

Who is Spying on you? - Taking a look at Spyware

Table 1

Legislation	Potential offence
Criminal Code Act 1995 (Cth)	<p>Attempting to commit a serious offence (such as fraud) using a telecommunications network;</p> <p>Unauthorised access, modification or impairment of data, information or programs with intent to commit a serious offence;</p> <p>Causing unauthorised modification of data, information or programs to cause impairment - including the reliability, security or operation of data, information or programs;</p> <p>Unauthorised impairment of electronic communication;</p> <p>Unauthorised access to or modification of restricted data - data held on computer and to which access is restricted by an access control system (such as passwords etc) associated with the function of the computer;</p> <p>Possession or control of information with the intention to commit or facilitate a computer offence;</p> <p>Producing, supplying or obtaining data with intention of committing or facilitating a computer offence;</p> <p>Dishonestly obtaining, possessing, supplying, using or dealing in personal financial information without consent; and</p> <p>Intentionally using a carriage service to menace, harass or cause offence.</p>
Trade Practices Act 1974 (Cth)	<p>Anti-competitive behaviour</p> <p>Misleading and deceptive conduct</p>
Australian Securities and Investments Commission Act 2001 (Cth) and Corporations Act 2001 (Cth)	Misleading and deceptive conduct
Privacy Act 1988 (Cth)	<p>Invasion of privacy</p> <p>Harvesting and collecting personal information</p>
Criminal Law Consolidation Act 1935 (SA)	Identity theft
Telecommunications Act 1997 (Cth)	Applies to some use of personal information
Telecommunications (Interception) Act 1979 (Cth)	Collection of data and other information

The Medium, the Message, the Artist and the Image: unauthorised photography on the Internet

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Introduction

The medium, or process, of our time – electric technology – is reshaping and restructuring patterns of social

interdependence and every aspect of our personal life...¹

The unauthorised use of photographs on the Internet raises a number of interesting legal issues. This article

will focus on a few of the issues raised by the Standing Committee of Attorneys-General discussion paper, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*

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('Discussion Paper'), which was released in August 2005.²

Since the boom of the information superhighway and the increasing ease of access to computers and the Internet, there has been interest in, and hysteria surrounding, the communication of photographs on the Internet particularly unauthorised photographs of people appearing on the Internet without their permission. However, in the last few years the public and media frenzy over the taking and use of unauthorised photographs has escalated. The Discussion Paper attempts to focus on the use to which the unauthorised images were put, rather than the act of taking the photographs, as it is argued that unauthorised use of photographs is what promotes public attention and concern. Addressing this public concern, the Discussion Paper opens with a number of examples from the Australian media where photos were taken "surreptitiously" and then "exposed to the world via the Internet".³ This includes the use of mobile phone cameras to take unauthorised photographs, one example being, the use of unauthorised photographs of teenage Melbourne schoolboys participating in sporting activities, on a website which was linked to other adult sites. As a result of media coverage the website was shut down and the pictures were apparently removed.⁴

The Discussion Paper provides a comprehensive overview of the issues, the existing regulation of unauthorised photographs, and the use or publication of these photographs. The overview includes an outline of the criminal law, the national regulatory schemes, civil law and international approaches. The Discussion Paper also addresses options for reform, including legislative and non legislative reform options. In summary, the discussion questions set out in the Discussion Paper includes consideration of: whether the taking of unauthorised images of children should be restricted, giving consideration to the competing interests of privacy and the freedom to take photographs in a public place; whether the use or publication of unauthorised photographs taken in a public place should be regulated;

whether consent should be required for photographs to be used for particular purposes; and whether there should be an offence dealing with unauthorised photographs on the Internet or an enforceable civil right relating to the use of a persons image.

The Arts Law Centre of Australia ('Arts Law'), as the national community legal centre for the arts which provides legal advice, education and advocacy services to thousands of Australian artists and arts organisations every year, made a submission in response to the Discussion Paper. As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the above issues, and how any proposed response to these issues might affect Australian artists and photographers. The general Arts Law position is that an individual's expectation of privacy should not extend to controlling images of themselves beyond the regulations and protections that currently exist in Australia, as described in further detail below. Arts Law argues that existing laws cover most of the situations raised by the Discussion Paper; it is just that the medium (the Internet) makes it difficult to monitor, or in many cases makes it impossible to prosecute the offenders who are breaching these existing laws. Moreover, introducing laws that criminalise the use of unauthorised photographs, or even just unauthorised photography of people and any subsequent use on the Internet, will not address this difficulty and will most likely result in some artistic casualties along the way.

Current restrictions on the taking of unauthorised images

In Australia, there is no right not to be photographed.⁵ There is also no tort of invasion of privacy to generally protect an individual from having their photograph taken.⁶ Nonetheless, there are numerous restrictions on one's ability to invade another's privacy, such as the law of nuisance or harassment,⁷ obscenity, defamation,⁸ misleading and deceptive conduct,⁹ and breach of confidence which may be used by individuals to prevent

unauthorised use of their image in particular circumstances. These mechanisms, combined with the criminal law, provide sufficient safeguards.

At present, if a photograph is sexually explicit, then state based criminal restrictions may apply. The law in Australia currently provides regulations to protect children and the taking of and use of unauthorised photographs of children in an offensive manner.¹⁰ For example, in New South Wales, Part 3B of the *Summary Offences Act 1988* (NSW) deals with filming for an indecent purpose where someone is engaged in a private act or in circumstances where they would expect privacy and where the filming is for the purpose of sexual arousal, or sexual gratification. Whilst there may be a need to introduce uniform legislation in all Australian jurisdictions, there is no need for the introduction of a further offence of voyeurism where an expectation of privacy exists. Further, the National Classification Code already regulates the publication of offensive images of children whether they are authorised or not.¹¹

Outside Australia there has been some recognition of the interests of a person depicted in a photograph.¹² In France legislation has been passed to prohibit the publication of any photograph of a person without their consent.¹³ Following the introduction of the *New Zealand Bill of Rights Act 1990*, the case of *Hosking v Simon Runting*¹⁴ recognised that in some circumstances, unauthorised photography could be an invasion of privacy. In Canada, in the case of *Aubry v Éditions Vice-Versa*,¹⁵ an unauthorised candid picture taken of a teenage girl sitting on a set of steps eating her lunch, later published in the *Vice-Versa* magazine, was held to be an invasion of privacy. The privacy of the image has also been enshrined in the Netherlands, but through a different mechanism: copyright law. In the Netherlands the Copyright Act prohibits the publication of a portrait without commission if it would be contrary to the reasonable interests of the person shown in the portrait.¹⁶

The recognition of privacy or ownership of our own image has not

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been recognised in Australia. Whilst there are clearly limits to the remedies available to someone whose photograph is taken without their consent in Australia, this must be weighed against the interests of Australian photographers and artists. Accordingly, an individual's expectation of privacy should not extend to controlling images of themselves beyond the regulations and protection that currently exists in Australia. In Australia, the *Copyright Act 1968* (Cth) currently provides that, subject to section 35(5), the copyright owner of a photograph is the author of the work and is granted the exclusive right to reproduce, publish and communicate the work to the public. Section 35(5) provides some protection for persons photographed for private or domestic purposes or for a portrait of family members, a wedding party or children. And whilst section 35(5) has limited application, and will only apply to a commissioner of photographs where valuable consideration is paid, any introduction of an enforceable civil right beyond this in relation to the use of an individual's own image would unnecessarily curtail the artistic practice of photography.

Street photography as an art form, the Internet as a gallery

Street photography is epitomised by the work of photographers such as Cartier Bresson, Alvarez Bravo, Robert Frank, Philip-Lorca DiCorcia and Max Dupain. Their work characterises a movement and genre of 'candid' or 'street photography' which provides a record of history, reality and daily life, and explores how we see society and the world we live in. Street photography is defined as a form of photography where the photograph is made in public places and often features people going about their daily lives. It demonstrates a vision of the world, whilst also documenting it. Since the invention of the camera, photographers have documented the world we live in and creatively reflected and questioned public places, spaces, faces and events. Introducing new laws that prevent unauthorised photography of people in public will certainly curtail this artform and how we see the world. The photographer Diane Arbus

stated that she really believed there were things nobody would see if she didn't photograph them.¹⁷

It is also important to remember that for many contemporary photographers the Internet is their gallery. Often photographers will set up websites to display their photographs and offer others the ability to discuss their work.¹⁸ For many street photographers this is the only place their work is exposed to the wider public and those who are interested in it. For example, on the website www.4020.net/unposed the Sydney photographer Andrew Nemeth displays his street photography under the heading *Sydney Unposed: candid colour people photography*. As he states on his website:

"They are of complete strangers, photographed as-is, with little or no interaction from me. I merely travel Sydney and its suburbs in my spare time, inconspicuously photographing whatever looks interesting... To keep the results natural and spontaneous, I never ask for permission."

Nemeth describes his approach as inconspicuous; one that is instigated by an interest in Sydney's cultural and social history. For many street photographers their aim is to record, reflect and create new realities that explore how we see and ascribe meaning to the society we live in. How will they be able to achieve this if street photography is banned or curtailed by limitations on unauthorised photography, and its exhibition is further prevented on the Internet?

It appears that the ability of governments and individuals to control the use of digital technology and photography on the Internet is one of the main issues in this debate. For example, the most worrying use of unauthorised photographs is arguably child pornography, and yet in the global realm of the Internet, the source of a child pornography image will almost never be found, and tracing the source is often impossible.¹⁹ Whilst introducing regulations which restrict the taking of photographs in public

may have little effect on the use of digital cameras for taking unauthorised photos, and the use of the Internet for displaying them, it may have a negative effect on artists such as street photographers who create their work in public. Increasingly photographers find the question of whether they need or should seek permission to take photographs of others a vexed and stressful one.²⁰

It is a concern that the Discussion Paper refers to the surreptitious photographer and photographs taken by the 'voyeur'. This raises a number of questions. For example, if further regulation of photography and images in public places is introduced, how will the law differentiate between the voyeur and the artist, and any subsequent use or publication of these images? Further, it would be unnecessarily restrictive to require photographers to obtain the consent of individuals before taking a photograph of them in a public place, and then using or publishing this photograph on the Internet or in any other media: it is an unrealistic expectation for any society with a viable artistic community.

Privacy v. Freedom of Expression

Whilst there should be a consideration of the competing interests of privacy versus freedom to take photos in public places, there should also be a consideration of how further restrictions on taking photographs in public further privatises public space, and limits the capacity of artists to make art in a public context and then display it in a public context such as the Internet.

Photography is important as it reflects, records and explores public places and spaces and those people who inhabit them. International instruments, such as Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory, provides:

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the

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form of article, or through any other media of his choice.

(3) The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights and reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.

The current regulations in Australia protect the rights and reputations of others without encroaching on this right to freedom of expression. Current law in Australia also provides certain restrictions to ensure respect for the rights and reputations of others. Creating a right for people not to have their photograph taken in public without their permission or a legal expectation of privacy in public places – or while engaging in public activities – drastically alters the current societal expectations as well as the current legal protections; it is as oxymoronic as it sounds. It would place undue restrictions upon artists who create art in public places, or art that reflects these public places and those who inhabit them.

The balancing act

In the United States of America, the Commission on Child Online Protection (COPA) insists that only a combination of public education, consumer empowerment, enforcement of existing laws, and industry action can balance the need to protect children from sexually explicit material with the need to maintain adults' freedom of speech on the Internet. COPA concludes that there is no single technology or approach that will effectively protect children from material on the Internet or protect children from being the subject of unauthorised material, such as photographs, on the Internet.²¹ When the use of unauthorised images of children on the Internet is one of the main public concerns surrounding this issue in Australia, perhaps it is useful to look at the findings of an organisation like COPA and how they

translate to the Australian legal landscape.

As COPA's work illustrates, there has to be a balance between freedom of expression and personal privacy interests when addressing the issue of unauthorised photography of people and the exhibition of photographs on the Internet. Arts Law's submission in response to the Discussion Paper highlights the importance of this approach without introducing further laws that hinder the freedom of creation and expression of Australian artists who use the Internet as a virtual gallery. Navigating the realm of personal privacy, intellectual property and freedom of expression in the face of the digital revolution, and grappling with a medium such as the Internet, is difficult. But our regulation of the current digital landscape could have a detrimental effect for those artists and creators who inhabit it. Ensuring that there is a balance between the often conflicting interests of privacy, intellectual property and freedom of expression is a delicate process. It will be interesting to reflect on the proposals for negotiating this balancing act and negotiating over the medium, the message, the artist and the image, when the conclusions of the Standing Committee of Attorneys-General are released.

¹ Marshall McLuhan et al, *The Medium is the Message* 8 (1967) quoted in Jason Kay, 'Sexuality, Live Without a Net: Regulating Obscenity and Indecency on the Global Network' (1995) 4 *Southern California Interdisciplinary Law Journal* 355 at p.356.

² Standing Committee of Attorneys-General, *Discussion Paper: Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, August 2005. Available from www.justice.vic.gov.au. There has been no response from the Standing Committee of Attorneys-General since the closing date for submissions in October 2005.

³ *Ibid.* p.6.

⁴ *Ibid.* p.5.

⁵ *R v Sotheren* [2001] NSWSC 204.

⁶ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *ABC v Lenah Games Meats Pty Ltd* (2001) 208 C.L.R. 199.

⁷ *Bernstein (Baron) v Skyviews Ltd* [1978] QB 479.

⁸ *Ettingshausen v ACP* (1991) 23 NSWLR 443.

⁹ *Henderson v Radio Corp Pty Ltd* (1960) 60 SR (NSW) 576.

¹⁰ For example, see sections 4 and 21G, *Summary Offences Act* 1988 (NSW).

¹¹ The National Classification Code is available from the Office of Film and Literature Classification www.oflc.gov.au. See also *Classification (Publications, Films and Computer Games) Act* 1995 (Cth).

¹² For further discussion of these issues see Christina Michalos, *The Law of Photography and Digital Images*, London: Sweet & Maxwell, 2004.

¹³ *Presumption of Innocence and Rights of Victims Act* (2001).

¹⁴ [2004] NZCA 34.

¹⁵ [1998] 1 SRC 591.

¹⁶ *Copyright Act 1912* (Netherlands).

¹⁷ Stephen Shore. "The Nature of Photographs", Baltimore: John Hopkins University Press, 1998.

¹⁸ See <http://www.in-public.com/site/index.php> and <http://www.street-photography.com> two of many websites dedicated to promoting, showcasing, exploring and discussing street photography.

¹⁹ Timothy J. Perla. 'Attempting to end the cycle of virtual pornography prohibitions' (2003) 83 *Boston University Law Review*, 1209 at pp.1222-1223; see also Joel Michael Shwarz, 'A Case of Identity: A Gaping Hole in the Chain of Evidence of Cyber-Crime' (2003) 9 *Boston University Journal of Science and Technology Law* 92.

²⁰ Joel Meyerowitz and Colin Westerbeck. *Bystander: A History of Street Photography*, Boston: Bulfinch, 1994.

²¹ Dawn S. Conrad, 'Protecting Children from Pornography on the Internet: Freedom of Speech is Pitching and Congress May Strike Out' (2003) 9 *Richmond Journal of Law & Technology* 7, with reference to the Commission on Child Online Protection (COPA), *Report to Congress*, Oct. 20, 2000.