, the gossipy, the erotic, the scatological, and the profound."[13] The creation of Facebook, Twitter, and YouTube, arguably the three most influential social media platforms, has broadened the "marketplace"[14] where ideas are cultivated and formed. These social networking sites have brought people from all over the world closer, drawing interaction that has never before imagined or, least of all, expected. The proliferation of data coverage as well as WiFi access have also enabled people to be more attached to online activity. As of May 2013, the number of registered Twitter users has reached 554,750,000, with an average of one billion tweets every five days.[15] This figure is only half the demographic of Facebook, the topmost social media platform,[16] which has over 900 million subscribers worldwide as of September 2012, with Europe and Asia comprising almost 500 million.[17] Meanwhile, YouTube boasts of around 100 hours of video uploads

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[11] *Supra* note 3.

[12] William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

[13] Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 33 (2004).

[14] *See* Abrams v. U.S., 250 U.S. 630 (1919) (Holmes, J., dissenting). *See also* U.S. v. Rumely, 345 U.S. 41 (1953) (Douglas, J., concurring).

[15] Statistic Brain, *Twitter Statistics, at* http://www.statisticbrain.com/twitter-statistics (last visited Aug. 17, 2013).

[16] Anthony Kosner, *Watch Out Facebook, With Google+ at #2 and YouTube at #3, Google, Inc. Could Catch Up,* FORBES, Jan. 26, 2013, *available at* http://www.forbes.com/sites/anthonykosner/2013/01/26/watch-out-facebook-with-google-at-2-and-youtube-at-3-google-inc-could-catch-up/ (last visited Aug. 17, 2013).

[17] Internet World Stats, *Facebook Users in the World, at* http://www.internetworldstats.com/facebook.htm (last visited Aug. 17, 2013).

per minute, six billion hours of viewing in a month, and over one billion different users visiting the site monthly.[18]

With such phenomenon, the "right to be let alone" is not as easily protected now as compared to the time when everything was rooted in physical space. This paper submits that the protection and preservation of personal space has been undermined in two ways. First, the new landscape has provided a new mode by which public disclosures are committed. Before, print and photographs–which were necessarily limited to the rolls of film at the disposition of the photographer at a given time as well as entailed time and effort to publish or develop–principally served as the popular avenues of disclosure. Today, however, an unlimited number of photos and videos may be taken regardless of the amount of storage capacity, considering that the files in the memory card of a particular device may simply be uploaded in the computer and thereafter deleted, or the memory card itself may be replaced. Moreover, publication at present may simply be effected through online "posts" or "uploads." Consequently, the person who often commits privacy violations and who, incidentally, provided the context of *The Right to Privacy*, is not anymore limited to the press but has extended even to ordinary citizens. This is not to say that ordinary citizens could not have violated privacy rights in a similar fashion given the context before, only that the action of an ordinary citizen now could have *as much impact* as if it was done by a journalist or other member of the press. Today, anyone who has Internet access can simply post a status message, a tweet, a picture, or a video about a specific person, and such damage would be as monumental as a newspaper report on the same incident, if not more so, due to the online publication's permanent and continuous character (it can be tracked and viewed anywhere, anytime, without regard to physical space). Further, "[i]ndividuals say and do things online that they would never consider saying or doing offline because they feel anonymous."[19] In effect, the onset of cyberspace has broadened the means of committing privacy violations and the manner of involvement in committing the privacy violation.

Second, the prevalence of video-sharing websites and social media also *assists in the way traditional modes* of privacy violations are carried out. It is not only ordinary citizens who post, tweet, or upload a picture or video on

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[18] YouTube, *Statistics, at* http://www.youtube.com/yt/press/statistics.html (last visited Aug. 17, 2013).

[19] Daniel le Keats Citron, *Cyber Civil Rights*. 89 B.U.L. REV. 61-125 (2009).

Facebook, Twitter, or YouTube, but even the government and the press. Majority, if not all, of publications and broadsheets in Metro Manila have websites, Twitter accounts, and Facebook pages. In the same way that a private individual can commit a privacy violation via these new modes, the press can easily reproduce the photograph or personal information disclosed on print via its online equivalent, without having to wait for the print version to be distributed to the public. In fact, online equivalents can even be published first before the print version. In this sense, cyberspace has broadened the ways by which personal space can be accessed and intruded into by the press. As predicted by Justice Cortes,

> The computer is capable of producing a comprehensive dossier on individuals out of information given at different times and for varied purposes. Furthermore, it can continue adding to the stored data and keeping the information up to date. *And the information can be speedily retrieved. But the computer can only come out with what it has been fed.* When information of privileged character finds its way into a computer, it can be extracted together with other data about the subject. *Wrongly evaluated data fed to the computer can also work prejudice*.[20] (Emphasis supplied)

Although the state of cyberspace is vastly more complex and dynamic now compared to the computer generation that the late Justice described, the enunciation of the legal dilemmas remains fundamentally the same, if not worse. For instance, today, there are many ways to preserve the information to prevent anyone from taking down the uploaded information online. Moreover, the plaintiff whose privacy rights have been violated by the disclosure of the private fact will not be able to control the further dissemination of such fact once downloaded or shared into different individual accounts of other online users;[21] in this case, seeking injunctive relief from the courts will not fully address the damage already caused. Interestingly, this is compounded by the scenario where ordinary citizens "share" the published information. In this instance, do the press and the online netizen commit the violation, as principal and accomplice, if possible?

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[20] CORTES, *supra* note 3, at 12. *See also* Bradley Tennis, *Privacy and Identity in a Networked World*, *in* PERSONAL DATA PRIVACY AND PROTECTION IN A SURVEILLANCE ERA: TECHNOLOGIES AND PRACTICES 7, 12 (2011). *See also* Konstantinos Stylianou, *Hasta La Vista Privacy, or How Technology Terminated Privacy*, *in* PERSONAL DATA PRIVACY AD PROTECTION IN A SURVEILLANCE ERA: TECHNOLOGIES AND PRACTICES 48 (2011).

[21] Tennis, *supra* note 20.

As the authors' case samples will show, privacy violations amid this context are commonly committed by uploading a photo or video of a particular person without the person's consent. It must be pointed out that the uploaded "fact" about the person presupposes that such "fact" was first accessed. In other words, the act of posting or uploading a private fact presumes, first and foremost, an access to the fact disclosed. This leads to the conclusion that privacy violations done via photo/video upload or status post comprises two stages: (1) the act of obtaining the private fact, and (2) the act of uploading it online. As would be shown in the discussion below, these privacy violations are two distinct violations that deserve separate treatment and accordingly, separate liabilities. At this juncture, it must be noted that the paper will limit itself to one class of individuals uniquely affected by these changes in the social landscape—public figures, particularly, celebrities.

The number of privacy cases on celebrities[22] in this jurisdiction has been unsurprisingly small, owing to the collectivist culture of Philippine society[23] as well as the inherent interest of the public on the private lives of celebrities. What is special about celebrities is that their profession thrives on popularity, and what makes them more appealing to the public, especially for the curious Filipino audience, is not simply the movies they star in or the number of records they produce, but what they do at home or during Christmas, what they think about certain matters, what they wear at an event, who they are dating, and so on. This is also the bulk of the content in Sunday talk shows and gossip columns. The press is not only required to inform the public about current events but also to entertain,[24] and the public is only too interested to know the latest update on celebrities' private and social lives. However, this is not to say that celebrities are *forced* to deal with this practice. In fact, nowadays, it is very common for celebrities themselves to post a status on Instagram about their vacations, to tweet about their opinions and current emotional state, to upload pictures of parties they attended, the recent activities they did, and so on. In other words, celebrities are also willing to share particular facets of their personal lives, precisely because these acts presumably

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[22] To be discussed in Part III of this paper.

[23] Carmen Guerrero Nakpil writes in "Consensus of One," SUNDAY TIMES MAGAZINE, 1967, at 18: "Privacy? What's that? There is no precise word for it in Pilipino, and as far as I know any Filipino dialect, and there is none because there is no need for it. The concept and practice of privacy are missing from the conventional Filipino life. The Filipino believes that privacy is… at best, an esoteric Western afterthought smacking of legal trickery" *cited in* CORTES, *supra* note 3 at 12.

[24] CORTES, *supra* note 3 at 12.

contribute to their popularity. The more "likes" and "followers," the more TV appearances and projects they get. The more that their posts are "trending," the greater their popularity. Social media has effectively made fame, to a certain extent, quantifiable. In the Philippines alone, the celebrities with the most popular Facebook pages are Vice Ganda, Angel Locsin, Cristine Reyes, and Marian Rivera, whose "fans" number from two to four million.[25] This whole interplay between fame and social media further erodes the distinction between the public and the private in the life of a celebrity. Contrary to public officials whose status as a public figure may be generally limited only to governmental affairs, or even to writers or other personalities on whom the public has a limited interest, the celebrity's personal life is part and parcel of his profession as a public figure. The celebrity as a public figure is *sui generis*.

Ironically, celebrities themselves demand the press to respect their privacy even as they themselves post or tweet about aspects of their personal life. For instance, Neil Patrick Harris, the famous Barney Stinson in the CBS show, "How I Met Your Mother," tweeted in 2010 that he and his partner were "expecting twins," but at the same requesting the media to "respect their privacy." As of the time of tweeting, Harris had "nearly three quarters of a million Twitter followers."[26] This illustration shows the schizophrenic attitude of some celebrities towards privacy and fame: in uploading facets of their personal life online, celebrities themselves supply the material of the media and, consequently, help stir the pot in propagating news about their "private" affairs. This brings confusion as to how to properly observe the celebrity's right to privacy given this change in the way the entertainment industry operates.[27]

In light of these recent changes, there is a need to reexamine the existing legal framework on the concept of privacy. After examining the right to privacy of celebrities both in the US and Philippine legal systems, this paper will scrutinize common privacy violations on celebrities committed in

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[25] SocialBakers, *Philippines Facebook Statistics, at* http://www.socialbakers.com/facebook-statistics/philippines (last visited Aug. 17, 2013).

[26] Steve Tuttle, *Pay Attention and Leave Me Alone,* NEWSWEEK, Aug. 20, 2012, *available at* http://www.thedailybeast.com/newsweek/2010/08/20/pay-attention-and-leave-me-alone.html (last visited Aug. 22, 2013).

[27] *See* Lisa France, *Can celebs have the privacy Jodie Foster calls for?,* CNN, *at* http://edition.cnn.com/2013/01/14/showbiz/celebrity-news-gossip/jodie-foster-privacy (last visited Sep. 14, 2013) . *See also* James Masters, *Cristino Ronaldo and Daniel Craig – a right to privacy?*, CNN, *at* http://edition.cnn.com/2012/11/15/sport/ronaldo-and-stars-privacy/index.html (last visited Sep. 14, 2013).

cyberspace in light of the first two torts articulated by William L. Prosser. The paper will then test the efficacy of such legal framework by applying it to specific cases of intrusion upon personal space and unauthorized disclosures. Lastly, the paper will discuss the liabilities that correspond to such privacy violations, if any, as well as possible remedies available to the plaintiff under Philippine law.

II. CASE SAMPLES

A. Katrina Halili's Sex Video

In the Philippines, one way for celebrities to thrust themselves into notoriety, either voluntarily or otherwise, is through the proliferation of videotaped sexual acts. In the recent years, several celebrity sex scandals have surfaced, with parties either denying or confirming their identities in the videos. A few examples are that of Ethel Booba and Alex Crisano in 2005,[28] deceased Ram Revilla and Janelle Manahan in 2011,[29] and Chito Miranda and Nerizza Naig in August 2013.[30] For the purpose of examining the violation of the celebrity's right to privacy, perhaps the most prominent example is the scandal involving actress Katrina Halili and Dr. Hayden Kho, known to the public as the "Hayden Cam" videos. The authors will discuss the "Hayden Cam" videos for being the first of its kind, particularly because this controversy sparked not just public outcry and an emotional legal battle but even reached the halls of the Senate and inspired the passage of a law on voyeurism.

The scandal, involving a couple performing sexual acts and dancing in front of a mirror while apparently drugged, dominated newspapers and news shows for weeks. It led to a Senate investigation before the Committee on Youth, Women, and Family Relations, with a joint hearing conducted together with the Committee on Public Information and Mass Media, where the couple aired before the public intimate details of their relationship, replete with lies,

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[28] *Available at* http://www.mb.com.ph/node/112748 (last visited Aug. 17, 2013).

[29] *Available at* http://www.philstar.com/nation/article.aspx?publicationSubCategoryId=65&articleId=763534 (last visited Aug. 17, 2013).

[30] Dennis Atienza Maliwanag, *Web pulsates as Chito Miranda, Neri Naig 'sex scandal' deepens,* PHIL. DAILY INQUIRER, Aug. 4, 2013, *available at* http://entertainment.inquirer.net/c-as-chito-miranda-neri-naig-sex-scandal-deepens. (last visited Aug. 17, 2013).

drugs, and sex. Kho admitted to taking the videos without Halili's knowledge during the investigation, although he later stated in his Affidavit that the camera was never hidden from Halili. He denied having taken any part in spreading the video. He claimed that his laptop containing the said video files involving Halili, along with files on other women, was stolen, putting the blame on the thieves. Asked about how the issue has affected her career, Halili said that she had lost endorsements and projects since the start of the year 2009.[31]

On May 20, 2009, Halili filed a case against Kho for violation of Republic Act ("R.A.") No. 9262,[32] alleging two criminal acts.[33] This was followed by the removal of Kho's medical license on November 20, 2009.[34] On December 14, 2010, the Pasig City RTC Judge dismissed the case for insufficiency of evidence. According to the decision, the prosecution failed to present any evidence that Kho was responsible for uploading the videos. As for the charge that Kho videotaped the encounter without his consent, the Court held that the video camera was situated in an open and unconcealed place that could not have escaped Halili's notice. In acquitting Kho of the charges, the Court further held that "[t]he mere taking of the sex video by the accused without the private complainant's knowledge and consent is not yet a violation of R.A. No. 9262. It becomes a crime only when the said act "alarms or causes substantial emotional or psychological distress to the woman."[35] The Court noted that the prosecution's own evidence showed that the cause of the

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[31] Amita Legaspi and Mark Joseph Ubalde, *Katrina: I want justice! Kho: She's part of this mess,* GMA NEWS, *at* http://www.gmanetwork.com/news/story/163326/news/nation/katrina-i-want-justice-kho-she-s-also-part-of-this-mess (last visited Aug. 17, 2013).

[32] This is known as the Anti-Violence Against Women and Their Children Act of 2004.

[33] Under Rep. Act. No. 9262, she alleged the following violations in her complaint:(a) the act of taking a video of the sexual encounter without the knowledge and consent of private complainant, causing psychological and emotional distress on private complainant Halili; and (b) the act of uploading the sex video in the internet, causing mental and/or emotional anguish and humiliation on private complainant Halili.

[34] Rose Garcia, *Professional Regulatory Commission revokes license of Hayden Kho,* PHILIPPINE ENTERTAINMENT PORTAL, *at* http://www.pep.ph/news/23978/Professional-Regulation-Commission-revokes-license-of-Hayden-Kho (last visited Aug. 17, 2013).

[35] Bong Gonidez, *Pasig City RTC dismisses Katrina Halili's case against Hayden Kho for "insufficiency of evidence,"* PHILIPPINE ENTERTAINMENT PORTAL, *at* http://www.pep.ph/news/27678/pasig-city-rtc-dismisses-katrina-halilis-case-against-hayden-kho-for-insufficiency-of-evidence/1/2 (last visited Aug. 17, 2013).

psychological distress was not the videotaping of the encounter but the act of uploading it on the Internet, which Kho was found to have taken no part in.[36]

On January 25, 2011, the Court of Appeals denied the petition for certiorari of Halili in a decision penned by Associate Justice Manuel Barrios, saying that there was no showing of grave abuse of discretion in the decision of the lower court. On the other hand, the Court of Appeals affirmed the decision of the Professional Regulatory Commission to revoke the medical license of Kho on the grounds of immorality and unethical conduct.[37] Despite the unsuccessful attempt to vindicate her rights before the courts, Halili said in an interview that she has since bumped into Kho on at least two occasions and has moved on from the ordeal, as "past is past."[38]

B. Mo Twister's Confession

Most celebrities utilize social networking sites as a way to connect with their audiences. Local celebrities have taken to Twitter, YouTube, and Facebook to share often-mundane details of their lives or promote their latest advertisements in an informal context. Every now and then, however, videos in which celebrities disclose intimate personal details are uploaded on these sites, as in the case of Mohan "Mo Twister" Gumatay's personal video allegedly taken on July 28, 2010 and uploaded by a YouTube user named *PrettyJenny55*.[39]

In the video, Mo Twister talked about an abortion that his then partner Rhian Ramos had no choice but to make, owing to the pressure placed

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[36] *Id.*

[37] Demai Granali, *Court of Appeals dismisses Katrina Halili's plea to indict Hayden Kho Jr. for violation of R.A. 9262,* PHIL. ENTERTAINMENT PORTAL, *at* http://www.pep.ph/news/35314/court-of-appeals-dismisses-katrina-halili39s-plea-to-indict-hayden-kho-jr-for-violation-of-ra-9262 (last visited Aug. 17, 2013).

[38] *Katrina Halili on Hayden Kho: 'Past is past,'* ABS-CBN NEWS, *at* http://www.abs-cbnnews.com/entertainment/04/30/13/katrina-halili-hayden-kho-past-past (last visited Aug. 17, 2013).

[39] *Mo Twister video on Rhian Ramos abortion scandal goes viral… but what was he thinking?,* AJAY'S WRITINGS ON THE WALL, *at* http://www.annalyn.net/2011/12/03/mo-twister-video-on-rhian-ramos-abortion-scandal-goes-viral-but-what-was-he-thinking/ (last visited Aug. 17, 2013).

on her by the entertainment industry, her manager, and her parents.[40] The video is in essence a private confession of Mo Twister that was meant to be viewed by him in the future. Unfortunately, the said YouTube user unceremoniously uploaded the same. In a statement, Mo Twister said that he regularly made videos, with the knowledge of Ramos herself, to document his memories. He further disclosed that, after the breakup, he was asked to surrender copies of the videos, with the same files on his computer deleted in front of him.[41]

Ramos filed a suit alleging violation of R. A. No. 9262 with a prayer for temporary protection order against Mo Twister.[42] The temporary protection order having been granted by the court, she then sought a permanent protection order.

Since the scandal broke out, Ramos has gone on a hiatus under the recommendation of het network, GMA-7. Marian Rivera replaced her in the TV drama "My Beloved" where she was supposed to star in. Her first movie "My Kontrabida Girl" failed to perform well in the box office.[43] Only in January 2013 was she able to resurface in show business with a role in the program "Indio."[44]

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[40] *Mo Twister on Rhian Ramos Abortion scandal*, YOUTUBE, *at* http://www.youtube.com/watch?v=levhY9a4aGk (last visited Aug. 17, 2013).

[41] *Mo Twister releases official statement on Rhian Ramos' alleged abortion scandal; apologizes to GMA Network!*, ENTERVREXWORLD, *at* http://entervrexworld.wordpress.com/2011/12/05/mo-twister-releases-official-statement-on-rhian-ramos-alleged-abortion-scandal-apologizes-to-gma-network/(last visited Aug. 17, 2013).

[42] *Rhian Ramos files "harassment case" vs. ex-boyfriend Mo Twister,* SPOT.PH, *at* http://www.spot.ph/the-feed/49923/rhian-ramos-files-harrassment-case-vs-ex-boyfriend-mo-twister- (last visited Aug. 17, 2013).

[43] *Rhian Ramos hopes she won't see Mo Twister again,* PINOYSTOP, *at* http://www.pinoystop.com/news/celebrity/805/rhian-ramos-hopes-she-wont-see-mo-twister-again (last visited Aug. 17, 2013).

[44] Glaiza Jarloc, *Rhian Ramos enjoys show biz comeback,* SUN STAR, Jan. 21, 2013, *available at* http://www.sunstar.com.ph/manila/entertainment/2013/01/21/rhian-ramos-enjoys-show-biz-comeback-263942 (last visited Aug. 17, 2013).

C. Claudine Barretto's Brawl with Erwin Tulfo

On May 6, 2012, TV personalities Claudine Barretto, Raymart Santiago, and Ramon Tulfo figured in a brawl that was caught on video by an onlooker. Within a few minutes, the uploaded video was the subject of discussion in social networking sites. Versions of what truly happened vary, but what the video shows is a man that appears to be Santiago and several men hitting Tulfo, who was lying prostrate on the ground. The apparent cause of the conflict was Tulfo's act of taking a video of Barretto berating an airline crew for having left their luggage behind.[45]

Tulfo has filed charges of attempted homicide, grave coercion, and oral defamation. The couple, on the other hand, has filed a complaint for slight physical injuries and child abuse under Republic Act. No. 7610 ("R.A. No. 7610") as a result of the incident.[46] In addition, the couple filed a criminal complaint for grave threats and slander as well as a petition for a writ of amparo with special protection order against Ben, Raffy, and Erwin Tulfo after the May 3 episode of T3, hosted by the three. In the said episode, the three hosts hurled expletives against the couple.[47] They apologized soon after and have been meted out with a suspension order from the MTRCB.[48]

The Office of the City Prosecutor, in a joint resolution dated October 26, 2012, has dismissed Tulfo's charges of Attempted Homicide, Grave Coercion and Oral Defamation, while sustaining charges of Slight Physical Injuries and another one for Grave Coercion.[49] On the other hand, the Office

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[45] Eric Apolonio, *Mon Tulfo, Raymart Santiago exchange blows at NAIA 3,* INTERAKSYON, *at* http://www.interaksyon.com/article/31176/mon-tulfo-raymart-santiago-exchange-blows-at-naia- (last visited Aug. 17, 2013).

[46] *Raymart Santiago, Claudine Barretto file counter charges vs. Tulfo,* PHIL. DAILY INQUIRER, May 9, 2012, *available at* http://entertainment.inquirer.net/39743/raymart-santiago-claudine-barretto-file-counter-charges-vs-tulfo (last visited Aug. 17, 2013).

[47] *Mon Tulfo files charges against Raymart Santiago and Claudine Barretto after airport altercation,* FEMALE NETWORK.COM, *at* http://www.femalenetwork.com/celebrities/mon-tulfo-files-charges-against-raymart-santiago-and-claudine-barretto-after-airport-altercation (last visited Aug. 17, 2013).

[48] Julie Aurelio, *Raymart Santiago, Claudine Barretto seek writ of amparo against nTulfo brothers,* PHIL. DAILY INQUIRER, May 11, 2012, *available at* http://entertainment.inquirer.net/40253/raymart-santiago-claudine-barreto-seek-writ-of-amparo-against-tulfo-brothers (last visited Aug. 17, 2013).

[49] *Court dismisses Mon Tulfo's complaints against Raymart Santiago and Claudine Barretto,* FEMALE NETWORK.COM, *at* http://www.femalenetwork.com/celebrities/court-dismisses-

of the City Prosecutor recommended the filing of grave threats against the Tulfo brothers.[50]

III. THE PUBLIC FIGURE DOCTRINE

A. Treatment in the United States

The public figure doctrine in Philippine jurisdiction is not of recent vintage. As early as 1918, the Supreme Court, through Justice Malcolm, established its beginnings and firmly set it as part of the legal framework in the case, *US v. Bustos*:

> The interest of society and the maintenance of good government demand a full discussion of public affairs. Completely liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts. Only thus can the intelligence and the dignity of the individual be exalted. Of course, criticism does not authorize defamation. Nevertheless, as the individual is less than the State, so must expected criticism be born for the common good. Rising superior to any official or set of officials, to the Chief of Executive, to the Legislature, to the Judiciary—to any or all the agencies of Government—public opinion should be the constant source of liberty and democracy.[51]

Despite this achievement, a preliminary disquisition on the public figure doctrine in the US is still imperative because of its expansive modification of the public figure doctrine as well as its illustration on the different kinds of public figures. For purposes of the paper, the discussion will

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mon-tulfo-s-complaints-against-raymart-santiago-and-claudine-barretto (last visited Aug. 17, 2013).

[50] Joyce Jimenez, *Quezon City Prosecutor recommends filing of grave threat case against Tulfo brothers,* PHIL. ENTERTAINMENT PORTAL, *at* http://www.pep.ph/news/36572/quezon-city-prosecutor39s-office-recommends-filing-of-grave-threat-case-against-tulfo-brothers-raymart-santiago-and-claudine-barretto-ldquofortunate-and-thankfulrdquo-about-the-decision (last visited Aug. 17, 2013).

[51] U.S. v. Bustos, G.R. No. 12592, Mar. 8, 1918.

be centered on jurisprudence relevant in setting the parameters of the right to privacy of celebrities in this day and age.

Any discussion of the public figure doctrine in the US necessarily starts with the landmark case, *New York Times Co. v. Sullivan*.[52] The respondent in this case was the City Commissioner of Public Affairs in Montgomery, Alabama. He brought a suit against New York Times for the allegedly defamatory statements published by the latter against him on its newspaper. The newspaper advertisement narrated certain police action directed against students who participated in a civil rights movement. Respondent asserted that the statements referred to him since one of his tasks was to supervise the police department.

The US Supreme Court carved out a test that eventually became the standard up to this day on whether or not to grant recovery in libel cases brought by public officials (and later on, even public figures) against members of the press. The Court held that for the libel action of the public official to prosper, the requirement of "actual malice" must first be satisfied. "Actual malice" is a standard where the defendant cannot be held liable for statements issued against a particular public official unless the former knew the statement to be false or he issued it in reckless disregard of the truth or falsity of such statement. The US Supreme Court defended the importance of the "actual malice" standard in this wise:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship" . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so.[53]

For failure of the respondent public official to prove actual malice, the newspaper company was not adjudged liable in issuing the allegedly defamatory statements imputed on him as an elected official.

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[52] 376 U.S. 254 (1964).

[53] *Id.* at 279.

It bears stressing that the Court imposed the higher standard of actual malice because of the public issue involved. Criticism of official conduct was conceded by the Court to be an example of "freedom of expression upon public questions."[54] It was not necessary to discuss the *extent* of the right to privacy of public officials (the decision was centered on official conduct and did not distinguish between public and private affairs), and to balance such with free speech and the freedom of the press. This is because it can be reasonably assumed, supposing the statements in fact referred to the respondent, that there could be no privacy violation when the questioned statements pertain to official conduct in the public sphere, and not to private affairs. Viewed in this light, the law will tilt in favor of freedom of speech and not the right to privacy of the public official.

The requirement of actual malice is relative to the statement at issue, that is, whether such statement was issued despite knowing it to be false or in reckless disregard of its truth. It does not pertain to the motive of the defendant in making those statements. Thus, even if the plaintiff shows that the defendant was motivated by ill will in making the questioned publication, this does not satisfy the actual malice requirement, precisely because ill will pertains to motive, not to the value of the statement.

Although *New York Times* pertained to public officials per se, the plaintiff therein involved an elected official. The question therefore arises if "public officials" under the *New York Times* framework applies to non-elective officials.

The matter has been put to rest in *Rosenblatt v. Baer*, where the Court held that no reasonable distinction exists as to entitle the two classes of public officials to different treatment.[55] The respondent in this case was employed by the Belknap County Commissioners, who are themselves elected officials, to manage a recreation area, which primarily functioned as a ski resort. After management was transferred to a different group, the petitioner published an article in the *Laconia Evening Citizen* where he stated in strong language that the management of the recreation facility this year was a huge improvement compared with previous years. One of the striking statements made by petitioner was, "What happened to all the money last year? And every other

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[54] *Id.* at 269.

[55] 383 U.S. 75 (1966).

year?"[56] This statement prompted respondent to bring a libel suit against petitioner, averring that such statements were defamatory.

Although the US Supreme Court remanded the case in order to reformulate the questions pursuant to the *New York Times* ruling, the first part of the decision gives the impression that the libel action could have been denied at the first instance on the basis of failure to prove that the allegedly defamatory statements referred to respondent. Respondent's insistence that the questioned statements undoubtedly refer to him did not persuade the court, since the statements could imply a different meaning from that purported by the respondent, i.e., that the new management merely has exemplary skill in handling the recreation facility. In the words of the US Supreme Court:

> The column, on its face, contains no clearly actionable statement. Although the questions "What happened to all the money last year? [a]nd every other year?" could be read to imply speculation, they could also be read, in context, merely to praise the present administration. The only persons mentioned by name are officials of the new regime; no reference is made to respondent, the three elected commissioners, or anyone else who had a part in the administration of the Area during respondent's tenure. Persons familiar with the controversy over the Area might well read it as complimenting the luck or skill of the new management.
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> . . .
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> Here, no explicit charge of speculation was made; no assault on the previous management appears.[57]

At this point, the denial of recovery could have been done based on the failure on the part of respondent to prove the nexus between the questioned statements and the person referred to in the article. Simply put, the respondent failed to prove that the statements were specifically directed at him. However, the US Supreme Court held further that the respondent can properly be considered as a public official, and hence, the *New York Times* standard of actual malice must first be tested before fully disposing the case. Since the trial of the case occurred prior to the *New York Times* ruling, a remand of the case to the district court for further proceedings is in order so that the issue of the case could properly be reformulated in accordance with *New York Times*.

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[56] *Id.* at 78.

[57] *Id.* at 79, 82.

The US Supreme Court stressed the need to reformulate the issue in conformity with the *New York Times* standard because the respondent can still properly claim protection in two ways: (1) by proving that he cannot be counted as a public official, or (2) even if proven to be a public official, by showing that there is malice in the publication of the statements. The US Supreme Court thus held:

> As respondent framed his case, he may have held such a position. Since *New York Times* had not been decided when his case went to trial, his presentation was not shaped to the "public official" issue. He did, however, seek to show that the article referred particularly to him. His theory was that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations, chargeable with its failures and to be credited with its successes. Thus, to prove the article referred to him, he showed the importance of his role; the same showing, at the least, raises a substantial argument that he was a "public official."
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> The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the *New York Times* rule. Moreover, even if the claim falls within *New York Times,* the record suggests respondent may be able to present a jury question of malice as there defined.[58]

Despite the remand of the case, the Court did stress the importance of the *New York Times* rule in the case of public officials in general. This gives the impression that assuming that the statements indeed referred to respondent, in the absence of malice, the same would be protected by free speech under the actual malice formulation, because the statements relate to official conduct which the public has a legitimate interest in knowing. Drawing from principles enunciated in the landmark case, the *Rosenblatt* Court enunciated, thus:

> Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But, in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that, when interests in public discussion are defamation. Where a position in government has such apparent importance that the

[58] *Id.* at 87.

> public has an independent interest in the qualifications and performance of the who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present, and the *New York Times* malice standards apply.[59]

Although *New York Times* and *Rosenblatt* involved public officials, the standard of "actual malice" was later on extended to public figures in general a mere three years later in *Curtis v. Butts*.[60] *Curtis* consists of a consolidation of two cases which concern allegedly defamatory statements issued against non-public officials (Butts was the athletic director of the University of Georgia and a prominent football coach while Walker was a retired military officer who later became a political activist) who gain popularity and notoriety for being implicated in issues of public interest. In both situations, two competing considerations are involved: on one hand, the right to privacy of these individuals who were not really celebrities or even public officials at the time of the publication of the questioned statements, and on the other, the defense of the publishing companies that the issues in which both individuals were implicated must give way to the more important interest in informing the public about "questions of public concern."[61] The defense of freedom of speech was therefore hinged on the public interest involved.

The Court, speaking through Justice Harlan, held that Butts and Walker are considered as "public figures" for purposes of libel suits:

> We note that *the public interest* in the circulation of the materials here involved, and the publisher's interest in circulating them, is *not less than that involved in* New York Times. And both Butts and Walker *commanded a substantial amount of independent public interest at the time of the publications*; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. . . . Butts may have attained that status by position alone, and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but *both commanded sufficient continuing public interest* and *had sufficient access to the means of counterargument* to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. *Whitney v. California,* 274 U.S. 357, 377 (Brandeis, J., dissenting). (Emphasis supplied)

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[59] *Id.* at 86.

[60] 388 U.S. 130 (1967).

[61] *Id.* at 150.

. . .

> [A] "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[62]

The Court makes two important doctrines here: first, that public officials and public figures involve a similar level of public interest, and second, by virtue of the preceding principle, that public figures must also be subject to the same standard of actual malice as public officials, pursuant to *New York Times*. Butts and Walker were held to be public figures with respect to the public issues in which they were involved.

In his concurring opinion, Justice Warren provided an extensive discussion on the competing considerations that must be resolved in favor of free speech. First, he acknowledged that political power is no longer concentrated on the government, but has spread out to various institutions in the private sector, such that the distinction between the government and private individuals has blurred. Consequently, the public now has a legitimate interest in being informed about certain issues that the private sector is involved in. By virtue of their actions or their speech in such issues, they are transformed into public figures for the purpose of information dissemination and public debate, thus:

> Surely, as a class, these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

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[62] *Id.* at 154-155.

> I therefore adhere to the *New York Times* standard in the case of "public figures" as well as "public officials." It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation. Its definition of "actual malice" is not so restrictive that recovery is limited to situations where there is "knowing falsehood" on the part of the publisher of false and defamatory matter. "Reckless disregard" for the truth or falsity, measured by the conduct of the publisher, will also expose him to liability for publishing false material which is injurious to reputation. More significantly, however, the *New York Times* standard is an important safeguard for the rights of the [p165] press and public to inform and be informed on matters of legitimate interest. Evenly applied to cases involving "public men"—whether they be "public officials" or "public figures"—it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.[63]

Another important observation is that the Court already recognized that as public figures, they have sufficient means to rebut the statements issued against them ("sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements"), which is later extrapolated in *Gertz v. Welch.*

Before *Gertz,* however, a discussion of the doctrine laid down in *Rosenbloom v. Metromedia*[64] is in order, if only because this case puts forth to the test the extent to which matters of public concern deserve protection.

Petitioner Rosenbloom was engaged in the distribution of nudist magazines. Acting on numerous citizens' complaints, Rosenbloom was arrested and prosecuted under the city's obscenity laws. Respondent, a radio station, then aired the matter in its half-hour broadcasts. In the news report, the literature confiscated by the police was described as "obscene" (although this was later on changed to "reportedly obscene"). Rosenbloom's name was never mentioned in any of the reports, but they contained words such as "smut merchants" as well as "girlie-book peddlers."

The petitioner was eventually acquitted of the criminal charge against him on the basis that the nudist magazines distributed by petitioner do not

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[63] *Id.* at 164-165.

[64] 403 U.S. 29 (1971).

constitute obscene material under the city's obscenity laws. Thereafter, he instituted the present suit for damages under Pennsylvania's libel laws, alleging that respondent issued defamatory statements against him in the news reports.

At this point it must be stressed that Rosenbloom was never immersed in the public limelight until the broadcast of the news report allegedly pertaining to him. At first blush, one would think that Rosenbloom would be granted the award of damages, as in fact done by the district court; however, the US Supreme Court denied relief to the respondent, holding that the matter in which the petitioner was implicated is a "subject of public or general interest," and thus the *New York Times* standard should apply.

The Court here, in effect, disregarded the distinction between public figures and private individuals, holding that it is ultimately the issues in which the alleged defamatory statements relate to that shall decide whether or not the *New York Times* rule should apply. Equally important is the rationale given by the Court for the "actual malice" requirement stated in *New York Times*:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because, in some sense, the individual did not "voluntarily" participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.
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> . . .
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> The *New York Times* standard was applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life.[65]

The Court, moreover, rejected the argument of the petitioner that only the lower standard of failure to observe "reasonable care"—as opposed to actual malice—in the publication of the allegedly defamatory statements was required. Upholding the actual malice standard as applying to the petitioner, the Court reasoned that to impose a lower requirement would effectively result in self-censorship by the press, since they would not know which acts or

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[65] *Id.* at 43, 46.

precautionary measures would constitute "reasonable care," thereby curtailing freedom of speech.

The ruling of the US Supreme Court in *Rosenbloom* would be in stark contrast to *Gertz v. Welch*,[66] a case decided three years later. *Gertz* involved the killing of a young man surnamed Nelson. He was shot by a Chicago policeman named Nuccio. Gertz was hired by the Nelson family to bring forth the civil liability arising from the criminal case. Nuccio was eventually convicted murder.

The controversy arose when respondent, the publisher of a monthly magazine named *American Opinion*, published an article claiming that Nuccio was framed and that the testimony against him during his murder trial was not true.[67] This was published in connection with the magazine's previous publications regarding a Communist conspiracy to undermine the local police. Gertz was described as a "Leninist," a "Communist-fronter," and an officer of the National Lawyers Guild, which was described as a Communist organization, and implied that Gertz had a criminal record. Moreover, the article featured a photograph of Gertz with the caption, "Elmer Gertz of Red Guild harasses Nuccio." It must be noted that the managing editor did not confirm the veracity of the statements made, although it did assert that "extensive research" on the Nuccio case was done. The *American Opinion* was sold on newsstands across the country and reprints of the article were distributed in Chicago.

Gertz filed a libel suit against respondent, alleging that the questioned publication injured his reputation as a lawyer and as a citizen. The US Supreme Court ruled in his favor, first defining that "public figures" as held in *Curtis* and *Rosenbloom*, are "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures."[68] On the basis of the foregoing, the Court then emphasized that private individuals should not be subject to the *New York Times* standard of actual malice to which public figures are subjected to. The Court rejected the "public or general interest" test set in *Rosenbloom* in this wise:

> [T]he *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. *New York Times Co. v. Sullivan, supra;*

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[66] 418 U.S. 323 (1974).

[67] *Id.* at 326.

[68] *Id.* at 342.

> *Curtis Publishing Co. v. Butts, supra.* We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.[69]

According to the Court, to subject private individuals to the same standard merely because they are involved in an issue in which the public has an interest in would ultimately undermine the right of an individual to seek a remedy for an injured reputation.

At this point, it must be noted that it is the damage to the reputation, which lies at the heart of a libel suit, that is sought to be protected here, not the right to privacy per se. It can be gleaned from the cases so far discussed that the right to privacy does not often appear in the equation, if at all. This is understandable since a libel suit is composed of different elements that may not even touch on the topic of privacy, or at most, only incidentally. Although the right to privacy has been recognized as a right, the remedy that comes with it is still intricately connected to a different cause of action, which may not even have the right to privacy as its central aspect. This may be the consequence of the public figure doctrine as simply being an available defense in a defamation suit.

The *Gertz* Court justified the rationale for the distinction between public officials/public figures on the one hand and private individuals on the other, *to wit*:

> . . . we have no difficulty in distinguishing among defamation plaintiffs. The *first remedy* of any victim of defamation is *self-help – using available opportunities to contradict the lie or correct the error, and thereby to minimize its adverse impact on reputation.* Public officials and public figures usually enjoy significantly *greater access to the channels of effective communication,* and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

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[69] *Id.* at 343.

> Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
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> More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. *An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.* He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison v. Louisiana,* 379 U.S. at 77, the public's interest extends to anything which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.
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> *Those classed as public figures stand in a similar position.* Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, *those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.*
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> *No such assumption is justified with respect to a private individual.* He has not accepted public office or assumed an "influential role in ordering society." *Curtis Publishing Co. v. Butts,* 388 U.S. at 164 (Warren, C.J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.[70] (Emphasis supplied)

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[70] *Id.* at 344-345.

A public figure is deemed to have consented to being thrust in the limelight by virtue of accepting his position or status in contrast to private individuals who are mere victims of defamatory falsehood. Apart from such consent, the public figure also has more access than private individuals to effectively rebut the statements issued against him. It is apparent that from the start the Court treated Gertz as a private individual; this was their basic premise. However, although the Court did not adopt the *Rosenbloom* formulation, it failed to characterize when issues of public interest transform a private individual into a public figure, albeit for a limited purpose.[71] The *Gertz* Court only looked at the personality of the individual concerned in determining whether he should be considered as a public figure.

Lastly, the Court rejected respondent's argument that petitioner can be considered a public official, much less a "de facto public official" by virtue of petitioner's appearance during the coroner's inquest. The Court observed that this would lead to the absurd result that lawyers can easily become public figures simply because of the demands of the cases they are handling. Neither could Gertz come under the category of a public figure. Using the definition of "public figures" as mentioned above, the Court held that Gertz's activities in the community, although making him well-known, does not amount to such "general fame or notoriety"[72] as to make him a public figure.[73]

Gertz indirectly answers the converse situation that *Curtis* necessarily brings up. It must be remembered that the Court in *Curtis* treated Butts and Walker as public figures only with respect to the public issues on which the allegedly defamatory statements were published. A corollary question to this is: does the same lower standard of protection apply even to matters that are not vested with public interest (e.g. private affairs)? Using the *Gertz* formulation, it

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[71] For an in-depth discussion of the limited purpose public figure vis-à-vis the all-purpose public figure *see* Waldbaum v. Fairchild Publication, Inc., 627 F.2d 1287 (1980); Marcone v. Penthouse International Ltd., 533 F. Supp. 353 (1982); Lerman v. Flynt Distributing Co., Inc. 745 F.2d 123 (1984). *See also* James Mitchell, *The Accidental Purist: Reclaiming the Gertz All Purpose Public Figure Doctrine in the Age of Celebrity Journalism*, 22 LOY. L.A. ENT. L. REV. 559 (2002); Mark Foley, *Torts - Defamation - Public Figure Doctrine Will Be Used Expansively to Protect Media*, 31 VILL. L. REV. 1245 (1986).

[72] *Supra* note 66, at 352.

[73] The Court held thus in the context of resolving the issue of whether or not Gertz can be considered as a public figure for all purposes. The distinction of a limited purpose public figure from an all purpose public figure may not be relevant for purposes of this paper, but for an extensive discussion, *see supra* note 66.

is clear that despite being limited purpose public figures, as defined in *Gertz*, such individuals will still be entitled to a higher protection regarding their private affairs.

All this points to the conclusion that *Gertz* creates levels of protection for public figures. Not all matters pertaining to public figures will be subsumed in the actual malice standard of *New York Times*; their private affairs will be given a higher level of protection than in public issues in which they are thrust, whether voluntarily or involuntarily, incorporating the *Rosenbloom* formulation.

However, a distinction must be made between the ruling in *Rosenbloom* and *Gertz*. The broad strokes painted in *Rosenbloom* seemingly gave way to a narrower ruling in *Gertz* in the sense that the level of protection to libel plaintiffs was more generous in the latter case than in *Rosenbloom*. In *Rosenbloom*, it is the issue (the public or general interest test) that will necessarily determine if one can properly be classified as a public figure, whereas in *Gertz* it is the personality and character of the individual (his activities, the scope of his affairs and "pervasive involvement"[74] in the affairs of society) that will decide his status as a public figure or as a private individual. The former is issue-based; the other, personality-based.[75] The difference between these two formulations will later have an influence on Philippine jurisprudence relating to the public figure doctrine.

As can be distilled from the foregoing cases, celebrities who are properly considered as public figures under *Curtis* and *Gertz* are not entitled to the same level of protection as private individuals. Apart from the fact that they voluntarily sought fame, they also have sufficient, if not the broadest, access to media outlets which provide them with a venue to rebut statements and imputations issued against them. Although the public figure doctrine was not mentioned, this interplay between the right to privacy of public figures (and not simply injury to reputation which lies at the heart of any libel case) and the extent of the freedom of the press is threshed out in *Galella v. Onassis*.[76]

Galella was a freelance photographer, who was more appropriately called as a member of the "paparazzi." Onassis was the wife of the deceased US president, John F. Kennedy, and the mother of two children, John and

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[74] Gertz v. Welch, 418 U.S. 323, 352 (1974).

[75] *See* Tan, *supra* note 3.

[76] 487 F.2d 986 (1973).

Caroline. Following the arrest and eventual acquittal of Galella upon a complaint filed by Onassis's bodyguards, the photographer brought suit against Onassis and her bodyguards, claiming that the latter's malicious prosecution of him was done under the orders of the widow. Onassis denied this allegation, and filed a counterclaim for damages and injunction, "charging that Galella had invaded her privacy, assaulted and battered her, intentionally inflicted emotional distress and engaged in a campaign of harassment."[77] In contrast to the preceding cases, where libel was the remedy sought, and hence, was grounded on the determination of the existence of injury to reputation, here, the claim was based on the alleged injury to the privacy and personal space of Onassis.

The Court did not treat as an issue the question of whether or not Onassis counts as a public figure; it readily conceded that Onassis was a public figure, being the wife of the former president. The issue merely boiled down to the scope of the protection that Onassis was entitled to, given the circumstances. The Court acknowledged that the things which were the proper subject of interest of the public in the life of Onassis, though continuing, is merely a matter of public curiosity.[78] Nevertheless, this was not regarded as being within the purview of private affairs that are not excluded from the public precisely because of Onassis's status as a celebrity. Necessarily, this calls for the need to generate on the part of the public a feeling of being privy to the celebrity's private affairs. If anything, the case of *Galella* is instructive in demonstrating that the unique position of celebrities has already been acknowledged or considered before finally deciding the issue of intrusion, if any. On this second aspect, it was shown that Galella used extreme measures to get photographs of the Onassis, such as following and surprising the former first family; in fact, Galella resorted to:

> *[h]arassing, alarming, startling, tormenting, touching the person of the defendant . . . or her children . . .* and from *blocking their movements in the public places and thoroughfares, invading their immediate zone of privacy* by means of physical movements, gestures or with photographic equipment and from performing any act reasonably calculated to place the lives and safety of the defendant . . . and her children in jeopardy.[79] (Emphasis supplied)

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[77] *Id.* at 992.

[78] Jamie Nordhaus, *Celebrities' Right to Privacy: How far Should the Paparazzi Be Allowed to Go?*, 18 REV. LITIG. 290 (1999).

[79] Galella v. Onassis, 487 F.2d 986, 992 (1973).

Given the intrusive methods used by Galella to take photographs of the first family, the Court issued an injunction against Galella to the extent that both the legitimate expectation of gathering news as well as the privacy of Onassis were both equitably protected. Said the Court:

> *Relief must be tailored to protect Mrs. Onassis from the "paparazzo" attack which distinguishes Galella's behavior from that of other photographers*; it should not unnecessarily infringe on reasonable efforts to "cover" defendant. Therefore, we modify the court's order to prohibit only (1) any approach within twenty-five (25) feet of defendant or any touching of the person of the defendant Jacqueline Onassis; (2) any blocking of her movement in public places and thoroughfares; (3) any act foreseeably or reasonably calculated to place the life and safety of defendant in jeopardy; and (4) any conduct which would reasonably be foreseen to harass, alarm or frighten the defendant.
>
> *Any further restriction on Galella's taking and selling pictures of defendant for news coverage is, however, improper* and unwarranted by the evidence.
>
> . . .
>
> Likewise, we affirm the grant of injunctive relief to the government modified to prohibit any action interfering with Secret Service agents' protective duties. Galella thus may be enjoined from (a) entering the children's schools or play areas; (b) engaging in action calculated or reasonably foreseen to place the children's safety or well being in jeopardy, or which would threaten or create physical injury; (c) taking any action which could reasonably before seen to harass, alarm, or frighten the children; and (d) from approaching within thirty (30) feet of the children.[80] (Emphasis supplied)

The Court attempted to strike a balance by imposing *physical* parameters within which Galella may gather his photographs. More importantly, the Court held that the protection provided by the First Amendment could not extend to the immunity for the conduct of newsmen in gathering information for their news item. The "wall of immunity" cannot permit intrusive conduct akin to what Galella did. One must note, however, that the solution of imposing physical boundaries is rendered ineffective

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[80] *Id.* at 998-999.

nowadays because the reach and sophistication of cameras and other devices render inutile the attempt to control and intrude via physical limitation.

B. Treatment in the Philippines

While there is no glaring conflict in the analysis of the public figure doctrine between American and Philippine jurisprudence, the public figure doctrine in the latter covers a broader set of categories than in the former, as Philippine case law continues to adopt the doctrine laid down in *Rosenbloom*. To reiterate, this provides that even private individuals can be considered public figures as long as the issue involves a matter of public or general interest.[81] In both the US and the Philippines, the guarantee of freedom of speech includes the complete liberty to comment on the conduct of public men. The same requirement of actual malice enunciated in *New York Times* also exists.[82] The doctrine has been expanded in terms of the subject matter covered, as held in *Borjal v. Court of Appeals*, to include:

> [e]ven private individuals who are involved in a matter of public or general interest, even if the said individual did not voluntarily choose to become involved, as the public's primary interest is the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety.[83]

It bears stressing that the Court merely cited *Rosenbloom* in this case. This kind of ruling has continued even in the recent cases of *Villanueva v. Philippine Daily Inquirer*[84] and *Fortun v. Quinsayas*.[85] In using the *Rosenbloom* formulation, it is therefore apparent that the Philippine public figure doctrine is defined based on the issues involved, disregarding the personality or character of the individual à la *Gertz*, and notwithstanding the fact that *Gertz* has already overturned *Rosenbloom*.

Social media may have made it possible to easily and conveniently violate the right to privacy of a public figure, specifically celebrities, yet the vindication of such right in the Supreme Court has been few and far between.

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[81] Tan, *supra* note 3, at 130.
[82] Lopez v. Court of Appeals, G.R. No. 26549, Jul. 31, 1970.
[83] G.R. No. 12646, Jan. 14, 1999.
[84] G.R. No. 164437, May 15, 2009.
[85] G.R. No. 194578, Feb. 13, 2013.

In illustrating the extent of the right to privacy accorded to public figures, *Ayer Productions v. Capulong*[86] remains to be one of the most illuminating. The case stemmed from a complaint with a prayer for a temporary restraining order and a writ of preliminary injunction filed by respondent Juan Ponce Enrile to enjoin the petitioners from producing the film "The Four-Day Revolution," a mini-series that depicts the events that led to the EDSA Revolution. According to the private respondent, the film constituted an obvious violation of his right to privacy. The petitioners, on the other hand, argued that they were merely exercising their freedom of speech and of expression.

The Court made the following pronouncement as to the right to privacy of persons like the private respondent:

> The right of privacy or "the right to be let alone," like the right of free expression, is not an absolute right. A limited intrusion into a person's privacy has long been regarded as permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitute matters of a public character. Succinctly put, the right of privacy cannot be invoked to resist publication and dissemination of matters of public interest. The interest sought to be protected by the right of privacy is the right to be free from "unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern.[87]

In applying this doctrine, the Court held that the events, which led to the change in government during a critical stage in national history, were of public interest and an appropriate subject for speech and expression. It further held that the mini-series does not relate to the individual or personal life of Enrile. The mini-series, if it was to be historical, would necessarily refer to the role played by Enrile during that specific point in Philippine history. The extent of intrusion upon his life would be, according to the Court, "such intrusion as is reasonably necessary to keep that film a truthful historical account." The Court quoted Professors Prosser's and Keeton's classic definition of a public figure:

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[86] G.R. No. 82380, Apr. 29, 1988.

[87] *Id.*

> Such public figures were held to have lost, to some extent at least, their right of privacy. Three reasons were given, more or less indiscriminately, in the decisions that they had sought publicity and consented to it, and so could not complain when they received it; that their personalities and their affairs had already become public, and could no longer be regarded as their own private business; and that the press had a privilege, under the Constitution, to inform the public about those who have become legitimate matters of public interest. On one or another of these grounds, and sometimes all, it was held that there was no liability when they were given additional publicity, as to matters legitimately within the scope of the public interest they had aroused.[88]

As a principal actor in the change of government, Enrile is considered a public figure and was properly included in the mini-series as one of the key players of the People Power Revolution.

The Court drew a distinction between its ruling in this case and *Lagunzad v. Vda. de Gonzales*.[89] The latter case involved a suit to enforce a licensing agreement between a motion picture producer (the licensee) and the heirs of the deceased Moises Padilla (licensee). The licensee was given the right to produce a movie portraying the life of Padilla, a mayoralty candidate for whose murder Governor Rafael Lacson and his men were tried and convicted. After producing and exhibiting the movie, the producer refused to pay the royalties under the agreement, arguing that the consideration for it was null and void, that the episodes in the life of Padilla were matters of public knowledge and occurred at about the same time that the deceased became a public figure, and that the heirs did not have any property right over his life. The Court rejected this argument, ratiocinating that being a public figure does not *ipso facto* automatically destroy a person's right to privacy, nor does it extend to a fictional or novelized representation of a person. In the said case, the petitioner admitted that he included a little romance in the film although it exerted efforts to present a true-to-life story of the said public figure. In addressing the freedom of speech and of the press claimed by petitioner, the Court used the "balancing-of-interests" test and upheld the agreement after consideration. It held that the limit of freedom of expression was breached when it touched upon matters of essentially private concern.

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[88] *Id.*

[89] G.R. No. 32066, Aug. 6, 1979.

One key difference in *Ayer* and *Lagunzad* was that in the former, the depiction of Enrile would be as much as possible faithful to the events that transpired during the EDSA Revolution, while in the latter, a hint of romance was injected into the plot, which was well beyond the accurate depiction of the life of Padilla. Although the Court did not mainly discuss this inclusion of romance into the plot, it must be stressed in any case that to decide such cases based on the sensationalizing or a more creative approach in the depiction of the public figure is a thin line that already goes into the form of depiction. Thus, in *Ayer*, the Court held that same limit on freedom of expression was not breached and the film did not constitute an unlawful intrusion upon Enrile's right to privacy. What makes *Lagunzad* even more interesting is how the Court implied that a public figure's private life, or at least the fictionalized or novelized aspect thereof, can be considered a property right, thereby excluding it from the coverage of the public figure doctrine. It is the view of the authors that as long as the depiction relates to the public conduct of of the individual, the manner of depiction must give way to the public interest issue that the individual was involved in, applying *Rosenbloom*. The conservative standard of excluding the depiction or a portion thereof simply by virtue of adding a novel or mainstream element to the depiction will curtail the broad public interest test laid out in *Rosenbloom*.

What is common in both cases, nonetheless, is that the right to privacy of persons cannot be invoked in matters of legitimate public concern, in which case the Court will accord respect to freedom of speech and of the press. The public interest aspect transforms such individuals into public figures with a restricted scope of privacy rights. This same line of reasoning is seen in recent cases, where the right to privacy of the public figure was discussed vis-à-vis the claim to freedom of speech and of expression by the media.

Thus far, the Court has not made an express declaration that the right to privacy relating to a public figure's private affairs will be accorded respect. It can be implied, however, in *Lagunzad* that private affairs could be protected, if the novelized presentation of a public figure's life has been held to be included in the right to privacy.

Despite the inclination to rely on the *Rosenbloom* formulation, the Supreme Court's ruling in *Yuchengco v. The Manila Chronicle Publishing Corporation*[90] seems to be inspired by *Gertz*. Here, the plaintiff, Alfonso T.

[90] G.R. No. 184315, Nov. 25, 2009.

Yuchengco, alleged that the Manila Chronicle published a series of defamatory articles against him, alleging that he was a "Marcos crony." The respondent's defense was that the articles were comments on matters of legitimate public interest and that they were within the bounds of constitutionally guaranteed freedom of speech. The Court found that the elements of libel existed. The defense that Yuchengco was a public figure was unavailing, as he did not thrust himself onto the forefront of particular public controversies. Notably, this case is akin to *Gertz*, where Gertz was not held to be a public figure because he did not acquire a level of general fame or notoriety within the community.

The public figure doctrine was likewise raised as a defense in a relatively recent case[91] involving a series of published articles imputing graft and corruption on the aggrieved party. The Court held that there was actual malice in the publication of articles against this Bureau of Customs official. The Court cited *Borjal* in its disquisition:

> . . . While Borjal places fair commentaries within the scope of qualified privileged communication, the mere fact that the subject of the article is a public figure or a matter of public interest does not automatically exclude the author from liability. Borjal allows that for a discreditable imputation to a public official to be actionable, it must be a false allegation of fact or a comment based on a false supposition. As previously mentioned, the trial court found that the allegations against Atty. So were false and that Tulfo did not exert effort to verify the information before publishing his articles.[92]

The Court held that Tulfo published unsubstantiated acts on the public official, which cannot be countenanced as being privileged simply because the subject was a public official. It cautioned journalists against similar acts, since "journalists still bear the burden of writing responsibly when practicing their profession, even when writing about public figures on matters of public interest."

In the list of cases decided by the Supreme Court where the public figure doctrine was often used as a defense by the accused in defamation cases filed by public officials, one defamation case filed by a celebrity stands out. The case of *Fermin v. People*,[93] like most cases involving the public figure doctrine,

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[91] Tulfo v. People, G.R. No. 161032, Sep. 16, 2008.

[92] *Id.*

[93] G.R. No. 157643, Mar. 28, 2008.

arose from a defamation suit filed by Annabelle Rama Gutierrez. The accused Cristinelli Fermin published on her gossip column in a tabloid certain accusations imputing the crimes of malversation and *estafa* against the private complainant. Fermin called the private complainant a "wastrel" and a "fugitive from justice," among other things, in her gossip column. According to the private complainant, the article exceeded the bounds of fair comment. The accused, on the other hand, claimed the constitutional guarantee of freedom of speech and of the press, as well as the absence of malice. The Court upheld the conviction for libel of the accused, saying that the acts of the accused reeked of malice.

> While complainants are considered public figures for being personalities in the entertainment business, media people, including gossip and intrigue writers and commentators such as petitioner, do not have the unbridled license to malign their honor and dignity by indiscriminately airing fabricated and malicious comments, whether in broadcast media or in print, about their personal lives.[94]

Similar to US jurisprudence on the matter, for a libel suit filed by a celebrity to prosper in the Philippines, actual malice—an important consideration in *New York Times*—must first be proven by the complainant. Equally important is the express recognition that the public figure doctrine does not always tilt in favor of the press, as in *Galella* and *Fermin*. Interestingly, in *Fermin*, the Court also mentioned that personalities in the entertainment business cannot be maligned by malicious comments about their personal lives in gossip and intrigue columns—a tacit recognition that celebrities' personal lives are constantly the subject of such columns, which was also implicitly acknowledged in *Galella*.

C. Conclusion from the Survey of American and Philippine Jurisprudence

It can be gleaned from the foregoing cases that the Court usually resolved the issue of liability in a libel suit in two stages: 1) by determining whether the individual is a public official or public figure, and 2) proceeding from the first question, whether the questioned statements relate to the professional affairs ("official conduct" and those that are necessarily implied from this duty) of such persons.

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[94] *Id.*

In deciding the first issue, *Gertz* is instructive: the *Gertz* Court made the limited-purpose/all-purpose public figure distinction. The limited-purpose public figure renders affairs which are reasonably related to the public interest involved as the only matter subject to the "actual malice" standard of *New York Times*; it does not include matters which go beyond this threshold. As a hypothetical example, the City Commissioner in *New York Times* can only be the subject of the actual malice standard if the acts pertained to his official conduct, but if it pertained, say, to his family or sex life, then this is not anymore covered by it. In effect, he can only be considered as a public figure for the limited purpose of his official conduct.

The converse of the limited-purpose public figure is the all-purpose public figure. However, the boundaries of what constitutes an all-purpose public figure remains a matter of debate,[95] and lacks consensus. The general notion is that these individuals are subject to public scrutiny in most aspects of their lives, thereby totally obliterating the distinction between the public and the private. This also presumes that the level of protection accorded them is minimal, if not altogether rare.

The limited-purpose/all-purpose public figure dichotomy enunciated in *Gertz* seems to reap blurrier and absurd results. True enough, in the US alone, Johnny Carson[96] and Clint Eastwood[97] have been considered to be all-purpose public figures, even if they can arguably be considered as limited-purpose public figures with respect to the specific roles in society or the specific issues in which they are involved, such as Eastwood.[98] All-purpose public figures are described thus:

> They are recognized by substantial segments of the mass audience. . . . They include the stars of stage and screen, the great athletes of our time, the prize winners, the creators of our fads and fashions, the great corporations, and the movers and shakers.[99]

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[95] Mitchell, *supra* note 71, at 571-572.

[96] Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976).

[97] Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1250-51 (9th Cir. 1997).

[98] Mitchell, *supra* note 71 at 578.

[99] DONALD GILLMOR ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 58 (1996).

This definition seems to include all celebrities, leading to the conclusion that such class of persons cannot avail of any kind of privacy protection.

Interestingly, the limited-purpose/all-purpose public figure distinction has not been adopted in Philippine case law thus far. However, the metes and bounds of such a distinction could have a more dynamic application in this jurisdiction, considering the amount of Filipino celebrities who are simultaneously politicians or government officials. Consequently, the public interest in both their private and public affairs overlap more strongly. Former President Joseph Estrada, Senators Bong Revilla and Lito Lapid, Governor Vilma Santos, and Congressman Lucy Torres-Gomez are some examples of personalities who are both public figures and public officials.

At this juncture, it must be stressed that the limited-purpose/all-purpose dichotomy is irrelevant in deciding the first issue with respect to celebrities because there is no need to decide whether celebrities are to be considered as public figures in the first place, which *Galella* and *Fermin* already illustrated. A distinct characteristic of celebrities as public figures is that a substantial part of their private affairs is part and parcel of their status as celebrities. As mentioned, the personal affairs of celebrities contributes as much to their fame as do their professional pursuits, whether starring in a film or modeling in Philippine Fashion Week. Thus, the issue of whether or not the person possesses "general fame or notoriety" need not even be discussed. On the contrary, courts would readily concede their status as a public figure/celebrity. In other words, there is no need to vacillate between the *Rosenbloom* and *Gertz* doctrines because the status of celebrities as public figures is already established. The distinction between the limited-purpose public figure and an all-purpose public figure is entirely irrelevant in this context.

This brings forth the assertion that in deciding libel suits or privacy cases relating to celebrities, the starting point for the resolution of the issue is necessarily different. It goes straight to the determination of whether or not the particular circumstances warrant protection under the right to privacy. As mentioned in the previous paragraph, a substantial part of the private affairs of celebrities is still entitled to protection. The question now is how to determine the scope, i.e., what constitutes the "substantial part" to be protected. In other words, although it is not necessary to use the limited-purpose/all-purpose public figure standard for purposes of determining whether celebrities are public figures or not, the limited-purpose/all-purpose distinction is still

important in analyzing the scope of privacy protection accorded to them. Viewed in this light, are celebrities considered to be limited-purpose or all-purpose public figures?

At the outset, it must be emphasized that, although the personal lives of celebrities are usually exposed to the public more than any other kind of public figure or public official, the right to privacy of celebrities is still recognized. Even Prosser admits this in his article, citing Spiegel: "It is clear, however, that the public figure loses his right of privacy only to a limited extent",[100] and that "the privilege of reporting news and matters of public interest is likewise limited."[101] Celebrities cannot be deemed to be all-purpose public figures, who would otherwise expose all aspects of their lives to public scrutiny, leaving their right to privacy as mere lip service. Mitchell goes so far to say that to classify celebrities as all-purpose public figures is "unfair."[102]

The limited-purpose categorization of celebrities again proceeds to the scope of protection accorded by the right to privacy. The answer can be found if the question is properly framed. Intrusions upon personal space as well as unauthorized disclosures are commonly viewed in what-formulations, that is, what affairs should be considered private, and therefore, protected. Although this can serve as the standard in determining the scope of privacy right of private individuals or even public officials like Enrile in *Ayer*, the same what-formulation cannot be applied to celebrities precisely because the latter's personal affairs are intricately connected to their professional fame. For instance, nudity is often regarded as a private fact; when it comes to movie stars or models, however, it comes with the job. Whereas nudity as content can properly be regarded as protected by the right to privacy with respect to a private individual, the nature of nudity acquires a different element with respect to the celebrity. Thus, the issue of what can properly be considered as private boils down to what the celebrity *allows* to be excluded from his private affairs.

Moreover, content analysis in determining the scope of privacy protection will lead to a lack of consistency in deciding what matters can be properly regarded as "private." The Courts will have a tendency to rule on a case-by-case basis, which does not help at all in providing a guide for

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[100] Prosser, *supra* note 12, at 415, *citing* Irwin Spiegel, *Public Celebrity v. Scandal Magazine-The Celebrity's Right to Privacy,* 30 SO. CAL. L. REV. 280 (1957).

[101] Prosser, *supra* note 12.

[102] Mitchell, *supra* note 71, at 559.

predicting how future litigation will turn out, thereby undermining the principle of *stare decisis*. The authors propose that a means-based analysis, which relies on the existence of express or implied consent, should be the proper standard in deciding whethere there is an intrusion upon the personal space of the celebrity, who, *in the context of the scope of privacy protection*, must be treated as a limited-purpose public figure.

Perfect illustrations of the means-based analysis are *Galella* and *Fermin*. Here, Onassis's and Rama's private lives were not construed by the Court as being outside the scope of a proper subject of a news item. In fact, the Court implicitly recognized this, with the only qualification that such newsgathering must be done within reasonable means. In other words, the private affairs of celebrities are already considered to be newsworthy. However, this does not give the press blanket freedom to obtain private facts about celebrities in an overly intrusive manner. The reason why the Court ruled against Galella and Fermin was because the means involved were intrusive (in the *Galella* case) or the statements issued were malicious (thereby meeting the actual malice standard set in *New York Times*), not because they involved the personal lives of these public figures/celebrities. In other words, the extent of such "limited purpose," in the context of determining whether a privacy violation has been committed, must not depend on the content of the fact disclosed; instead, the "limited purpose" must be tested against the means of obtaining the fact as well as the surrounding circumstances–the context–in facilitating the access to such fact.

Finally, the reconnaissance of existing jurisprudence on the public figure doctrine is relevant in determining the applicability of the *New York Times* standard. The requirement of actual malice is still good law; celebrities must still prove that publication of certain statements (whether true or not) must meet this threshold before the defendant becomes liable. Since the onset of social media has effectively broadened the definition of "publication," the question now is whether the celebrity involved must prove actual malice when a private individual (in the sense that he is not a member of the press) uploads an embarrassing post, photo, or video of a celebrity without the latter's consent, as exemplified by Halili's and Ramos's experience. If the concept of "publication" is expanded, necessarily, upon a cursory scrutiny, the coverage of actual malice must extend beyond the members of the press. Or does it?

D. The Limitations of the Public Figure Doctrine in Today's Context

As mentioned in Part I, celebrities are *sui generis* since their fame and success in the industry is not simply a result of hard work, but the result of an aggregate set of factors. In other words, the activity in their Twitter, Instagram, and Facebook accounts, among others, are effective publicity tools that may contribute as much to their fame as their latest box office hit or chart-topping single. Because of their unique status, the test laid down in *Ayer*[103] cannot properly apply to celebrities. To recall, *Ayer* imposed a test that as long as the disclosure or the depiction pertained to acts of official character or was related to his duties as a government official, then the right to privacy cannot be invoked. However, in the case of celebrities, the private is mixed with their public affairs; the private is as sought after as their public lives, and so one cannot just blindly apply the official conduct test of *Ayer* to the experience of celebrities.

It is easy to draw the line in determining the scope of protection with respect to public officials using the *Ayer* doctrine. However, the same cannot be said for the *sui generis* status of celebrities. Their "official acts" pertain not only to their latest movie projects, roles in television shows, or advertisements—avenues that provide entertainment to the public—but also to the intimate details of their personal lives. To reiterate, it is not clear where the public sphere of a celebrity's life ends and where his personal and private details of his life begins—or if such a line can even drawn in the first place.

Another angle that further complicates the public figure doctrine is the intrusion on a celebrity's right on more than one level. The violation of a public figure's right to privacy traditionally involves the publication of a libelous or defamatory article in a newspaper of general circulation. Today, the violation has been transformed on two levels: (a) the intrusion on a celebrity's life by one or more people, and (b) the expansion of public disclosure. The public disclosure can now be done in more easily accessible platforms, such as social networking sites like Twitter and Facebook, and video-streaming sites like YouTube. In previous rulings by the Supreme Court, the freedom of speech was invoked by the press and the media, and not by Internet users. In a

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[103] We use this test since it constitutes the doctrinal standard with respect to the Philippine public figure doctrine.

case,[104] the Court even cautioned journalists against irresponsible journalism. Internet users are by no means journalists bound by a professional code of ethics, nor do they fall under the same category of professionals who have invoked the same right to freedom of expression as a defense against public figures.

Aside from the violation of the right to privacy in several levels, there is also an increase in the number of violators. The traditional violator is the press and the media. Today, there can be as many as three violators: (a) the intruder upon the person's solitude or seclusion in a more or less private setting, (b) the person responsible for making the public disclosure (e.g., the "uploader" of the video file in YouTube), and (c) the public who indiscriminately spreads the same (e.g., a Facebook user who shares a post or a video for the consumption of his network of friends).

In the traditional model, prosecuting the violation of the right to privacy under defamation or label can easily be done because the identity of the journalist is also easy to discover. The same cannot be said in how privacy violations with respect to celebrities are committed nowadays, as identifying all the violators is a futile and simply impossible exercise when identity can easily be hidden in cyberspace. For example, it is not enough that the celebrity identifies the first violator, he must then proceed to identify the person who made the public disclosure—a person who often hides behind an untraceable username or avatar, unlike a journalist whose authorship of the article is expressly stated, or even if using a pseudonym, can likewise be discovered without difficulty. The quandary the celebrity finds himself in brings to the fore the inadequacy of the public figure doctrine as it has been developed so far both by US and Philippine jurisprudence.

Moreover, the self-help doctrine, which was also discussed in *Gertz* is reason enough to lessen the protection of the right to privacy of the public figure, according to Prosser. It is correct to say that celebrities enjoy the same access to different forms of media until now, considering the many gossip shows that they can guest in and the press conferences that will surely be attended by the media. However, this concept of self-help has, in some instances, been more self-defeating than curative of their reputation. In some cases, the more actively celebrities seek media in order to clear their name and

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[104] Fermin, *supra* note 93.

reveal the truth, the more damaged their careers become. The truth does not even matter in some cases; the mere fact that they have been cast in a bad light is sometimes enough to irretrievably damage their career.

Notably absent in existing Philippine jurisprudence is a classification as to the different kinds of celebrities as well as the distinction of the nuances of the various personalities included within the definition of a celebrity. This is necessary in light of the influx of celebrity-politicians in the Philippines.

The limitations of the public figure doctrine as applied to celebrities are easily exposed in light of new forms of violations of the right to privacy, compounded by the very nature of the celebrity as a nuanced type of public figure; simply reiterating the previous rulings decided as far back as 1918 would no longer suffice. The need to recalibrate the public figure doctrine is pressing, if celebrities have any hope of vindicating their right.

IV. THE RIGHT TO PRIVACY OF CELEBRITIES

A. Who is protected?

A survey of jurisprudence would show that the Court has not explained at length who a celebrity is, often mentioning that it is included in the definition of a public figure, a person who "by his accomplishments, fame, mode of living, or by adopting a particular profession or calling gives the public a legitimate interest in his doing, his affairs, and his character."[105] Prosser calls such person a celebrity—one who by his own voluntary efforts has succeeded in placing himself in the public eye. However, the celebrity that is referred to in this paper requires a narrower definition—a definition that will concretely differentiate it from public figures—in order to clearly define its right to privacy.

In light of the need to strictly define the boundaries of who can properly be called a celebrity, *Fermin* gives an unsubstantiated, and perhaps inadvertent, definition, by referring to Rama, an actress, a well-known manager in the show business industry, and the mother of several famous actors, as one of the "personalities in the entertainment industry."[106]

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[105] Prosser, *supra* note 12, at 410.

[106] Fermin, *supra* note 93.

The US Supreme Court,[107] on the other hand, said that a celebrity should be interpreted to encompass more than traditional categories of professional athletes, comedians, actors and actresses, and other entertainers. These are prominent persons, who, far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances in different forms of media. These are people whose status and name may be used for commercial benefit.

In defining what a celebrity is, Gabler reflected on the famous definition by cultural historian Daniel Boorstin, who described one as "a person who is known for his well-knownness."[108] Gabler recognized the importance of publicity or being well-known for a person to be considered a celebrity. However, he criticized this definition to the extent that not all well-known people, like Queen Elizabeth or Bill Clinton, would be considered celebrities. He then proceeds to define what would make a well-known person a celebrity:

> *So what turns a famous person into a celebrity? The grand answer, on empirical evidence, seems to be narrative.* The main reason we want to read about certain individuals in the supermarket tabloids or in People or Vanity Fair, or we want to watch television reports about them on "Entertainment Tonight" or "Access Hollywood" is that *we are interested in their stories*: In Matthew Perry's drug addiction, in Tom Cruise's and Nicole Kidman's divorce, in the serial romances of Russell Crowe, in Jesse Jackson's love child, in the Hillary/Bill relationship.[109] (Emphasis supplied)

Gabler also addresses the connection that exists between different forms of media and the celebrity—a focal point that requires discussion, as most suits by celebrities were filed against the same people who are responsible for bolstering their success.

> It is pliant, novel, authentic rather than imagined, by definition plausible and suspenseful since it is constantly unwinding. In effect,

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[107] Martin Luther King Jr. Center for Social Change v. American Heritage Products Inc., 694 F.2d 674 (11th Cir 1983).

[108] DANIEL BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA (1992).

[109] Neal Gabler, *Toward a New Definition of Celebrity* (Contribution as Senior Fellow, Norman Lear Center, 2001).

> celebrity is the ultimate in so-called reality programming. More, it is adaptable to other media the way, say, a novel might be adapted for the screen, creating unparalleled opportunities for synergy. Celebrity provides magazines, television, newspapers, books and increasingly the Internet with stories and stars; these media in turn provide celebrity, having no screen of its own, with a veritable multiplex to reach the public.[110]

A celebrity is likewise someone who "through their talent, charm, or charisma, play a role in setting the cultural agenda, and often, whether intended or not, plays an indirect but sometimes compelling role in public policymaking."[111]

While there's no one fixed formula that holistically defines what a celebrity is, he is someone who possesses more or less the same characteristics. At this junction, it bears stressing that some of these qualities are: (1) their presence in the entertainment industry, (2) the use of their identities in a way that is direct in nature and is commercially motivated, (3) the capacity to generate interest in their official projects such as movies, music albums, and endorsements and in the sphere of their lives, and (4) their presence in different forms of media, including television shows like *The Buzz*, gossip columns—both in tabloids and major broadsheets—and various websites in the Internet like Spot.ph. What remains to be answered is the extent of legitimate public interest in their lives, without unduly interfering with their right to privacy.

With the foregoing characteristics of a celebrity, approximating whether or not one is a Philippine celebrity can be done with relative accuracy.

Category of Celebrity	**Example in the Philippine Entertainment Business**
Actors and actresses appearing in television shows and movies	John Lloyd Cruz
Celebrity endorses of commercial products	Kris Aquino
Children of celebrity actors who also have endorsements	Maverick Legaspi and Cassandra Legaspi (Children of Carmina Villaroel-Legaspi and Zoren

[110] *Id.*

[111] DONALD GILLMOR, POWER PUBLICITY AND THE ABUSE OF LIBEL LAW 38 (1992).

	Legaspi)
Models	Georgina Wilson
TV show hosts	Willie Revillame
Collegiate basketball players who are also product endorsers	Chris Tiu
Contestants in talent shows streamed in national television, like Pinoy Big Brother or The X-Factor Philippines	Myrtle Sarrosa
Comedians and entertainers	Jose Marie "Vice Ganda" Borjal
Actors who are also politicians	Vilma Santos
Beauty pageant contestants	Janine Tugonon
Fashion icons	Liz Uy
Fashion designers	Rajo Laurel
Directors	Joyce Bernal
Professional Athletes	The Azkals
Broadcast Journalists	Korina Sanchez
Singers	Sarah Geronimo

Table 1. Categories of Celebrities

Although celebrities have a defined set of characteristics unique to them, they remain public figures. As such, they are still entitled to the protection of their right to privacy, albeit restricted. What remains to be answered is the extent of the legitimate public interest in their lives, which also indicates the amount of privacy protection they deserve.

B. What is the Privacy Violation?

Whether or not the celebrity is entitled to privacy has been the subject of debate, with one side rejecting the existence of such right considering that public and private matters of a celebrity's life are exposed to the public.[112] However, the right has been expressly recognized, with Warren and Brandeis

[112] Time, Inc. v. Hill, 385 U.S. 401 (1967) (Douglas, J., concurring).

stating that even personages who enjoy the limelight are still entitled to keep certain areas of their life away from public scrutiny and exposure.[113]

The factual circumstances in the Halili, Ramos, and Barretto scandals involve a two-stage process: (1) the act of obtaining the private fact, and (2) the act of uploading such private fact. This two-stage process falls under the first two torts propounded by Prosser, who stated that privacy violations do not simply comprise one tort violation, "but a complex of four."[114] These four torts are the following:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff
3. Publicity that places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

For purposes of determining if a privacy violation has been committed and to what extent, if applicable, with respect to the experience of Halili, Ramos, and Barretto, the framework used will be borrowed from Prosser's first two torts, that is, intrusion upon the plaintiff's seclusion or into his private affairs, and public disclosure of embarrassing private facts about the plaintiff. Particularly, the act of obtaining the information will be analyzed from the perspective of the first tort, intrusion upon the celebrity's private affairs, while the act of uploading the accessed fact online will be scrutinized from the point of view of a public disclosure tort.

Though the authors submit that the existing framework created by Prosser applies, there is nevertheless a modification on how to determine the applicability of these two torts. For one, the intrusion upon private affairs must be subject to a means-based analysis as introduced in Part III. Second, with respect to public disclosures of embarrassing private facts, the concept of "disclosure" must be tested against the expanded definition of "publication."

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[113] Warren & Brandeis, *supra* note 1, at 216.

[114] Prosser, *supra* note 12, at 389. This was later adopted in the Restatement (Second) of Torts §§ 652A-652E (1977).

1. Intrusion into Private Affairs

The basic concept of intrusion particularly refers to physical intrusion, that is, intrusions into physical space. This may properly be illustrated in the case of a journalist or a paparazzo trespassing into the home of the celebrity in order to gather news or take pictures. Such violation is related to violating property rights, that of trespass, as discussed in *The Right to Privacy*. However, Warren and Brandeis already disposed of the issue by saying that the infliction of mental distress on the plaintiff attributed to the same behavior must form the basis of a separate cause of action (a separate right) altogether. Prosser affirms this claim. He also stated that such physical intrusion has later on extended to eavesdropping and other forms of prying.[115]

Prosser propounded that in order to obtain relief from the intrusion into private affairs, such intrusion must be offensive or objectionable to a reasonable man, and the object of the intrusion must in the first place be entitled to privacy.[116] An intrusion is deemed offensive and objectionable to a reasonable man when a person peers into the windows of a home or an unauthorized person pries into the bank account of another. On the other hand, the following objects are not entitled to privacy protection: when a person's pre-trial testimony is being recorded, or when there is inspection and public disclosure of corporate records which the law requires to be made available. The interest protected in these cases is a mental one, "used to fill the gaps left by trespass, intentional infliction of mental distress, nuisance, and whatever remedies there may be for the invasion of constitutional rights."[117]

In distinguishing intrusion from public disclosure, publication in the former is not a necessary requirement. It is not dependent on any publicity given to the person whose interest or affairs are invaded but consists solely of an intentional interference with his interest in solitude or seclusion.[118] However, proof of dissemination of the intrusion may aggravate or enhance plaintiff's collectible damages. Moreover, proceeding from Prosser's explanation, the measure of the relief is based on how offensive and objectionable the intrusion upon a thing, which in the first place must be entitled to privacy, was. In

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[115] *Id.* at 390.
[116] *Id.* at 391.
[117] *Id.* at 382.
[118] DAVID ELDER, THE LAW OF PRIVACY 32-33 (1991).

providing relief, the goal is to protect the mental damage caused by the intrusion.

It must be borne in mind that the examples of intrusions cited by Prosser are still rooted in physical space. It does not contemplate a situation where a photographer takes pictures from a block away on top of a building, using only a high-powered lens to spot the celebrity. It also does not contemplate a situation where a man surreptitiously steals the hard drive of a celebrity by hacking into the latter's account, thereby retrieving all her nude pictures. The sophistication of technology nowadays does not often call for spatial intrusions.

More importantly, Prosser's two elements—the test of offensiveness as well as that the object of intrusion, in other words, the fact acquired, must be considered private—necessarily gives the impression that content analysis is required in order to determine whether a given fact is private or not, and to determine what intrusions are considered as offensive or objectionable.

At this point, it must be noted that there have been numerous attempts to define "privacy." Westin defines it as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[119]

Stylianou defines it, thus:

> [P]rivacy is inherently "a broad, abstract and ambiguous concept" (Griswold v. Connecticut (1965), Justice Black's dissent, p. 509) Under that broad understanding privacy would include all activity and all information that the subject has a reasonable expectation to keep to himself, the expectation to be free from unwarranted governmental or private intrusion, the option not to become the object of attention, the right to remain anonymous, and the ability to block physical access to himself.[120]

Meanwhile, Schoeman describes its historical and contextual significance, *to wit*:

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[119] ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967).

[120] Stylianou, *supra* note 20 at 47, *citing* R. Gavison, *Privacy and the Limits of Law,* 89 YALE L.J. 428-436 (1980); J. Frombolz, *The European Union Data Privacy Directive,* 15 BERKELEY TECH. L.J. 463-464 (2000).

> The etymology of "privacy" provides insight into its connotations in one historical context. "Private," the *Oxford English Dictionary* informs us, derives from the Latin *privatus* meaning "withdrawn from public life" . . . and stems from the verb, *privare* meaning "to deprive" or "bereave." In contrast, the word "public" stems from *pubes* referring to adult males, suggesting the locus of decision making.[121]

The idea of demarcating what properly constitutes the public and the private has been the normative approach in resolving privacy violations for the past century.[122] However, as the cases of celebrities show, what is normally considered to be excluded from the public sphere is necessarily included to bolster their fame. This creates a dissonance between what should be regularly deemed as "private." Attempting to formulate the concept of the privacy of celebrities via a set of certain factual scenarios inevitably results in looking into the content of the fact accessed.

Tennis points out that it has increasingly become difficult to demarcate what kind of personal information is protected by the right to privacy and what is not; "the separation of public and private is an insufficiently nuanced view of privacy in a networked world."[123] Thus, content analysis will ultimately be decided on a case-by-case basis, for to delineate black-and-white rules will most certainly lead to absurd consequences. For the most part, however, "we have difficulty sorting out what belongs to us and what belongs to the societies of which we are part."[124] This is even truer in the case of celebrities, where aspects of their private and professional lives merge in the public sphere, such that one cannot simply resort to content analysis to determine if such acquired or accessed fact is indeed "private." Privacy on aspects of private life, protect an individual from "social overreaching" by other people,[125] which celebrities are usually subjected to.

It then becomes obvious that something other than the blurry category of content must be looked into. The authors assert the non-

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[121] FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 116 (Cambridge Univ. Press, 1992).

[122] Tennis, *supra* note 20, at 2.

[123] *Id.* at 8, 11.

[124] SCHOEMAN, *supra* note 121, at 22.

[125] *Id.* at 107.

applicability of the second element of Prosser's first tort in the case of celebrities in particular, where the dichotomy between public and private is separated by a very fine line.

There is also a need to clarify the factual context on which Prosser's concept of intrusion upon private affairs operates. Intrusion here must refer to the act of violating personal space, rather than physical space. Personal space does not refer to physical parameters and specific metes and bounds, but pertain to that zone which the plaintiff treats as a matter or affair that is not for public exposure. In several examples that Prosser cites, there may have been prying into or an interference of physical space, but this must be construed only as a necessary consequence of the intrusion upon an individual's personal space. Where trespassory intrusions protect a person's physical space, the interest protected in non-trespassory intrusions is the psychic integrity or "psychological solitude," which can be broadly applied in a wide variety of factual scenarios.[126]

What constitutes that personal space cannot be determined by setting rules on what content or affairs should be deemed "private," again resorting to content analysis, but by knowing what the plaintiff *allows* to be viewed and/or accessed by others, and what he or she alone can view or access. Wacks explains it, thus:

> Is something 'personal' by virtue simply of the claim by an individual that it is so, or are certain matters intrinsically/ personal? The assertion, in other words, that something is 'personal' may be norm-dependent or norm-invoking . . . . These norms are clearly culture- relative as well as fluctuating.
>
> 'Privateness' is not an attribute of the information itself . . . What changes is the extent to which [the person] is prepared to permit the information to become known or to be used.[127]

In other words, with respect to celebrities in particular, further compounded by the developments of the 21st century where intrusions have taken a form beyond the trespass of physical boundaries, a new standard must be used in order to provide relief to the celebrity's right to privacy violated by the intrusion. Rather than focusing on the content of the fact obtained, the

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[126] ELDER, *supra* note 118, at 43.

[127] RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 12-13 (1989).

dividing line between private and public is more properly delineated if one considers the means and the context under which such fact was obtained.

Assessing the means as to how the private fact was obtained is a more reasonable standard for protecting the celebrity's personal space, given that celebrities themselves do not object to certain aspects of their personal lives being posted online (in fact, they also participate in this habit). The best way to truly protect the celebrity's right to privacy as regards the private details of his life is to determine the existence of consent or waiver. If consent is not obtained or is not waived, then respect must be accorded to a person's right to privacy.

As introduced in Part III, the means-context standard is material because the content of the fact accessed and eventually disclosed never changes. It is only the *nature* of such fact which spells out whether such fact should be protected by the right to privacy. As a hypothetical scenario, when a celebrity consents to the videotaping of her engaging in sexual intercourse as well as its subsequent upload, the consent given does not change the nature of the content (act of sexual intercourse). However, it makes the accessed fact legally available to and viewable by the public, because the means by which such fact was accessed does not make it anymore private. In this light, any particular act is not *per se* public or private (for this would only lead to a blurry case-by-case formulation which is neither helpful nor instructive in predicting the effect of privacy cases); only the means and the context by which the fact was obtained may make it so.

Applying this formulation, the photographer taking nude pictures of a celebrity in her bathroom, for example, from a block away, cannot use the defense that he did not intrude into the hotel room of the celebrity or that he took the photo from a block away. His location at the time of taking the photograph is inconsequential; this defense in fact assumes that the right to privacy is still hinged on the concept of trespass. On the contrary, when a celebrity consents, knowing fully well that photographs of her will be taken, or when she impliedly assents thereto such as when she opens her window knowing fully well that paparazzi have been tailing her, the fact of nudity ceases to become a private fact, and she cannot later argue that she never gave such consent and that her personal space was intruded upon. If, on the other hand, a video of a sexual act between the celebrity and another person was taken by the latter without the knowledge of the former, then the intrusion upon the person's personal space is definite. While the celebrity may have

consented to the sexual act, which precludes any claim of trespass or violation of spatial privacy, the celebrity's personal space was nonetheless violated. In this case, the celebrity's personal space refers to the expectation that such an act would not be recorded on video.

All individuals impliedly consent to at least some intrusions upon privacy as an inevitable consequence of living in a society.[128] However, consent is not always apparent; there may be waiver in certain instances. This is where the context comes in. If the claim of intrusion occurs in a context where the surrounding circumstances show that there is a waiver of the right to privacy, then the claim will not prosper. Implied consent can be gleaned from the celebrity's own actions. It may be further argued that implied consent is found in custom and usage or "consent by implication."[129] A celebrity, whose status is known to many, cannot expect to walk right in a public area and expect people not to notice. Photos of him will be taken, and a celebrity cannot have a reasonable expectation of privacy in this scenario. As an illustration, a celebrity, knowing that members of the press are surrounding her house, cannot expect to be protected by her right to privacy by taking a shower with the windows open or swimming in her outdoor pool naked.

The means-context standard is the ideal way to protect a celebrity's right to privacy, which extends not only to his immediate physical space, but more appropriately, to his personal space. To be sure, no special treatment will be given to celebrities, as their consent, taken together with the context, will be considered. This standard also respects the distinction elaborated by Prosser: that the intrusion must be offensive and the object must be entitled to privacy in the first place. The celebrity's personal space is the object entitled to privacy, while the means by which the intrusion was done refers to how offensive or objectionable the intrusion was.

2. Public Disclosure of Private Fact

When determining whether or not a privacy violation via this second tort has occurred, it is necessary to consider first if such action would fall under the concept of "publication" or "disclosure" so as to properly constitute it as a public disclosure of private fact.

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[128] ELDER, *supra* note 118, at 69.

[129] *Id.*

"Publication" can be defined as the communication of a private information to a third person, as can be inferred from the Supreme Court ruling in *Alonzo v. Court of Appeals*.[130] The following are examples of traditional publication by the press that have been recognized by the courts: books, magazines, newspapers, journals, periodicals, and pamphlets.[131] Although this formulation is specific to libel cases, the same can also be used particularly in determining privacy violations. It must be observed that this definition is a low standard that can easily be met as long as a third person is shown the private fact; quantity is effectively disregarded for the same conclusion is reached whether the material is shown to one person or a dozen, or a hundred. Such a low standard, in fact, actually exposes uploaders of embarrassing photos or videos of celebrities to a much stricter standard, although of course other elements, such as actual malice, no consent in obtaining the fact, fact is private, etc., are proven by the plaintiff-celebrity. Another, yet quite similar, definition of "publication" proffered by Schoeman is that it pertains to "*dissemination plus something else*. This something else is the *conversion of a matter that is personal* into a matter that is open or acknowledged *as a public fact*."[132] (Emphasis supplied) Incidentally, conformably to Schoeman's theory, the online user who "shares" or "retweets" the private fact disclosed relating to the celebrity *cannot* be held liable, because when he shared or retweeted the information, such fact was already transformed into a public fact by virtue of its upload in the public domain. Thus, what is material is only the *first* upload or disclosure in cyberspace.

On the other hand, "disclosure" is described as an act of communicating a private fact to almost everyone, and explains in detail the different layers of privacy, to wit:

> There are many private realms; disclosures made in some private settings seem consistent with privacy norms, whereas disclosures in other private settings are inconsistent with these same norms. If I say to you, someone I know only casually, out of earshot of anyone else, "You should lose weight," there is a sense in which this is not public communications. *Others in general have no access to this*

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[130] G.R. No. 110088, Feb. 1, 1995. *See also* People v. Atencio, CA-G.R. No. 1135, Dec. 14, 1954.

[131] GERALD FERRERA ET AL., CYBERLAW: TEXT AND CASES 253 (South-Western College Publishing, 2001)

[132] SCHOEMAN, *supra* note 121, at 148.

> *criticism*. This is very different from putting an ad in a personals column indicating my thoughts both to my subject and the rest of the interested world. Alternatively, if I say to my local lodge, whose members are sworn to secrecy, what I think about your shape or romantic habits, this communication should be considered private and not public for our purposes. *What would be public disclosure would typically involve a communicative act normatively open to (nearly) anyone.*[133] (Emphasis supplied)

The simplest definition has been "any communication, made to any person, of facts known to the one who makes such communication but not to the addressee."[134] The "privacy" referred to in such matters of disclosure includes:

> [t]he *individual's ability to pick and choose for himself* the time and circumstance under which, and most importantly, *the extent to which, his attitudes, beliefs, behavior*, and opinion *are to be shared* with or withheld from others. This control by the individual of information about himself is frequently called "disclosural privacy."[135] (Emphasis supplied)

The preceding definition bolsters the means-context (consent) standard in determining whether an uploaded fact is within the scope of protection of the celebrity's right to privacy. Moreover, although "disclosures" can simply be characterized by means of communication to any person (even just one person),[136] the better view, in line with the specific context in which disclosures operate via video/photo/data uploads in cyberspace, is to regard "disclosures" only in instances when the communication is done to the public in general, in line with Schoeman's view, and not simply any communication to a third person.

Such imbrication of privacy levels fully explains the distinct situation of accessing a fact and disclosing it online for public viewing. This, in effect, opens to everyone who has Internet access the private fact about the celebrity. "When you transmit information to third parties, you often surrender practical

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[133] *Id.* at 141.

[134] STIG STRÖMHOLM, RIGHT OF PRIVACY AND RIGHTS OF THE PERSONALITY: A COMPARATIVE SURVEY 121 (1967).

[135] LAW OF PRIVACY RIGHTS IN A TECHNOLOGICAL SOCIETY 13 (Irving J. Sloan ed., Oceana Publications, 1986).

[136] *Id.* at 19.

control of it."[137] What's worse in this specific context is the permanent and continuous character of the damage of this type if not regulated or acted upon by the celebrity. There is no question that the common mode by which privacy violations are committed now (via upload of private facts) falls under Schoeman's concept of "disclosure."

Public disclosure of embarrassing private facts about the plaintiff requires three elements according to Prosser. First, there must first be a disclosure of the private facts that are public in character. Some examples are when the fact is published on a newspaper and when a notice on a window is displayed on the public street. In any case, such publication must be written or printed.[138] A corollary to this requirement of publicity is that the plaintiff must be reasonably identifiable as the subject of the published matter. Some cases have followed the requirement of identification in defamation cases, where the requirement of publicity is met if the publication is capable of being reasonably understood as intended to refer to plaintiff.[139]

A second qualification is that the disclosure must pertain to private facts, not to facts that he leaves open to the public.[140] This includes his presence and his actions in the public, which may well be recorded by photograph and circulated to the public. In some cases, matters of public record will often remove the right to privacy, with exceptions in rare cases, such as official records that are not open to public inspection.[141] That the matter includes facts that are hidden from the public eye as well as the existence of a reasonable expectation of privacy constitute the burden of proof to be borne by the aggrieved party.

The third dimension in this tort is that the matter must be one that would be offensive and objectionable to a reasonable man of ordinary sensibilities.[142] This refers to the character of the private fact, with protection accorded "when the details of sexual relations are spread before the public gaze,

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[137] Tennis, *supra* note 20, at 13.

[138] Prosser, *supra* note 12, at 393.

[139] ELDER, *supra* note 118, at 162.

[140] Prosser, *supra* note 12, at 394.

[141] *Id.* at 396.

[142] *Id., citing* Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Davis v. General Finance and Thrift Corp., 80 Ga. App. 708, 57 S.E.2d 225 (1950); Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 253 P.2d 441 (1953); Samuel v. Curtis Pub. Co., 122 F. Supp. 327 (N.D. Cal. 1954).

or there is highly personal portrayal of his intimate private characteristics or conduct."[143]

Like the two elements in the first tort, that is, intrusion upon personal space, the matter of what should be considered as a private fact as well as what is reasonable and objectionable traditionally call for unstable and subjective requisites. These elements are likewise rooted in content analysis, which, for reasons already explained, fails to accommodate the breadth and creativity of privacy violations that are being committed at present, not to mention the issues of *stare decisis* that it may raise. Both requisites must be qualified by the means-context approach. Instead of simply deciding on a case-by-case basis, a determination of the existence of consent to the disclosure, or a waiver thereof, must be effected, similar to the consent/waiver requirement in intrusions upon personal space.[144]

A means-context standard presumes recognition that the private fact eventually disclosed "belonged" to the person who gave such consent.[145] Like in the first tort, such a standard must be similarly met in instances where consent is not expressly given. Implied consent in this context is possible if there is "a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice" and does not contemplate instances when there is misuse of such fact.[146]

Compared to intrusion, one of the main interests protected here is the individual's reputation—with the same mental distress associated with defamation. This is also the particular type of violation present in most defamation cases, where the public figure sues a journalist on the basis of an allegedly defamatory publication. The public figure often, in suing for damages (although not necessarily in the context of a libel case), may also invoke the right to privacy with respect to the published article. This shows the difference between libel, where reputation is the interest to be protected, and a suit for damages based on a privacy violation, where privacy is protected.[147] "In all

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[143] *Id.* at 397.

[144] ELDER, *supra* note 118, at 189-192.

[145] WACKS, *supra* note 127, at 158.

[146] Hawkins v. Multimedia, Inc., 288 S.C. 569, 344 S.E.2d 145 (1986).

[147] WACKS, *supra* note 127, at 162. However, in US case law, Wacks points out that the distinction between libel and privacy cases has been a fine one, with libel being expanded to cover even privacy violations.

cases, the harm to the reputation must be severe enough so as to lower the esteem of the plaintiff in the community by subjecting the individual to ridicule, contempt or even hatred."[148] It is fair to assume that more than the slight in reputation caused by the disclosure of the embarrassing private fact, the injury to the plaintiff also stems from the expectation that such private fact would not be disclosed in the first place. This latter argument thereby recognizes the injury as being based on his right to privacy *per se*.

Nowadays, the violation of the celebrity's right to privacy is incomplete without a public disclosure of the illegally obtained private fact. This can come in the form of a sex scandal or a public confrontation caught on videotape, then subsequently uploaded on YouTube or other social media site. There is also public disclosure of the same private fact when a Facebook user "shares" the scandalous video or photo or when a Twitter user "retweets" the same on their respective social networks. Schoeman argues that it is not the act of disclosure *per se* that contravenes the right to privacy of the celebrity, but the means by which such information is acquired.[149] If anything, this conforms to the applicability of the means-context approach in determining if there is intrusion upon the personal space of the celebrity.

The elaboration of Prosser on this tort substantially conforms to how the right to privacy of celebrities is violated today. For one, the disclosure happens in a public forum, albeit not in a newspaper. Online media like social networking sites and online news sites are just as public in character as print media, in terms of the reach of their audience and its relative permanence, if not more so. Further, some of the facts disclosed are of private character, and are not of the type open to public view. Lastly, these private facts may possess an objectionable and offensive, even scandalous, character. Accordingly, if the facts fall squarely within the three dimensions discussed by Prosser, it will be hard to disagree that a celebrity should, indeed, be protected from public disclosure regarding a private fact.

A novel factor in the way public disclosures are made nowadays is the liability, if any, of the person who uploaded the video. Whereas journalists and publishing companies were often impleaded before as the respondent/defendant in defamation cases, identifying the person liable now has become a more difficult exercise. As previously mentioned, these people

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[148] FERRERA ET AL., *supra* note 131, at 249.

[149] SCHOEMAN, *supra* note 121, at 147.

hide under the cloak of anonymity and are free to choose usernames that they please. The celebrity likewise has no chance of obtaining relief by impleading the owners of the social networking sites or even the person from whom such private fact was obtained, unlike the traditional model where the celebrity can likewise implead the publishers or can easily pinpoint the involvement of a particular party to the incident.

Another interesting angle is that public disclosures of private facts today happen in successive and interlinked episodes. As the person who originally discloses the public fact is no doubt liable for the violation of the right, the question arises as to whether those, who, being receivers of the disclosed public fact, proceeds to share the same to their networks, should also be held liable. It can be argued, after all, that they who initially were mere passive receivers of the information became active participants in the violation by passing on the disclosed private fact. In effect, the damage is further worsened when people who either read or hear of the private fact share the same to their networks. However, it may be reasonable to say that a person who "shares" or "retweets" cannot incur liability because when he obtained the "fact" disclosed, it was no longer "private," having been uploaded already for public viewing. The presence of the uploaded fact in the public domain loses the private character of such disclosed fact with respect to the person who shares or retweets. Those who merely extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of the occurrence have no liability.[150] However, this does not in any way absolve the original uploader of the private fact. This presupposes that the private nature of the fact disclosed is only material during the original upload, for this is the crucial fact that will transform the "private" fact into a public matter. And the way to determine if such fact was "private" is to go back to how the information was accessed. In other words, we go back to the means-context approach.

C. The Relevance of Prosser's Framework

The beauty of Prosser's proposition—that privacy violations may sometimes consist of a synthesis of different torts, and not just a single kind—is its comprehensive scope and the potential of the different torts to apply to a

[150] ELDER, *supra* note 118, at 167

single factual scenario.[151] His classification is useful in scrutinizing the concatenation of privacy violations that occur when a private fact of a celebrity is obtained without waiver or consent and subsequently uploaded in a social media platform.

Although Prosser could not have imagined the transformation by which privacy violations can be committed at present, his synthesis of the four torts as a complex group that sometimes overlaps or consecutively occurs despite arising from one specific situation, complements the two-tiered process of intrusion upon private affairs and public disclosure of embarrassing private facts that common online privacy violations against celebrities partake of. There is no need to invent a new formulation by which to analyze the legal nuances of this kind of privacy violation (access of private fact then uploaded online, not necessarily by the same person), as will be illustrated in the next chapter. There is only the need to clearly articulate how these nuances play out using Prosser's first two torts, which the paper has attempted to express thus far.

The question arises as to whether actual malice, as pioneered in *New York Times*, remains applicable in this new framework. As celebrities remain to be public figures, the authors believe that actual malice remains to be a requisite, *with respect to libel actions against members of the press*, but not so with respect to private individuals who violate the celebrity's privacy rights. After all, the cause of action against the private individual will not be libel but more fittingly, tort (damages) under the Civil Code provisions or special laws such as R.A. No. 9262. In libel suits against members of the media, the wealth of jurisprudence uniformly agrees that public figures must still prove the higher standard of actual malice in order for his case to prosper in a libel suit.

V. AN APPLICATION OF PROSSER'S MODIFIED FRAMEWORK TO THE CASE SAMPLES

A. Katrina Halili's Sex Video: Implied Waiver and the Issue of Liability

The case of Halili is instructive particularly with respect to the implied waiver construed by the trial court in dismissing her case. Her experience also

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[151] *Id.* at 3.

exemplifies that privacy violations in this specific context can be attributed to two different persons.

As to the first stage, it is conceded that it was Kho who took the video; this was never the area of contention in the case brought by Halili against Kho later on. Rather, the issue was whether or not Halili gave her consent in recording her sexual intercourse with Kho, and concomitantly, whether it was proven that Kho uploaded the video online.

As mentioned, Halili's case was based on a violation of R.A. No. 9262, alleging that the upload of the video online caused her "emotional and psychological distress."[152] During the Senate hearing, Kho admitted that he did not obtain the consent of Halili before filming their sexual intercourse. However, the Regional Trial Court, whose decision was later on affirmed by the Court of Appeals, ruled that Halili could not have known that she was being filmed because the video camera was located in a place conspicuous enough as to rule out the possibility of surreptitious filming. Moreover, it was not proven that Kho was responsible for uploading the videos. Thus, Kho cannot be responsible for the emotional and psychological distress suffered by Halili, if any, because such trauma was found to be the direct consequence of the uploading of the videos, which Kho was not proven to have been involved in.

The question that must be resolved here on the first level is whether or not there is intrusion upon Halili's personal space. Such intrusion can be determined by finding out whether or not Halili gave any form of consent or waiver to the act of filming the sexual intercourse. Applying the means-context standard, it must be noted that the lower court inferred Halili's waiver from the location of the video camera in the room. The problem with this finding is that it presumes too much. Something other than the device's location must be taken into account in construing consent; otherwise, this would render the right to privacy of celebrities in this context inutile. There are too many possibilities that could prevent Halili from seeing the video camera; the lower court should have based its finding on factors other than the location of the video camera. It did not help that Halili admitted having consented to the videotaping during one of the Senate hearings. As a consolation, it is worthy to

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[152] *Appeals court clears Hayden Kho in sex video case,* GMA NEWS, *at* http://www.gmanetwork.com/news/story/270023/showbiz/appeals-court-clears-hayden-kho-in-sex-video-case (last visited Aug. 26, 2013).

note though that the lower court, in considering the location of the camera, at least acknowledged that the context surrounding the means of obtaining the private fact (i.e., whether there is consent) is crucial in determining whether a privacy violation occurred.

Contrary to the finding of the RTC, it is submitted that using the means-context standard for determining intrusion upon the personal space of Halili reveals the lack of evidence sufficient to lead to a finding of implied waiver in the taking of the video (obtaining the private act, which in this case, was the act of sexual intercourse).

After the act of sexual intercourse was filmed and recorded, another privacy violation occurred in the form of uploading the video in cyberspace for the whole online community to see. This conforms to the second privacy violation described by Prosser: the public disclosure of embarrassing private facts. First, the public disclosure was uploaded online, which can be easily viewed by any person who has access to the Internet, not just here in the Philippines, but also beyond. Second, the video pertained to a private fact, considering the means and context in which it was obtained.

Assuming that Halili indeed did not give her express or implied consent to the taking of the video, then the act of sexual intercourse uploaded in cyberspace is patently a privacy violation. True enough, the shame and humiliation Halili suffered stem from the vulnerability of having a private fact viewed by anyone indiscriminately. This led the lower court to rule that it was the act of uploading the video that caused distress to the actress, and not really the act of video-taping the sexual act.

The finding that Kho was not proven to have uploaded the video raises a theoretical, as well as an evidentiary, problem. Halili faced an obstacle in trying to assert her right to privacy in disclosing the sex video to the online community: there was no other face to look for, no other person to blame but Kho, precisely because there is no way of ascertaining the identity of the person who uploaded the video. In such a case, the issue of liability is compounded by the problem of adducing evidence in order to prove the legal truth that Kho indeed uploaded the video. Likewise, if it were someone else who uploaded the video, the manner of unmasking the identity of this random/anonymous uploader is an equally challenging, if not more difficult, feat. Indeed, Kho claimed that his laptop, along with its content, was stolen by thieves. Of course, this constitutes an evidentiary dead-end, such that on the

one hand Halili was faced with the task of proving that it was indeed Kho who uploaded the video online, and on the other hand, Kho and others similarly situated in future cases could simply come up with an alibi to dispute any involvement in the alleged upload.

B. Mo Twister's Confession: Self-Video of Personal Information about the Celebrity and the Distinction between Subsequent vis-à-vis Original Access

As mentioned in Part I, celebrities share aspects of their personal lives as a way of contributing to their popularity. A peculiar aspect of this case is that the person subject of the video was not the victim Ramos, but the alleged offender himself, revealing his personal knowledge of certain information about Ramos's private affairs. This should be contrasted with the Halili and Barretto videos, where the questioned acts or "private facts" originated from the celebrities-plaintiffs themselves.

Applying the means-context standard in determining intrusions upon personal space, it is unclear whether there was consent in the taking of the video in the first place. What is clear was the absence of consent on the part of Ramos to the upload of the video; this is very well the subject of the second tort–public disclosure of a private fact.

It cannot be denied that even if Mo Twister did not film Ramos (but himself) saying such "private fact," the fact disclosed by Mo Twister through the video is still a fact that pertained to Ramos, whether the information is true or not; thus, Ramos could properly invoke her right to privacy in such a case. The truth of the statement is irrelevant when it leaks to the public sphere; gossip takes many forms and is usually harmful in itself, whether or not the content of such gossip is in fact true or not. As Schoeman explains, "Gossip gives informational access to an individual in apparent violation of that individual's private domain."[153] Incidentally, in libel law, truth of the statement is immaterial; this may be worthy of note since this is the gravamen of the acts that formed Ramos's cause of action based on R.A. No. 9262.

There is no showing whether Ramos ever gave her consent to the taking of the video of Mo Twister, thereby making it difficult to determine if

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[153] SCHOEMAN, *supra* note 121, at 136.

an intrusion upon personal space legally occurred; in fact, Mo Twister intended this to be a private confession to his future self. Assuming this to be true, the factual context of this legal dilemma points to the conclusion that there is no privacy violation of the first tort. However, if we construe Ramos's objection over the uploaded video also as an absence of consent in taking the video, then clearly, there is a privacy violation of the first tort. The context and the means by which the private information was obtained become relevant in this light.

Mo Twister insists that the videos were erased from his laptop but was subsequently "repaired" and retrieved presumably by the person who got his laptop after he had sold it.[154] However, the fact of subsequent access is not relevant for determining if the first tort occurred, that is, intrusion upon personal space. Hence, Mo Twister is liable for the first tort, irrespective of the upload.

Both the Halili and Ramos scandals would show that the access of the data, which was subsequently uploaded online, is not taken into account in determining whether there is intrusion upon the personal space of the celebrity-plaintiff. Unauthorized access, which is the essence of intrusions upon personal space, only considers the access of the private fact, not the access of the data containing such private fact. Moreover, it only contemplates original or initial access, and not the subsequent access of thieves or other third persons as alleged by Kho and Mo Twister. The subsequent access of the video is immaterial because the consent or waiver requirement is with respect to *initial access* of the private fact by the person who first took/recorded/filmed that private fact, who in both cases, are Kho and Mo Twister, respectively.

More appropriately, the access of the data by persons subsequent to that initial access becomes relevant only in determining who is liable for the upload or the public disclosure of the private fact. Either the person who had subsequent access to the data (thieves or other third persons) is also the uploader, or the person who subsequently delivered it (with or without consideration) to someone who eventually uploaded the video on YouTube or Facebook. Again, this raises evidentiary and liability issues which existing rules of procedure may not accommodate, taking wholly the circumstances of the case.

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[154] Walden Martinez Belen & Gerry Plaza, *Mo Twister faces legal action over online video,* YAHOO! PHILIPPINES, *at* http://ph.omg.yahoo.com/news/mo-twister-faces-legal-action-over-online-video.html (last visited Aug. 27, 2013).

As to the second tort, the elements of public disclosure of a private fact are present. First, the permanent nature of the uploaded video to be viewed, shared, and even downloaded by the whole community within and beyond the Philippines is undisputed. The consequences of such upload goes beyond that of print publication, where distribution of the print version is restricted to a specific area and available for distribution and reprinting up to a certain period. The second requisite likewise exists, assuming that Ramos did not in fact give her consent or waive any objection to the taking of the video by Mo Twister of himself regarding a private information on Ramos. The lack of consent in effect is what makes the personal information within the coverage of privacy, not the nature of the fact disclosed ("fact" of abortion).

C. Claudine Barretto's Brawl with Erwin Tulfo: The Limits of Reasonable Expectation of Privacy

The context standard in determining intrusion is stretched to its limits in the episode between the couple, Barretto and Santiago, and Tulfo. Here, there can be no intrusion upon personal space, because the actions of Barretto and Santiago occurred in a public place. This is similar in nature to what happened in *Gill v. Hearst Pub. Co.*,[155] discussed by Prosser in his article. Knowing fully well that their actions as celebrities would merit considerable intrigue and curiosity by onlookers and passersby, Barretto still berated the airport crew while Santiago beat up Tulfo. This is not to say that not all incidents that happen in a public place are outside the protection accorded by the right to privacy or that it can be construed as an implied waiver, thereby negating intrusion upon personal space. However, in the case of celebrities, this assertion is, more often than not, true, precisely because celebrities are always subject to public scrutiny, and this fact the celebrities are only too familiar with. Here, the doctrine of consent as discussed in *Gertz* is clearly applicable. Moreover, they also have viable access to explain the motives behind their questioned actions, in line with the self-help doctrine also enunciated in *Gertz*.

The academic worth of this case is that it tests the limits of the right to privacy of celebrities in a public place. It raises the question of whether the celebrity's reasonable expectation of privacy stops at the threshold of the front

[155] 40 Cal. 2d 224, 253 P.2d 441 (1953).

door of his home. Although acts done by celebrities in a public place are often entitled to little protection, not all acts automatically fall outside of the scope of one's right to privacy. In other words, not because a questioned incident happened in a public place does not mean that all situations occurring in the same kind of location (whether in an airport, mall, school, and the like) would merit the same treatment. This is the import of *Katz v. United States*,[156] when the US Supreme Court held that the right to privacy protects people and not places. It follows then that such right does not emanate from the nature of the location.

What puts this particular incident outside the ambit of protection granted to the right to privacy is the manner in which Barretto and Santiago acted. Indeed, location alone does not comprise the context standard. In this case, the *behavior* of the celebrities must be factored in as well. It must be noted that Barretto was furiously berating the airport staff while Santiago and other men beat up Tulfo in public. Whether the same incident has been committed by a celebrity or an ordinary citizen would lead to the same result: the raucous stirred up by the parties involved would definitely catch the attention and interest of innocent bystanders. Although it may be conceded that the attention garnered by the actors would not be the same if it were done by private individuals, both situations still merit considerable amount of attention. Thus, apart from the location, the behavior of the actors contributed substantially to the public commotion. The couple knew fully well of their fame and the resultant interest it creates on the part of the public. Their behavior, in effect, *invited* public attention, and the fact that it was Tulfo who recorded Barretto fuming at the airport staff is irrelevant for purposes of determining whether there is intrusion upon personal space in the first place.

The instant case must be contrasted with *Galella*. Although *Galella* specifically concerned an intrusion upon personal space (not public disclosure), and, subsequently, the implicit recognition of the *Galella* Court of a means-based analysis, the scenario, when extended to its logical conclusion, that is, assuming the photographs are eventually printed and circulated in major magazines or tabloids, would result in Onassis still being allowed her right to privacy under certain circumstances. This owes to the fact that her behavior, even though she was in a public place when the picture was taken, partook of

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[156] Katz v. United States, 389 U.S. 347 (1967). *See also* FERRERA ET AL., *supra* note 131, at 193; ELDER, *supra* note 118, at 47 *citing* Nader v. General Motors Corp., 25 N.Y. 2d 560 (1970).

the nature of doing personal chores. Her conduct was not unbecoming or scandalous; no one was shouted at or hit by Onassis. She was only proceeding with her daily life, so to speak. Though the Court held therein that her right to privacy does not include acts done in public, it may still be argued that there are circumstances that would warrant such protection, as for instance, when Onassis, though in a public place, secretly took medication implying a disorder which she did not want the public to know.

In the case of Barretto, there being no "private fact" within the scope of protection of the right to privacy, it follows that there can be no commission of the second tort, that is, public disclosure of a private fact, for failing to meet one of the requisites thereof (i.e., fact disclosed must be private). To reiterate, there is no private fact involved in uploading the video of Santiago beating up Tulfo, for the same reason just propounded.

VI. REMEDIES

It is a well-settled legal maxim that "every right when withheld must have a remedy, and every injury its proper redress."[157] So it is with the right to privacy: more than a century after it was first conceptualized, the aggrieved party has various remedies under various Philippine laws. Moreover, "[t]o meet the threats which computerization poses there is a need to provide a regulatory system which while protecting individual privacy will not hamper the march of progress represented by these versatile machines."[158] Public figures have often sought recourse by defamation cases against journalists and media publications. Now that privacy violations have taken an entirely different form, defamation, although still applicable in a certain contexts, may not be enough. The authors propose that there are certain Philippine laws that can be used to remedy privacy violations of the 21st century.

A. Existing Remedies in Philippine Law

Although these laws do not expressly provide that they aim to remedy violations of the right to privacy, celebrities may nonetheless seek recourse

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[157] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1765-1769).

[158] CORTES, *supra* note 3, at 81.

under them. What the celebrity must do, aside from alleging the specific elements under each law enumerated here, is to specify that the right to privacy was violated.

1. Application for Temporary Restraining Order or Preliminary Injunction

A preliminary injunction is proper as a provisional remedy to refrain from a particular act or acts.[159] Injunctive relief has likewise been upheld to protect against intrusions infringing upon a property right or interest of the plaintiff.[160] This was availed of by the complainant Enrile in *Ayer*,[161] where he filed a Complaint with application for Temporary Restraining Order and Writ of Preliminary Injunction with the Regional Trial Court. Both were issued by the Regional Trial Court of Makati, with the dispositive portion of the writ of Preliminary Injunction partly ordering the production staff and crew of the production company to cease and desist from producing and filming the mini-series entitled "The Four Day Revolution" and from making any reference whatsoever to the plaintiff and his family. The Writ of Preliminary Injunction, in an apparent effort to protect the right to privacy expressly claimed by the plaintiff, even prevented the production company from creating any fictitious character based on or bears substantial resemblance to the plaintiff.

The same remedy will only work in privacy violations identified herein if the celebrity is immediately able to identify the violator. The celebrity must then act swiftly, as files are easily transferrable and can be uploaded on the Internet and subsequently downloaded and stored much faster than the wheels of justice turn. Otherwise, a petition of this nature has no practical value in privacy violations today.

2. Damages

In intrusion, the "gravamen of the tort is the injury to the feelings of the plaintiff, and the mental anguish and distress caused thereby," entitling the

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[159] Rules of Court, Rule 58.

[160] ELDER, *supra* note 118, at 65

[161] Ayer, *supra* note 86.

plaintiff to substantial damages.[162] This is in recognition of the fact that "an injury to personality may produce suffering much more than that produced by mere bodily injury."[163] Public disclosure likewise entitles the plaintiff to damages, which "are available if some form of common law malice is demonstrated and the finder of fact, in its discretion, decides the specific facts just in punishing and/or deterring the defendant or others."[164] While both justifications were made in the context of American law, Philippine courts have generally awarded damages when the privacy of public figures have been violated by Philippine media.[165] Such an action to recover damages essentially differs from actions for libel or defamation, as damage to reputation is not essential to recovery.[166]

The Court has also awarded damages because of the violation of the right to privacy through Article 26 of the Civil Code, as a quasi-delict.[167] Although the Court has interpreted the provision in an altogether different factual context,[168] its emphasized the place of the right to privacy stresses in our legal system:

> . . . The philosophy behind Art. 26 underscores the necessity for its inclusion in our civil law. The Code Commission stressed in no uncertain terms that the human personality must be exalted. The sacredness of human personality is a concomitant consideration of every plan for human amelioration. The touchstone of every system of law, of the culture and civilization of every country, is how far it dignifies man. If the statutes insufficiently protect a person from being unjustly humiliated, in short, if human personality is not exalted—then the laws are indeed defective. Thus, under this article,

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[162] ELDER, *supra* note 118, at 57.

[163] *Id.*

[164] *Id.* at 186.

[165] Yuchengco v. Manila Chronicle Publishing (*infra* note 170) and Fermin v. People (*supra* note 93) are some of the many examples where the Court tilted in favor of the right of privacy when the freedom of speech and of the press was invoked by the privacy violator.

[166] CORTES, *supra* note 3, at 24.

[167] "Every person shall respect the dignity, personality, privacy, and peace of mind of his neighbors and other persons."

[168] In Concepcion v. Court of Appeals, G.R. No. 120706, Jan. 31, 2000, the case concerned an imputation by the petitioner Rodrigo Concepcion against the respondent Nestor Nicolas that the latter was having an extramarital affair. The Court awarded Nicolas P50,000 for moral damages, P25,000 for exemplary damages, and P10,000 attorney's fees for his suffering in embarrassment and mental anguish.

> the rights of persons are amply protected, and damages are provided for violations of a person's dignity, personality, privacy and peace of mind.[169]

In various cases, the Court has awarded moral damages, exemplary damages, and attorney's fees in varying amounts. In a case, the amount of moral damages awarded amounted to P25,000,000 for moral damages and P10,000,000 exemplary damages for one of the two causes of action in the petition. [170] At the very least, nominal damages must be awarded "in recognition of a technical injury and by way of declaring the rights of the plaintiff".[171] When seeking damages, the celebrity must allege the continuing nature of the violation in order to estimate the worth of damages that they must have.

3. Immoral Doctrines, Obscene Publications and Indecent Shows

A rarely used cause of action where the celebrity can seek recourse is in Article 201 of the Revised Penal Code:

> **Immoral doctrines, obscene publications and exhibitions and indecent shows.** — The penalty of prision mayor or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:
>
> (1) Those who shall publicly expound or proclaim doctrines openly contrary to public morals;
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> (2) (a) the authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same;
>
> (b) Those who, in theaters, fairs, cinematographs or any other place, exhibit, indecent or immoral plays, scenes, acts or shows, whether live or in film, which are prescribed by virtue hereof, shall include those which (1) glorify criminals or condone crimes; (2) serve no other purpose but to satisfy the market for violence, lust or pornography; (3) offend any race or religion; (4) tend to abet traffic

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169 *Id.*

170 Yuchengco v. Manila Chronicle Publishing Corp., G.R. No. 184315, Nov. 25, 2009.

171 ELDER, *supra* note 118, at 57.

> in and use of prohibited drugs; and (5) are contrary to law, public order, morals, and good customs, established policies, lawful orders, decrees and edicts;
>
> (3) Those who shall sell, give away or exhibit films, prints, engravings, sculpture or literature which are offensive to morals. (As amended by P.D. Nos. 960 and 969).[172]

In order to be held liable under Article 201, the following must be proved: (a) the materials, publication, picture or literature are obscene; and (b) the offender sold, exhibited, published or gave away such materials. Necessarily, that the confiscated materials are obscene must be proved. The Court has previously applied the said penal offense in the context of sale and distribution of pornographic materials, and exhibition of indecent and immoral picture scenes.

P.D. No. 969, which amended Article 201 of the Revised Penal Code, directs the destruction or forfeiture of obscene/immoral literature, films, prints, engravings, sculpture, paintings or other prohibited articles, even if the accused was acquitted. In *Nogales v. People*, the Court acquitted the accused who were charged with an offense under Article 201. However, it ordered the deletion of the obscene materials or pornographic files in the confiscated hard disks. It affirmed the lower court's pronouncement that the removal of the hard disk itself and not just the files from the CPU is a reliable way of permanently removing the said files. However, such an order will hardly be useful in the case of celebrities if the public disclosure has already been done through an upload of the files containing the private facts.

4. Republic Act No. 9262 (The Anti-Violence Against Women and Men or Anti-VAWC)

Celebrities like Halili and Ramos have sued for the violation of their right to privacy under the R.A. No. 9262. The specific provision invoked is that on psychological violence, consisting of "acts or omissions causing or likely to cause the mental or emotional suffering of the victim, such as but not limited to intimation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse, and mental infidelity."[173] For a cause of

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[172] REV. PEN. CODE, art. 201.

[173] Rep. Act No. 9262, § 3 (2004).

action alleging psychological violence to prosper, the respondent must have had a prior sexual or dating relationship with a woman against whom he has committed psychological violence, resulting in mental or emotional anguish, public ridicule or humiliation. This was precisely the situation in the Halili and Ramos cases.

The limitations of this cause of action are apparent from the title of the law itself: the act must constitute violence against a woman or her children. In other words, it will not be relevant at all if the complainant was a male celebrity. There must also have been a sexual or dating relationship between the privacy violator and the celebrity. While R.A. No. 9262 is indeed a powerful deterrent against criminals who abuse women and violate their privacy, it is only applicable in very limited circumstances.

5. Republic Act No. 10175 (The Cybercrime Prevention Act)

Although the constitutionality of the law has yet to be decided by the Supreme Court, the provision on libel in the Internet, classified as a content-related cybercrime offense, are of no doubt applicable.

> Sec. 4. Cybercrime Offenses. — The following acts constitute the offense of cybercrime punishable under this Act:
>
> . . .
>
> (c) Content-related Offenses:
>
> . . .
>
> (4) Libel. — The unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed through a computer system or any other similar means which may be devised in the future.[174]

The Cybercrime Prevention Act also strengthened the penalty provisions of libel in the Revised Penal Code. Many people have expressed fears of the ramifications of the law, including the possibility of being charged of abetting libel by simply clicking the "like" button in Facebook, retweeting

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[174] Rep. Act. No. 10175 (2012).

posts on Twitter, or using suggestive language in the Internet.[175] This would erode the proposition that the fact shared, retweeted, or liked, was already part of the public (online) domain when such online activity was done.

6. Republic Act No. 9995 (Anti-Photo and Video Voyeurism Act of 2009)

Promulgated in light of the scandal Halili found herself in, the Anti-Photo and Video Voyeurism Act of 2009 zooms in on the taking of a photo or a video of a person involved in a sexual act without his or her consent and under circumstances where privacy can be reasonable expected. It also prohibits a person from taking another person's private area.

> Prohibited Acts. - It is hereby prohibited and declared unlawful for any person:
>
> (a) To take photo or video coverage of a person or group of persons performing sexual act or any similar activity or to capture an image of the private area of a person/s such as the naked or undergarment clad genitals, public area, buttocks or female breast without the consent of the person/s involved and under circumstances in which the person/s has/have a reasonable expectation of privacy;
> (b) To copy or reproduce, or to cause to be copied or reproduced, such photo or video or recording of sexual act or any similar activity with or without consideration;
> (c) To sell or distribute, or cause to be sold or distributed, such photo or video or recording of sexual act, whether it be the original copy or reproduction thereof; or
> (d) To publish or broadcast, or cause to be published or broadcast, whether in print or broadcast media, or show or exhibit the photo or video coverage or recordings of such sexual act or any similar activity through VCD/DVD, internet, cellular phones and other similar means or device.[176]

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[175] *10 Scary Things About the New Cybercrime Prevention Act of 2012*, GMA NEWS, *at* www.gmanetwork.com/news/story/276434/scitech/socialmedia/digital-martial-law-10-scary-things-about-the-cybercrime-prevention-act-of-2012 (last visited Aug. 28, 2013).

[176] Rep. Act. No. 9995, § 4 (2009).

The same law also provides a method by which such a copy of such can be used as evidence against the defendant. There is also an exemption, provided, thus:

> Exemption. - Nothing contained in this Act, however, shall render it unlawful or punishable for any peace officer, who is authorized by a written order of the court, to use the record or any copy thereof as evidence in any civil, criminal investigation or trial of the crime of photo or video voyeurism: Provided, That such written order shall only be issued or granted upon written application and the examination under oath or affirmation of the applicant and the witnesses he/she may produce, and upon showing that there are reasonable grounds to believe that photo or video voyeurism has been committed or is about to be committed, and that the evidence to be obtained is essential to the conviction of any person for, or to the solution or prevention of such, crime.[177]

In prosecuting an offense under this law, it is not necessary that the aggrieved person is engaged in sexual intercourse, as it is enough that a private area of the victim was captured without consent, or is captured with consent but later on broadcasted without permission.

The law addresses the two stages of privacy violations pointed out by the authors. First, it punishes the violator of the celebrity's privacy with respect to intrusions. The lack of consent is important as it establishes the failure to meet the means-context as previously discussed. Second, it punishes public disclosure by the privacy violator, whether or not the same person as the violator of the first tort, notwithstanding the consent previously given.

Although the recently passed law at the very least gives a recourse to aggrieved parties whose sexual acts were covered on video and subsequently uploaded for the public to see, its obvious limitation is that it only applies to sex scandals. It left the matter of other privacy violations, such as the experience of Ramos, without a specific and precise remedy.[178]

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[177] § 6.

[178] Press Release of Office of Sen. Miriam Defensor-Santiago, Prosecute Hayden Kho for 'Psychological Violence' (May 22, 2009), *available at* http://www.senate.gov.ph/press_release/2009/0522_santiago3.asp (last visited Aug. 20, 2013).

7. Republic Act No. 10173 (Data Privacy Act of 2012)

R.A. No. 10173 will principally impact companies that process personal data disclosed to them by customers in confidence. The law only allows lawful processing of information, which "refers to any operation or any set of operations performed upon personal information including but not limited to, the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data."[179] There is further protection for the processing of sensitive personal information, except if, among others, there is "consent, specific to the purpose prior to the processing, or in the case of privileged information, all parties to the exchange have given their consent prior to the processing."[180]

This is especially important for celebrities who volunteer their personal information—an act that constitutes a waiver of intrusion into private affairs. A violation of the celebrity's right to privacy, however, if company discloses such private fact. In this case, there will clearly be a violation under this law, for imprisonment of up to seven years and a fine of up to 2,000,000 Pesos.[181]

B. Remedies Pending in Congress

Aside from remedies already existing under our laws, there are also pending bills which must be discussed as it may very well modify or add remedies in the vindication of the right to privacy. Some of them, if passed, may change how the dynamics of the right to privacy operate in our country.

1. The Anti-Stalking Bill

In the Senate, Senate Bill No. 2242 filed by former Senator Manuel Villar Jr. penalizes some of the following acts: repeated phone calls without any reason, sending messages without introducing oneself or the use of rude words,

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[179] Rep. Act. No. 10173, § 11(1) (2012).
[180] § 13(a).
[181] § 28.

repeatedly going to a target's home, and frequently following someone.[182] The bill has three counterparts in the House of Representatives: (1) House Bill 5099 by Camarines Sur Rep. Diosdado Arroyo and Pampanga Rep. Gloria Macapagal-Arroyo, (2) House Bill 3367 by Sorsogon Rep. Salvador Escudero III, and (3) House Bill 6114 by Buhay party-list Representatives Irwin Teng and Mariano Michael Velarde. According to Rep. Arroyo, the bill has its roots in Article 26 of the Civil Code, and, although not a criminal action, will give a cause of action for damages, prevention, and other relief.[183]

If passed into law, celebrities who have had to deal with stalkers and whose right to privacy has been violated may seek protection under this law. It will give added teeth to the protection from intrusion. However, the law must be careful in limiting the acts that can be construed as a violation of the right to privacy, as it may very well be abused by celebrities whose status and constant exposure to the public may consequently diminish the freedom of the press. These two competing considerations must be taken into account in the deliberations on the bills.

2. The "Electronic Violence Against Woman" ("E-VAW") Bill

One of the pioneer bills proposed by recently elected Senator Nancy Binay, E-VAW is essentially the digitized counterpart of the VAWC. It punishes electronic violence, which is any act that can cause or is likely to cause mental, emotional, and psychological distress or suffering to the victim. Some examples that fall under such are the following: the unauthorized recording, reproduction or distribution of videos showing the victim's private areas; uploading or sharing any form of media with sensitive and indecent content without the victim's consent; harassment through text messaging, electronic or any other multimedia means; "cyber-stalking," including the hacking of personal accounts on social networking sites and the use of location trackers on cellular devices and the unauthorized use of the victim's identity (pictures, video, voice, name) for distribution that can harm the victim's

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[182] *Stalkers beware, bill aims to make you criminals*, GMA NEWS, *at* http://www.gmanetwork.com/news/story/262064/scitech/technology/stalkers-beware-bill-aims-to-make-you-criminals (last visited Aug. 25, 2013).

[183] Cynthia Balana & Karen Bonconan, *House bills filed against stalking*, PHIL. DAILY INQUIRER, May 31, 2012, *available at* http://newsinfo.inquirer.net/204153/house-bills-filed-against-stalking (last visited Aug. 25, 2013).

reputation.[184] If passed into law, the E-VAW will give aggrieved female celebrities an additional cause of action against privacy violations that substantially have the same elements as the elements in the Anti-VAWC, except that the violation is done in the Internet.

3. Magna Carta for Philippine Internet Freedom

Filed by Senator Miriam Defensor Santiago in the Senate as Senate Bill No. 3327, with its counterpart filed by Representative Kimi Conjuangco in the House of Representatives as House Bill No. 1086, the Magna Carta for Philippine Internet Freedom affirms basic constitutional principles as applied to the Internet.[185] Notably, Section 4 focuses on:

> [protecting] and [promoting] freedom of speech and expression on the Internet" and protecting the right of the people to petition the government via the Internet for "redress of grievances.[186]

It also contains a reproduction of what constitutes libel: public and malicious expression tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead, made on the Internet or on any public network.

The right to privacy is likewise adequately addressed:

> Section 8 provides for State promotion of the protection of the privacy of data, with Section 8(b) providing the right of users to employ encryption or cryptography "protect the privacy of the data or networks which such person owns or otherwise possesses real rights over."
>
> Section 8(d) guarantees a person's right of privacy over his or her data or network rights, while 8(e) requires the State to maintain

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[184] Louis Bacani, *Nancy Binay files bills vs. cyberbullies,* PHIL. STAR, Jul. 3, 2013, *available at* http://www.philstar.com/headlines/2013/07/03/961150/nancy-binay-files-bill-vs-cyberbullies-online-violence (last visited Aug. 25, 2013).

[185] Press Release, Senate of the Philippines, After the RH Law: Magna Carta for Internet Freedom is Miriam's new pet bill (Jul. 3, 2013), *available at* http://www.senate.gov.ph/press_release/2013/0703_santiago1.asp. (last visited Aug. 25, 2013).

[186] S.B. No. 3327, § 4 (2013).

> "appropriate level of privacy of the data and of the networks maintained by it."
>
> Section 9 refers to the protection of the security of data and 9(b) guarantees the right of persons to employ means "whether physical, electronic or behavioral" to protect the security of his or her data or network.[187]

Largely a proclamation of the rights accorded to Internet users, the bill provides a framework as to what will most likely be an actionable offense related to Internet use. If passed, the courts are left with the task of interpreting and interrelating its provisions in order to uphold or deny the right to privacy claimed by the celebrity, all while balancing the freedom of expression of Internet users. The interplay of privacy rights, especially that of celebrities, and freedom of speech has always had a tendency to clash, and this bill confronts the situation by recognizing the possibility of both rights existing in the same context.

4. Internet Freedom Bill

Filed by Rep. Terry Ridon of Kabataan Party-list, House Bill No. 1100, the Internet Freedom Bill affirms the freedom of expression of Internet users. One of the rights of Internet users is the non-violation and secrecy of communications on the Internet, except upon a competent order as prescribed by law, for purposes of criminal investigations or the gathering of evidence for criminal prosecutions.[188] Although on surface it seems like a deterrent to a celebrity claiming the right to privacy, there's a reasonable exception: limitations in existing laws will be respected.[189]

Two other provisions also expressly recognize the right to privacy on the side of the Internet user:

> Section 12. Freedom of Expression on the Internet – All citizens have the right to express their ideas, views, and opinions on the

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[187] Electronic Frontier Foundation, *Brief Analysis of Magna Carta of Philippine Internet Freedom, available at* https://www.eff.org/deeplinks/2013/07/brief-analysis-magna-carta-philippine-internet-fredom (last visited Aug. 25, 2013).

[188] H.B. No. 1100, § 7.

[189] § 8.

> Internet without fear of reprisal. The preservation of the right to privacy and freedom of expression in communications is a condition for the full exercise of the right to Internet access.
>
> Section 13. Privacy on the Internet. The State shall guarantee the right to privacy of its citizens. The State shall protect the right of a person to ensure the privacy of the data or networks over which the person has property rights over, and shall protect the right of a person to employ reasonable means to this end.

What these provisions protect is the right of an Internet user, which may clash against that of the celebrity depending on the circumstances. If this bill were passed and a complaint is filed with both parties claiming the right privacy, it will be interesting to see how the two rights will be balanced together, and which will prevail over the other under specific conditions.

C. Limitations and Recommendations

1. The Issue of Liability

In the specific context where a private fact about a celebrity is obtained and subsequently uploaded online, the violation is committed in stages, such that one distinct act may be said to be independent of another. Assuming that Halili never gave her consent or any form of waiver, the act of Kho of taking the video while both of them are engaging in sexual intercourse is still a privacy violation, that of intrusion into personal space, although there is no public disclosure involved. The subsequent upload of the video, whether by the same person or otherwise, constitutes a separate violation because it is not anymore related or hinged on the first consummated act, that of accessing a fact which is not available for retrieval.

This divisibility into two separate violations finds stronger support supposing that the access to the private fact is consented to or waived, perhaps for private viewing of the person who obtained such fact. This would be the defense insisted upon by Mo Twister—that the private confession was only meant to be viewed by himself. Assuming that Ramos did not express any objection to the video of Mo Twister telling himself about Ramos's abortion, then there would be no intrusion into Ramos's personal space. However, this does not mean that no one can be held liable when such video is uploaded online for the whole world to see, without Ramos's consent or waiver to the

upload, as in fact what happened. Hence, the act of publicly disclosing the acquired fact or information should be divorced from the act of acquiring the private fact.

This separate categorization is also the essence of the complex set of four torts that Prosser propounded. He said that these four kinds may overlap, but they can stand on their own as well. In the case of the privacy violations that happen in this specific factual milieu, it becomes clear that although subsequently occurring like a process, the two torts of intrusion into personal space and public disclosure of private fact are two independent violations which have no relation to each other, except perhaps the plaintiff and the data accessed and disclosed.

The separate categorization, branching out into two different violations, thus calls for separate liabilities. Indeed, in the case of Halili and Ramos, there was no hard evidence pointing to Kho and Mo Twister as the person who uploaded the subject videos, respectively. In the latter case, it was *PrettyJenny55* who did so, and the identity of this user can simply be disguised through a bogus email address set up for the sole purpose of uploading the video. The possibilities of hiding one's real identity in the Internet are limitless, if not easy. In Halili's case, Kho insisted that it might have been the thieves who stole his laptop, or another third person who eventually bought the same. Again, the possibilities are inexhaustible. This is also one of the reasons why two separate violations must call for two separate liabilities. Usually, the aggrieved celebrity files an action based on R.A. No. 9262, as in the case of Halili and Ramos, or libel. However, the facts that must be proven in those cases are entirely different. It may be more beneficial to the plaintiff to file a case for damages and then allege the facts sufficient to constitute a privacy violation of these two separate torts.

The need for two separate liabilities will solve several procedural dilemmas for the plaintiff. For one, he will now know what facts must be proven. With respect to intrusion upon personal space, one must establish whether there was (1) consent or waiver, (2) in case of waiver, the context and circumstances of the case which would warrant such waiver, among others. If, for example, consent was not proven to have been obtained, then the defendant shall be held liable for that specific privacy violation. For public disclosure of private facts, among the facts to be established are the following: (1) that there was no consent or waiver on the part of the person whose

private fact was disclosed via online upload, and (2) that the uploaded material is available for public viewing without restricted access.[190].

In the case samples of Halili and Ramos, there is a paucity of material facts which would show commission of the two privacy violations. In the Halili case, the consent of Halili was merely inferred from the location of the camera; Halili would have persuaded the Court to rule in her favor had she presented proof that her consent was neither obtained nor that she waived any objection to the act of filming the sexual intercourse. Moreover, the RTC held that it was the upload of the video which caused emotional and psychological distress on Halili, and not the act of filming per se. Halili could have surpassed this argument had she asserted that her lack of knowledge of the filming of the sexual intercourse is sufficient to imply that the disclosure thereof would have caused her such distress. On the other hand, if Ramos were to file a similar case against Mo Twister, she could allege that she never consented to the taking of the video, assuming she knew of it in the first place. Second, that the context of the videotaping is sufficient to prove that her consent, assuming such consent was given, only extended up to private viewing by Mo Twister, and not for public consumption. It bears emphasis that the lack of a clear boundary on how to decide these specific violations committed against celebrities owes its limitation to the inability to separate the violation incurred on the unauthorized access to the private fact, or the "intrusion" upon personal space, and the public disclosure of such private fact. The failure to treat these two acts as separate violations contributes to the inadequate ruling of the court.

In the case of Halili and Ramos, they must also allege that the mental suffering and anguish they suffered were caused by the taking of the private fact and not the uploading of the video, in order to hold Kho and Mo Twister liable. Certainly, alleging that the psychological distress was caused by the upload is virtually to negate the liability of the defendant; it amounts to an admission on the part of the complainant that the defendant is being sued for something on which there is no proof of, or which the complainant is not even going to prove. This is because the complainant, as Halili's case would show,

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[190] Even if the uploaded material is viewable only by a specific group or a set of "friends" or "followers," it should still be considered as intended for "public viewing" because it is communicated to a third person without consent of the plaintiff and still meant to be shown in general to others although to a narrower segment of the uploader's network.

can only prove at best that the private fact was obtained without consent, leaving the act of uploading entirely without any leg to stand on.

A separate cause of action will arise for public disclosure of a private fact. This cannot constitute *res judicata* or splitting causes of action.The elements of res judicata are as follows: (1) the former judgment or order must be final; (2) the judgment or order must be on the merits; (3) it must have been rendered by a court having jurisdiction over the subject matter and the parties; (4) there must be, between the first and the second action, identity of parties, of subject matter and cause of action.[191] Here, the second violation does not have the same subject matter and cause of action from the first tort. Moreover, it may not even concern the same parties, as the respondent may be different from the one who obtained the private fact. The facts alleged are necessarily different as well.

Bringing a separate action is advisable when the uploader is different from the one who *originally* obtained the fact. Assuming that Kho's and Mo Twister's claims are true, that the uploaders are thieves and other third persons, respectively, then such uploaders can be held liable for public disclosure of private fact, regardless of whether or not the defendant under the first tort is previously, simultaneously, or even subsequently, held liable. This will provide ample protection to celebrities who do not know the person who originally obtained the private fact eventually disclosed. In suing for damages, the plaintiff must also allege the continuing and permanent nature of the uploaded fact, so that the court can properly consider it in awarding the amount of damages or in granting other reliefs (injunction, mandatory injunction, etc.)

Another advantage for the separate liability under these two torts is the clear delineation between the liability of the acquirer of the private fact, and the uploader of the material. Thus, in the case of Kho and Mo Twister, if consent was not proven to have been given, then they become automatically liable under existing remedies in the New Civil Code, RPC, etc. There is no need to prove that they indeed uploaded the video, which raises evidentiary problems of its own.

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[191] Mirpuri v. Court of Appeals, G.R. No. 114508, Nov. 19, 1999; Taganas v. Standard Insurance Co., G.R. No. 146980, Sep. 2, 2003.

2. Evidentiary Issues

An obstacle that faces litigation of privacy rights in this specific factual milieu is the issue of proving who is liable for the upload of the material online. Verily, there are many cases, as the experience of Halili and Ramos would show, or even Barretto for that matter, that the uploader is not necessarily the acquirer of personal information or private fact. The problem is not simply a matter of establishing the burden of evidence required, but even includes the problem of how to obtain such proof in the first place. The uploader could very well have been a ghost for its ephemeral avatar. As mentioned, there are easily a hundred ways to avoid detection. Even if the acquirer of information is in fact also the uploader of such material, the same weight of burden applies.

The defendant is also quite helpless especially when the private fact was simply taken from him without his consent. He runs the risk of being sued by the plaintiff for his failure to save such private data or fact. This may also prejudice the plaintiff, when the Court is forced to rule in favor of the defendant due to insufficiency of evidence. This might render futile the whole exercise of litigating privacy rights before the courts. For instance, the "alibis" of Kho (the laptop was stolen) and Mo Twister (the files were repaired) must be proven based on a certain standard of evidence set by the courts in order to be given consideration.

Another proposed alternative is to come up with presumptions that will tilt the balance in favor of the plaintiff for purposes of presenting evidence. This will force the defendant to overcome presumptions not favorable to him. There can also be certain standards set by the courts wherein the defense of the defendant regarding the subsequent access of the data (for purposes of determining where there exists the second tort) must be taken with a grain of salt, so to speak. For instance, it can be treated as self-serving in nature, similar in the nature of an alibi.

It must be stressed that in all cases, particular regard must be given to the peculiar mode by which such disclosure was facilitated, taking into account the multifarious ways that identity can be masked in cyberspace as well as the relatively easy way of suppressing evidence in cases concerning the Internet.

VII. CONCLUSION

It is often said that the life of a celebrity is very much an open book. This paper, on the whole, lays down the content of that book, so to speak. The paper attempts to draw the boundaries of how much this book is open to the public, taking into account the right to privacy of celebrities on one hand, and the desire to be privy to the personal affairs of these stars, on the other. More importantly, the paper reexamines how such boundaries, which consequently indicate the scope of the protection of the celebrity's right to privacy, are to be scrutinized.

Although Prosser's framework has been attacked in the past for stunting the development of the right to privacy and limiting its adaptability to modern privacy violations,[192] the authors have sufficiently underscored the point that the first two privacy violations—intrusion upon personal space as well as public disclosure of embarrassing or private facts—are still applicable in the Information Age. Despite the criticisms, the authors still assert that this is the opportune time to adopt Prosser's framework, as recalibrated by the authors, in Philippine jurisprudence. Philippine cases involving the right to privacy have been decided by citing landmark US cases and previously decided cases without establishing a holistic framework regarding the right to privacy of public figures. There has been a mirroring of existing US dogma on the matter but at the same time this unstable line of cases offers no definitive guide as to whether future privacy violations will be decided by following suit with respect to the modifications that have occurred in American common law. The paucity of cases on celebrities may also contribute to the instability in resolving privacy violations in the future, especially considering that the right to privacy of celebrities is a highly dynamic and continuously evolving field. Halili's, Ramos's and Barretto's experiences are certainly just the first of their kind.

The framework that the authors advance attempts to structure the debate surrounding the right to privacy of celebrities and the existing social conditions that provide the backdrop to privacy violations unique to the Information Age. It uses Prosser's first two torts and accordingly fits them to the successive stages in which privacy violations of this kind are commonly carried out nowadays. Such is the modified framework advanced by the

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[192] Neil Richards & Daniel Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2010).

authors: one that respects Prosser's structure yet takes into account the variances of privacy violations of celebrities and technological advancements that Prosser himself could not have imagined.

More than the trespass into their physical space, celebrities who are constantly in the public eye still have a defined personal space, which may not be intruded upon by the violator. In order to determine what constitutes an intrusion into the celebrity's personal space, one must look past the content of what is being violated and examine whether or not the celebrity gave his consent. The consent, more often than not, is not an express affirmative or negative answer by the celebrity, but must be inferred from the circumstances. A need to look into the context under which the private fact was accessed is thus in order. Intrusions, in order to be actionable, must first satisfy the proposed means-context standard, a concept not fully explored in Prosser's four torts.

Since there are two separate and distinct privacy violations involved, the plaintiff will not be burdened with proving that the person who has accessed the private fact must also be the uploader of the data if only to establish the connection between the mental anguish from the video/photo/data upload to the last person that the plaintiff knew to have had control over the fact concerning him. The person who hides under the guise of anonymity and uploads the files in social networking and video-sharing sites to be watched by the public must stand trial for a liability separate but factually connected to the prior intrusion. This accommodates the situation where the two violators may very well be altogether different persons pushed by different motives.

Aside from these two violators, there are also the thousands of Internet users who in one way or another further expand the violation by sharing the same in their own social networks. Although doubts have been entertained about the possible liability of these people under existing laws such as the cyber-libel, the authors believe that under the carefully laid out principles of the right to privacy, these online users cannot be held liable for violating the celebrity's right because, at the time they shared the information, the matter shared, retweeted, or even liked, long ceased to be private, and they are doing no more than to further publicize what has already become a public fact.

Celebrities have always been considered as public figures, but a canonical disquisition on the status of celebrities as public figures and why they

deserve separate treatment from other public figures is yet to come. Indeed, there is a need to scrutinize and pore over this more specific area of law. After all, in light of the current social context, the right to privacy of celebrities in the Information Age will most likely encounter more challenges in the future that, if left resolved only by outdated doctrines, may subsequently expose the celebrity with no story left to narrate.

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