



Hawaii should walk away from Steven Tyler Act

Hawaii needs to rethink the "Steven Tyler Act." States can promote the right of privacy while ensuring freedom of speech.

By: Josh Blackman and Ilya Shapiro – February 16, 2013

In a brazen giveaway to celebrities who like to like to vacation on its pristine beaches, Hawaii is about to bid a sorry aloha to the First Amendment.

The 50th state is poised to pass the "Steven Tyler Act." The bill, named after -- indeed, written by -- the Aerosmith frontman, could punish anyone who takes a photograph of a celebrity in public. That includes a tourist who takes out her iPhone to snap a pic of a rock star or, perhaps, the Obama family.

The law would prohibit recording someone "in a manner that is offensive to a reasonable person," while that person is "engaging in a personal or familial activity." The Steven Tyler Act not only departs from a century's worth of privacy laws, but does so at a huge cost to the First Amendment's guarantee of the freedom of speech.

There are several significant constitutional defects.

First, the bill offers no exceptions for newsworthy content. It simply assumes that if a person is "engaging in a personal or familial activity with a reasonable expectation of privacy," any recording would be illegal. Newspapers covering matters of public affairs (that may be personal or familial) could be snared by this statute. Citizen journalists reporting from the field, or even perceptive tourists, will be at risk of litigation.

Second, the proposed statute is intentionally vague. It offers no guidance of what "personal or familial activity" means. Courts may construe this statute too broadly, limiting the ability of the press to report the news.

Third, courts would have the authority not only to stop the initial publication of a photograph, but to issue orders against future reproductions of the same photograph. This type of authority is called "prior restraint," which is highly suspect in First Amendment jurisprudence and allowed only in certain exceedingly rare cases with uniquely compelling interests.

Prior restraints will rarely survive scrutiny even when national security concerns are raised. Perhaps most famously, in 1971 the Supreme Court found that the government couldn't stop the New York Times from publishing the Pentagon Papers, which

contained classified information about war strategy in Vietnam. Surely blocking publication of awkward photos of Britney Spears or Tommy Lee -- other supporters of this bill -- isn't more compelling than blocking the release of sensitive materials regarding military decision-making. (Indeed, going by tabloid sales, there's significant public interest in obtaining such pictures.)

Fourth, the penalties are severe, and include compensatory damages, triple punitive damages and disgorgement of profits. Such penalties attached to a vague statute would chill speech far more than the worst kind of paparazzi can chill celebrities' personal activities.

Fifth, this standard applies not only to the person who takes the photograph, but potentially to anyone who uses the photographs in any capacity -- even if not for profit. Imagine incurring liability for sharing an Instagram photo on Facebook.

Many of these constitutional defects could be fixed by (1) adding a newsworthiness exception to the law, (2) defining where in public places this law would apply and (3) limiting the scope and nature of damages that can be awarded.

These tweaks would bring the law more in line with existing privacy law while still respecting the Constitution. This bill should be fixed now before it passes, rather than after it is challenged in court.

Protecting privacy in public is a laudable goal. Indeed, we're all affected by the sweet emotion of seeing celebrities harassed by the paparazzi (think of Princess Diana). The Steven Tyler Act, however, misses a very important thing -- that privacy and the First Amendment can coexist.

Hawaii shouldn't walk this way. Instead it should promote the right of privacy that our society should strive for, while ensuring the freedom of speech. Let's not be jaded by the social costs of freedom. Anything else is just crazy.