

MEDIA DISCLOSURE OF INDIVIDUAL PRIVACY: A PROPOSED FRAMEWORK FOR CHINA

JIANYUAN YANG*

INTRODUCTION

The right to privacy and freedom of the press are two competing rights in the Western society. An excessive protection of privacy inevitably leads to a sacrifice of the freedom of the press because media cannot provide in-depth reports without the opportunity to interact closely with people. On the other hand, people are often nervous about the broad, intrusive coverage of modern media, which may disturb their peaceful lives. In the case of China, the issue is more complicated because both rights are considered central to the nation's economic and social reform. The right to privacy is one of the most fundamental personal rights, as identified by laws, markets, and individuals. The active participation of the media in overall reform has not only stimulated economic development, but it has also helped with the creation of democratic political institutions and the advancement of social justice.

Privacy law has been developed in the United States and the United Kingdom for over hundreds of years. U.S. privacy law, as it regards the issue at hand, takes as its criterion the "reasonable standard," while the corresponding U.K. law regards the "type of information and relationship" as its standard. In China, the right to privacy pertains to the right of reputation in Article 101 of the General Principles of Civil Law.¹ It is worth noting that the right to privacy was treated as an independent

* LL.M. Graduate, Class 2006-07, Asian Law Center, University of Washington School of Law, Seattle Washington. I sincerely thank my advisor Professor Dongsheng Zang for his comments and advise. Please contact me at yang.jianyuan@gmail.com for any questions and concerns about this Article.

¹ General Principles of the Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 101 *translated in* LAWINFOCHINA (last visited Oct. 20, 2008) ("Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.").

right in the Supreme Court's Judiciary Interpretation of 2001² and was written into the Chinese Draft Civil Code in 2002, which implied that this right would be officially recognized as an independent personal right. However, there still cannot be conferred any direct judiciary rights until the enactment of the Civil Code. Nowadays, media disclosure of individual privacy is primarily governed under general tort law and the abovementioned Judiciary Interpretation, but this brings about many problems in practice. These problems mostly arise from obscenity issues and the generality of the rule itself because there have been no feasible guides with respect to how the protection would be implemented. It is very likely that Chinese citizens will be able to protect their privacy rights through formal legal channels in the near future, but the practical question should be asked as to how the law works.

This Article observes the methods of applying the rules about the protection of individual privacy against the media in the United States and the United Kingdom. By comparing these two approaches, potential solutions to problems relating to Chinese privacy law may emerge. This Article therefore attempts to build a practical framework for Chinese courts to utilize in handling relevant privacy cases. Though privacy law concerns a broad range of problems, this Article is limited to the invasion of privacy by media.³

I. CURRENT CHINESE LAW CONCERNING PROTECTION OF RIGHT TO PRIVACY

Chinese law gives protection to individual privacy when it is infringed upon by media. In the Constitution of the People's Republic of China, three articles have connections with the protection of privacy: they are the right of personal dignity, the right of residence, and the right of the freedom of privacy in correspondence.⁴ Although general Chinese

² Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts (promulgated by Sup. People's Ct. Feb. 26, 2001, effective Mar. 10, 2001), art. 1, translated in LAWINFOCHINA (last visited Oct. 20, 2008) [hereinafter 2001 Interpretation].

³ Media here includes books, newspapers, television, radio, movies, advertising, and the Internet.

⁴ XIAN FA arts. 38-40 (1982) (P.R.C.) (arts. 38 and 39 providing that personal dignity and homes of citizens are inviolable, and art. 40 giving legal protection for the freedom and privacy of correspondence of citizens).

Civil Law does not include the right to privacy as an independent personal right, the Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China of 1988 ("1988 Opinion") provides victims with a legal basis for compensation: "In case anyone propagates the privacy of any other person in writing or orally . . . which results in a certain influence, such acts shall be determined as acts infringing upon the citizen's right of reputation."⁵ Thirteen years later, the Supreme People's Court restated the protection of this right through the Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts ("2001 Interpretation"), where "The People's Court shall accept according to law cases arising from the violation of societal public interest or societal morality by infringing upon a person's privacy . . . and brought to the court by the victim as a civil tort for claiming emotional damages."⁶ However, the protection of privacy is far from sufficient under the current Chinese law. The biggest problem is that privacy litigation has not been a cause of action. Instead, it has been subsumed in defamation cases since the 1988 Opinion came into force. Although the publication of privacy information mostly results in a negative impact on reputation in addition to emotional damage, these two rights do not completely overlap. With respect to defamation cases, the defamatory statement is the first element.⁷ This statement most often involves fabrication. In contrast, the content of a disclosure that may invade privacy is usually true. And so judging the disclosure of privacy should be broader than the tort of defamation, since neutral or even positive disclosure can be an invasion of privacy. Also, reputation publicly relates to social appraisal, yet privacy focuses on the control of personal information.

Another problem is that the issue of undertaking civil liability is not made clear by comparing the 1988 Opinion and the 2001 Interpretation. The two regulations diverge on one important issue: is damage to

⁵ Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (promulgated by the Sup. People's Ct., effective Jan. 26, 1988), art. 140, *translated in* LAWINFOCHINA (last visited Oct. 20, 2008).

⁶ 2001 Interpretation, *supra* note 2, art. 1.

⁷ H. L. FU & RICHARD CULLEN, *MEDIA LAW IN THE PRC* 193 (1996).

reputation a necessary element for making an invasion to privacy actionable? Obviously, the 1988 Opinion rules that courts cannot initiate a judicial procedure to protect individual privacy until the invasion of privacy has harmed a person's reputation. But the 2001 Interpretation holds a different opinion in that the victim is able to sue the privacy invader as long as his action violates the societal public interest or societal morality. The difference gives courts discretion to handle this kind of case: they can adopt either regulation. Therefore, parties in privacy cases may face the risk of disparate standards.

II. CHINESE CASES ABOUT MEDIA DISCLOSURE OF INDIVIDUAL PRIVACY

Four Chinese cases will be discussed in this section in order to illustrate the problems with and the development of privacy law in China over the last ten years.

A. *Shi Zhaohui v. The People's Daily*⁸

In this 1995 case, plaintiff Shi Zhaohui sued the *People's Daily* for the tort of defamation. The *People's Daily* published a picture alongside an article about the one-child policy, in which Shi Zhaohui was sitting in front of a contraceptive products retail store. The caption with the picture indicated that he was waiting for consultation. Shi claimed that the report was untrue since he was called in by the doctor rather than having voluntarily sought consultation from him, and therefore the paper's act was a tort of defamation. The defendant denied Shi's claim and argued that the picture primarily served as a component of the report, which covered the promotional event of the national one-child policy. It was argued that Shi's picture was randomly chosen to enrich the context and that nobody would care who was actually in the picture. The court decided in favor of the *People's Daily*, saying that this report did not damage Shi Zhaohui's reputation because the court found that there is no untrue imputation that harmed the plaintiff's reputation. Furthermore, the defendant did not intend to lower the plaintiff in the estimation of

⁸ Tianshui Shen, *Xin Wen Bao Dao Zhong De Xiao Xiang Quan Wen Ti [The Right to Image in News Report]*, REN MIN WANG, Sep. 20, 2005, <http://media.people.com.cn/GB/22114/49489/53393/3711390.html> (last visited Oct. 20, 2008).

society.⁹

Although the image of Shi Zhaohui can be considered as a part of the news report, the *People's Daily* should have obtained his consent prior to publication, or the court has the power to acknowledge this as an invasion to privacy. This case was decided twelve years ago when the only applicable rule was the 1988 Opinion, which had merged the right to privacy with the right of reputation. Therefore, Shi Zhaohui could not use the disclosure of privacy as the cause for action, but could only claim damage to reputation instead. However, damage to reputation in this case was not discernable from the facts, which gave the defendant room to argue. In contrast, one could easily recognize an infringement to the plaintiff's privacy through the defendant's unauthorized publication of the plaintiff's image. Unfortunately for the plaintiff, he had no access to this alternative way of viewing the legal issues, which would have been better for the protection of his privacy. His action was at the time limited by law and the judiciary practice of ten years ago.

B. *Xiaoli (Alias) v. The China Times*¹⁰

Xiaoli (not her real name) is an HIV carrier. In December, 2005, the *China Times* disclosed Xiaoli's photo, her real name, and her identity as an HIV carrier to the public through its newspaper. Her guardian Jin Wei brought a lawsuit to Beijing Chao Yang District Court, alleging that the *Times* had infringed upon Xiaoli's right to privacy. The plaintiff's pleading in this case reflects the typical Chinese approach to dealing with the privacy problem, which is a four-element test in deciding whether an act constitutes an injury to another party; the test includes (a) fault of the infringer, (b) illegal acts, (c) consequence or influence of the infringing act, and (d) the cause and effect between the act and consequence.¹¹ The

⁹ In defamation cases, a plaintiff has the responsibility to prove (1) defamatory nature of the statement by holding the plaintiff in "hatred, contempt or ridicule" (2) reference to the plaintiff, and (3) publication. FU & CULLEN, *supra* note 6, at 193.

¹⁰ *Xiaoli (Alias) v. The China Times* (Beijing Chaoyang Dist. Ct., July 17, 2006) ; see Chen Jing, *Qin Hai de Shi Yin Si Quan Hai Shi Ming Yu Quan?—Shi Xi Zhong Guo Shou Li Ai Zi Gu Nu: Qin Quan An Zhong de Yi Ge Fa Lu: Wen Ti [Infringement to right to privacy or right of reputation?—The Legal Issue in China's No. One Tort Case of HIV Orphan]*, CHINA MEDIA RESEARCH CENTER, Nov. 23, 2006, <http://www.cddc.net/shownews.asp?newsid=10867> (last visited Oct. 20, 2008).

¹¹ The Interpretation of the Supreme People's Court on Several Issues About the

plaintiff provided her conversation with the journalist to show that the defendant deliberately revealed Xiaoli's real name and identity. In order to persuade the court of the illegal nature of defendant's action, the plaintiff discussed several laws and regulations related to this issue. Xiaoli's abnormal behavior after the report could prove that she suffered grave emotional damage. The court obviously adopted the 2001 Interpretation, because it reasoned that all the facts related to Xiaoli's infection of HIV were private, so she was justified in claiming emotional damages. The rationale here was that the disclosure about Xiaoli's as a HIV carrier made her trapped in sorrow, which also violated the social morality.

The result of this case was for Xiaoli, because she was granted compensation for her emotional distress in the sum of 20,000 RMB. The legal significance of this judgment is that the courts ratified the protection of privacy on its own, at least with respect to emotional damages arising from a disclosure of privacy. In effect, the majority of courts employed the 2001 Interpretation after it took effect because the 1988 Opinion was too narrow to protect personal privacy. However, the interesting part here is that Chao Yang District Court not only held that the article infringed upon Xiaoli's privacy, but it also added damage to reputation as a result of the disclosure of privacy. The introduction of the damage to reputation judgment sounded a little farfetched based upon the facts. Presumably, since the 2001 Interpretation constrained the remedy of privacy disclosure only to emotional damages, the court might intend to give the plaintiff maximum compensation as a result of the possibility that other rights might have been infringed. The limitation of the 2001 Interpretation was exposed as a result of this case.

C. *Fu Qiang v. Union Press*¹²

The Defendant in this case, *Union Press*, described plaintiff Fu Qiang's second spermary fixing treatment in its newspaper report of over one thousand words. Fu Qiang sued the newspaper for an injunction and

Trial of Cases Concerning the Right to Reputation] (promulgated by Sup. People's Ct., July 14, 1998, effective Sep. 15, 1998) translated in LAWINFOCHINA (last visited Oct. 20, 2008).

¹² *Fu Qiang v. Huaxia Times* (Jinan Lixia Dist. People's Ct., June 3, 2000) LAWINFOCHINA (last visited Oct. 20, 2008).

300,000 RMB as redress for emotional distress. The defendant argued that facts of the plaintiff's treatment were no longer a privacy matter because they had been repeatedly disclosed by other media outlets. The district court decided in favor of the defendant on this point, recognizing that China Central Television had in fact reported his treatment nationwide before the disclosure in the case. Furthermore, this disclosure had not exceeded the public knowledge about details of the treatment.

This is a case partially about the public disclosure of privacy, but the privacy issue here can neither be answered by the general four-element tort rule, nor by the specific 1988 Opinion or 2001 Interpretation, because the issue is whether or not previous publications can cause a personal matter to lose its private nature. Regarding this issue, the court did not refer to any legal documents, but instead referred to civil policy and to its own judgment. People expect law to be predictable and fair—that is why statutes or precedents are created. Chinese privacy law is therefore too general to the degree that it becomes inapplicable when it is asked to deal with some particular issues.

D. *Wu Jing (Alias of Ms. Liu) v. A Guangdong Newspaper*¹³

On December 18, 2003, a Guangdong newspaper published an article about Wu Jing's face-lifting therapy. People were shocked by the story because it reported that the girl received twelve therapies within three years and spent 100,000 RMB. The report covered in detail each therapy and attached two photos of Wu Jing for comparison. Wu Jing was angry after seeing the story and sued the newspaper for reputation damage and privacy invasion. The defendant argued that there was no legal foundation for the protection of individual privacy in Chinese law. Both the district court and appellate court rejected the defendant's argument. Both courts adopted the 2001 Interpretation, and in doing so considered individual privacy as an independent interest.

Face-lifting therapy has become accepted by more and more people

¹³ Wu Jing (alias of Ms. Liu) v. a Guangdong newspaper (Guangdong Zhongshan Interm. People's Ct., Dec. 21, 2005); see Yu Guan, *Guang Dong "Ren Zao Mei Nu": Ying Xin Wen Qin Quan Guan Si* [Man-made beauty from Guangdong wins media tort case], JINYANG WANG, Dec. 26, 2005, http://www.ycwb.com/gb/content/2005-12/26/content_1044840.htm (last visited Oct. 20, 2008).

in China today, but in the 1980s and 1990s, people viewed the therapy as an attempt to change one's appearance, and thought the therapy was very unreasonable. As a result, a story like the one in this case might be found to be educationally significant. Therefore, the plaintiff was likely to lose her case even if the 2001 Interpretation had existed at that time. Although Chinese courts rarely state policy considerations in their judgments, considerations of social environment that extend beyond statutes or regulations still affect court opinions.

E. Summary

The above four examples reflect a trend in the courts of acknowledging privacy rights in media tort cases. Therefore, the issue is not one regarding privacy right in Chinese law per se, but rather of how to build a uniform and specific ruling for the courts to apply.

The four-element test has been generally adopted by Chinese tort law, combined with two legal documents—the 1988 Opinion and the 2001 Interpretation. The 1988 Opinion has prevented victims from obtaining redress, as explained in *Shi Zhaohui*.¹⁴ The 2001 Interpretation to a certain degree fixes this problem, but its limitation restricts compensation only for emotional distress, as demonstrated in *Xiaoli*.¹⁵ *Fu Qiang*¹⁶ discloses the problem of over-generalizing current Chinese privacy. Moreover, media disclosure of individual privacy is distinguished from other types of torts due to the identity of the infringer and sometimes its immense social effect. For example, in regards to the conflicts between freedom of the press and the protection of individual privacy, what kind of role should public interest play in different cases and how should it be balanced with a definition of personal life? The assumptions made in *Wu Jing*¹⁷ present a good example of the problems arising within Chinese privacy law.

III. THE U.S. APPROACH—REASONABLE STANDARD

In the United States, there exist four types of privacy incursion by

¹⁴ Shen, *supra* note 8.

¹⁵ Xiaoli (alias) v. The China Times (Beijing Chaoyang Dist. Ct., July 17, 2006).

¹⁶ Fu Qiang v. Huaxia Times (Jinan Lixia Dist. People's Ct., June 3, 2000).

¹⁷ Wu Jing (Alias of Ms. Liu) v. A Guangdong Newspaper (Guangdong Zhongshan Interm. People's Ct., Dec. 21, 2005).

media: (1) intrusion upon seclusion; (2) appropriation of name and likeness; (3) publicity placing a person in false light; and (4) publicity given to private life.¹⁸ They are separately interpreted by the Restatement (Second) of Torts sections 652B, 652C, 652E, and 652D. Type (1) mostly discusses the way to obtain information, namely newsgathering and type (2) is about the publication of false or misleading information, which is similar to defamation. Type (3) attempts to protect the interest of an individual in the exclusive use of his own identity, represented by his name or likeness—Chinese law addresses these issues in two articles.¹⁹ This Article only covers the public disclosure of truthful information (type (4)) which is described by the Second Restatement of Torts as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for an invasion of his privacy if the matter publicized is of a kind such that it, (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.²⁰

Apart from trying to remedy the publication of private information in common law, a number of statutes passed by states and the federal government prohibit the publication of some specific information. For example, if Xiaoli had lived in Florida, she would definitely have had a remedy because the Florida Statute has provisions providing statutory remedies for the disclosure of AIDS.²¹

In view of the length of this Article, only the general rule discussed in the Restatement will be explored. This rule deals with three basic questions: What kind of media behavior concerning the disclosure of personal information should give rise to civil liability? How does one cope with the incompatibility between this liability and the free speech of the First Amendment? What type of role should "public interest" play in

¹⁸ DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 75 (2d ed. 2005).

¹⁹ General Principles of the Civil Law, *supra* note 1, art. 99 ("Citizens shall enjoy the right of personal name . . . [and i]nterference with, usurpation of and false representation of personal names shall be prohibited."); *id.* art. 100 ("Citizens shall enjoy the right of portrait. The use of a citizen's portrait for profits without his consent shall be prohibited.").

²⁰ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

²¹ FLA. STAT. §§ 381.004(3), 381.004(6) (2008).

this campaign? Since this particular area is primarily governed by common law and each state has different ways of interpreting the rule, some cases cited in this Article are adjudicated by the district courts. In general, this rule pertains to the public disclosure of embarrassing private facts that would be offensive to a person of ordinary sensibilities and should be subject to the newsworthy test.

A. *Private Matter*

Is an act in the public domain considered to be a private matter? Is it still a private matter if it was known to some people before the disclosure? The answers to both questions are "no" in the Restatement, as to whether there is a liability either for "giving publicity to facts about the plaintiff's life that are matters of public record," or for "giving further publicity to what the plaintiff himself leaves to the public eye."²² However, opinions split in the U.S. courts.

Normally, facts that appear in public zones²³ are not protected by the implication of a needed consent waiver, even if they have a private nature.²⁴ However, one contrasting example is *Daily Times Democrat v. Graham*, which arose in a fun house open to the public.²⁵ When the plaintiff entered the house, jets of air came from the platform and blew up her dress, revealing her panties.²⁶ The defendant's photographer snapped a picture of her at this moment and published it in his newspaper.²⁷ The court held for the plaintiff even though she was in public because of the involuntary exposure of her body.²⁸ The court

²² RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

²³ Public zones are areas open to the public, including public streets, public stadiums, or public parks.

²⁴ See *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 493-96 (1975) (stating that under the First Amendment, there can be no recovery for the disclosure of and publicity given to facts that are a matter of public record); *Key v. Compass Bank, Inc.*, 826 So. 2d 159, 167-68 (Ala. Civ. App. 2001) (affirming that a bank did not invade the customer's and her son's privacy by giving publicity to them when the bank videotaped them during a bank transaction).

²⁵ *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476 (Ala. 1964). Since exceptions are very few to the private location requirement, this somewhat old case is the only one appropriate for reference.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 478 ("[One] should not be deemed to have forfeited . . . [one's] right of privacy merely because misfortune overtakes [one] in a public place.").

found that in a public location, one can only be lawfully photographed as an incidental part of a scene in an ordinary appearance.²⁹

With regards to the second question, the basic idea is that once facts appear in public, privacy interests fade to the point of not being protectable at all.³⁰ Some scholars argue that this issue is a question of degree rather than having the protection of privacy completely removed. In *Times Mirror Co. v. Superior Court* the plaintiff revealed the discovery of the murdered body of her roommate to certain neighbors, friends, family members, and investigating officials.³¹ A newspaper then published this incident, including the plaintiff's name.³² The plaintiff sued the newspaper for public disclosure of private facts,³³ but the newspaper denied that its nature was that of a privacy matter because of the previous disclosure.³⁴ The court concluded that the private nature of the plaintiff's identity remained intact since the previous disclosure was limited and necessary.³⁵

²⁹ *Id.* ("One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status.")

³⁰ *Cox Broadcasting Corp.*, 420 U.S. at 496 (allowing publication of rape victim's name taken from open criminal indictment records); *Ritzmann v. Weekly World News*, 614 F. Supp. 1336, 1338, 1340 (N.D. Tex. 1985) (giving further publicity to information contained in news stories already published is not actionable because the information is no longer private).

³¹ *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 558, 561 (Cal. Ct. App. 1988).

³² *Id.* at 558.

³³ *Id.*

³⁴ *Id.* at 560 ("The Times contends Doe's identity as discoverer of the body was not a private fact . . . because it was publicly known before the Times published its story . . .")

³⁵ *Id.* at 561 ("[W]e cannot say Doe rendered otherwise private information public by cooperating in the criminal investigation and seeking solace from friends and relatives."); see also *Michaels v. Internet Entertainment Group, Inc.* 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998) (finding that "the plaintiffs' privacy interest in the 148-second clip [of their sex tape] might be diminished" due to recent prior publication, but granting injunction on various other grounds); but see *Pasadena Star-News v. Superior Court*, 249 Cal. Rptr. 729, 731 (Cal. Ct. App. 1988) (rejecting idea that publication of a name in conjunction with potentially embarrassing newsworthy facts constitutes invasion of privacy, since then "[t]he press could not without consent reveal the name of anyone other than a public official or public figure . . ." and this might interfere with First Amendment freedoms).

B. *Publicity*

Publicity means "the public" has gained access to a private fact.³⁶ There are certain disputes about the degree of publicity, and the corresponding degree of injury to a person's dignity.³⁷ However, the media has the strongest ability to disclose facts beyond publicity, and so this criterion can be satisfied in media disclosure.³⁸

C. *Highly Offensive*

Disclosure of a private fact is "highly offensive" if "a reasonable person would feel justified in feeling seriously aggrieved" by the publicity.³⁹ This requirement has garnered some disagreements, but the Restatement is still the most popular and compelling approach. A natural question is how to exactly define "a reasonable person." According to the Restatement, it relates to customs of the times and place, as well as to contemporary social values.⁴⁰ Courts and commentators give further illustrations by analyzing cases. For example, a local event published as "Mrs. B did her washing yesterday" in A's newspaper is not an invasion of Mrs. B's privacy, while it would be an invasion if A published a picture of B nursing her child without B's consent.⁴¹ Another view of defining the aggrieved feeling a reasonable person may suffer takes account of the fact that the defendant's action perhaps "outrage[s] the community's notions of decency."⁴² The common foundation of these

³⁶ RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977) ("Publicity" . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.")

³⁷ Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 437 (1996) (noting that majority of courts determine "publicity" by number of people to whom information is disclosed, but minority focus instead on nature of relationship between plaintiff and the parties to whom the information is disclosed).

³⁸ See *supra* text of part III.A; see also RESTATEMENT (SECOND) OF TORTS § 652D cmt. a ("any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term").

³⁹ RESTATEMENT (SECOND) OF TORTS § 652D cmt. c. (1977)

⁴⁰ *Id.*

⁴¹ RESTATEMENT (SECOND) OF TORTS § 652D illus. 8, 10 (1977).

⁴² Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L.

two views may be the way a contemporary reasonable person would feel; most of the time that person is the judge.

This requirement is considered together with the newsworthy test.⁴³ There is no way to scrutinize one without discussing the other.

D. *The Newsworthy Test*

The newsworthy test approach in the Restatement also looks to customs and conventions of a given community.⁴⁴ It is designed to find a balance between the information that the public is entitled to know and that a person has right to reserve.⁴⁵ Even if an individual has not sought publicity or consented to publicity, he is subject to the newsworthy test in order to determine whether his conduct or otherwise has become a legitimate subject of public interest.⁴⁶ Once publicity is proved to be beneficial to public debates, it may be justified to sacrifice part of the individual's personal privacy.⁴⁷ Actually, the purpose for establishing this test is to avoid First Amendment problems, which are probably the most critical issues arising from the tort of public disclosure in the U.S.⁴⁸

For example, in the *Times-Mirror Co.*, the defendant newspaper published the name and address of the plaintiff's as a witness in a murder case.⁴⁹ The newspaper argued that public had a legitimate interest in knowing the witness's identity because she had been involved in the

REV. 1205, 1263 (1976) quoting *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967).

⁴³ RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977) ("[a person] must expect . . . that his comings and goings and his ordinary daily activities[] will be described in the press as a matter of casual interest to others."); *id.* cmt. d ("it is not enough that the publicity would be highly offensive to a reasonable person . . . [if] the subject-matter of the publicity is of legitimate public concern").

⁴⁴ *Id.* cmt. h ("In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community . . .").

⁴⁵ See *id.* ("[a] line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake . . .").

⁴⁶ *Id.* cmt. f. (noting that individuals may become "news" by virtue of their actions or otherwise).

⁴⁷ *Id.* cmt. h. (stating that once a public interest arises, what is newsworthy may extend into areas of a person's life that normally would be considered private).

⁴⁸ See *id.* cmt. d. (noting that this is a constitutional issue); *cf. id.* Special Note on Relation of § 652D to the First Amendment to the Constitution (noting that it is unclear whether section 652D conflicts with the First Amendment).

⁴⁹ *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 558 (Cal. Ct. App. 1988).

criminal case.⁵⁰ The court disagreed, holding that the newsworthiness of the crime did not win the publisher a summary judgment—instead, it distinguished the public interest in knowing the witness's name from the newsworthiness of the crime, weighing heavily the protection of the witness during a criminal investigation.⁵¹

Newsworthiness, however, has also been "broadly construed and liberally applied."⁵² For example in *Walter v. NBC Television Network, Inc.*, the defendant television network displayed the plaintiff's photo as a part of a comedic segment of a television show.⁵³ Although the performance did not relate to a legitimate news broadcast or event, the court concluded that the newsworthiness exception here.⁵⁴

How to balance the interests of personal privacy and public interest is usually decided on a case-by-case basis. The only thing that most cases of newsworthiness may have in common is that the decisions start with First Amendment considerations.⁵⁵ The goal of the First Amendment is to "preserv[e] an uninhibited marketplace of ideas and [to] foster[] self-expression free of government restraint."⁵⁶ Public debates are an effective way to simulate the First Amendment's goals. The use of newsworthy facts, even concerning private matters, is an indispensable part of public debates.

Another approach is that newsworthiness does not mean that publicity simply titillates the public's curiosity, but rather it relates to widely-debated issues.⁵⁷ For example, in *Pasadena Star-News v. Superior Court*, a news report identified and located a single mother who abandoned her newborn baby.⁵⁸ The court refused to compensate the

⁵⁰ *Id.* at 561.

⁵¹ *Id.* at 561-62.

⁵² *Walter v. NBC Tel. Network, Inc.*, 811 N.Y.S.2d 521, 523 (N.Y. App. Div. 2006).

⁵³ *Id.* at 522-23. The segment was broadcast as part of *The Tonight Show*. *Id.*

⁵⁴ *Id.* at 523 (finding that in this instance, the rule that a "performance involving comedy and satire may fall within the ambit of the newsworthiness" applied).

⁵⁵ *See, e.g.*, *Times-Mirror Co.*, 244 Cal. Rptr. at 559 (discussing First Amendment as a primary issue); *cf.* *Walter*, 811 N.Y.S.2d at 523 (though not discussing First Amendment explicitly, concerning itself with related issues such as commercial speech limitations and obscenity).

⁵⁶ Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA ENT. L. REV. 301, 305 (2004).

⁵⁷ *Pasadena Star-News v. Superior Court*, 249 Cal. Rptr. 729, 731 (Cal. Ct. App. 1988).

⁵⁸ *Id.* at 730.

plaintiff for disclosure of this embarrassing fact, because this fact was related to the disputable issues of unplanned pregnancy, children born to single mothers, adoption, and by implication, contraception and abortion.⁵⁹

The media disclosure cases in which public officials are plaintiffs are very rare in the U.S., since the officials have been accustomed to the situation that their behaviors are not wholly private. To the extent of protecting a public figure's life, the Restatement suggests that some "intimate details" of his or her life are entitled to be kept private.⁶⁰ But regarding public officials, many scholars agree that even in an intimate moment, they have been "willing accomplices in the creation of a new political culture that sees private aspects of a person's life as politically relevant, that collapses older boundaries between public and private."⁶¹

IV. THE APPROACH OF THE U.K. AND OTHER EUROPEAN COUNTRIES

Cases in this section have been selected from the U.K. and countries on the European continent ("U.K. approach"), involving the European Court of Human Rights ("ECtHR"). A legal basis for considering European cases as a whole is found in Articles Eight⁶² and Ten⁶³ of the European Convention on Human Rights ("ECHR"), adopted by the Council of Europe in 1950, which provide a right of privacy balanced by a right of free expression.⁶⁴ All the member states are parties to the Convention, and therefore the Convention is presumed to be effective in

⁵⁹ *Id.* at 731.

⁶⁰ RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977) .

⁶¹ J.M. Balkin, *How Mass Media Simulate Political Transparency*, 3 CULTURAL VALUES 393, 404 (1999), available at <http://www.yale.edu/lawweb/jbalkin/articles/media01.htm> (last visited Oct. 20, 2008).

⁶² Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8 Nov. 4 1950, Europ. T.S. 5, *as amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Europ. T.S. 155, available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited Oct. 20, 2008) [hereinafter ECHR] ("Everyone has a right to respect for his private family life, his home, and his correspondence.").

⁶³ *Id.* art. 10. Article 10 of the ECHR states that the right to freedom of expression is subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society."

⁶⁴ *Id.* arts. 8, 10.

most European countries.⁶⁵

In the U.K. jurisdiction, courts protect individual privacy "from media intrusion . . . via a number of creative means such as the law of confidence, defamation, trespass, nuisance, Article 8 of the [ECHR], breach of copyright, and the Data Protection Act [of] 1998."⁶⁶ Among them, the ECHR is generally recognized and applied.⁶⁷

The U.K. approach can be summarized as being concerned with a breach of confidence, which constitutes a four-part test: (1) confidential information, (2) relationship of parties, (3) unauthorized disclosure, and (4) public interests.

A. Confidential Information

Information itself must be confidential to be protected as private. To determine whether the information is of a private matter, courts normally consider whether it can be obtained from the public domain, to what extent the party has made it publicly accessible, and whether the facts published are highly offensive to a reasonable person.

British law holds that private matters must not be placed in the public domain, and so does German law. In *Von Hannover v. Germany*, the plaintiff was "the eldest daughter of Prince Rainier III of Monaco."⁶⁸ Three series of photographs were published by a German magazine, showing the princess in a variety of circumstances.⁶⁹ The domestic court ruled that German law only protects privacy in secluded locations, where an expectation of privacy must exist, for a "figure[] of contemporary society '*par excellence*.'"⁷⁰ A different voice came from the ECtHR—the court admitted that some of the photos were taken in a public context, but

⁶⁵ Twenty-seven countries have joined the European Union by January 2007 with the addition of Romania and Bulgaria.

⁶⁶ Helen Padley, *Lord Coe Left Standing as Princess Has Fairytale Ending in the European Court*, 16 ENT. L. R. 17, 17 (2005), available at <http://www.dentonwildesapte.com/assets/1/16866.pdf> (last visited Oct. 20, 2008).

⁶⁷ *Cf. id.* ("In exercising their judgment, the courts must weigh up two important principles of the ECHR . . .").

⁶⁸ *Von Hannover v. Germany*, App. No. 59320/00, 2004-VI Eur. Ct. H.R., ¶ 8 (June 24, 2004), available at <http://www.echr.coe.int/echr> (last visited Oct. 20, 2008).

⁶⁹ *Id.* at ¶¶ 11-17.

⁷⁰ *Id.* at ¶ 25, quoting Bundesverfassungsgericht [Federal Constitutional Court] Dec. 15, 1999, 1 BvR 653/96, ¶¶ 87-119, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs19991215_1bvr065396.html (last visited Oct. 20, 2008).

there still existed a "zone of interaction" with others that might "fall within the scope of private life."⁷¹

Regarding the previous publicity defense, it is worth taking a look at the U.K. case, *HRH Prince of Wales v. Associated Newspapers Ltd.*⁷² In that case, the defendant newspaper published articles extracted from a journal written by the Prince of Wales that contained the Prince's impressions of and reflections on his visit to Hong Kong for the handover of Hong Kong to China.⁷³ Although the Prince regarded his journals as private and confidential, he circulated copies to some persons outside of the private office.⁷⁴ The court held that this circulation did not amount to making it available to the public since only a carefully selected group of people received copies of the journal.⁷⁵

In the U.K. approach, in most cases the most critical portion to satisfy the "private matter" requirement is the "highly offensive" test—but sometimes information may be obviously private.⁷⁶ In *Campbell v. Mirror Group Newspaper Ltd.*, the defendant newspaper published articles that disclosed the drug addiction of plaintiff Naomi Campbell, an internationally famous fashion model, and the fact that she was receiving

⁷¹ *Id.* ¶¶ 73-74. See also *Peck v. United Kingdom*, App. No. 44647/98, 2003-I Eur. Ct. H.R., ¶ 57, available at <http://www.echr.coe.int/echr> (last visited Oct. 20, 2008) ("There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life.'" (citations omitted)); *PG and JH v. United Kingdom*, App. No. 44787/98, 2001-IX Eur. Ct. H.R., ¶ 56 (Sept. 25, 2001), available at <http://www.echr.coe.int/echr> (last visited Oct. 20, 2008) ("Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world." (citations omitted)); *Botta v. Italy*, App. No. 21439/93, [1998] Eur. Ct. H.R. 12 ¶ 32 (Feb. 24, 1998), available at <http://www.echr.coe.int/echr> (last visited Oct. 20, 2008) (stating that ECHR article 8 is intended to promote "relations with other human beings."); *Niemietz v. Germany*, App. No. 13710/88, 251-B Eur. Ct. H.R. (ser. A), ¶ 29 (Dec. 16, 1992), available at <http://www.echr.coe.int/echr> (last visited Oct. 20, 2008) (stating that professional activities may be private matters).

⁷² *HRH Prince of Wales v. Associated Newspapers Ltd.* (No. 3), [2006] EWHC (Ch) 522 (Eng.), *aff'd* by *Associated Newspapers Ltd. v. HRH The Prince of Wales* [2006] EWCA Civ 1776.

⁷³ *Id.* at [2].

⁷⁴ *Id.* at [14]-[15].

⁷⁵ *Id.* at [100]-[102].

⁷⁶ *Campbell v. Mirror Group Newspaper Ltd.*, [2004] UKHL 22, [92] (Eng.) (opinion of Lord Hope of Craighead) ("Where it is not [obvious whether information is private or public], the broad test is whether disclosure of the information about the individual ('A') would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.")

therapy.⁷⁷ In addition, the newspaper made public her treatment details at rehabilitation group meetings and photographs of her at those meetings.⁷⁸ By her public denials of a drug addiction, Campbell accepted the publication of the first two facts as justified,⁷⁹ but the newspaper covertly obtained the photographs and details of her rehabilitation.⁸⁰ For good measure, the court used the "highly offensive" test⁸¹ despite a finding that the details of her treatment were, as a matter of public interest, obviously private matters,⁸² and found the newspaper liable.⁸³

B. *Relationship of the Parties*

This element is read as: (a) The party who is in possession of the information either knows or ought to know the other person can reasonably expect his privacy to be protected; (b) Information imposed on a third party, which it knows is subject to an obligation of confidence.

For example, in *Prince of Wales*, the defendant newspaper should have known that Prince Charles had a reasonable expectation that the content of his journals would remain private because the envelope circulated to other people containing copies had "confidential" marked on the top.⁸⁴ On the other hand, a newspaper publisher may disclose a married football player's sexual relationships with two women other than his wife when those two women do not wish the information to remain confidential.⁸⁵

In *Douglas v. Hello! Ltd*, in a dispute over the exclusive rights to

⁷⁷ *Id.* at [1]-[4] (Lord Nicholls, dissenting).

⁷⁸ *Id.* at [3]-[6].

⁷⁹ *Id.* at [36] (Lord Hoffman, dissenting) ("[having] made very public false statements about . . . her use of drugs[, plaintiff] . . . conceded[it was] justifiable[for a newspaper to report the fact that she was addicted.];" *id.* at [82] (opinion of Lord Hope of Craighead) (acknowledging same concession at early stages of litigation).

⁸⁰ *Id.* at [5]-[8] (Lord Nicholls, dissenting).

⁸¹ *Id.* at [124] (opinion of Lord Hope of Craighead).

⁸² *Id.* at [95].

⁸³ *Id.* at [125]; *but see* Padley, *supra* note 34, at 20 (questioning whether *Campbell* will create a new cause of action).

⁸⁴ [2006] EWHC (Ch.) 522, [102], [140].

⁸⁵ *A v. B Plc. and Another*, [2002] EWCA Civ 337, [45] ("Relationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential.").

report the wedding of two film stars, *Hello!* lost to its rival *OK!*.⁸⁶ *Hello! Magazine* published photographs of the celebrity wedding of film stars Michael Douglas and Catharine Zeta-Jones without their authorization—the couple had already entered into an exclusive deal with *OK!*.⁸⁷ Therefore, the publicity was unauthorized, despite the fact that *OK!* was authorized to publish photographs of the same event, and the court affirmed that there was a breach of confidence.⁸⁸

C. Unauthorized Disclosure

This element excludes the situation when media obtain the consent from the individual before publicity.⁸⁹

D. Public Interest

The public interest test has the dominant purpose of protecting the freedom of speech. Apparently, the chilling effect of having to pay damages or account for profits would inhibit publication. If these publications are of great legitimate interests, the chilling effect will undermine the freedom of speech.

Since at least the time of *Campbell*, the courts have carried out an exercise of balancing an individual's right to privacy against the media's freedom of expression when considering actions for breach of confidence.⁹⁰ These are the rights enshrined in ECHR Article 8 and

⁸⁶ *Douglas v. Hello! Ltd.* [2007] UKHL 21, [108], [120] (opinion of Lord Hoffman).

⁸⁷ *Id.* at [108]-[10].

⁸⁸ *Id.* at [122] ("The pictures published by 'OK!' were put into the public domain . . . but no other pictures were in the public domain and they did not enter the public domain merely because they resembled other pictures which had."); *id.* at [114] ("[T]he obligation of confidence was imposed for the benefit of 'OK!' as well as the Douglases."); *cf. id.* at [327] (opinion of Lord Brown of Eaton-Under-Heywood) (noting that exclusive publication right granted to *OK!* allowed it to sue *Hello!* for breach of confidence with respect to the Douglases).

⁸⁹ *Cf. id.* at [117] (opinion of Lord Hoffman) ("The point of which one should never lose sight is that 'OK!' had paid £1m for the benefit of the obligation of confidence . . .").

⁹⁰ *See, e.g., Campbell*, [2004] UKHL 22, [126] (opinion of Baroness Hale of Richmond) (noting the difficulty of balancing privacy rights against right of free expression); Paul Mitchell & Simon Bourn, *HRH the Prince of Wales v. Associated Newspapers Limited: Copyright Versus the Public Interest*, 17 ENT. L. REV. 210, 211 (2006) ("Since *Campbell* . . . when considering actions for breach of confidence the courts have had to carry out the delicate exercise of balancing an individual's right to privacy against the media's freedom of expression.")

Article 10.⁹¹ The fundamental principle here is to balance the legitimate aim served and the harm caused by disclosing the personal information—if the disclosure is beneficial in a democratic society for the protections of rights and freedoms, the right to privacy might be justifiably overridden.⁹²

Courts have different interpretations of this test, although the purpose of the balancing test is the same. For example, in *Von Hannover*, the ECtHR noted that the German Regional Court⁹³ decided that a public's legitimate interest in knowing how "figures of contemporary society *par excellence*" behave in their private life outweighed any right to privacy outside the home.⁹⁴ However, the ECtHR has persisted in giving every person, including well-known people, the ability to enjoy a legitimate hope for the protection of their private lives.⁹⁵ ECtHR emphasizes the distinction between reporting facts about a public figure's functions that are capable of contributing to a debate in democratic society and reporting details of the private lives of those who do not exercise official functions.⁹⁶ From the view of ECtHR, even regarding politicians, there should not be an easy loss of the protection of their personal privacy.⁹⁷

E. Summary

Actually, most courts do not exactly follow the four-step test; instead they simply pick several critical issues to discuss. The first question is about the nature of information, i.e. whether it should be obviously private.⁹⁸ If not, the highly offensive test will be applied as to whether the

⁹¹ ECHR *supra* note 62, arts. 8, 10; Mitchell & Bourn, *supra* note 92.

⁹² Cf. Campbell, [2004] UKHL 22, [113] (opinion of Lord Hope of Craighead) (noting that rights to privacy and freedom of expression are of equal value to a democratic society).

⁹³ The Regional Court is the equivalent of an American District Court; that is, it is the court where the case is first tried.

⁹⁴ *Von Hannover*, 2004-VI Eur. Ct. H.R., at ¶ 19.

⁹⁵ See, e.g., *id.* at ¶ 77 ("[T]he public does not have a legitimate interest in knowing . . . [every detail of the] private life [of a figure of contemporary society *par excellence*] even if she appears in places that cannot always be described as secluded . . .").

⁹⁶ *Id.* at ¶ 63.

⁹⁷ Cf. *id.* at ¶¶ 72-75 (expressing doubt that the public/private dichotomy drawn by the German courts affords significant privacy rights to public figures).

⁹⁸ Padley, *supra* note 66, at 17.

disclosure would cause substantial offense to a reasonable person.⁹⁹ The information should be private if it would. With the private matter issue being settled, the court has to carry out a balancing test as to competing rights under Article 8 and Article 10 of ECHR.¹⁰⁰ The public interest must be taken into account this balancing process,¹⁰¹ especially when the disclosed party is a public figure. Although the procedure has been standardized, results seem unpredictable. From several cases,¹⁰² one may get the impression that the ECtHR plays a more active role in protecting individual privacy compared to EU member states.

V. WHICH APPROACH IS BETTER FOR CHINA?

It is time to build a uniform and practical framework for the protection of the Chinese people's personal information while maintaining a free market place of ideas for the media. First of all, Chinese law should distinguish the right of privacy from the right of reputation. This question should be left to the legislature for a final confirmation. This Article aims only at picking up certain methodologies from U.S. and U.K. practice in order to analyze their applicability in the Chinese setting.

By observing purely legislative techniques, the U.S. and the U.K. adopt a very similar system for media disclosure in individual privacy cases. A minor difference between the U.S. approach and the U.K. approach is that some of the same elements serve different functions. For example, the notion of the highly offensive is an independent element in the U.S. approach, while it is a sub-element supporting the confidential information requirement in the U.K. approach. However as revealed in the cited cases, adjudication under these similar systems often differs, which implies a certain degree of flexibility in the systems. If these systems can work well in both of these important jurisdictions, the underlying principles at work may also be suitable for China. It is advisable then for China to learn from the advanced, legislative and practical experience in these jurisdictions, allowing for proper adjustments in light of China's distinct social, political, and economic

⁹⁹ *Id.* at 17-18.

¹⁰⁰ *Id.* at 18.

¹⁰¹ *Id.*

¹⁰² *See, e.g.*, Von Hannover, 2004-VI Eur. Ct. H.R., at ¶ 65 (collecting cases).

grounds.

A. *Private Matter*

Chinese law does not require that the matter should have a private nature, but there are common questions pertaining to this issue that comes up often, such as in *Fu Qiang*.¹⁰³ In light of the frequent occurrences, this element should be introduced into Chinese law with the term "private matter" rather than "confidential information." Personal privacy is different from national secrets and should be covered by civil law. Also, the translation of "confidential information" into Chinese sounds awkward in the private sense.

It might also be best to combine the two approaches in framing this requirement. The main structure should be adopted from the U.K. approach. Generally speaking, private matters can be either obviously related to private affairs or matters that when publicized can be highly offensive. The tricky point in making the rule is the definition of the highly offensive: what kind of disclosure may make a reasonable Chinese person with ordinary sensibility feel highly offended? The answer is not only different from, but also is more complicated, than in the U.S. or the U.K. context. Chinese people are influenced by the traditional Chinese culture, which is different from Western society. The people's notions also vary from one place to another in China. In a few big cities, open-minded people think and act nearly the same as Western people, but the society as a whole is still conservative since the majority of the population lives in rural places. Therefore, the proper strategy to handle this problem is to transfer the right of discretion to local courts. In order to avoid unfairness, the High Court of each province can then enact its judiciary interpretations based upon a regional standard regarding the highly offensive test.

Two more issues are often in dispute—the issues of previous publicity and actions in public. With respect to the first, the court may want to ask to which degree the facts have been published. The solution given by *Times Mirror Co.*¹⁰⁴ might be of reference.

Acts in the public domain may also be considered as private matters. Various reports from Internet and other media reveal that a considerable

¹⁰³ *Fu Qiang v. Huaxia Times* (Jinan Lixia District People's Ct., June 3, 2000).

¹⁰⁴ *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 556 (Cal Ct. App. 1988).

amount of pictures put online are taken by undercover cameras in public places. As the extensive use of camera phones combines with the boom of the Internet, everyone in public faces the risk of the public disclosure on the Internet of their personal images and private matters. Because victims in these situations are exposed to the public, courts are always reluctant to rule that acts in public remain private matters. The burden of proof is supposed to be on the plaintiff, but it is difficult to provide the time, location, and the means with respect to photos taken discreetly. Unfairness may therefore result from an absolute private location requirement under some special circumstances. However, this does not mean that undercover cameras should be forbidden at all times. One should draw a line between the serious news investigation and tabloid news that only aims at catering to public curiosity. Meanwhile, public figures, especially public officials, should be given less protection than ordinary people.

The highly offensive test from the U.K. should also be considered here. This issue will be explored in section V.C., *infra*.

B. *Unauthorized Publicity*

The fact of one having received consent from the disclosed party is a sound argument for eliminating liability from the media. Both the U.S. and the U.K. approaches have acknowledged the effect of consent waivers. It is common, however, for the media to tend to disclose individual privacy beyond the disclosed party's consent. *Xiaoli*¹⁰⁵ is a typical case here. Actually, some of the content that the defendant newspaper published was from a conversation with her guardian Jin Wei. Although Jin required that the newspaper not disclose Xiaoli's true name, the *China Times* still published a large photo of Xiaoli, her real name, and her identity as a HIV carrier. In the event that the disclosure exceeds consent, the court should deem the action to be the same as unauthorized publicity.

C. *Public Interest*

The discussion of this element has a special meaning in Chinese society, especially during transition periods of political and social reform.

¹⁰⁵ *Xiaoli (Alias) v. The China Times* (Beijing Chaoyang District Ct., July 17, 2006).

Many responsible Chinese media outlets are playing positive roles in fighting for more transparent governance. Since this Article is limited to the disclosure of individual privacy, newsgathering reports about the conduct of organizations are not discussed here.

1. Reporting Facts about Public Officials and Other Public Figures

Chinese media outlets face much more constrictions than do Western ones in terms of disclosing facts relating to public officials, even if the content of the reports is within the domain of their political functions.¹⁰⁶ In recent years, more and more lawsuits for tort of defamation¹⁰⁷ have been brought by public officials against media outlets. Although many reports are in fact for the purpose of critically reviewing the work done by public officials, media outlets are still very likely to be sued by such officials and lose their cases. A book published in 2002 enumerated piles of relevant cases, and named the issue as "the fourth wave for disputes on torts of media."¹⁰⁸

The mass media can make the political system more transparent and public officials more self-disciplined, which is a major purpose of Chinese political reform. With respect to an overly strict approach to political reports, China should adopt the U.S. approach rather than the ECtHR approach of *Von Hannover*. The European approach makes a clear distinction between reports about public officials in the exercise of their duties and reports about their private lives. However, a public official's moral character sometimes is easier captured from his behavior in private life. For example, a Republican representative resigned from the U.S. House of Representative after a sexually explicit instant

¹⁰⁶ The media is obligated to protect and educate the masses with regard to the conduct of the officials who represent and affect them and the organizations created to facilitate such representation. Newsgathering reports are one of the important ways to achieve this goal. See Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1153 (1996) ("The public at large has an interest in the role that the press plays in informing the public about the behavior of others, in affecting the conduct of public officials and public figures, and in deterring wrongful conduct by both public officials and private individuals.").

¹⁰⁷ Actually, many of these kinds of lawsuits are related to the disclosure of the public officials' personal information.

¹⁰⁸ XU XUN, *THE FOURTH WAVE OF CHINESE MEDIA TORTS* 56 (2006).

message conversation with a teenager was published on abcnews.com.¹⁰⁹

Other public figures besides public officials should have the right to keep their privacy from the public, but the ECtHR approach that is too favorable to public figures is not advised. For public figures, press coverage of their personal lives is very important to the success of their careers. There is a public interest in disclosure of information about their private lives.

Public officials should have the least protection of individual privacy because an open and robust political debate is capable of contributing to the establishment of a democratic society. The media can play its vital role here as a watchdog in stimulating this process by freely imparting information on matters of public interest—most matters related to public officials are in this sphere.

2. Limitations to Publicity

The rise of publicity intrusions, in conjunction with new technology, makes the media more invasive than ever before.¹¹⁰ Moreover, the increasingly intrusiveness of the media is the result of increased competition for ratings and profits rather than a greater desire to serve the public interest.¹¹¹ This is also correct beyond doubt when describing the media in China. The other side of this mass media development is the thousands of fake news stories published every day merely to satisfy the public's curiosity and to increase the volume of sales.

A solution to this problem is provided from both U.S. and U.K. practices. The publicity that qualifies as involving public interest should be related to debated issues that are necessary in a democratic society, instead of those merely attractive to vulgar tastes. In that case, even if the published report is embarrassing to the disclosed individual, media disclosure may still be justified. For example, in *Campbell*, Naomi Campbell, a super model, was a role model for many youths, especially young girls.¹¹² Therefore, the fact that she used to be addicted to drugs

¹⁰⁹ Dana Bush, *Congressman Quits After Messages to Teens Found*, CNN.com, Sep. 30, 2006, <http://www.cnn.com/2006/POLITICS/09/29/congressman.e.mails> (last visited Oct. 20, 2008).

¹¹⁰ Lyrisa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 179 (1998).

¹¹¹ *Id.*

¹¹² *Campbell*, [2004] UKHL 22, [163] (opinion of Lord Carswell).

and then received treatment was valuable to the debate about healthy attitudes towards drugs among the younger generation.¹¹³ As to the details of her treatment, they were unnecessary to add credibility to the reports.¹¹⁴

CONCLUSION

The Chinese legislature can design a framework similar to the U.S. and the U.K. approaches because those approaches basically cover most of the problems arising in Chinese cases, and because those rules have been periodically tested in the two countries. However, one should be aware of the uniqueness and diversity of the Chinese social environment and make any necessary changes to the rules, especially in terms of the "highly offensive" test and of public interest considerations.

¹¹³ *Id.* at [151] (opinion of Baroness Hale of Richmond).

¹¹⁴ *Id.* at [170] (opinion of Lord Carswell).