The Case for Compulsory Prior Notification in Privacy Cases

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“Privacy - like eating and breathing - is one of life's basic requirements.”

— Katherine Neville

Easy like Sunday morning...

On the morning of Sunday 30 March 2008, the then Director of Communications of the Fédération Internationale de l'Automobile called the then President, Max Mosley, and informed him that the News of the World had published an article about him.

Baffled, Mosley went to his local newsagent to investigate. A few minutes later, he read the headline in horror: ‘F1 boss has sick Nazi orgy with 5 hookers’. Mosley read the accompanying article that described how he had, in a private residential property, engaged in sadomasochistic, group sex sessions with several prostitutes. One of the prostitutes had used a hidden camera to record the meetings and the footage was obtained by the News of the World.

The article, written by the chief reporter of the now defunct newspaper, included pictures and was accompanied by a video on the newspaper’s website. Splashed across the front page the article took up the first three pages of a paper, that, on average, entertained 2.8 million Brits on lazy Sunday mornings.
The proposed reform

This essay argues in favour of a legal obligation on the print media to notify individuals when stories about their private lives are about to be published. This reform will afford those individuals whose private information is about to be published the opportunity to obtain an interim injunction. This will ensure that the individual in question has the means to exercise his or her Article 8 rights. This reform will be subject to one defence when an interim injunction is applied for, namely public interest.

The argument has four parts. First, the case of Max Mosley has shown what is wrong with the current law, to wit, it allows flagrant breaches of privacy. Second, I will present a principled argument for prior notification. Third, I will present a practical argument for prior notification. Fourth, I will rebut potential objections to prior notification.

Privacy as sui generis: a principled case for the proposed reform

This point can be made very simply: once information has been made public, it can never be made private again. As a result, the only possible remedy is to stop the information becoming public. What is needed is a mechanism that allows parties to get an order to stop the information becoming public. To have any chance of being successful in getting an order of this kind, parties need to know what the information is and that it is about to be published.

1 This essay does not deal with the broadcast media because it is regulated by a tighter and materially different set of regulations. Attempting to tackle both industries would be too wide a task for the scope of this essay.
The central argument is put lucidly by Eady J in his judgment in the Mosley case. He writes “…Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action…”

Currently, the decision whether or not to honour the subject’s right to privacy is made by an editor, who in the vast majority of cases is hugely incentivised to allow the violation. More fundamentally, this arrangement allows our legal system to be held hostage by editors.

**The 99 per cent: the proposed reform and practical realities**

The need for prior notification only arises in cases where the subject does not already know of the story. Under current practice this is a small minority of cases.

Paul Dacre, editor of the Daily Mail and Chair of the Editor’s Code Committee of the Press Complaints Commission, claims that in 99 per cent of cases the subject is given prior notification, making the small minority only 1 per cent. Although Dacre’s

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2 Mosley v News Group Newspapers Ltd [2008] EMLR 679 at [230]
3 On 23 April 2009 Paul Dacre told the CMS Committee that “ninety nine times out of a hundred the subject has notice of the story”.

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figure is disputed, I will take it as true.\textsuperscript{4} This concession is made because the true
figure is both difficult to calculate with precision and unanimously held to be a
majority of cases.

This may make it appear that the practical argument for prior notification is not
particularly pressing. If in the vast majority of cases subjects are given prior
notification, the system is working well, right? No. Despite being a narrow one, this
problem is especially egregious because of the power it puts in the hands of editors.
Newspapers only ambush an individual if they know what they are going to write is
illegal.

Cases where prior notification is not given also violate another principle of natural
justice, \textit{Nemo iudex in causa sua}, namely that no one shall be a judge in their own case.
Without a prior notification requirement, it follows that whether the subject of a
story is able to seek and obtain the only effective remedy, an injunction, depends on
the willingness of the defendant newspaper to notify him. The wrongdoer is judge in
his own case.

There is no reason why this minority should have their right to privacy hijacked and
legal protection rendered useless by an attempt to unjustly benefit from
commercialised mass titillation. Some newspapers will not inform the subject and

\textsuperscript{4} Two practitioners that contest this figure are 1) Hugh Tomlinson QC, who contests it at a public
lecture on the topic of super-injunctions (http://www.youtube.com/watch?v=wemDU1cdnbQ, see
from 42 minutes) and 2) Mark Thomson, a partner at leading claimant firm Carter Ruck who said to a
Select Committee Enquiry. “It used to be when I started in practice the media would notify.
Nowadays generally the tabloid media do not.” (SCCMS, Oral evidence, HC 275-i, Q107 (2008-09)
maintain a high level of secrecy precisely because they know an injunction would be granted were the victim to find out in time. They also know that once a story is published the victim is unlikely to sue because of the huge costs, increased exposure and inability of the courts to make the information private again.

An example gives life to this point. In the subsequent Mosley trial the then editor of the News of the World, Colin Myler, admitted that the article was not published in the paper’s first edition (accessible online on Saturday evening), precisely because he was worried that Mosley would seek and win an injunction preventing further publication. Later that year, Myler nominated the Mosley story for ‘Scoop of the Year’ at the British Press Awards. The British press trades in the private lives of celebrities and we currently have a system that only works when the newspapers decide it will.

Furthermore, that the more flagrant the breach of privacy, the more likely it is that the court could grant an injunction, and the less willing the newspaper will be to notify the subject in advance.

**Defeating objections to the proposed reform**

*Objection 1: Prior notification will be impossible to implement. We should aim for self-regulation.*

Law rests upon a system of sanctions. The argument that media organisations owned by large conglomerates will not be deterred by sanctions imposed, whether
they are fines or cultural distain, is faced with two problems. Firstly, its truth can be doubted and secondly, it a red herring.

Firstly, under a reformed system, failure to pre-notify will allow a right to exemplary damages and cost orders. The courts will have to be prepared to make major awards if such a rule is to have a genuine deterrent effect.

Self-regulation is unacceptable because even on the (false) premise that the PCC’s code is always rigorously upheld by its members, only those that submit themselves to industry self-regulation will be regulated. Proprietors might follow the example of Northern & Shell, publishers of several print publications including the Express and Star newspapers and OK! Magazine, and withdraw from industry self-regulation.

Furthermore, self-regulation denies an independent voice. D. Harris et al argue that with regards to violations of Articles of the European Convention on Human Rights, the remedy-granting body must be “sufficiently independent” of the rights violating body. The constituent parts of the PCC are clearly not “sufficiently independent” from the rights-violator because they are the rights-violator itself.

Secondly, the objection is to some degree a red herring. The fact the law cannot do something with complete effectiveness, does not mean that the law should not

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5 This would, admittedly, be a necessary variation from the principle in the Mosley case that exemplary damages are not available in privacy cases.
attempt to do something about it. Many offences are difficult to prevent, but the law
endeavours to stop them happening. Equally, the law should endeavour to prevent
flagrant breaches of privacy. If anything, rather than an argument to sit back and do
nothing, the practical difficulties of the problem at hand is an argument in favour of
radical action.

Objection 2: Academic opinion, British Courts, the European Court of Human Rights and
most importantly Parliament have recognised that the right to damages is an adequate
remedy.

Damages are not adequate and neither is this is the academic community’s,
Parliament’s, the Courts’ or the European Court of Human Rights’ position.

Initially, we must note that there is consensus amongst the academic community on
this issue.7 Damages fail to cure an invasion of privacy because they cannot erase the
information revealed from peoples’ memories. Professors Leigh and Lustgarten have
argued that “the interim stage is the critical one. It is effectively the disposition of the
matter.”8

In an important decision on privacy under the Human Rights Act, the Court of
Appeal recognised that, “…if the injunction is not granted, the claimant may be

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7 Phillipson, G. in Max Mosley goes to Strasbourg: Article 8, claimant notification and interim injunctions,
Journal of media law, 2009, page 75, shows the “overwhelming agreement on this point... from
academic authorities in the field of privacy”.
8 I. Leigh and L. Lustgarten, Making Rights Real: the Courts, Remedies, and the Human Rights Act, 1999,
55(3) CLJ pages 509, 533 and 551
deprived of the only remedy that is of any value.” The case for a prior notification requirement gained momentum in the UK courts. Let us now turn to the question of what Parliament thinks.

Andrew Scott, on the basis of Section 12 of the Human Rights Act, argues that Parliament is satisfied with damages. However, as Mosley points out, if this had really been the case, Parliament could have “contented itself with extending to privacy the well-established non-injunction rule in libel”, but in reality “Section 12 specifically allows for interim orders. [This] demonstrates that Parliament did indeed recognise their need in privacy cases.”

Scott’s second argument is in the form of an analogy with personal injury cases. He argues that damages should apply to privacy cases by considering a thought experiment where a child throws a stone which hits another child and irreparably damages one of his eyes. In this case, damages are the only remedy and Scott concludes that it is “not clear why privacy harms should be treated differently to this or other forms of irreversible non-pecuniary loss.” The clear objection to Scott’s argument is that it is totally disanalogous: it ignores the fact that a judge, could, in a case of an invasion of privacy, stop the proverbial stone being thrown in the first

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9 A v B plc (Flitcroft v MGN Ltd) [2002], [11(ii)
10 https://inforrm.wordpress.com/2010/06/30/opinion-prior-notification-in-privacy-cases-a-
response-to-andrew-scott-by-max-mosley/
place. Scott’s argument cannot work against prior notification since it implicitly assumes prior notification is not possible. Prior notification is priorly dismissed as a remedy. It is ironic, considering Scott’s example, that the sentiment of health and safety legislation itself champions the maxim that prevention is superior to cure.

Finally, we must recognise that the tide in Europe, both with regards to member states and the European Court of Human Rights, is changing.

In France and Germany, for example, injunctions are the norm. Article 9 of the French Civil Code allows efficient protection of privacy including the seizure of publications for breaches of ones “intimate private life”. Dupre writes that “In most cases plaintiffs prefer to prevent or to stop a breach to their “intimate private life” happening. As a result, this emergency remedy had become the general remedy for the protection of private life, as opposed to normal procedures where judges award damages after the breach has happened.”

The prohibition of censorship by the German Basic law does not apply to “preclude the granting of a temporary judicial order to prevent a publication” as long as the

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applicant’s claim is “well-founded” and interim relief is “necessary in order to prevent a significant detriment.”

In addition to Justice Eady’s comments above it is clear the European Court of Human Rights stands against the sentiment that damages are adequate, having stated that, “It is clear that no sum of money awarded after disclosure of the impugned material could afford a remedy in respect of the specific complaint advanced by the applicant.”

Furthermore, European Court of Human Rights jurisprudence can be read to require prior notification. The Court has stated that like the State enjoys a wide margin of appreciation in implementing the obligation to respect private life, but “The Court nonetheless recalls that Article 8, like any other provision of the Convention…must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective.” There is an obligation to insure that one is “able effectively to enforce [one’s Article rights] against the press”.

The lack of an effective prospective way to protect unauthorised disclosure of one’s personal information, even with the availability of damages, amounts to, according to the European Court of Human Rights, a breach of Article 8.

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13 E. Barendt, Freedom of Speech, E. Barendt, Oxford University Press, 2006, pages 125 and 139
14 Mosley v United Kingdom at [72]
15 Armonas v Lithuania, 36919/02 (25 Nov 2008).
16 Ibid at [43]
17 Another case that clearly states this is I v Finland - 41 20511/03 (17 July 2008).
Objection 3: Prior notification is incompatible with Article 10 of the European Convention of Human Rights.

Likewise on this issue, the European Court of Human Rights has, on a number of occasions, made its position clear, namely that “Article 10 does not prohibit the imposition of prior restraints on publication”.18

Furthermore, there is a level of hypocrisy that is often overlooked with regards to how Articles 8 and 10 should be balanced. The print media have for many years been campaigning and recently managed to convince the Master of the Rolls’ committee that the law should be changed in their favour. They have gained prior notification of applications for interim injunctions made by individuals against the media. This form of prior notification is both mostly adhered to and attracts vigorous criticism from senior members of the judiciary when it is not.

Objection 4: A prior notification requirement will cause a chilling effect.

Some argue that a prior notification requirement would create a chilling effect and threaten to stifle serious, honest journalism. To combat this, the model I present allows for a public interest defence when an interim injunction is applied for.

Careful scrutiny by the courts at the stage when an application for an interim injunction is made is crucial to ensure the right to freedom of expression is upheld. Notwithstanding this, a clear distinction needs to be recognised between a

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18 Observer and Guardian v. The United Kingdom (1992) at [60]
temporary judicial order and the cries of ‘censorship’ often heard from the press. This reform calls for the former, not the latter.

Furthermore, the burden on proof at the application stage will be on the subject to show that the invasion of privacy is unjustified.\textsuperscript{19} Even if an invasion of privacy is found, it can be outweighed by the public interest justification, and has done so on many occasions in the past.\textsuperscript{20} In addition, settling the issue at the interim stage has been shown to be far quicker and cheaper than a final trial.

**Conclusion**

In his Reflections on the revolution in France, the political theorist, Edmund Burke asks us what is the point of an abstract right unless one has a way of securing whatever it is one has a right to? In this vein, I have argued, that since the maintenance of privacy depends on keeping confidential material out of the public domain, and because our system fails to do this, it needs to be reformed. The status quo leaves the decision making in the hands of the very persons – newspaper editors – who have least reason to uphold it. Compulsory prior notification is the only effective way to adequately protect people’s right to privacy.

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4th October 2012

Word count: 2998

\textsuperscript{19} This is in line with what ECHR’s judgment in the Mosley case, where, at [126], it stated that “in order to prevent a serious chilling effect on freedom of expression, a reasonable belief that there was a ‘public interest’ at stake would have to be sufficient to justify non-intervention, even if it were subsequently held that no such ‘public interest’ arose”.

\textsuperscript{20} Examples include *Lion Laboratories v. Evans* [1984] at 538, 548 and 553 and *Hellewell v Chief Constable of Derbyshire* [1995]