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David P. Schack

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In 1890 Samuel D. Warren and Louis D. Brandeis published an article, entitled *The Right of Privacy,*[1] in the Harvard Law Review. Using this concept of a right of privacy, the courts slowly began to develop a cause of action based on a right of privacy.[2] Seventy years later Dean William L. Prosser organized the types of privacy rights into four separate categories in an article entitled *Privacy.*[3] Although he analyzed the right of privacy in detail, Prosser devoted only one sentence to the application of the right of privacy to business entities: "It seems to be generally agreed that the right of privacy is one pertaining only to individuals, and that a corportation or a partnership cannot claim it has such."[4] Prosser did not disclose his reasoning for this conclusion, nor did he analyze business entities'[5] right of privacy in terms of his four categories. Since Prosser categorized the rights, many courts have adopted Prosser's classifications.[6] Furthermore, courts that have addressed the application of the right of privacy to business entities have agreed with Prosser's conclusion and refused to extend the right of privacy to business entities.[7]

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* Associate, Mitchell, Silberberg & Knupp, Los Angeles, California. B.A., 1979, Stanford University; J.D., 1982, University of California at Los Angeles.

1. 4 HARV. L. REV. 193 (1890).

2. For cases that have dealt with a right of privacy in varying contexts see Nixon v. Administration of General Services, 433 U.S. 425 (1977); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

3. Prosser, *Privacy,* 48 CALIF. L. REV. 383 (1960). *See infra* note 10 and accompanying text.

4. *Id.* at 408-09.

5. "Business entities" as used in this article means corporations, partnerships, business associations, business trusts and other independent business groups.

6. C. GREGORY, J. KALVEN, JR. & R. EPSTEIN, CASES AND MATERIALS ON TORTS 1136 (1977) (citing, *e.g.*, Kapellas v. Kofman, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969); Dotson v. McLaughlin, 216 Kan. 201, 531 P.2d 1 (1975)). Prosser's categories also form the basis for the discussion of privacy in the RESTATEMENT (SECOND) OF TORTS §§652A-652L. (1976).

7. Ion Equipment Corp. v. Nelson, 110 Cal. App. 3d 868, 878, 168 Cal. Rptr. 361, 366 (1980) (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 815 (4th ed. 1971) which repeats verbatim the sentence quoted in the text from Prosser, *Privacy,* 49 CALIF. L. REV. 383, 408-09 (1960) at text accompanying note 3, *supra*). *See* United States v. Morton Salt Co.,

However, in 1980 two separate three-judge panels of the California Courts of appeal reached different conclusions regarding the right of privacy for business entities. One court held that a business entity has no right of privacy,[8] while the other court found that a partnership has a right of privacy.[9] The California Supreme Court has not resolved the apparent conflict between these two decisions.

This article suggests a resolution to the conflict between the two cases by using Prosser's four right of privacy categories. The article concludes that the courts should recognize a right of privacy for business entities in only the public disclosure of private facts category because this category involves pecuniary damage to business reputation rather than merely harm to personal feelings. This conclusion also resolves the conflicting California Court of Appeal cases.

I. PROSSER'S FOUR CATEGORIES AND THE RIGHT OF PRIVACY FOR BUSINESS ENTITIES

In his article, Prosser enumerated four distinct types of privacy rights: 1) intrusion upon plaintiff's seclusion or solitude, or into his private affairs; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity which places the plaintiff in a false light in the public eye; and 4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[10] The right of privacy in each of these categories protects a distinct interest of the plaintiff. However, Prosser, in concluding that corporations and partnerships have no right of privacy, did not analyze the application of the privacy right to business entities in the context of each category. Rather, in a section of the article entitled "Common Features," he simply stated his conclusion.[11]

In reassessing the application of privacy rights to business entities, the first inquiry must be whether the protection of any of the four categories of privacy is necessary. If existing statutory and case law adequately protects business entities' rights in the areas covered

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338 U.S. 632, 652 (1950); CNA Financial Corp. v. Local 743, 515 F. Supp. 942, 946 (N.D. Ill. 1981); Maysville Transit Co. v. Ort, 296 Ky. 524, 526, 177 S.W. 2d 369, 370-71 (1944); Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc., 43 A.D.2d 178, 349 N.Y.S.2d 736, 738 (1973); Commonwealth Packel v. Shults, 26 Pa. Commw. 129, 362 A.2d 1129, 1135 (1976); Annot., 138 A.L.R. 22, 54 (1942).

8. Ion Equipment Corporation v. Nelson, 110 Cal. App. 3d 868, 168 Cal. Rptr. 361 (1980).

9. H & M Assoc. v. City of El Centro, 109 Cal. App. 3d 399, 167 Cal. Rptr. 392 (1980).

10. Prosser, *supra* note 3, at 389.

11. Prosser, *supra* note 3, at 408-09.

by Prosser's four categories, then the expansion of privacy rights to business entities would not be justified.[12]

In his article, Prosser hinted that a business entity's right of privacy already appeared to be adequately protected by other laws in at least one category. Although noting that corporations and partnerships have no right to privacy, Prosser admitted that "either may have an exclusive right to the use of its name which may be protected upon some other basis such as that of unfair competition."[13] Prosser's reference to the exclusive right of a business entity to use its own name addresses the "appropriation" category of privacy. This category seeks to protect the exploitation of the attributes of the plaintiff's identity. In addition to state unfair competition laws, there are also federal trademark laws which protect against appropriation.[14] Therefore, because a well-developed body of law protecting business entities in this area already exists, the courts should not expand the "appropriation" privacy right to business entities.

Corporations and other business entities are also protected in the false light area of privacy by other legal remedies. The false light privacy right provides a cause of action for persons placed in a false light in the public eye.[15] However, the law of defamation, which already provides business entities with a cause of action, overlaps significantly with the false light privacy cause of action.[16] Moreover, if there is improper use of a corporate name by another, the corporation may be able to utilize trademark or unfair competition laws.[17] While defamation, trademark, and unfair competition laws may not provide all the coverage of the false light privacy cause of action, they provide significant protection to business entities, and expansion of the false light cause of action is not warranted.

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12. Courts have been reluctant to extend the right of privacy to areas where other known causes of action exist. In Gregory v. Bryan-Hunt Co., 295 Ky. 345, 174 S.W. 2d 510 (1943), the court refused to find a right privacy in a situation where a cause of action for slander existed. The court stated:

> It is apparent that such [a privacy] right of action is restricted to matters peculiarly personal, private, seclusive, as distinguished from such wrongs as libel, slander, trespass or injury to property, assault, etc., for which there are other legal remedies . . . . In no event, however, was such [a privacy] right ever intended as a substitute or an alternative remedy for the invasion or violation of rights for which other known and established remedies are available.

Id. at 350-51, 174 S.W. 2d at 512.

13. Prosser, *supra* note 3, at 409.

14. *See* 15 U.S.C. §§1051-1127 (1983); in particular see 15 U.S.C. §1125 (false descriptions or representation of goods or services specifically prohibited).

15. Prosser, *supra* note 3, at 398.

16. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 745-46 (4th ed. 1971).

17. *Id.* at 954-62; *see also id.* at 924-26.

The third privacy category is intrusion. This allows the plaintiff to sue based upon intrusion on one's physical solitude. This cause of action also protects against wiretapping or peering into windows.[18] Although business entities do not generally have protection in this area, upon examination, they may not need such protection. In refusing to allow business entities a cause of action for invasion of privacy in general, courts look to the purpose of the privacy right. The privacy right is designed to protect the feelings and sensibilities of human beings. A business entity does not possess these characteristics.[19] The archetypal intrusion case is a peeping tom or a wiretap. As applied to a business entity, these acts do not seem to cause actionable harm. A business entity is not "humiliated" by having a stranger overhear private conversations or see private acts. Thus, mere intrusion does not cause a business entity the type of embarrassment against which the privacy right seeks to protect. However, as soon as private matters are *disclosed* to the public, the business entity may suffer damages.

Privacy protection seems most necessary for business entities where there is a disclosure of private facts. This fourth category involves the public disclosure of objectionable facts about a person. There is no overlap here with defamation since this privacy right prevents disclosure of private *facts* and does not involve falsehood. Moreover, the disclosure category protects more than mere feelings, and thus may properly be applied to business entities.

II. Interests Protected by the Disclosure Branch of the Right of Privacy

The paradigm for disclosure cases is that involving the public disclosure of private debts. An analysis of two such leading cases indicates that the disclosure privacy right protects more than just "feelings;" it also protects pecuniary interests. In *Biederman's of Springfield, Inc. v. Wright,*[20] Donald and Daisy Wright, husband and wife, bought merchandise from Biederman's furniture store. The Wrights made some payments on the merchandise, but left an upaid balance. Biederman's claimed that the unpaid balance was due, but

18. *Id.* at 807-09.

19. Ion Equipment Corp. v. Nelson, 110 Cal. App. 3d 868, 878, 168 Cal. Rptr. 361, 365-66 (1980); Maysville Transit Co. v. Ort, 296 Ky. 524, 526, 177 S.W.2d 369, 370-71. (1944); Annot., 138 A.L.R. 22, 54 (1942); *see also* City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 268, 85 Cal. Rptr. 1, 7-8, 466 P.2d 225, 231-32 (1970).

20. 322 S.W.2d 892 (Mo. Sup. Ct. 1959). Prosser cites this case in his article as an example of the disclosure right of privacy. *See* Prosser, *supra* note 3, at 393 n.87.

the Wrights refused to pay because they said Biederman's had not properly credited their previous payments. Subsequently, on three separate occasions, one of Biederman's agents went to the restaurant where Daisy Wright worked as a waitress and demanded in a loud, overbearing manner that Daisy pay the balance. On one of the occasions, the agent spoke the following words: "Something is going to be done with [sic] I am here—I think you're deadbeats—I don't think you intended to pay for the furniture when you got it."[21]

Eventually, Biederman's sued the Wrights for the balance allegedly due. The Wrights filed a counterclaim against Biederman's for breach of their right of privacy based on the agent's public disclosure of private facts concerning the Wrights' debts. Among the allegations in the counterclaim, the Wrights claimed that the agent's disclosure reflected poorly on the Wrights' integrity and damaged their business reputation causing them to lose their jobs.[22]

The court held that the pleadings, which included the allegations involving the damage to the Wrights' reputation in the business community, stated a cause of action for invasion of privacy. The court also cited the Restatement of the Law of Torts: "In some aspects [the right of privacy] is similar to the interest in reputation, which is the basis of an action for defamation, since both interests have relation to opinions of third persons."[23] The *Biederman's* court sought to protect the pecuniary interest of the Wrights as well as their humiliation from the agent's disclosure of private facts. Importantly, business entities, as well as individuals, have pecuniary interests which can be protected from public disclosure of private facts.

In *Brents v. Morgan*,[24] the appellee, W.R. Morgan, a veterinarian, was delinquent in his account to the appellant, owner and

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21. 322 S.W.2d at 895.

22. The Wrights' counterclaim included the following allegations:

> [The agent's conduct] also caused special damages to [Daisy's] reputation and conduct of her waitress work since it reflected on her integrity, and her calling as a waitress required integrity.
>
> As a result of [the agent's] conduct on the three said occasions, [Donald] was required by his employer, the Rose Exterminator Company in Springfield, Missouri, to cease working in the Springfield, Missouri area where he had previously worked for said company. . . . [The words of the agent describing the Wrights as deadbeats] in turn reflected on [Donald's] credit and integrity as a salesman for the Rose Exterminator Company and by reason of the said words, this defendant was injured in his good name and reputation as a salesman.

Id. at 894-95.

23. *Id.* at 896.

24. 221 Ky. 765, 299 S.W. 967 (1927). This case is also cited by Prosser as an example of the disclosure category. *See* Prosser, *supra* note 3, at 392 n.84.

operater of an auto garage. The appellant placed a five-foot by eight-foot sign in his window stating: "Dr. W.R. Morgan owes an account of $49.67. And if promises would pay an account, this account would have been paid long ago. This account will be advertised as long as it remains unpaid."[25] Morgan sued the appellant alleging the publication had "caused him great mental pain, humiliation, and mortification . . . tended to expose him to public contempt, ridicule, aversion, and disgrace and . . . caused an evil opinion of him in the minds of tradesmen and the public generally, all to his damage in the sum of $5,000 . . . ."[26]

The court entered judgment in favor of Morgan based on a right of privacy theory.[27] Although the component of humiliation was present, the pleading suggests that an element of damage to business reputation was also involved. As the opinion states, Morgan specifically pleaded that an evil opinion was formed in the minds of tradespeople.[28] By such pleading, Morgan sought damages on the theory that the disclosure of the private fact hurt his ability to conduct business in the town. If Morgan's mental state had been the only critical factor, the court probably would not have recited the facts involving damage to business reputation in the opinion.

In both *Biederman's* and *Brents,* the courts applied the disclosure branch of the right of privacy to protect both the pecuniary interests and the feelings of the individuals. Although business entities do not have "feelings", the entities have pecuniary interests which may require protection. The disclosure privacy right provides a means by which business entities can achieve such protection.

III. Application of the Disclosure of Private Facts Branch of Privacy to the Conflicting California Cases

In *Ion Equipment Corporation v. Nelson,*[29] the California Court of Appeal heard an action involving Ion Equipment Corporation's ("Ion") claim for invasion of privacy under the common law and under the California penal statute which prohibits the electronic recording of confidential communications.[30] Nelson[31] recorded a con-

25. 221 Ky. at 766, 299 S.W. at 968.
26. *Id.* at 766-67, 299 S.W. at 968.
27. *Id.* at 766, 299 S.W. at 968.
28. *Id.* at 774, 299 S.W. at 971.
29. 110 Cal. App. 3d 868, 168 Cal. Rptr. 361 (1980).
30. Cal. Penal Code §§ 632, 637.2 (West 1970 and Supp. 1983).
31. Nelson was the plaintiff in a previous case against Ion Equipment Corporation and was successful in that action against Ion for monies due under an employment contract. Nelson

versation with an Ion employee without the employee's knowledge or permission. Ion based its claim for invasion of privacy on this unauthorized recording. The court of appeal upheld the trial court's decision to sustain Nelson's demurrer on the common law privacy cause of action. In affirming the trial court's decision, the appellate court held that a corporation does not have a right of privacy.[32]

Furthermore, the court stated that "there are no California cases recognizing that a corporation enjoys the right of privacy. Consequently, no case law exists indicating that a corporation has a viable cause of action for invasion of privacy."[33]

Despite the *Ion* court's statement that no California case recognizes a corporate right of privacy, the Fourth District of the California Court of Appeal had issued an opinion two months earlier finding a right of privacy for a business entity. In *H & M Associates v. City of El Centro*,[34] the plaintiff, H & M Associates (H & M), a limited partnership, operated a 306 unit apartment complex in El Centro (the City).[35] H & M had obtained mortgages on the apartment complex from several financial institutions.[36] These institutions, as well as the City, knew that H & M was waiting for an approval on financing from the FHA.[37] On September 16, 1975, the

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obtained a writ of execution for use in enforcing his judgment. Prior to obtaining this writ, Nelson engaged in and recorded a telephone conversation with an Ion employee. Ion then sued Nelson claiming invasion of privacy under CAL. PENAL CODE §§ 632 (West 1970 & Supp. 1983), as well as for abuse of process for the use of the writ prior to disposition of Ion's appeal. 110 Cal. App. 3d 875, 882-83, 168 Cal. Rptr. 363, 368.

32. 110 Cal. App. 3d at 878-79, 168 Cal. Rptr. at 366. In reaching its conclusion the court stated:

> It is generally agreed that the right to privacy is one pertaining only to individuals, and that a corporation cannot claim it as such. (Prosser, Torts . . . (4th ed.) § 117, p. 815.) This is because the tort is of a personal character "concern[ing] one's feelings and one's own peace of mind." (*City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 268 [85 Cal. Rptr. 1, 466 P.2d 225, 37 A.L.R. 3d 1313]; see also, *Fairfield v. American Photocopy etc. Co.* (1955) 138 Cal. App. 2d 82 [291 P.2d 194].) A corporation is a fictitious person and has no "feelings" which may be injured in the sense of the tort. 110 Cal. App. 3d at 878, 168 Cal. Rptr. at 366.

Id. Despite its ruling on the common law privacy cause of action, the appellate court overruled the demurrer to the cause of action based on California Penal Code sections 632 and 637.2 which forbid electronic eavesdropping. The court cited section 632(b) which defines "person" to include corporations as perpetrators of the forbidden eavesdropping. Given this definition, the court reasoned that the legislature also intended the corporations to be protected under the statute. *Id.* at 879, 168, Cal. Rptr. at 366.

33. *Id.* at 878-79, 168 Cal. Rptr. at 366.

34. 109 Cal. App. 3d 399, 167 Cal. Rptr. 392 (1980).

35. *Id.* at 404, 167 Cal. Rptr. at 395.

36. *Id.*

37. *Id.*

City terminated the water service to the H & M apartment complex without notifying H & M, without giving H & M a hearing, and without giving H & M the opportunity to pay the apartment's water accounts.[38] After terminating the water service, the City's manager telephoned the institutional mortgagees, the FHA, the local newspaper and several other government agencies informing those entities that the water service had been terminated at the H & M apartment complex and that the service would not be reinstated.[39] H & M alleged that the City's action caused it (H & M) to lose tenants and to eventually default on its payments.[40] The City was able to buy the apartment complex at a bargain price at the foreclosure sale.

H & M claimed that the City had intended such a result when terminating the water service.[41] Among other causes of action, H & M pleaded a cause of action against the City for invasion of privacy for disclosing private facts to the public.[42] The trial court sustained a demurrer to the complaint without leave to amend.[43] H & M appealed, and the court of appeal subsequently reversed.[44] In its opinion the court thoroughly discussed the privacy rights of business entitites.[45]

The court in *H & M Associates* concluded that a partnership has a right to privacy.[46] In reaching this conclusion, the court analyzed the rights of partnerships and corporations, and held that the distinction between partnerships and individuals and their respective rights to privacy was a distinction without a difference.[47]

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38. *Id.* at 404, 167 Cal. Rptr. at 396.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 403, 107 Cal. Rptr. at 395.
43. *Id.* at 404, 167 Cal. Rptr. at 396.
44. *Id.* at 403, 413, 167 Cal. Rptr. at 395, 401.
45. *Id.* at 409-412, 167 Cal. Rptr. at 399-401.
46. *Id.*
47. *Id.* at 410, 167 Cal. Rptr. at 399. The court stated:

> Whether corporations or partnerships have a right to privacy is unsettled. There have been general statements to the effect that the right pertains only to individuals and it may not be claimed by any other. Prosser, Law of Torts (4th ed. 1971) §117, p. 815. With reference to a corporation's right to sue for defamation, our high court has recently said: . . . "there is no distinction between the protectible interest in reputation of corporations and individuals . . . . [¶] . . . the line between . . . natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defamation claims, the distinction between corporations and individuals is one without a difference." (*Vegod Corp. v. American Broad-*

The right to privacy exists in multiple fact contexts and in this sense it is amorphous—easy to recognize, but difficult to define. Plaintiff does not seek damages for hurt feelings because of "its" right to be left alone for how can a partnership, distinct from its members, suffer humiliation or embarrassment. Here, however, the damages requested relate to the partnership's economic loss—the real property it owned has been foreclosed.

In the commercial world, businesses, regardless of their legal form, have zones of privacy which may not be legitimately invaded. Bank customers entitled to privacy are not limited to individuals. The "California Right to Financial Privacy Act" includes partnerships and prohibitions against disclosure by bookkeeping services of information contained in the books or records of their clients also includes partnerships within the protected class.

A partnership as an entity distinct from its individual partners is now recognized in various legal settings. Procedurally, it may sue in its own name and it is a person with recognized status under the partnership act, bankruptcy, criminal law and licensing statutes.

In a social context many partnerships acquire a distinct personality, a composite of characteristics unique to the partnership and different from that of the individual partners. The reputation of prestigious law firms or famous medical clinics known by the names of now-deceased partners or founders is the residuum of the cumulative efforts, talents and energies of it participants over the history of the organization. Damage to the business reputation of the partnership is recompensed through an action for defamation, and its economic worth includes good will.

The increasing concern for privacy rights and its concomitant growth is the recognition of " . . . the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." The voters of this state manifested their anxiety by amending article I, section 1 of our state Constitution to include among the various "inalienable" rights of "all people" the right of "privacy." "The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." Although the language in *White*

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casting Companies, Inc. (1979) 25 Cal. 3d 763, 770-71 [160 Cal. Rptr. 97, 102, 603 P.2d 14]). The distinction between partnerships and individuals and their respective rights to privacy, depending upon the nature of the right asserted, is also a distinction without a difference.

Id. at 410, 167 Cal. Rptr. at 399.

> refers to "individuals," there is nothing restrictive in its rationale.[48]

The holdings in *H & M Associates* and *Ion Equipment* can be reconciled. In *H & M Associates,* the court found a right of privacy for a business entity in a case where disclosure of private facts damaged the pecuniary interest of the business entity. The *H & M Associates* court stressed the economic loss caused to H & M by the disclosure. On the other hand, in *Ion Equipment,* the court found no right to privacy where there was an intrusion upon the plaintiff's solitude through the surreptitious recording of a conversation. The *Ion Equipment* court emphasized the fact that corporations have no "feelings" which are humiliated by the intrusion into private affairs.

Neither court analyzed the right of privacy in light of Prosser's four categories. However, when the decisions are analyzed in light of those four categories, both decisions can be reconciled. In the *Ion Equipment* case, the application of the right of privacy to the plaintiff corporation was not appropriate because the corporation had no feelings harmed by the recording of a private conversation. Further such a recording already received statutory protection[49] and the expansion of the common law right of privacy in such a situation was not necessary. However, in the *H & M Associates* case, invasion of the right of privacy involved public disclosure of private facts. In this situation, the business entity, a partnership, did not have an overlapping legal remedy and needed a cause of action for the invasion of right of privacy to protect its pecuniary interests rather than any "feelings."

CONCLUSION

Through the years, the courts have developed a common law of privacy. Most often the courts have applied the right of privacy within the four categories identified by Prosser. Generally, the courts have concluded that business entities have no right to privacy because such entities have no "feelings" which can be protected from an invasion of privacy. Although this rationale justifies the refusal to apply the right of privacy to business entities within some of Prosser's categories, the rationale does not justify the refusal to apply the disclosure of private facts right of privacy to business entities where a pecuniary interest of a business entity has been damaged by such a

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48. *Id.* at 409-11, 167 Cal. Rptr. at 399-400 (citations omitted).

49. *See supra* note 32.

disclosure. The California court of appeal has implicitly recognized a privacy cause of action for business entities when private facts are disclosed to the public causing pecuniary damage. The application of such a cause of action is exemplified in two apparently conflicting decisions of the California court of appeal which found no right of privacy for business entities in a case involving the intrusion category but found a cause of action for right of privacy for a partnership in another case involving the disclosure category.