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How to be Alone: New Dimensions in Privacy Law

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How to Be Alone by Jonathan Franzen, Harper Collins, London, 2002, 278 pages, ISBN 0374173273.

New Dimensions in Privacy Law: International and Comparative Perspectives Andrew T Kenyon and Megan Richardson (Eds), Cambridge University Press, Cambridge, 2006, 296 + ix pages, ISBN 978-0-521-86074-1.

On the Identity Trail by Ian Kerr, at <http://www.idtrail.org/content/view/12/34/>.

How to be alone: New dimensions in privacy law

The book, *New Dimensions in Privacy Law*, has an arresting cover — a pack of paparazzi take photographs, with their flash-bulbs popping and exploding, like starbursts in the sky. The collection explores the valiant efforts of courts and parliaments to defend the privacy of individuals against such unwanted intrusions.

The American essayist and novelist, Jonathan Franzen, has reflected upon the tenuous, derelict state of privacy law:

The right to privacy — defined by Louis Brandeis and Samuel Warren, in 1890, as ‘the right to be let alone’ — seems at first glance to be an elemental principle in American life. It’s the rallying cry of activists fighting for reproductive rights, against stalkers, for the right to die, against a national health-care database, for stronger data-encryption standards, against paparazzi, for the sanctity of employer e-mail, and against employee drug testing. On closer examination, though, privacy proves to be the Cheshire cat of values: not much substance, but a very winning smile. Legally, the concept is a mess. Privacy violation is the emotional core of many crimes, from stalking and rape to Peeping Tommeries and trespass, but no criminal statute forbids it in the abstract.

He observed that the relevant civil law in the United States is a ‘crumbly set of torts’.

In the marvellous book, *New Dimensions in Privacy Law*, the editors, Andrew Kenyon and Megan Richardson, seek to shore up the shards and ruins of privacy law, and provide substance and unity to the legal discipline. This collection explores how privacy remains endangered by a host of threats — including the media obsession with fame and celebrity; intellectual property rights; spyware and other intrusive information technologies; and national security concerns in the Age of Terror.

In the opening essay, the editors chart the origins of privacy law, and map its contemporary manifestations: ‘While the idea of “privacy” is venerable, modern obsessions with privacy are largely tooted in the twentieth century, particularly the years following the Second World War.’ The editors explore the uneven development of privacy law in various jurisdictions. In Europe, Kenyon and Richardson suggest that the protection of privacy was ‘a direct response to the many varied intrusions on personal integrity that occurred

during the war years'. By contrast, in the United States, the 'human rights movement of the 1960s and 1970s really established the modern concept of rights as basic to a democratic politic in the United States — even if it was free speech rather than privacy that emerged as dominant'. Kenyon and Richardson observed that former English colonies such as Australia and New Zealand have conflicted, dissonant attitudes to privacy: 'Our debates about privacy and free speech appear as pale companions to English battles between celebrities seeking to control personal revelations (with one eye to preserving a marketable reputation) and the media whose business includes celebrity revelation.'

Curiously, celebrities and public figures have often invoked the right of privacy in response to the press reporting of scandal and gossip. Megan Richardson and Lesley Hitchens pose the critical question: 'Is personal revelation the right of the subject alone or can others tell the story without consent?' A number of key cases relating to privacy law involve the efforts of famous people to protect their privacy. In the matter of *Douglas v Hello!*,¹ Michael Douglas and Catherine Zeta-Jones received damages for the unauthorised publications of their wedding party by paparazzi in the magazine *Hello!*. In the case of *Campbell v MGN Ltd*,² the House of Lords held that Naomi Campbell could defend her privacy through an action of breach of confidence against the *Daily Mirror*. The newspaper had published a number of articles and photographs, which revealed that she had been receiving treatment at Narcotics Anonymous. In *Von Hannover v Germany*,³ the European Court of Human Rights ruled that Princess Caroline of Monaco's right to privacy had been violated by the publication of photographs of the Princess and her children by a celebrity magazine called *Bunte*. More recently still, Kate Middleton, the girlfriend of Prince William, threatened legal action against British newspapers publishing paparazzi photographs of her. Surveying such case law, Megan Richardson and Lesley Hitchens wonder: 'Has the language of "privacy" become a mask for protection of other interests not really to do with privacy at all — a de facto publicity right perhaps?'

Eric Barendt comments that privacy enjoys a complicated relationship with freedom of speech: 'While privacy rights and the interests of the mass media may often conflict, the same is not always true of privacy and the speech rights of individuals.' He observes: 'Indeed, some privacy protection is necessary for them to exercise their speech rights free from anxiety and inhibition.'

Privacy also has an uneasy relationship with copyright law. A number of literary authors and creative artists have relied upon copyright law as a means of protecting privacy. Most notably, J D Salinger, the celebrated author of *Catcher in the Rye*, brought a legal action for copyright infringement of his private correspondence against his prospective biographer, Ian Hamilton, and the publisher Random House. The US Court of Appeals for the Second Circuit found in favour of the literary author. As a result, Ian Hamilton was forced to write a book, *In Search of J D Salinger*, about his frustrated efforts to write a biography of the elusive author.

1 [2006] 1 QB 967; (2005) 65 IPR 449; [2006] 4 All ER 128.

2 [2004] 2 AC 457; (2004) 62 IPR 231; [2004] 2 All ER 995.

3 (2005) 40 EHRR 1.

Sometimes, copyright estates have relied upon copyright law to protect the reputation of authors, after their death. The estate of Sylvia Plath was locked in antagonistic conflict with a number of biographers. The biographer Peter Ackroyd was forbidden by the estate of T S Eliot to quote from Eliot's published work, except for purposes of fair comment in a critical context, or to quote from Eliot's unpublished work or correspondence. The estate of Brett Whiteley has brought legal proceedings against unauthorised biographies, refusing permission for the use of literary and artistic works. The estate of Albert Tucker refused permission for the reproduction of artistic works in the biography, *Australian Gothic*. The estate of James Joyce has been jealous about defending the reputation of the dead author and his family. The biographer, Carol Shloss, was forced to sue the Joyce estate to use copyrighted materials in connection with her scholarly biography of Lucia Joyce.

David Lindsay and Sam Ricketson reflect that copyright law and digital rights management systems can also be used to undermine the privacy of consumers: 'In addition to the collection of identifying information, some DRM systems incorporate the ability to monitor, or conduct surveillance of, activities of an end user associated with the protected content.' The authors conclude that 'detailed attention is required to examine the appropriate level of control that owners should have over digital content and the extent to which limits on control may be justified in order to protect content users, including their rights to privacy'.

Such fears have been borne out by recent developments. Sony BMG Music Entertainment distributed rootkit software on audio compact discs, which compromised the privacy of thousands of its customers, not to mention the security of their computers. The music company was forced to withdraw the spyware-affected sound recordings, apologise to the consumers and settle a number of lawsuits.

A recurring theme throughout *New Dimensions in Privacy Law* is the impact of information technology upon privacy and anonymity. Yves Poullet and J Marc Dinant reflected: 'The global dimension of the network and the multitude of transborder movements give rise to unease regarding the privacy implications of the internet.' There have been particular concerns about the operations of internet search engines — such as Google, Yahoo!, American Online and Microsoft's MSN. There has been much public debate about the US government demanding search data from such intermediaries to help revive strict child pornography laws.

In a parallel work, the great Canadian legal philosopher, Ian Kerr, has also been investigating the relationship between privacy, law and technology. His project is entitled, 'On the Identity Trail: Understanding the Importance and Impact of Anonymity and Authentication in a Networked Society'. This year, Kerr and his collaborators held a conference entitled, 'The Revealed "I"'. They reflect:

Identity, it has been said, is a theft of the self. Who we are in the world and how we are identified is, at best, a concession. Aspects of our identities are chosen, others compelled. Ultimately, we are defined by things that are revealed and things that are concealed.

Kerr has coined the phrase, 'technoprudence', to describe the impact of cyberspace upon traditional legal theory and doctrine. He suggests that new

technologies are influential in the development of legal norms in respect of privacy, intellectual property, freedom of expression, and public access to information sources. Kerr concludes that the public face a critical choice: 'We are at a crucial point: do we want technology that allows a space for anonymity or will we create an IT space where the default is to identify each and every individual and her or transactions?'

The collection, *New Dimensions in Privacy Law*, also explores whether the nebulous concept of privacy has also been encroached upon by the concerns of national security. In his essay, Raymond Wacks commented: 'Among the casualties of the so-called war on terror has been individuals' privacy.' He noted: 'In the immediate aftermath of the events of 11 September 2001, politicians, especially in the United States, have understandably sought to enhance the powers of the state to detain suspects for interrogation, intercept communications, and monitor the activities of those who might be engaged in terrorism.' Commenting on the measures taken by states to address the challenges of terrorism, Kenneth Keith cautioned that 'we must take care in times of peril not to endanger that which is essential to our system of constitutional and democratic government under the rule of law'. Such concerns are very pertinent for authors and writers in Australia. In 2004, officials from the Attorney-General's Department 'cleansed' computers which held copies of Andrew Wilkie's original manuscript, *Axis of Deceit*, under the imperative of national security.

Hopefully, such scholarship will inform and inspire the Australian Law Reform Commission, and the new Australian Government, in its wide-ranging review of Australian privacy law. Perhaps such studies will provide intellectual support for a statutory cause of action for the invasion of privacy in Australia. Such protection will help safeguard the privacy of Australian citizens against the various threats posed by the media, spyware and new information technologies, and the information-gathering of intelligence agencies.

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