

AMENDED IN SENATE SEPTEMBER 2, 2009

AMENDED IN SENATE JULY 23, 2009

AMENDED IN SENATE JUNE 29, 2009

AMENDED IN ASSEMBLY MAY 19, 2009

AMENDED IN ASSEMBLY APRIL 29, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 524

**Introduced by Assembly Member Bass
(Principal coauthor: Assembly Member Davis)**

February 25, 2009

An act to amend Section 1708.8 of the Civil Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 524, as amended, Bass. Privacy.

Existing law provides that a person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, or knowingly trespasses or commits assault with the intent to capture, as specified, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, as specified. The person who commits the act is liable for up to 3 times the amount of general and special damages, and may be liable for punitive damages. However, the sale, transmission, publication, broadcast, or use of any image or

recording of the type, or under the circumstances, described does not itself constitute a violation of that provision.

This bill would create an exception to the latter provision regarding the *first sale, offer for sale, transmission, publication, broadcast, or other use of an any visual image or, sound recording, or other physical impression*, if the person sold, transmitted, published, broadcast, or used any image or recording of the type described in the provision above with actual knowledge, *as defined, that the images or recordings were obtained—illegally in violation of specified provisions* and provided compensation, consideration, or remuneration, monetary or otherwise, for the ~~use of, or rights to, the unlawfully obtained images or recordings~~ *visual image, sound recording, or other physical impression. The bill would specify that those provisions apply only to a visual image, sound recording, or other physical impression that is captured or taken in California after January 1, 2010.* The bill would also make technical changes.

The bill would provide that a person who violates the provisions described above, or who directs, solicits, actually induces, or actually causes another person to violate any of those provisions would be subject to a civil fine of not less than \$5,000 and not more than \$50,000.

The bill would authorize a county counsel or a city attorney to recover those civil fines, as specified. The bill would specify the allocation of the fines collected pursuant to the foregoing provision, including $\frac{1}{2}$ to the prosecuting agency. The bill would also establish the Arts and Entertainment Fund in the State Treasury for the deposit of $\frac{1}{2}$ of the fines, for expenditure by the California Arts Council, upon appropriation by the Legislature, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares all of the
- 2 following:
- 3 (a) Individuals and their families have been harassed and
- 4 endangered by being persistently followed or chased in a manner
- 5 that puts them in reasonable fear of bodily injury, and in danger
- 6 of serious bodily injury or even death, by photographers,
- 7 videographers, and audio recorders attempting to capture images

1 or other reproductions of their private lives for commercial
2 purposes.

3 (b) The legitimate privacy interests of individuals and their
4 families have been violated by photographers, videographers, and
5 audio recorders who physically trespass in order to capture images
6 or other reproductions of their private lives for commercial
7 purposes, or who do so constructively through intrusive modern
8 visual or auditory enhancement devices, such as powerful telephoto
9 lenses and hyperbolic microphones that enable invasion of private
10 areas that would otherwise be impossible without trespassing.

11 (c) Such harassment and trespass threaten not only professional
12 public persons and their families, but also private persons and
13 families for whom personal tragedies or circumstances beyond
14 their control create media interest.

15 (d) There is no right, under the United States Constitution or
16 the California Constitution, to persistently follow or chase another
17 in a manner that creates a reasonable fear of bodily injury, to
18 trespass, or to constructively trespass through the use of intrusive
19 visual or auditory enhancement devices.

20 (e) The right to privacy and respect for private lives of
21 individuals and their families must be balanced against the right
22 of the media to gather and report the news. The right of a free press
23 to report details of an individual's private life must be weighed
24 against the rights of the individual to enjoy liberty and privacy.

25 SEC. 2. Section 1708.8 of the Civil Code is amended to read:

26 1708.8. (a) A person is liable for physical invasion of privacy
27 when the defendant knowingly enters onto the land of another
28 person without permission or otherwise committed a trespass in
29 order to physically invade the privacy of the plaintiff with the
30 intent to capture any type of visual image, sound recording, or
31 other physical impression of the plaintiff engaging in a personal
32 or familial activity and the physical invasion occurs in a manner
33 that is offensive to a reasonable person.

34 (b) A person is liable for constructive invasion of privacy when
35 the defendant attempts to capture, in a manner that is offensive to
36 a reasonable person, any type of visual image, sound recording,
37 or other physical impression of the plaintiff engaging in a personal
38 or familial activity under circumstances in which the plaintiff had
39 a reasonable expectation of privacy, through the use of a visual or
40 auditory enhancing device, regardless of whether there is a physical

1 trespass, if this image, sound recording, or other physical
2 impression could not have been achieved without a trespass unless
3 the visual or auditory enhancing device was used.

4 (c) An assault committed with the intent to capture any type of
5 visual image, sound recording, or other physical impression of the
6 plaintiff is subject to subdivisions (d), (e), and (h).

7 (d) A person who commits any act described in subdivision (a),
8 (b), or (c) is liable for up to three times the amount of any general
9 and special damages that are proximately caused by the violation
10 of this section. This person may also be liable for punitive damages,
11 subject to proof according to Section 3294. If the plaintiff proves
12 that the invasion of privacy was committed for a commercial
13 purpose, the defendant shall also be subject to disgorgement to the
14 plaintiff of any proceeds or other consideration obtained as a result
15 of the violation of this section. A person who comes within the
16 description of this subdivision is also subject to a civil fine of not
17 less than five thousand dollars (\$5,000) and not more than fifty
18 thousand dollars (\$50,000).

19 (e) A person who directs, solicits, actually induces, or actually
20 causes another person, regardless of whether there is an
21 employer-employee relationship, to violate any provision of
22 subdivision (a), (b), or (c) is liable for any general, special, and
23 consequential damages resulting from each said violation. In
24 addition, the person that directs, solicits, ~~instigates, induces, or~~
25 ~~otherwise actually induces, or actually~~ causes another person,
26 regardless of whether there is an employer-employee relationship,
27 to violate this section shall be liable for punitive damages to the
28 extent that an employer would be subject to punitive damages
29 pursuant to subdivision (b) of Section 3294. A person who comes
30 within the description of this subdivision is also subject to a civil
31 fine of not less than five thousand dollars (\$5,000) and not more
32 than fifty thousand dollars (\$50,000).

33 ~~(f) Sale, transmission, publication, broadcast, or use of any~~
34 ~~image or recording of the type, or under the circumstances,~~
35 ~~described in this section shall not itself constitute a violation of~~
36 ~~this section, unless the person sold, transmitted, published,~~
37 ~~broadcast, or used any image or recording of the type described~~
38 ~~in this section with actual knowledge the images or recordings~~
39 ~~were obtained illegally and provided compensation, consideration,~~

1 ~~or remuneration, monetary or otherwise, for the use of, or rights~~
2 ~~to, the unlawfully obtained images or recordings. This section shall~~

3 (f) (1) *The transmission, publication, broadcast, sale, offer for*
4 *sale, or other use of any visual image, sound recording, or other*
5 *physical impression that was taken or captured in violation of*
6 *subdivision (a), (b), or (c) shall not constitute a violation of this*
7 *section unless the person, in the first transaction following the*
8 *taking or capture of the visual image, sound recording, or other*
9 *physical impression, publicly transmitted, published, broadcast,*
10 *sold or offered for sale, the visual image, sound recording, or other*
11 *physical impression with actual knowledge that it was taken or*
12 *captured in violation of subdivision (a), (b), or (c), and provide*
13 *compensation, consideration, or remuneration, monetary or*
14 *otherwise, for the rights to the unlawfully obtained visual image,*
15 *sound recording, or other physical impression.*

16 (2) *For the purposes of paragraph (1), “actual knowledge”*
17 *means actual awareness, understanding, and recognition, obtained*
18 *prior to the time at which the person purchased or acquired the*
19 *visual image, sound recording, or other physical impression, that*
20 *the visual image, sound recording, or other physical impression*
21 *was taken or captured in violation of subdivision (a), (b), or (c).*
22 *The plaintiff shall establish actual knowledge by clear and*
23 *convincing evidence.*

24 (3) *Any person that publicly transmits, publishes, broadcasts,*
25 *sells or offers for sale, in any form, medium, format or work, a*
26 *visual image, sound recording, or other physical impression that*
27 *was previously publicly transmitted, published, broadcast, sold*
28 *or offered for sale, by another person, is exempt from liability*
29 *under this section.*

30 (4) *If a person’s first public transmission, publication,*
31 *broadcast, or sale or offer for sale, of a visual image, sound*
32 *recording, or other physical impression that was taken or captured*
33 *in violation of subdivision (a), (b), or (c), does not constitute a*
34 *violation of this section, that person’s subsequent public*
35 *transmission, publication, broadcast, sale or offer for sale, in any*
36 *form, medium, format or work, of the visual image, sound*
37 *recording, or other physical impression, does not constitute a*
38 *violation of this section.*

39 (5) *This section applies only to a visual image, sound recording,*
40 *or other physical impression that is captured or taken in California*

1 *in violation of subdivision (a), (b), or (c) after January 1, 2010,*
2 *and shall not apply to any visual image, sound recording, or other*
3 *physical impression taken or captured outside of California.*

4 (6) *Nothing in this subdivision shall be construed to impair or*
5 *limit a special motion to strike pursuant to Section 425.16, 425.17,*
6 *or 425.18 of the Code of Civil Procedure.*

7 (7) *This section shall not be construed to limit all other rights*
8 *or remedies of the plaintiff in law or equity, including, but not*
9 *limited to, the publication of private facts.*

10 (g) *This section shall not be construed to impair or limit any*
11 *otherwise lawful activities of law enforcement personnel or*
12 *employees of governmental agencies or other entities, either public*
13 *or private who, in the course and scope of their employment, and*
14 *supported by an articulable suspicion, attempt to capture any type*
15 *of visual image, sound recording, or other physical impression of*
16 *a person during an investigation, surveillance, or monitoring of*
17 *any conduct to obtain evidence of suspected illegal activity or*
18 *other misconduct, the suspected violation of any administrative*
19 *rule or regulation, a suspected fraudulent insurance claim, or any*
20 *other suspected fraudulent conduct or activity involving a violation*
21 *of law or pattern of business practices adversely affecting the*
22 *public health fraudulent conduct, or any activity involving a*
23 *violation of law or business practices or conduct of public officials*
24 *adversely affecting the public welfare, health or safety.*

25 (h) *In any action pursuant to this section, the court may grant*
26 *equitable relief, including, but not limited to, an injunction and*
27 *restraining order against further violations of subdivision (a), (b),*
28 *or (c).*

29 (i) *The rights and remedies provided in this section are*
30 *cumulative and in addition to any other rights and remedies*
31 *provided by law.*

32 (j) *It is not a defense to a violation of this section that no image,*
33 *recording, or physical impression was captured or sold.*

34 (k) *For the purposes of this section, “for a commercial purpose”*
35 *means any act done with the expectation of a sale, financial gain,*
36 *or other consideration. A visual image, sound recording, or other*
37 *physical impression shall not be found to have been, or intended*
38 *to have been captured for a commercial purpose unless it is*
39 *intended to be, or was in fact, sold, published, or transmitted.*

1 (l) For the purposes of this section, “personal and familial
2 activity” includes, but is not limited to, intimate details of the
3 plaintiff’s personal life, interactions with the plaintiff’s family or
4 significant others, or other aspects of the plaintiff’s private affairs
5 or concerns. “Personal and familial activity” does not include
6 illegal or otherwise criminal activity as delineated in subdivision
7 (f) (g). However, “personal and familial activity” shall include the
8 activities of victims of crime in circumstances under which
9 subdivision (a), (b), or (c) would apply.

10 (m) (1) A proceeding to recover the civil fines specified in
11 subdivision (d) or (e) may be brought in any court of competent
12 jurisdiction by a county counsel or city attorney.

13 (2) Fines collected pursuant to this subdivision shall be allocated,
14 as follows:

15 (A) One-half shall be allocated to the prosecuting agency.

16 (B) One-half shall be deposited in the Arts and Entertainment
17 Fund, which is hereby created in the State Treasury.

18 (3) Funds in the Arts and Entertainment Fund created pursuant
19 to paragraph (2) may be expended by the California Arts Council,
20 upon appropriation by the Legislature, to issue grants pursuant to
21 the Dixon-Zenovich-Maddy California Arts Act of 1975 (Chapter
22 9 (commencing with Section 8750) of Division 1 of Title 2 of the
23 Government Code).

24 (4) The rights and remedies provided in this subdivision are
25 cumulative and in addition to any other rights and remedies
26 provided by law.

27 (n) The provisions of this section are severable. If any provision
28 of this section or its application is held invalid, that invalidity shall
29 not affect other provisions or applications that can be given effect
30 without the invalid provision or application.