IMAGES OF CELEBRITY: PUBLICITY, PRIVACY, LAW
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ABSTRACT

Celebrity has been a notable focus in recent media and cultural research, with work considering its textual construction as well as its production, circulation and consumption. Concurrently, celebrities’ claims for privacy from certain media publications have been important in English, European and New Zealand case law – law which has significance beyond those jurisdictions and has received considerable Australian attention from lawyers and commentators. In light of themes about celebrity from cultural and media research, this article examines an illustrative legal claim by celebrities where privacy was sought from particular media coverage; namely, the long running Douglas v Hello! litigation. The authors explore ideas about the celebrity as a commodity and the treatment of photographs in privacy-related claims, and draw out two points. The first concerns legal awareness of what could be called the celebrity industry and its role in the construction and circulation of media content. In some situations, these industrial aspects of celebrity may carry doctrinal weight for issues such as when reasonable expectations of privacy exist. The second raises matters about the uses of celebrity content in terms of subjectivity – uses which are suggested in contemporary media and cultural research – and the role of privacy itself within identity formation, which has been raised recently within Australian legal commentary on privacy.

INTRODUCTION

Celebrity has received substantial recent attention within cultural and media studies. As well as textual approaches, commentators have considered contemporary

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production and consumption practices surrounding celebrity. Three themes from that research are outlined in this article. They concern connections that exist between the media and promotional industries; the aims of promotion for control over media content and its utilisation of selected material from celebrities’ private life to that end; and the changing audience uses of media content away from information and toward identity formation. In light of such research, this article examines a recent legal claim by celebrities who were seeking privacy from particular media coverage. The illustrative legal dispute used here is the suit by Catherine Zeta Jones [312] and Michael Douglas about magazine coverage of their wedding and reception. Drawing on the authors’ distinct disciplinary backgrounds and offering wider references into the relevant legal and humanities literatures, the article aims to enliven awareness about points where future developments may occur in law and in cultural analysis.

The 2005 English Court of Appeal decision in Douglas is notable for its endorsement of legal protection for what can be called the ‘celebrity commodity’. The decision illustrates a different dimension within commonwealth approaches to privacy from those prominent in other notable celebrity cases. In a number of recent privacy decisions, celebrities are constructed predominantly as passive objects of media attention. This can be seen in Naomi Campbell’s claim over newspaper coverage of her attending a Narcotics Anonymous meeting, in the New Zealand decision of Hosking v Runting – involving a celebrity newsreader, his then partner and their child – and in Princess Caroline’s dispute over media coverage the European Court of

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4 See Douglas v Hello! [2001] QB 967 (Eng CA) (preliminary injunction); Douglas v Hello! [2003] EMLR 31 (Ch D) (trial); Douglas v Hello! [2005] HRLR 27 (Eng CA) (appeal from trial). We use the professional name of Zeta Jones throughout this article, unless quoting from court judgments in which she is referred to as Douglas.

5 Campbell v MGN [2004] 2 AC 457 (HL).

6 Hosking v Runting [2005] 1 NZLR 1 (NZ CA).
Human Rights. Of course, the judgments contain important references to the parties’ public activities; for example, Naomi Campbell’s false public denials of drug use meant the media legally could publish some – but not all – of the information about her seeking treatment for drug addiction. In addition, in other preliminary decisions involving celebrity claimants, their actions in courting the media or acting as role models for members of the public have received judicial comment. Given the particular facts involved, however, decisions like Campbell, Hosking and Von Hannover do not discuss connections between the publicity and media industries in any detail. Nor do they examine the creation of celebrity content through a complex interplay of celebrities, intermediaries and the media. These elements of celebrity appear with greater recognition in the 2005 Douglas decision. And the issues they illustrate can be expected to raise legal interest in England, Australia and New Zealand, as well as academic interest more widely.

In one sense, the recognition of the celebrity commodity in Douglas is nothing unusual for law – the commercial appropriation of intangible values associated with business enterprises and advertising endorsements has long been protected by legal doctrine. But recognising the celebrity’s commodity value within privacy law is

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7 Von Hannover v Germany (2005) 40 EHRR 1 (ECtHR, delivered in 2004).
10 In England, the issue is raised under the decisions discussed here. In Australia, the issue can be expected to be important if privacy protection against media publications develops under the general law, which is a topic of great contemporary academic attention. And in New Zealand, the privacy tort approach raises similar matters about the treatment of celebrity content.
11 While US courts’ application of the strong constitutional protection for free speech under the First Amendment has substantially limited privacy law’s applicability to media content, similar matters about the connections between celebrity and the media have value for US academic analysis across law, media and cultural fields.
likely to have significance for other legal decisions and for academic engagements with privacy law and with celebrity. Douglas illustrates that future analyses may need to [313] consider more closely when it is that a ‘reasonable expectation of privacy’\(^\text{13}\) exists for celebrities and how the industrial construction of celebrity content affects that question. Similarly, the issue of when publication of private material is in the ‘public interest’ deserves to be considered with an eye to the existence and effects of the publicity industry – whether for material related to celebrity figures from entertainment and sport or to the celebrity produced around political figures.

**CELEBRITY MEDIA CULTURE**

A prominent theme in recent cultural and media studies analyses of celebrity explicates the central role of the publicity industries in generating media content. Celebrity inspired journalism has become absolutely routine,\(^\text{14}\) with distinctions between celebrity and other forms of ‘elite status’ being less defined ‘as the signs of


celebrity drive out less powerful alternatives’. In part, this use of celebrity has arisen from the historical development of mass audiences and the commercial need for content that appealed across social divisions. David Marshall, for example, suggests:

It is difficult to separate the histories of journalism and the emergence of the contemporary celebrity system. Journalism has been instrumental in proselytizing a new public sphere and celebrities have been foundational means and method for expansion of key elements of that new public sphere.

These developments have seen the publicity and promotion industries closely incorporated with media production processes. In their *Fame Games* research, Graeme Turner, Frances Bonner and Marshall found these industries were central to the Australian media’s operation and to analyses of its social roles:

Enabling [celebrity stories] is an industrial structure: a professional articulation between the news and entertainment media and the sources of publicity and promotion … [There is] a complex and important support industry, filled with media buyers, editors, writers, agents, publicists, managers and promoters … an industry within an industry [which] determines an increasing proportion of our media content.

Such investigations have been useful for drawing attention to the industrial aspects of celebrity – aspects which previously have masked their own existence. That relative lack of visibility, however, may be changing under television forms such as *Big Brother* in which the apparatus used to construct celebrity is visible – even if it is a type of celebrity, or ‘celetoid’, that is subject to greatly accelerated life cycles. In such programming, celebrity’s industrial structure is ‘as much an object of fascination

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16 Marshall, above n 14, 28.
17 Turner et al, above n 15, 4–5.
18 Turner, above n 14, 26.
as the individuals it promotes’. In any event, the development of celebrity content has been linked to wider media changes toward the coverage of what were formerly personal, domestic and little explored subjects. Such changes in media content and usage are examined further below.

If the integration of promotions and the media is the first point to take from this research, the second is that the aim of the publicity and promotional activity is control: control of access which is used to influence media representation.

[Under ordinary circumstances, our access to information about celebrities is strategically regulated in the service of interests which are those of the agent, the promoter, the publicist, the media outlet or the celebrity themselves, rather than those of the consumer.]

As marketers would argue, the ‘key is story control’, in which celebrities and their developers ‘seize the initiative’ in exploiting media relations.

This links with the third point to note from the media and cultural research: seeking control over celebrity content should not be thought to involve excluding the private, the intimate or the domestic from coverage. On the contrary, the strategic deployment of information and images about the private life of celebrities is central to constructing celebrity. It is often linked to the para-social opportunities offered by celebrity content, such as the work it enables in terms of identity formation and the ways that celebrities ‘function more to embody social typifications than unique,

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22 Eg Turner, above n 14, 134; Marshall, above n 14, 24.
23 Turner et al, above n 15, 4.
special qualities’. With the involvement of promotional industries, media coverage has moved from tropes of ‘distance and aura’ to examining celebrities’ everyday lives. This focus is part of the source of the power of celebrity: ‘the negotiation of an extraordinary/ordinary binary’. As Turner notes, ‘the discursive regime of celebrity … crosses the boundary between the public and the private worlds, preferring the personal, the private or “veridical self” as the privileged object of revelation’. The boundary between public life and private life is dissolved, and coverage focuses on the private in an effort to elaborate the celebrity’s ‘authentic self’.

Film stars have been seen to fulfil a significant discursive function in this regard; there is a complex affective and ideological dynamic produced at the site of the spectator between the character the star plays in a particular film and the ‘real’, corporeal existence of the actor. As Marshall explains:

[315] [I]t is the solving by the audience of the enigma of the star’s personality that helps formulate the celebrity: the audience wants to know the authentic nature of the star beyond the screen. Through reading the extratextual reports about a particular film celebrity, the audience knits together a coherent though always incomplete celebrity identity.

Crucial to this process is the technologically mediated economy of identification. An enduring problematic for cinema, the mechanism by which film spectator forges an imaginative relation of intimacy and affect with screen representation has been theorised through a range of techno-ideological frameworks. Richard Dyer, for example, cites the nineteenth century novel and its ‘emphasis of bourgeois characterisation’ as key to understanding the process of ‘audience-star identification’; while Alexander Walker, Stanley Cavell and Laura Mulvey have

26 Marshall, above n 14, 22.
27 Craig, above n 25, 57–58
28 Turner, above n 14, 8 quoting Rojek, above n 19.
insisted, in different ways, that the gaze of the camera and the physiognomy of its object establishes significant affective relations between spectator and screen presence.32

These three elements – the conjunction of media and promotional industries, the aims for control of celebrity coverage, and the central role of the private within celebrity content – suggest that it will not always be useful to see celebrity litigants as passive objects of media attention. None of that should suggest the connections between promotional and media industries exist without criticism – the views of journalists themselves that they seek to fulfil a fourth estate role are one notable example.33 For present purposes, it is noteworthy that a prominent area for criticism within media and cultural research has been the way in which media publications can encroach on privacy. In *Fame Games*, for example, the authors conclude ‘there are aspects of the celebrity industry which no amount of understanding would enable us to condone’:

One of the most serious is the issue of privacy. The obsessive interest in signs of the ‘authentic self’ leads to intrusive behaviour on the part of the press, which can readily be disavowed as the activity of paparazzi … but which is nevertheless systematically encouraged by the decline in staff photographers and the increased dependence by media outlets on freelancers of all kinds.34

Thus, media and cultural research has examined connections between media and the promotional industries related to media content and to the strategic use of ‘private life’ by celebrities and by the commercial interests associated with them.35 As noted

34 Turner et al, above n 15, 173 (endnote omitted).
35 The literature’s criticisms of the media treatment of privacy are often, quite understandably at a general level. It is interesting, however, that the lack of details about the scope of legal protection that might be offered to celebrities is paralleled by the current position of English law discussed below.
above, the research also has explored the audience’s use of celebrity content. For example, in *Fame Games* the authors suggest:

> The clear indication of the work on celebrity today is to regard the interest in celebrities as another symptom of the media’s gradual disarticulation from a model of media practice that foregrounds the dissemination of information, and its increasing alignment with a model that more directly participates in the process of disseminating, interrogating and constructing identities.36

[316] More recently, Marshall has noted that ‘celebrities, via journalistic reportage, have become the effective conduit for discourses about the personal: celebrities have become the discursive talking points for the political dimensions of a host of formerly private and personal concerns’.37

While John Hartley’s support for the positive potentials of these media transformations may be somewhat stronger than commentators like Turner and Marshall, he raises similar points about news that has ‘drifted’ toward celebrity:

> Throughout modernity various forms of identity politics have advanced their cause in the public domain, bringing into the realm of citizenship important attributes of what had until then been thought of as entirely private matters … All of these rights [related to gender, ethnicity, sexuality, nationality and age] had to be established by taking the identities and practices to which they referred out of the privacy of the bedroom, the family, and the community, and establishing in law and legislation that people’s very identity – their subjectivity as persons not just their status as subjects of the state – was part of citizenship.38

Thus, as Marshall has suggested, one could conceptualise a ‘celebrity function’ that ‘is as important as Foucault’s “author-function” in its power to organise the legitimate and illegitimate domains of the personal and individual with the social’.39 These ideas, developed from the idea of celebrity being ‘the textual form taken by identity in

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36 Turner et al, above n 15, 16.
37 Marshall, above n 14, 27.
39 Marshall, above n 30, 57.
media’, 40 will be returned to after considering some basic legal matters about the Douglas case.

DOUGLAS AND ZETA JONES GO TO COURT

Background

The facts of this long running dispute are well known legally. In 2000, Michael Douglas and Catherine Zeta Jones announced their engagement. During great media interest in their upcoming wedding, the magazines OK! and Hello! each sought the exclusive right to publish wedding and reception photographs. The couple contracted the rights to OK! for a payment of £1 million. Under the contract, Douglas and Zeta Jones hired a photographer to take colour shots of the event at the Plaza Hotel in New York, while they retained the right to determine which photographs were supplied to OK! for publication. The magazine had no rights to see or use any photographs taken by the photographer that the couple decided to retain from the wedding and reception.

The contract also imposed obligations on the couple to use their best efforts to prevent any other media gaining access to the wedding and reception, and to provide security to minimise the possibility of other photographers gaining shots of the event. The security measures were extensive. 41 They included entry cards delivered to guests only one day preceding the event. Each card was coded to identify which guest was linked to that card, and carried a secret design in invisible ink on its reverse side. A specialist fire security firm was used to manage the venue’s fire alarm system. The rooms used for the event were swept repeatedly for audio and video devices before the ceremony. Some 30 to 40 rooms within the hotel were blocked off across the entire weekend and security staff were placed throughout that area of the hotel, including in the stairwells. Specific arrangements were made for any cameras that might be found when guests arrived at the event, with computers and technicians being on site to deal with any digital equipment that was found. In addition, the 350 wedding invitations expressly requested that no photographs be taken by guests.

40 Hartley, above n 38, 17 (emphasis added).

41 The security measures are described in detail in the trial judgment: Douglas v Hello! [2003] EMLR 31, [61]–[66] (Lindsay J); also see [43]–[47].
Notwithstanding these steps, a freelance photographer gained entry and surreptitiously took a number of photographs. Through other freelancers, acting as intermediaries, the exclusive publication rights for six of the photographs were sold to Hello! for £125,000. After a failed attempt to restrain publication of the non-official photographs, OK! brought forward publication of the official images so they appeared on the same day as Hello!’s six photographs.42

The subsequent trial and appeal involved multiple issues about the rights of the couple and the magazines in relation to the six photographs published in Hello! In particular, did Douglas and Zeta Jones have a privacy right that could be recognised under the expanded breach of confidence doctrine that has developed in English law to protect against publication of private information?43 And did OK! have similar rights under breach of confidence that were infringed by the publication in Hello!?44

**Trial and Appeal**

At trial, the claimants succeeded in their claim for breach of confidence before Lindsay J. Douglas and Zeta Jones were awarded a permanent injunction against future publication of the unauthorised photographs and received two aspects of damages. First, each of them was awarded £3,750 for the distress flowing from

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42 Some of the Hello! photographs also appeared in two UK newspapers, The Sun and The Daily Mail.

43 The law is reviewed by the Court of Appeal in Douglas v Hello! [2005] HRLR 27, [54]–[91]. Also see eg Butler, above n 13; Lindsay, above n 13; and chapters by Phillipson and Wacks in Kenyon and Richardson, above n 12.

44 The case is also significant on appeal for considering the European Court of Human Rights’ decision in Von Hannover, which involved Monaco’s Princess Caroline and German publications about her everyday life: Von Hannover v Germany (2005) 40 EHRR 1 (ECtHR, delivered in 2004). Other important issues in the Douglas appeal included the treatment of economic torts and the substantial lack of relevance of the law of New York (which is where the wedding ceremony and reception took place) when it was accepted that media publication in New York rather than the UK would have created no cause of action: Douglas v Hello! [2005] HRLR 27, [99] (Lord Phillips MR for Eng CA).
publication of the unauthorised photographs.\(^{45}\) Second, they were awarded £7,000 together for the inconvenience of needing to select the authorised photographs to supply to OK! much more quickly than had been planned, when the publication date of the authorised images was brought forward. It is notable that their total award of damages of £14,500 is far from a large sum in legal terms. However, OK! also succeeded in its confidentiality claim and received more than £1 million for its loss of profit from exploiting the authorised photographs.

In the 2005 Douglas decision, Lord Phillips MR delivered the Court of Appeal’s judgment. Following the House of Lords decision in Campbell, the court held that Douglas and Zeta Jones had a reasonable expectation of privacy in relation to the non-authorised photographs – in part due to the extensive arrangements taken to secure the event: the ‘photographs of the wedding plainly portrayed aspects of the Douglases’ private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information’.\(^{46}\) Having contracted for publicity about the event did not mean privacy interests could no longer be protected by law.\(^{47}\) It is also notable that, while public interest and free speech-related arguments may overcome claims to protect private information, the Douglas case involved no arguments about public interest in publishing the unauthorised photographs.\(^{48}\)

\(^{45}\) The couple’s distress on learning of the unauthorised photographs is detailed in the trial judgment: Douglas v Hello! [2003] EMLR 31, [82]–[84] (Lindsay J).

\(^{46}\) Douglas v Hello! [2005] HRLR 27, [95] (Lord Phillips MR for Eng CA). Also relevant is that Hello! and the photographers would have known about the couple’s exclusive deal with OK! and the security measures taken at the wedding and the reception.

\(^{47}\) Ibid [103]–[110].

\(^{48}\) Ibid [92]. Thus, in addition to the celebrity industry raising issues for when law will say a reasonable expectation of privacy exists, it can be expected to raise issues for when free speech arguments will take precedence over privacy claims. Roderick Bagshaw, eg, has noted, in ‘Unauthorised Wedding Photographs’ (2005) 121 Law Quarterly Review 550, 552:

\[T\]he court did not have to consider how a claimant’s interest in privacy as a commercial commodity should be weighed relative to personal privacy. Thus it remains unsettled when it will be necessary in a democratic society to restrict free expression in order to protect a person’s right to release private information about [him or her self] … in the most commercially advantageous way.
The Court of Appeal supported the damages awarded to the couple related to selecting the authorised photographs more quickly than planned and to distress at the invasion of privacy. But the appellate court allowed the appeal against the award of more than £1 million to OK! for publication of the unauthorised photographs. OK! had no basis on which to make a claim and had no right to damages. The legal interest was that of Douglas and Zeta Jones: it was a personal not proprietary interest and had not been transferred to OK! Lord Phillips MR explained:

OK!’s complaint is not that Hello! published images which they had been given the exclusive right to publish, but that Hello! published other images, which no one with knowledge of their confidentiality had any right to publish. … These photographs invaded the area of privacy which the Douglastes had chosen to retain. It was the Douglastes, not OK!, who had the right to protect this area of privacy or confidentiality.49

The appeal also rejected a claim to increase the couple’s award to reflect the sum of damages taken away from OK! Douglas and Zeta Jones contended they were entitled to a more substantial award than £14,500 in these circumstances. They argued the damages should reflect the notional licence fee they would have charged Hello! to publish the unauthorised photographs. This argument failed because the basis of their claim against Hello! was the invasion of their privacy through publishing unauthorised photographs – which the trial award of damages to them already reflected. In addition, the claimants would not have agreed to any publication in Hello! given the control they retained in relation to choosing authorised photographs and their contractual obligations to OK!, which gave that magazine exclusive rights to photographs of the event for £1 million. That contract had ‘exhausted their relevant commercial interest’.50 The fate of the far larger award that was originally granted to OK! (and the implications for legal costs in the dispute) meant that commentators expected the case to proceed to the House of Lords.51 At this point, issues about the

49 Ibid [136].
50 Ibid [247].
legal treatment of the commodified celebrity and of photographs in privacy claims are worth examining more closely.

**THE CELEBRITY COMMODITY**

*A Hybrid Privacy?*

As we noted earlier, this case is interesting for its recognition of the commodification of celebrity. At trial, for example, Lindsay J said Douglas and Zeta Jones

[319] had here a valuable trade asset, a commodity the value of which depended, in part at least, upon its content at first being kept secret and then of its being made public in ways controlled by [them] … I quite see that such an approach may lead to a distinction between the circumstances in which equity affords protection to those who seek to manage their publicity as part of their trade or profession and whose private life is a valuable commodity and those whose is not but I am untroubled by that.52

Lindsay J described the confidence as a ‘hybrid kind’53 because of the way in which material that would have been private – information from a couple’s wedding that occurred in their private life – became commoditised. The approach was accepted on appeal:

The description of the confidence identified by the judge as ‘hybrid’ was appropriate. The Douglastes had claimed damages under two heads: (1) for invasion of their privacy and (2) for damage to their commercial interest in information about their wedding. Their contention was that they were commercially exploiting information about their wedding in such a way as to preserve residual confidentiality, or privacy, in relation to it. Selected photographs would be made public, disclosing that part of the private

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53 Ibid [228].
information that the Douglases were content should be conveyed to the public. No other images would be made available to the public.54

As noted above, Douglas and Zeta Jones obtained damages related to selecting the authorised photographs quickly, which allowed OK! to publish them at the same time as Hello! published the unauthorised photographs. This claim ‘had nothing to do with interference with private life’.55 Rather, the couple had a commercial interest in their celebrity as a commodity which the law would assist them to protect. ‘The judge accepted that the information of what took place at the wedding was similar to a trade secret which the Douglases were entitled to exploit and to keep confidential until exploited.’56 It is noteworthy that both aspects of the claim – the parts related to private life and to celebrity commodity – are protected by what can be called in English law ‘the cause of action formerly described as breach of confidence’.57 The English courts are not happy with the label of ‘breach of confidence’, but have remained with it rather than any direct recourse to ‘privacy’:

We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion.58

The hybrid quality of the couple’s interest suggests the case is really about an image right – it ‘is arguably not about privacy at all’59 but about images of celebrity. The connection with image rights suggests the academic interest in comparisons with US legal approaches to publicity rights,60 especially as the English courts accepted that

55 Ibid [111].
56 Ibid [111].
57 Ibid [53]. Michalos, above n 51, 385 has already made the invited cultural reading of referring to ‘the artist formerly known as Prince’.
New York law would have offered no recourse to the couple for the photographs’ publication.61

[320] In Douglas an intention to profit commercially transformed private information into something protected under law. As Christina Michalos notes, and as the cultural and media research described above would support: ‘Almost anything to do with a celebrity can be profitable’.62 The Court of Appeal acknowledged the development it was making:

Recognition of the right of a celebrity to make money out of publicising private information about [him or her self] including … photographs [taken] on a private occasion, breaks new ground. We can see no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret.63

Thus as well as celebrities and the associated promotional and publicity structures having created a form of media content with, among other things, significant social value, the law recognises their industriousness in the trade value of their work – in particular, it recognises the value of images.

Photographs, Privacy and Celebrity

The Douglas decision illustrates the law’s particular concern with images in relation to privacy. Lord Phillips MR described the issue in this way:

[Photographs] are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive.64

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62 Michalos, above n 51, 385.
63 Ibid [113].
64 Ibid [84].
Similar concerns can be seen in earlier decisions such as *Theakston v MGN*[^65] and *Von Hannover,*[^66] as well as some judgments in *Campbell v MGN.*[^67] In *Theakston,* for example, a newspaper publication describing the claimant’s actions in a brothel was allowed, but publishing photographs of those actions was restrained by the court.

As media and cultural research would suggest, the intimacy effect of photographs could be linked to other aspects of celebrity. In particular, as Chris Rojek, Elizabeth Anne McCauley, Walter Benjamin and others have noted, the socio-technological relations of commodity culture are, to a significant degree, enabled by the invention of photography.[^68] André Disdéri’s 1854 patent of *carte-de-visite* photography, for example, ushered in new forms of image consumption, archiving and circulation. Often depicting royalty, politicians or military leaders, this new mode of portraiture was responsible for ‘bringing the famous into every living room and, as a result making them more familiar, less heroic’.[^69]

In addition, the particular status of photographs for the law of breach of confidence can be seen in the [321] approach to injunctions. In general, once material has been published it will not be subject to an injunction under the law of confidence to prevent further publication. This is the position for the types of confidential information traditionally protected under breach of confidence, as well as for many types of private material. But it appears not to be the position for photographs:

> Once intimate personal information about a celebrity’s private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. Insofar as

[^67]: *Campbell v MGN* [2004] 2 AC 457 (HL).
a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it.\textsuperscript{70}

This is a difference between private photographic information and other types of confidential information. And the change is ‘a major inroad’ into traditional approaches to breach of confidence.\textsuperscript{71}

Given the attention paid to the status of photographs in general in \textit{Douglas}, it is notable that little was said about the actual content in question.\textsuperscript{72} Lindsay J at trial described them in comparative detail. Their composition was ‘generally poor’, with two being out of focus and none displaying any awareness by the subjects of the photography. One image showed Zeta Jones traversing the wedding aisle; another showed her dancing with someone other than Douglas. In two she was shown eating, once with Douglas holding a fork in her mouth. In another she ‘playfully holds up a cake knife at her husband’ and a ‘hopelessly out of focus’ image showed the couple kissing.\textsuperscript{73} These would be ordinary events at a private wedding. And this wedding was treated as a private event by the law. At trial, for example, Lindsay J noted the wedding was not a ‘celebrity event’ – the guests were friends and family of the couple, and Douglas and Zeta Jones had not taken ‘any steps to stir up publicity for the event’.\textsuperscript{74}

\textbf{Privacy Law, Celebrity, Identity}

The above examination of celebrity in cultural analysis and in privacy law suggests two points by way of conclusion here, concerning law’s awareness of the celebrity industry – and its relevance for when a reasonable expectation of privacy exists or

\textsuperscript{70} \textit{Douglas v Hello!} [2005] HRLR 27, [105] (Lord Phillips MR for Eng CA).

\textsuperscript{71} Michalos, above n 51, 386.

\textsuperscript{72} Eg Michalos, above n 51, 386.

\textsuperscript{73} \textit{Douglas v Hello!} [2003] EMLR, [76] (Lindsay J). The couple both have very large families, see eg evidence of Douglas ibid [69].

\textsuperscript{74} Ibid [67]–[68].
will be protected against free speech-based claims – and parallels that could be explored between the contemporary uses of celebrity content and the role of privacy in longer social battles over identity.

First, in cases other than *Douglas* more could well be made of the roles of celebrities and their agents in the production of celebrity content. In *Douglas*, there were detailed descriptions of the roles of various intermediaries in moving the photos from New York to *Hello!* and the negotiations around various authorised photographs of the couple and their baby. But the focus was not on the claimants’ involvement in the celebrity industry, at least not in terms of the scope and strength of the protection available to them in relation to the wedding. This is not surprising given the particular circumstances of the case. However, the manner in which the couple is described – at times as if it is quite separate to the publicity industry and the professionals who work closely on its image management – may not always be the approach in celebrity privacy cases. In the trial judgment, Lindsay J noted that while Douglas and Zeta Jones no doubt welcome much of the publicity they experience, they ‘can also find their privacy or ordinary life severely curtailed’. He then detailed clearly intrusive actions by journalists and photographers against Zeta Jones’ private life. But absent to a fair degree is comment about the difficult issues around the publicity industry’s involvement in the construction of controlled access to celebrities’ ‘private life’ – which is striking given the wedding photographs illustration of that very point in their depiction of the intimate and everyday.

Other factual situations in future privacy cases can be expected to see this matrix explored further. This would build on passing references in existing cases, such as in *Beckham v Gibson*. In this decision, a contractual provision for confidentiality between the celebrity couple, Victoria and David Beckham, and their nanny was not upheld. The result appears to have been due, in part, to the already public status of

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75 Ibid [9].

76 Lindsay J does note the content of *Hello!* and *OK!* includes many commissioned, authorised photographs and articles with text that generally is ‘warm’ to the subjects, clearly suggesting the collaboration of the celebrities and their agents: ibid [13]–[14].

77 (unreported, Langley J, 24 April 2005)
some of the information about the Beckhams’ marriage, but it also followed from the way in which ‘the Beckhams had courted and used publicity about their apparent fairytale marriage for their own considerable benefit’. Similarly, in the earlier \textit{A v B}, the Court of Appeal stated: ‘Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows.’ This would extend other case law comments about situations in which claimants have misled the public. For example, in \textit{Campbell} Lord Nicholls followed the Court of Appeal in noting: ‘Where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight.’

As Megan Richardson and Lesley Hitchens suggest, ‘courts have stopped short of treating self-publicity as engendering an automatic obligation of utter transparency’. But it is the detail of the practices and effects of publicity that awaits legal consideration, beyond the existing legal recognition of ways in which celebrities trade on their private life. An approach that looks to when a ‘reasonable expectation’ of

\textbf{78} Lewis et al, above n 13, 176.

I consider that the claimant has placed aspects of his private life, whom he has intimate relations with and his general attitude towards sexual relations and personal relationships into the public domain, discussing them willingly so as to create and project an image calculated to enhance his appeal to those who do or would employ him, through enhancing his fame, popularity and reputation as a man physically and sexually attractive to many women … He has courted publicity of that sort and not complained at it when, hitherto, it has been very largely favourable to him … The claimant cannot complain if the publicity given to his sexual activities is less favourable in this instance.

Of course, the English doctrinal treatment of such situations remains to be seen following the European Court of Human Rights expansive approach to privacy protection in \textit{Von Hannover v Germany} (2005) 40 EHRR 1 (ECtHR, delivered in 2004). The point was noted in the \textit{Douglas} appeal: \textit{Douglas v Hello!} [2005] HRLR 27, [73] (Lord Phillips MR for Eng CA).

\textbf{81} Richardson and Hitchens, above n 10.
privacy exists may allow these details to be taken into account, and might fill out concepts such as what courting the media means in particular cases.\(^{82}\) But that consideration should extend law’s images of celebrity beyond the traditional media actors – actors who may well not be ‘entirely disinterested [323] agents of public “exposure” of private, personal celebrity information’\(^{83}\) – to the surrounding industrial apparatus of celebrity.

It might be that the interests of celebrities and associated entities in engaging the media make it harder for them to obtain legal protection of privacy. However, their very interests in controlling publicity – as well as their financial resources – mean that celebrity privacy cases can be expected to remain prominent in English courts. A similar situation could be expected for Australia if the law moves beyond the High Court decision in *Lenah Game Meats*\(^ {84}\). So perhaps the legal question may differ from one such as whether ‘personal revelation [is] the right of the subject alone’\(^ {85}\) because of how the concepts of ‘personal revelation’ and ‘alone’ are made complicated – at least at times – by the celebrity industry.

\(^{82}\) See eg Butler, above n 13, 355 (a reasonable expectation of privacy would often decrease as a person’s public profile increased), 375 (whether publicity was courted should be important in determining whether a reasonable expectation of privacy exists).

\(^{83}\) Richardson and Hitchens, above n 12.

\(^{84}\) *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 and see eg Lindsay, above n 13. At the same time, the vast majority of privacy disputes are likely to remain with self regulatory bodies like the Press Complaints Commission. Eg Press Complaints Commission, *2004 Annual Review* (London: PCC, 2005) available at <www.pcc.org.uk>, records the PCC considered 127 privacy complaints for the year which involved possible breaches of its code of practice, with only a handful of them being dealt with by the courts. For a brief examination of the PCC, see Russell L Weaver, Andrew T Kenyon, David F Partlett and Clive P Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (2005) 124–27 and 273. Also likely to remain prominent in litigation will be defendant newspapers, rather than broadcasters. In England, for example, the *Ofcom Broadcasting Code* (2005) sets out restrictions on broadcasters’ treatment of private information, see <http://www.ofcom.co.uk/tv/ifi/codes/>.

\(^{85}\) Richardson and Hitchens, above n 10.
Second, analyses from media and cultural research about media content moving towards the domestic, private and quotidian have been outlined above, as have the uses of that content for subjectivity formation and the media’s value for processes of ‘disseminating, interrogating and constructing identities’.\(^{86}\) Celebrity coverage is central in these developments and for the performance of what could be called the ‘celebrity function’.\(^{87}\) An important legal engagement with privacy invites a comparison here. Drawing on Foucault and others, David Lindsay has argued for privacy to be understood within ongoing processes of social rationalisation.\(^{88}\) He examines deontological and consequentialist approaches to privacy – approaches that conceptualise individuals more as ‘ideal citizens’ or ‘empirical consumers’,\(^{89}\) which can be related, in broad terms, to a European focus on a forum or a US focus on the market.\(^{90}\) Lindsay suggests that, especially given Australian society’s consequentialist style,\(^{91}\) market-based approaches to privacy may primarily reinforce social rationalisation. In that context, deontological or rights-based approaches to privacy may resist global pressures for rationalisation and protect plural social identities, notwithstanding their universalised view of the subject:

[D]eontological justifications for the legal protection of privacy can be seen both as a form of resistance to rationalisation and normalisation, and as a form of entrenching a particular view of the self as atomistic, individualistic and self-determining. This [view of the self] does not mean, however, that deontological justifications of a right to privacy should be ignored; merely that the universalistic pretensions they draw on are overly ambitious.\(^{92}\)

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\(^{86}\) Turner et al, above n 15, 16.

\(^{87}\) Marshall, above n 30, 57.


\(^{89}\) Ibid 134.

\(^{90}\) Ibid 175–76.


\(^{92}\) Lindsay, above n 88, 149.
[324] Lindsay emphasises that privacy is central to the creation of individual subjectivity:

[P]rivacy laws can be usefully analysed as part of ongoing, historically-specific struggles over identity and forms of subjectivity, in the midst of totalising forms of social ordering. Sometimes privacy laws may entrench particular forms of subjectivity; sometimes they can be seen as part of complex struggles over diverse forms of subjectivity.93

This means ‘the protection of privacy remains a continual process of negotiating limits, including legal limits, on a broad front: that of individual identities’.94 And all that is offered by legal protection of privacy is ‘ongoing struggles over identity’.95

One thing that may usefully be explored in light of such an interpretation is the contemporary role of celebrity content in those processes of identity formation. If the analysis of a ‘celebrity function’ is accepted, then the legal treatment of at least some celebrity privacy claims implicates more than their own claims to privacy within ‘historically-specific struggles over identity’. Of course, it could be thought that the celebrity commodity element of the damages obtained in Douglas are not concerned with privacy at all96 – at the least, they appear closer to the market than to the forum dimensions of the concept. Even so, media research suggests there may be more to consider legally and culturally in relation to celebrity and privacy than simply the ‘global victory of the market’ in which the ‘celebrity as a commodity was waiting to pounce’.97

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93 Ibid 142.
94 Ibid 142.
95 Ibid 143.
96 See above nn 55–59 and accompanying text.