May 8, 2016

NSW Photo Rights

Australian Street Photography Legal Issues

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Introduction

The following by is an analysis of legal issues which apply to street photography in NSW Australia.

Created in response to objections to my Sydney Unposed project, it is written from a photographer's perspective, with a focus on what rights shooters have (and don't have) when it comes to candid photographs of people. Please note: it is not an encyclopaedia on every possible aspect of photographic law, so it does not attempt to address issues like anti-terrorist legislation, council photography permits or National Park commercial photo restrictions. Instead the sole purpose of the following is to discuss legal issues which apply to *people photography only*.

In case you are wondering, I am a photographer and qualified solicitor (UNSW 1991) who worked for a short while at a large Sydney law firm, before leaving the profession in 1992 to find a more honest way to make a living. So the following is based on an (ex) practitioner's understanding of Intellectual Property and Privacy Law, and not just the usual Internet Hearsay. =)

BTW when citing this article, please use *"http://photorights.4020.net"*.

2021 Recent Updates:
24 Nov — Inclosed Lands Protection Act 1901 references updated

Your Right To Take Photographs

In Australia the taking and publication of a person's photograph, without their consent or knowledge but within the limitations outlined below, is *not* an invasion of privacy, nor is it in contravention of case or statute law.

Privacy advocates may disapprove, but in this country people-photography has always been, and for the moment remains, a perfectly legal thing to do.

1. High Courts "Approve"

In Australia most forms of "unauthorised" photography have in fact been authorised since the 1937 High Court decision in Victoria Park Racing v. Taylor (1937) 58 CLR 479 (at p.496). This was reaffirmed recently in ABC v Lenah (2001) HCA 63, where the Court ruled that despite the passage of decades since **Victoria Park**, any concept of a *"Tort of invasion of privacy" still* does not exist in Australia.

As Justice Dowd put it with ruthless clarity in R v Sotheren (2001) NSWSC 204: *"A person, in our society, does not have a right not to be photographed."*

2. Photography Is Not (Yet) A Crime

Many photographers are fed-up with being treated like perverts. In the last few years things have deteriorated to such an extent that JPG Magazine devoted an entire issue to it in February 2006:

> *"[...] amateur photographers are the documentarians of real life. People with cameras bear witness to the everyday dramas of ordinary people. We capture our world to help us understand it. We are not terrorists. We are not dangerous. And we are certainly not a threat."*

Likewise the Aug 2012 New York Times blog *"Can You Take a Photography Anywhere"* . Or the lengthy article by John Reid and subsequent blog discussion, *"Talking Pictures: Photography Is Not A Crime"*, on the Sydney Morning Herald website (Feb 2007). Ditto the 2010 Sydney Photo Rights Rally plus UK websites *"I'm a Photographer, not a Terrorist"* and *"Not-A-Crime"*.

Similar sentiments have even led to the making of a documentary movie called *" Off Limits (La rue zone interdite) "* (2005). Featuring interviews with Marc Riboud, William Klein, Willy Ronis, Janine Niepce and Elliott Erwitt, it was directed by Gilbert Duclos — the Quebecian street photographer who lost a 1998 Supreme Court case concerning his photo of an art student sitting on a bank's steps (see the Canadian discussion below).

3. No Federal Bill Of Rights

A legacy of our convict past is that Australia has never had a Bill of Rights. Consequently there has never been any concept of a constitutionally protected *" Right To Privacy "*. Because of this, our common law has *always* rejected attempts to prohibit photography by merely claiming privacy rights — see this Photos and surveillance FAQ by the *Australian Government Office of the Australian Information Commissioner* (OAIC).

Interestingly, Australia is a signatory to the International Covenant on Civil and Political Rights (ICCRR), which means the Federal Government could in theory establish a statutory Bill of Rights by implementing the treaty via the External Affairs Power in the Constitution. That it has not been done is mainly due to politics, history and indifferent public opinion. Despite this, on the 60th anniversary of the Universal Declaration of Human Rights in December 2008, the Federal Government announced the creation of a 4-member consultation panel to look into the creation of a Bill of Rights charter for Australia. Maybe. One day.

Implied Rights To Freedom Of Speech

Analyse the constitution as fastidiously as you like, but you will not find anything on personal rights. Yet thanks to 1990's judicial legerdemain, the High Court discovered that, amazingly, ~~media proprietors~~ citizens do have a few *implied* Rights to Freedom of Speech — see this research note by Roy Jordan (2002).

So does this mean photographers can now use *" Freedom of Speech "* to counter restrictions on photography? Unfortunately, no. In typical High Court fashion, our "rights" have been carefully limited to only matters regarding political discourse (eg. the Sydney anti-pope protests in July 2008). To quote Roy Jordan:

> *" [...] there are implied rights to free speech and communication on matters concerning politics and government, e.g. permitting political advertising during election campaigns. This is known as the 'implied freedom of political communication'. "*

That's it. Which means for general (ie. non political) photography, *"Freedom of Speech"* does not exist in Australian federal law.

Victoria Charter Of Human Rights And Responsibilities

This act was passed in 2006 and became fully operational in January 2008. For the first time in an Australian State, it implemented most of the elements found in a typical Bill of Rights, including *"Freedom of movement, expression, assembly and association"*, *"Right to liberty and security"* and — most importantly for photographers — *"Protection of privacy and reputation"*. It is still too early to see what impact it will have on candid photography, but it is not unreasonable to expect someone will eventually use it to wage anti-photo lawfare.

A couple of important caveats: (1) the VCoHRaR is jurisdictionally limited to Victoria and does not apply to the Commonwealth or any other state; (2) the Australian Capital Territory has had its own Human Rights Act since 2004, yet in all this time it has still not been used to ban photography.

Limitations On Photo Rights

Just because "unauthorised" photography has not been generally prohibited, it does not mean it is a free-for-all. In NSW Anti-Voyeurism, Defamation and Obscenity laws still apply, as do common law doctrines of Nuisance, Trespass, or statutory prohibitions arising out of the *Commonwealth Trade Practices Act*.

The remainder of this article presents an analysis of these photo restrictions and limitations. For a similarly detailed overview in an Australian context, you may also wish to refer to Caslon Analytics note on Unauthorised Photographs, along with this Australian Arts Law Centre *"Unauthorised use of your image"* article.

Anti-Voyeurism Laws

The situation in NSW used to be that if photos were taken of people without their consent *"to provide sexual arousal or gratification"*, then photographers risked being charged with Offensive Behaviour under Section 21G NSW Summary Offences Act 1988.

Section 21G was however repealed at the end of 2008. From 2009 onwards, "Peeping Tom" photography in NSW is now addressed by Division 15B of the NSW Crimes Act 1900, specifically the *"Voyeurism and related offences"* provisions in sections 91I, 91J, 91K, 91L and 91M.

Note that Division 15B does *not* generally apply to everyday candid photography. This is because its scope is carefully limited to (a) photographs of a sexual and voyeuristic nature, usually of a person's *"private parts"*; (b) taken without consent and (c) taken in places where a *"reasonable person would reasonably expect to be afforded privacy"* (such as toilets, showers, changing rooms, enclosed backyards etc.).

The use of the word "reasonable" is crucial because it means the test for the expectation has to be rational and *objective*. It has nothing to do with the photographed person's feelings, thoughts, sensibilities, religious convictions or paranoia. So if a subject is parading around naked in clear public view, then they can hardly claim their privacy was violated if someone took their picture. (See also *"beach photography bans"* discussed below…)

BTW if the photographs are indecent enough, then even if they were taken with consent then they still may run afoul of the National Classification Scheme, should they be published online or in a magazine.

"Upskirting" Or "Downblousing"

Taking general photographs without consent is one thing, but zooming in to snap a person's *"private parts"* is specifically prohibited under Section 91L. Furthermore, in the case of *"private parts"*, the new test is *not* limited to a reasonable expectation of privacy, but rather *"circumstances in which a reasonable person would reasonably expect the person's private parts could not be filmed"*.

This is a significant difference, for it obliterates the *"no privacy in public places"* defence. According to **s.91L**, the mere act of taking sexualised close-ups of a person's private parts without their consent is sufficient. It is irrelevant where the shots were actually taken: either through a person's bathroom window or in the middle of a crowd at a sporting event, both cases are now equally in breach of the NSW Crimes Act. Heck, even *attempting* to take such photos is in breach of **s.91L(6)**!

Photo-peepers and other telephoto creeps should therefore consider themselves warned. (FWIW see also the Wiki article on Upskirting.)

National Anti-Voyeurism Legislation?

In Queensland, thanks to the child-photo antics of **Paul Michael Bartram** (in particular his 2005 *"Children Swimming"* website), amendments to the QLD

Criminal Code 1899 were introduced in November 2005, leading to **s.227A** *" Observations or recordings in breach of privacy "* and **s.227B** *" Distributing prohibited visual recordings "*, with s.227A(2) specifically targeting voyeurism and "upskirting".

To allay fears of inadvertently criminalising candid photography, Queensland's 227A(2) is specifically limited to *" ... the observation or visual recording made for the purpose of observing or visually recording the other person's* ***genital or anal region*** *"* (emphasis added). Like NSW this exempts everyday shots of people in crowds or bars or at the beach.

The July 2006 SCAG meeting noted their intention of adopting the *" Queensland model "* for nation-wide anti-voyeurism laws. NSW did it at the end of 2008, presumably remaining states will follow ASAP.

Private Land

Every time you enter private land, you do so with the common law understanding that you consent to any requirements the property's owner may impose upon you. Should a property's owner (or their agent) tell you to cease taking photographs, for whatever reason, then there is nothing you can do about it. Even if the area is freely accessible to the public, a property's owner has full power of veto over what happens on their land. Reattach that lens-cap and put thy camera away.

As noted by Professor George Williams in *" Picture this: city puts photo ban in the frame "*:

> *" The law would say that once you own land you get to control what goes on there. "*
>
> *" The basic problem is that so much of our space these days is out of public hands and in control of private enterprise. [...] "*
>
> *" [T]he law recognises few public rights on private property. It is a very large debate around the world. It has become a big issue in the US where shopping centres can ban people wearing T-shirts with political slogans, and the courts have sought to define quasi-public spaces. "*

Hence the difficulty in taking photographs inside department stores; bars; night-clubs; sports arena; shopping centres; "Kmarts" or supermarkets. They may be areas freely open to the public and justifiably regarded as the *" village square or commons "* of our time, but they are all private land and thus come under the control and regulation of their owners. Which means they can prohibit almost anything they like (including photography) *on their land* and there is nothing you can do about it. Their turf, their rules. For non-political discourse, No Bill of Rights in Australia = no Freedom of Expression.

Supermarkets have always balked at unauthorised photos. Even back in the 1980s I was once escorted from a South Hurstville store for taking shots of an empty aisle...

Once you leave the property however, there is no restriction on taking photographs from *outside*. This was the finding in the 1937 Victoria Park case, and it is still law. Thus for example the July 2006 photography ban at Melbourne's Southgate Precinct was carefully limited to pictures taken *inside* the centre. Even management admitted they were powerless to stop people from photographing things outside.

What if you take photos of a private space, publish them, and are then contacted (threatened?) by the property owner, claiming you have no right to display or sell images of their land? Frankly, ignore them. They may be able to restrict you while the photos are being taken, but they cannot do anything once the images have been captured (unless of course the photos are defamatory or infringe trademarks, trade secrets etc). As noted earlier there is no general *"right to privacy"* here, especially for publicly accessible areas. Furthermore in Australia there is no concept of ownership over the appearance of architectural spaces (see the copyright discussion below).

Inclosed Lands Protection

There is a special exemption for publicly owned spaces such as nursing homes, schools, public libraries, childcare facilities, nursing homes or hospitals. These are deemed by the NSW Inclosed Lands Protection Act 1901 to be "prescribed premises" and have the same control rights as private land. So don't imagine you can question someone's authority to prevent you from taking photos at (say) hospital parks or Government House. It might be government owned land, but the ILPA means authorised persons *can* regulate your behaviour while on public property.

Weekend Markets — Caution

Occasionally photographers contact me because they have been prevented from taking photos at either Melbourne's Queen Victoria Market or Sydney's Paddys Markets. Are market proprietors allowed do this?

In a nutshell — yes. Although stall-holders do not have property rights over the space they occupy, the people who run and operate the markets — do. These markets (and others like them) are on *private land*, and consequently their

owners can prohibit almost anything they like. Furthermore, it is common knowledge that many stall-holders deal in stolen or counterfeit goods, so reticence in allowing lens-hounds to document this should be unsurprising.

The Sydney Paddys Market is a notoriously photo-unfriendly place. After I took this picture I was greeted with furious hand-waving and shouts of "No Photo! No Photo!"...

But Malls, Markets Etc. Are Public Space!

No they are not. Just because an area is publicly accessible, it does not also mean it is “public land”. What confuses some Australians are United States cases where people have won the right to hand out leaflets in malls: see <freedomforum.org/packages/first/freeexpression/index.htm>

Because we lack any Bill of Rights protection in Australia, aside from the ACT or Victoria, these precedents do not apply. Furthermore leaflets are one thing, photography something else. Despite constitutionally protected Freedom of Expression rights in the USA, their shopping centres are still photo-averse places — see for example this Feb 2004 online discussion. Even a street redevelopment by The Petersen Companies in Silver Spring has tried to ban photography, much to the disgust of US photographers.

As noted earlier Australia is a signatory to the ICCRR, Article 19 of which protects everyone's right to freedom of expression. Unfortunately the treaty has not been incorporated into Australian law, so it is of academic interest only.

What About NSW Railway Stations?

This is a different story for they *are* a public space (even if they are not, technically speaking, “prescribed premises” or “public land”). So provided you don't make a nuisance of yourself, you should be fine. In 2004 the NSW Minister for Transport Services spelled it out (at NSW Legislative Council Hansard, 24 Feb 2004, p.6394, art.53):

> *“ It is not an offence to take a photograph on a train or at a station. ”*
>
> *“ Transit officers are required to detect graffiti and other offences as they occur, as well as protecting State Rail property from vandalism. I am advised taking photographs of graffiti may indicate a connection*

between the person and the graffiti they are photographing, as graffiti offenders often photograph their work.”

See also the earlier Q&A in NSW Legislative Council Hansard, 12 Nov 2003, p.4731, art.22.

Nevertheless in 2012 the NSW Government implemented a policy formalising the requirement of permission for most photography done at Sydney and regional railway stations — see the *“Filming and Photography | Transport for NSW”* website.

There are two broad categories of photographer: *“Hobbyists”* and *“Other film-makers and photographers, including students”*. The former have free access to taking photographs, provided they contact the station first. The latter:

> *“[...] are required to submit an application for assessment.”*
> *“Applicants will require public liability insurance for the sum of $20 million. Students requests will also need to provide a letter from their institution, stating the filming forms part of their studies.”*
>
> - *Applications for use of stations and trains require 10 business days to process*
> - *Applications for exclusive use of a train require a minimum of eight weeks to process.*
> - *Applications will firstly be reviewed by the Special Events Unit. If your application is declined at this stage, no fees apply.*

The *“fees”* range from $550 (even if you apply to have the fees waived) to > $1650 (if you include the $110 hourly fees for site inspection and supervision).

Realistically, if you are a hobbyist and are going to linger and take photographs using a tripod, then contact the Station Master first. For casual hand-held photography however — don't ask, shoot. OTOH professional photographers or students should think seriously about taking their cameras elsewhere.

» Victoria?

Apparently NSW has adopted the restrictive approach taken by Metro Trains in Melbourne. Due to *“safety and security”* concerns, photography is expressly prohibited at Metro metropolitan railway stations. The stations, platforms and rails might still belong to the Crown, but unlike NSW they are controlled and are under the authority of a private company. You can however apply for photography permits if you are a *“rail enthusiast”* or *“amateur photographer”* — see the Metro website for more information.

Sydney Harbour And Foreshore

In anticipation of the Sydney 2000 Olympics, the **Sydney Harbour Foreshore Authority Act 1998** was created to enable the Sydney Harbour Foreshore Authority to regulate various matters concerning Sydney Harbour, its foreshore, Darling Harbour, the Rocks, Cockle Bay etc.

The Olympics came and went, but the legislation was retained and regulations were even upgraded to create the current Sydney Harbour Foreshore Authority Regulations 2006. Of particular interest to photographers is Part 2 — Reg 4, which provides a long list of prohibited *"Commercial and other activities"* including:

> *"r4(b): use [of] any audio, loudspeaker or broadcasting equipment or camera (whether photographic, cinematic or video), for a commercial purpose, [...]"*

Thus despite being "public land", any saleable photo taken in or around Sydney Harbour (or the Rocks, Darling Harbour etc.) is forbidden without SHFA authorisation… right?

Maybe not. The exact meaning of *"commercial purpose"* is not defined in either Act or Regs, while the language used in the *"Filming and Photography Application Form"* (see the SHFA *"Permits and Applications"* web-page) is clearly aimed at Film/ TV productions and (maybe) wedding photographers or coffee-table book Pros — not casual photographers.

The Cockle Bay promenade at Darling Harbour. Security guards can be zealous, but they also tend to ignore casual hand-held photographers. Things get less friendly if you try to set up a tripod...

So relax. You only need to worry about SHFA permits if your photography requires a film crew, portable generators and a couple of semitrailers. Otherwise the law is, as far as the general public is concerned, *"more honour'd in the breach than the observance"*.

» Sydney Luna Park

Has its own special legislation, the Luna Park Site Act 1990. Although public land, Luna Park is actually leased to and under the control of a private company. Which means similar to other *"private land"* sites, they can

prevent you from taking photographs or even ask you to leave (see discussion above). Rather than common law, the power to do this has been enshrined in Section 6G of the Act.

Notice however the *"boardwalk/ foreshore"* exception in s6G(3), whereby the Luna Park lessees can only control what happens *within* the boundaries of their site. Meaning you are free to photograph from outside the exterior/ face/ buildings as much as you like, or more accurately, as much as permitted by the Sydney Harbour Foreshore Authority Regulations!

Assaulting Photographers

Although property owners may use *"reasonable force"* to evict people, they can never threaten violence (*"assault"*), detain you at length (*"false imprisonment"*), push you around and seize your camera or film (*"battery"*), or even force you to delete digital files (*"coercion"*). Rent-a-cops, supermarket clerks, shopping centre managers and even customers at a Haldon Street Cafe in Lakemba should take careful note (see the "Hasselblad" tab in my *"Sydney Unposed"* project).

In the last few years there have been a spate of attacks on photographers, and in every case the assailants were charged with criminal offences:

- Feb 2006: Former politician Mark Latham was charged with assault, malicious damage and stealing after a press photographer snapped him and his children leaving a fast food restaurant.
- Dec 2005: A twenty-year-old was arrested and charged with malicious damage for assaulting *St George and Sutherland Shire Leader* photographer on Cronulla beach (in the lead-up to the pre-Christmas *"race riots"*).
- Nov 2005: Five men were charged with affray and assault after attacking a Channel Seven TV crew, who filmed them leaving a Melbourne terrorist suspects hearing.

What is the law here? Threatening to damage your camera or equipment: s.199 of the NSW Crimes Act 1900 — maximum penalty 5 years imprisonment. Threatening violence against you: s.93C of the same Act — 10 years. Even if someone tries to prevent you from contacting the police: s.315A or s.319 — 7 or 14 years.

The moral should be fairly clear: an unwilling photo subject may only *ask* you to stop taking photographs, that is all. No touching, pushing, shoving or

grabbing. Even Police officers must institute legal proceedings (ie. detain or arrest you) if they wish to seize your camera, film or digital files.

Common sense dictates however that if a 150kg Goon starts Being Ominous, then it is wise to go with the flow, even if it isn't legally justified. After all no photograph is worth GBH!

Forced Deletion Of Digital Files?

Obviously if you take photos of security installations, military manoeuvres or of special security lock-down zones, then duly authorised personnel can and most likely will ask you to delete photos.

My earlier remarks about image deletion only apply to general photography taken under everyday conditions (eg. at shopping centres, public parks, office parties, people walking along the street etc.) Furthermore, it is unlikely that anyone can ever compel you to erase images of *people* on the basis of security concerns.

Assault By Police

In my experience NSW Police Officers do not mind having their photo taken. A lot obviously depends on what they were doing at the time (eg. surveillance or criminal activity), but generally speaking, when out and about on the street or working at public events, Police officers will be friendly and will not complain.

I could have spent all day photographing police at the 2005 Swans Victory Parade if I had wanted to. In fact I had to work hard to avoid officers hamming it up in front of the lens...

So much for the good news. The bad is that like the general public, there are occasions when Police officers can misbehave, and even threaten or physically manhandle a photographer for pointing a camera at them — see the incidents discussed by Tom McLoghlin in Sept 2008.

Which of course is unacceptable. If you have such an experience and wish to take matters further, then I suggest you contact one of the options listed on the NSW Police Integrity Commission complaints page. A word of warning though, make sure you have *plenty* of evidence to support your claims. In particular get a note of the Police officer ID(s) of the officer(s) involved. If possible also

ensure the officer(s) make an entry in their police notebooks about the particular incident. You need the ID(s) to precisely identify the police officer(s), whereas you need the notebook entries as evidence to establish that an incident took place.

» Can Police Arrest You For Taking Photographs?

If you are annoying enough, then sure. See what happened to Sydneysiders Nick Holmes a Court, Oliver Hopes and Matt Khoury in 2008!

Generally speaking, NSW Police have broad powers to arrest people, typically if:

- They suspect on reasonable grounds that you have committed an offence;
- A warrant (written authority) for your arrest has been issued by a court;
- You have committed or are about to commit an offence;

What would the "offence" be in taking photographs? Most likely it is to *" [...] resist or hinder a police officer in the execution of his or her duty [...] "*, as per Section 546C of the NSW Crimes Act 1900. With the 2009 Division 15B voyeurism amendments, they could also say they *" suspect on reasonable grounds "* that photographers had or were about to take close-up photos of people's *" private parts "*.

That's the bad news. The good, especially if you read what happened on Tom McLoughlin's blog above, is that Magistrates tend to dismiss these things when they come to trial. See also the Oct 2009 wrongful-arrest finding and $40K compensation payout to Andrea Turner after she was arrested for photographing a NSW Police Officer on a train in Sydney's south. Consequently it is safe to say you would have to be a real in-yer-face-photo-pest to be saddled with a conviction.

» Police Stop Filming Or Delete Images?

Generally speaking and keeping in mind the above, police-officers *cannot* interfere with your right to take photographs nor insist you delete images without an appropriate court-order. If a police-officer does tell (threaten?) you to stop filming, then you have every right to ignore them — provided of course you are not interfering with the *" execution of his or her duty "*.

In March 2013 the NSW Assistant Police Commissioner Mark Murdoch spelled this out during an interview with the ABC (ABC The World Today, Mar 2013):

> *" LEXI METHERELL: In the video that's on YouTube, an officer is heard repeatedly asking the person to stop filming. Is that part of police training, to stop people using their iPhones or cameras to film police in action to stop? "*
>
> *" MARK MURDOCH: Absolutely not - in fact, it's contrary to our media policy. "*

> *" Again, I would suggest that it unfortunately shows a degree of naivety of the police involved who made those comments. "*
>
> *" We understand and accept and in fact support the right of the community to film anyone in a public space. We do it ourselves as part of our operational duties. So no, that is not something they were told - in fact, quite the contrary. Our police need to be mature enough to know that everyone on the street basically has a mobile phone with camera facility and they are going to be filmed and recorded. "*

Similar freedoms exist in other Australian states — see for example the commentary surrounding the situation summarised by Crikey.com.au (KeanB, 2011).

In the UK however, magisterial tolerance can be overridden by their notorious Section 76. Due to terrorism concerns, photos of police in Merry Ol' England *can* land you in gaol — see for example *" Photographer Films his own Anti-Terror Arrest "*.

Why The Anti-Photo Angst?

Most likely a mixture of commercial use and copyright ignorance, along with a dose of Baby Boom 2.0 Bambino On The Brain. The recent proliferation of voyeur websites has not helped either. Finally, photographers must also shoulder some of the blame. For years we have wielded our cameras like "weapons", so it should be no surprise that people eventually balked at being "targets".

Whatever the reason, the level of hostility has certainly increased in the last few years. See the following examples:

- PopPhoto article: *" The War on Photographers "*, December 2008
- *" London Park Warden stops parents from photographing their own children "*, Dec 2007
- *" Denver photographer forced off bus for snapping a passenger "*, Sep 2007
- *" Harassed by Police for photography on playground "*, Mar 2007
- Magnum photographer Martin Parr harassed in Rio, Feb 2007
- Bogus petition to ban UK photo ID laws causes a moral panic, Feb 2007
- *" Talking Pictures: Photography Is Not A Crime "*, Feb 2007
- Confrontation Anecdote: "Middle-aged female jogger", Jan 2007
- *" Dupain beach snaps draw Police attention "*, Dec 2006
- *" Who's Your Daddy: Stranger danger "*, Oct 2006
- *" Was this a cheap shot? "*, Sept 2006
- *" I didn't realise people were so uptight "*, June 2005

Countering misconceptions about illegality and immorality won't be easy, although the following tips may help:

i. Adopt a professional attitude, so don't sneak or creep about

ii. Prepare a simple and rational answer to the question *"Why did you take that photograph!?"*

iii. Be clear and confident when confronted but not cocky or argumentative

iv. Always remember you have rights, but don't forget your subjects have them too, especially on private land

v. Finally, it is always easier to put your camera away than engage in street-lawyer shouting matches

If this sounds too touchy-feely and metrosexual, then fifty push-ups before breakfast and a pair of steel-capped safety boots may also help. Finally, download a copy of my *"PDF Rights info-sheet"*.

Other Common Law

Injunctions may be sought to halt the publication of photographs if the images are indecent, offensive or otherwise demean the subjects (**Lincoln Hunt Australia v. Willesee** (1986) 4 NSWLR 456 at p.464). The depiction has to be clearly degrading though, saying you are "embarrassed" or "uncomfortable" will be laughed out of court — Donnelly v Amalgamated TV Services (1998) NSWSC 509.

For **Nuisance or Trespass**, merely taking a photo of someone is always permitted. It only becomes an actionable Tort if you photograph the same person again and again over an extended period of time (**Bathurst City Council v Saban** (1985) 2 NSWLR 704 at pp.706-8). The occasional shot is okay, as is pointing a camera over a fence, or even following people down the street, but do it to the same person day after day and you're asking for trouble (not to mention stalking charges or maybe even a punch in the face).

BTW, the *"no Tort of Invasion of Privacy"* doctrine is not fixed in stone. Already in ABC v Lenah there were minority judgement hints that the High Court may allow privacy-infringement claims in future (see also these 2003 articles by David Lindsay and Paul Telford).

Nevertheless an Australian Privacy Tort is still a long way off — see Kallenbach, P. (2009) *"Giller v Procopets the road to an Australian tort of privacy?"* Minter Ellison Newsletter. Although allowed in **Grosse v Purvis** [2003] QDC 151 and **Jane Doe v ABC and ors** [2007] VCC 281, both have proven to be weak precedents. They dealt with stalking, sexual harassment and rape (*"hard cases make bad law"*), and both are lower-court decisions limited to Queensland and Victoria. More significantly, higher courts still refuse to challenge the majority in *Lenah*: Milne v Haynes [2005] NSWSC 1107, Giller v Procopets [2008] VSCA 236, Moore-Mcquillan v Workcover Corporation SA

[2007] SASC 55 and Kalaba v Commonwealth of Australia [2004] FCA 763. Despite this, pundits (like retired Chief Justice Murray Gleeson) still like to give the Lenah barrow a little push every now and then.

The "Kidman Defence"

Australian celebrities face a problem in that they cannot claim general privacy rights, yet they often wish to restrict photographs of themselves when away from the public spotlight — eg. see Stan Grant and Traci Holmes in Aug 2000.

So what can they do? In January 2005 Nicole Kidman managed to obtain an interim **Apprehended Violence Order** ("AVO") against Paparazzi photographer Jamie Fawcett, via Part 15A of the NSW Crimes Act 1900, by claiming she feared for the safety of herself and family (see *"Paparazzi ordered away from Kidman"*). Although initially considered a legal masterstroke, the AVO turned out to be flawed in that it only prevented photographers from *approaching* within 20 metres, not from taking photographs. Unsurprisingly the AVO was quietly dropped a while later.

Then in January 2007 a "distraught" Kidman again called the Police against Fawcett, this time claiming "harassment" during her holidays at Bateman's Bay. In this case the Police sent an unmarked highway patrol vehicle, *"to ensure everyone's safety on Rosedale's narrow roads"*, but otherwise refused to restrict or lay charges against Fawcett.

So what does this all mean? Not much. You can rush to court or call the Police, but any legal relief in Australia will be at best superficial, and will not directly address the issue of being photographed without consent. OTOH in the UK, in May 2009 British performer Amy Winehouse won a general injunction on paparazzi photographers **and** other *"persons unknown"* against following or photographing her. Oh how I bet "Our Nicole" wishes she was in London-town…

Consent For Photographs Always Required?

As you can gather from the Kidman example above — not in Australia.

Aside from commercial use or Voyeurism issues, consent for photography is *not* required in this country. It is purely a question of etiquette and taste. As pointed out in the August 2005 Federal Attorney General's Discussion Paper *"Unauthorised Photographs on the Internet And Ancillary Privacy Issues"*, (as quoted on the <anlysphere.com> website):

> *"[...] for any society to function in a relatively free and open manner, there could not realistically be a requirement for all photographs to be*

> *taken with consent. If there were such restrictions, candid shots could never be taken, and the media would be severely constrained in the images they show us. Freedom of expression and artistic expression would undoubtedly be adversely affected ... while there may be legitimate circumstances when recording images should be restricted, it would not be practical or desirable to obtain consent from every person all of the time, for example, for use in television news file footage. "*

In Nov 2005 this view was supported by the NSW Commissioner for Children:

> *" Even the NSW Commissioner for Children, Gill Calvert, agrees that a ban on photography without permission would be overkill. The commission has written to the Government, saying that for any society to function in a " free and open manner " , there cannot be a legal requirement for consent to being snapped. "*

(For more on the AG's discussion paper, see further below. For the aesthetics of photographing without permission, see the remarks on my Sydney Unposed critics article.)

Video Sidebar

Everything on this page applies to video photography. After all, movies are just a stream of individual still photographs.

The only difference with video is the possibility of a sound component. Here there is special law in NSW (and the ACT) which specifically prohibits the recording of private conversations without consent. The emphasis is on *private* conversations though — if someone is performing or yelling or whistling, then presumably this falls outside the NSW Listening Devices Act 1984. (See also the extensive review of the LDA by the NSW Law Reform Commission in their " *Issues Paper 12 (1997) — Surveillance* " .)

So although consent is not required for the general recording of video *images*, it *is required* when recording sound to accompany them. That is why you will often see " *hidden camera* " investigative TV reporting with the sound deliberately turned off.

BTW also keep in mind the consent provisions of the NSW Workplace Surveillance Act 2005, even if it is specialist legislation concerned solely with the filming of employees at work by their employers.

Photographs Of Children — Special Case?

Generally speaking, no.

Many people assume parental consent must always be obtained when photographing children. But aside from specific provisions in the Children and Young Persons (Care and Protection) Act 1998 (especially **child protection orders** arising from abuse, AVO's or custody proceedings), children are *not* afforded unique legislative protection when it comes to photographs, consent, privacy or defamation. As with adults you need a signed release for commercial use, but for non-commercial images — nothing.

Perhaps the misconception arises from the child identity protection requirements of s.11 of the NSW Children (Criminal Proceedings) Act 1987 (which only apply to children charged with criminal offences). Maybe it's because of the under-18 consent provisions found in most Model Releases (a requirement for commercial usage only). Maybe it's just a deep cultural loathing of child pornography?

Whatever the case, photographers are — within the limitations outlined in this article, in particular commercial use and voyeurism issues — perfectly at liberty photograph children as freely as any other subject.

Photographing children without consent is certainly a provocative topic! Part of the reason school groups (see below) or Local Councils try to ban photography at dances, plays or sporting carnivals is to *"protect children from internet pedophiles"*. Likewise many of the submissions to the 2005 AG discussion paper referred to the need to "protect" children from unauthorised use of their image on websites, blogs etc.

Yet until the law changes, consent for general child photography remains purely an ethical and moral issue, not a legal one.

Is it only a matter of time before photos of anyone under eighteen will be regarded as culturally verboten?...

Overview Of Laws Which May Apply To Child Photography

The **Arts Law Centre of Australia** has created a web-page and PDF which explores all the possible Federal and NSW legislation which may apply when taking (usually posed and/or commissioned) photographs of children. For more information, see their article *"Children In The Creative Process: Information For Artists And Arts"*.

In June 2008 the **Federal Senate Standing Committee on Environment, Communications and the Arts** held an inquiry into *"Sexualisation of children in the contemporary media"*. As part of this, the *Commission For Children and Young People and Child Guardian* created a 4-page fact-sheet called *"Tips for parents on photography of children and young people"* — another detailed and useful summary of the laws concerning child photography.

If you would like to look more closely at the *"Division 15 — Child prostitution and pornography"* provisions of the NSW Crimes Act 1900, in particular s.91G and s.91H, then see also this June 2008 blog entry by "Inkster".

Consent Does Not Trump "Obscene"

For wannabe Sally Mann's, Jock Sturges' or Jill Greenberg's, please note that consensual photographs, even if they are of your own children, will fall foul of state censorship laws if the underage subjects are photographed in a sufficiently provocative or sexual manner. Furthermore, the recently added Section 578C of the NSW Crimes Act 1900 may also be used to prohibit the publication of "indecent" articles. There is however a defence in s.578C(6) if the images have *"... any merit in the field of literature, art, medicine or science"* — so presumably only blatantly pornographic images are covered. (N.B., in January 2010 the NSW Attorney General announced that the NSW Crimes Act will be amended and the *"artist defence"* will be removed. As of the date of this page this has still not happened…)

To date only two Australian photographers have been pinged for "indecent" kiddie-pix, and in both cases either the prosecution failed or the police backed away. The first example was with Connie Petrillo in 1995, when as a West Australian art-student she sent naked photographs of her three sons for processing at a Perth photo lab. After a lab worker complained, the police raided her home and charged her with *"indecently recording a child under the age of thirteen years"*. The matter eventually made it to trial, but after two years it was dropped without a conclusive result.

The second example concerned east-coast photographer Bill Henson and his gallery representative Roslyn Oxley in May 2008. Again there were police raids and the seizure of works, but this time no charges were laid. There was however tremendous controversy, with proscriptive Shock-Jocks berating laissez-faire Bohemians, and vice versa. Ditto a couple of months later the attention-seeking use of Polixeni Papapetrou's image of her daughter on the cover of Art Monthly Australia → Controversy II.

Putting aside questions of censorship, freedom, child exploitation and pedophilia, the lesson from these incidents should be fairly clear. Because our constitution lacks general Freedom Of Expression guarantees (for non-political discourse), if you cross the line with kiddie-pix, then get ready to be jumped on by The Men In Blue.

In the wake of the *"2008 Henson Case"*, photographs of naked children have understandably become a sensitive issue. Not only will the NSW Crimes Act will be eventually amended to remove the *"artist defence"* (see above), but also the **Australian Council for the Arts** has been prompted into releasing a discussion paper on its *"draft protocols for working with children in art"*. Unsurprisingly the protocols have generated a fair amount of controversy, although it should be noted that they will only ever apply to photographers who have, or seek, Australia Council arts funding. For more discussion about this issue, see also the (somewhat one-sided) NAVA Art Censorship Guide.

Finally in NSW keep in mind that according to the Schedule One - Code of Practice of the NSW Children And Young Persons (Care And Protection — Child Employment) Regulation 2005, you cannot employ a child to run around naked during a shoot (note that Henson did his work in *Victoria*).

Child Protection And Childcare Worker's Duty Of Care

The Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13 requires people who work with children (teachers, child-care, DOCs officers etc.) to exercise a duty of care to protect minors from a *"risk of significant harm"*. The harm may be physical or psychological, and its risk may not even be imminent. Merely a *reasonable suspicion* of risk is enough. Which means that those who work with children must exercise a much greater level of care than the general public when photographing minors, or else supervising children who are being photographed.

(For more detail about the 2009 legislation, see the NSW Government *"Keep Them Safe"* website.)

So if you take candid photos of people at a large public event and school children are involved, then their teacher will only be doing their job if they query your shots. By law they have to, for if they don't then they may have to answer allegations of Child Protection misconduct, even if the images turn out to be benign.

Likewise teachers should tread cautiously when photographing school performances or games or especially swimming carnivals. Yes the children and their parents may have consented to being photographed, and there may also be *"no reasonable expectation of privacy"* (see the Voyeurism topic above), but it only requires one disaffected student or suspicious adult to launch an Ombudsman-supervised investigation.

Otherwise teachers generally *do* have rights to photograph their own students while on school property. Permission for this is typically included in the terms and conditions that parents sign when enrolling their child in the school. If parents object to photographs, then they must sign a declaration to that effect (most don't bother).

Can a teacher or authorised carer stop you — a member of the public — from taking photographs *"due to child protection issues"*? No, not unless you are a employed in one of the occupations listed in the Act. Because child protection obligations are specifically limited to employees working in certain child-related areas, non-employees (and therefore the general public) are exempt.

Bans At Swimming Carnivals, School Plays Or Eisteddfods

Many school and children groups prohibit all photography, even by parents (eg. the 2006 Coffs Harbour Eisteddfod photo ban). Do organisations have any right to do this?

If the performance is on private land, then yes they do — see the discussion above about property owner rights. This also applies to schools and council-owned facilities, as strictly speaking they are not "public land" even if they are publicly owned (ie. not freely accessible to everyone like a street or park or beach). See the NSW Inclosed Lands Protection Act 1901 and also the discussion at *"Sports Photography Legal Issues"*.

Organisations may claim they wish to protect children, but the issue here is that people can prohibit almost anything they like on land they control. If however the event is held on property not owned or controlled by the organisers, then you are free to photograph as much as you like — subject of course to other issues discussed on this page. To put it bluntly, there is no person in Australia who can *legally* prevent you from taking non-indecent photographs of your own children on public land!

Some organisers try to restrict performance photography due to *"copyright reasons"*. This is a misunderstanding of IP law, for you cannot infringe the copyright of a *"dramatic work"* by merely taking still photographs (see discussion below). You have to take extensive video footage of a *substantial part* of the performance for infringement to occur (see the *"Choreography G072"* information sheet on the ACC publications webpage.) This is incredibly unlikely if daddy only wants a couple of shots of Tiffany's solo!

Let's be honest, many of these restrictions are merely rent-seeking in disguise. Organisers try to prevent people from taking photographs by claiming *"Child Protection Issues"*. Yet a visual record of the event is still required, so they hire their own photographers. Guess who benefits from the sales of these official videos and prints?…

Then there is the issue of sporting clubs trying to prevent parents from photographing their own children during Saturday morning games — see for example this June 2008 Channel 7 "Sunrise" program report. Just in case there is any confusion here, no it is not (yet) illegal to take photographs of your own child.

In 2007 the **Australian Sports Commission** released an "*Acquiring and Displaying Images of Children*" information sheet regarding photographs of children at sporting carnivals. Although an interesting read, their recommendations were not legally enforceable. What made the ASC Guidelines noteworthy however was that Soccer NSW adopted them as policy for a few weeks in 2007…

2007 Soccer NSW Photo Ban

In May-June 2007 I received a few e-mails from concerned parents and soccer officials about attempts to prevent parents from photographing their own children at weekend soccer matches.

It transpired that Football NSW had aggressively adopted the suggestions in the ASC Child Guidelines (see above). Misinterpreting the guidelines as black-letter law, FNSW issued a directive to all NSW clubs that henceforth *all* "unauthorised" child sports photography was forbidden.

Thankfully due to behind-the-scene efforts by **Christian Wright** and **Bob Kershaw**, the Policy was quickly rescinded in late May 2007 and the status-quo was reinstated: ie. *photography is no longer banned at NSW Soccer matches*. If an official still tries to prevent you from taking (legitimate) photographs, then direct them to contact Football NSW. Of course security personnel at sporting arenas may still prevent you from taking pictures, but that is a Private Property issue (see discussion above).

Commercial Use

Generally speaking, if you wish to make "*commercial use*" of a person's likeness, then you need to obtain their consent via a signed "*Model Release*". If you don't, then you have appropriated the person's likeness and they can, and most likely will, sue for damages.

Commonwealth Trade Practices Act

There are two ways for a person to prevent the commercial use of their likeness without their consent: either by the **Common Law Tort of Passing Off**, or else via the Unfair Practices portion of the Commonwealth Trade Practices Act 1974, (Part V — Division 1 — Section 52 and Section 53).

Passing Off

This is where you sue someone for appropriating your name or likeness to sell their product. There are a number of famous cases — eg. **Henderson v Radio Corp** [1960] S.R. (NSW) 576 or **Hogan v Koala Dundee Pty Ltd** (1988) ATPR

40-902 — but the basic point is that you initiate court action(s) to prove you have suffered monetary loss by someone else's misappropriation of your reputation. Needless to say it only makes sense to do it if you are famous, for not only is litigation ruinously expensive, but you also have to prove you have a substantial enough reputation to damage. The good news is that if you win, you can receive substantial compensation for losses you have sustained.

TPA Unfair Practices

Unlike Passing Off you don't launch an action against the offender, but rather complain to the ACCC, who investigate the infringement for you. If they decide to initiate legal action, then they have all the resources of a major Commonwealth Department to chase the miscreants down. And they don't take prisoners.

At the end of the trial(s) the offender may have to pay court costs + fines (up to $1M for corporations or $200K for individuals) + destroy the offending material and/or pay for advertising space to publish corrections or apologies. Keep in mind that you won't see a cent of this, as all compensation is paid directly to the ACCC. If you want damages then you have to launch the s52/53 action yourself.

» Are Unauthorised Photos Actionable?

They are, but it took the courts a while to agree. Initially the *"**Honey Case**"* (Gary Honey v Australian Airlines (1989) 14 IPR 264) found — by some rather oblique and pedantic logic — that the mere unauthorised use of a person's photo was *not* enough to construe "endorsement". Ditto the first *"**Perkins Swimming Cap Case**"* (Talmax v Telstra Corp Ltd [1996] QSC 34).

Luckily these narrowly legalistic interpretations were reversed on appeal in *"**Perkins II**"* (Talmax Pty Limited v Telstra Corporation Limited [1996] 2 Qd R 444). Henceforth commercial use of a person's photo without their consent *can* be an infringement of the TPA.

» Do You Have To Be Famous?

On the face of it s53(c) does not care, if someone merely *"represent[s] that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have"*, then they have infringed the Act. Yet a review of case-law, mainly featuring musical and sporting identities, tends to suggest otherwise. See remarks by Clayton Utz solicitor Nicholas Tyacke, along with remarks by ArtsLaw:

> *"The mere use of a person's image is unlikely to be found to mislead or deceive under this area of law unless that person is a celebrity or well known endorser of products. If a person is well known by the public as an endorser of products then the unauthorised use of their image in*

connection with a product may constitute misleading and deceptive conduct. This is because the public would be lead to believe that the celebrity is endorsing the product. "

I would argue differently. If you follow the above logic then there is nothing to stop a company from exploiting any non-famous person's image for unlimited financial gain. Someone could take a photo of your mother and — without her permission — put it onto millions of cake-mix boxes. Likewise a candid snap of a girl on a beach could be freely used for a national billboard campaign for tampons. Forever.

There are good reasons why this has not happened. Marketers are fully aware that the ACCC has a hair-trigger about this sort of thing. Legalism aside, the practical application of Australian TPA law is no different to that in any other civilised country: you cannot make commercial use of any person's likeness without their consent. Ecce Nestlé / Ecce Ita.

What Is "Commercial Use" ?

In a photographic context, *"commercial use"* does *not* mean the sale a picture, but rather the use of a person's likeness to endorse some product or service, or to entice others to buy it.

Here are a few examples to make this clear:

- A photographer displays photos on their website and offers prints for sale. **Non-Commercial — they are merely selling individual photographs, not using the people in them to endorse any product or service**.
- A wedding photographer shows samples of their work on their website. **Commercial — they are using images of people to endorse or sell their wedding photography services**.
- Fizzy drink manufacturer runs a magazine-ad featuring a candid photo of someone drinking a can of their product. **Commercial Use — they are trying to sell a beverage. Requires a signed Model Release.**
- Telephone company re-purposes editorial photographs of an Olympic swimmer or people being rescued from floods, for use in ad-campaigns. **Ditto — they are trying to sell phone services.**
- National Tourist body holds a competition to solicit photographs of people enjoying Australian scenery, for use in an ad-campaign. Despite carefully worded indemnities in the competition rules, this is still **Commercial Use — they are trying to sell tourism services**.
  (**Aside**: over the last decade many photography competitions have become a thinly veiled scam to obtain free content. For example notice how the Tourism Australia T&C does a full-rights grab in Clauses 11 & 12

for *all* images submitted. That this swindle has not been exposed more aggressively by the mainstream media should not be surprising — they are in on the scam as well: see "*Read the Fine Print*" by Jon Reid.)

- Art exhibition sells prints or posters or postcards. **Non-Commercial — they are not selling anything other than the photo itself.** (However it will become a "*commercial use*" if the posters are used to entice people to visit the show.)
- Photographs are sold for publication **inside** a book or magazine, but not as part of an ad. — eg. monographs, editorial illustration, celebrity gossip, tutorials, how-to articles etc. **Non-Commercial — no release required.** (Rex Dupain having everyone in his 2010 book sign media releases had, I suspect, more to do with circumventing defamation claims than inappropriate commercial use.)
- A photograph is published on a book or magazine **cover**. **Commercial** as the image is used to entice people to buy something, in this case the book or mag. (BTW this is why you almost never see candid-people photos used as magazine cover illustrations.)

Remember, the mere sale of a picture does *not* make its use *commercial*. **A person's likeness has to be used in such a way that it appears they endorse some product or are trying to entice others to buy something.** Which ultimately makes sense, as photographers sell thousands of people-images to newspapers and magazines every day. Ditto the publications themselves, who legitimately sell thousands of people-images directly to the public (eg. Fairfax or News Limited).

For more discussion about commercial use in a photographic context see: the ASMP Model Release Tutorial; the UK and Ireland Editorial Photographer's article on Creative Commons; Carolyn E Wright's PhotoAttorney Blog; Dan Heller's (long) Model Release Primer; and Sarah Skinner's article on the Salome Belly Dancing website (!)

Posting photos of old school friends on your website is okay, but you are asking for trouble if you try to use the images commercially...

Commercial Use Case Study: Virgin Mobile "Areyouwithusorwhat?"

In June 2007 Virgin Mobile Australia launched an *"exciting and impactful"* *[PDF file]* multi $100K billboard and internet campaign to tout their SMS-TEXT services in Australia. What made it noteworthy *[PDF file]* was that they illustrated their hip and groovy ads with *"creative commons"* pictures appropriated from **Flickr**, *without* the photographers' knowledge or permission. A lot of the images also featured in-close and clearly identifiable depictions of people (eg. Molly E. Holzschlag *[PDF file]* or Alison Chang *[PDF file]*), again without their knowledge or consent.

Despite assertions the photos were used legitimately via Flickr's Creative Commons License, Virgin never obtained consent from any of the photo subjects. Yet the Flickr license only applied to the photographer's copyright, not the subject's consent to use their likeness. Thus: (1) the images were used to sell products and services and (2) the photo-subject's consent was never obtained. Therefore the ads were in direct contravention of the TPA, and considering the magnitude of the campaign, prompt action could then have been expected of the ACCC to injunct the things out of existence.

Or so it would seem, except for one serious problem — either by accident or design *the people-photos were not taken in Australia and neither the photographers nor subjects were Australian citizens*. Which placed them beyond the scope of the TPA or any other Australian legislation. If the photographs were taken here, then the subjects would have a case. If they were taken overseas of Australian citizens, then again people might have a legitimate complaint. But foreign persons + foreign photographers + foreign locations = No Case To Answer.

(Mind you it didn't stop Ambulance Chasers from trying *[PDF file]*.)

Luckily the campaign created such an international uproar that Virgin Mobile had to act. Despite their letter-of-the-law compliance, on a month later the ad-copy was reworked and all identifiable images of people were removed *[PDF file]*. Furthermore, a few weeks later Virgin Mobile then abruptly terminated the campaign *[PDF file]* and ghost-towned the AYWUOW website.

So in case you missed it, the moral of this story is very simple: *"Always Get A Signed Release From Any Person Whose Image You Wish To Use In Advertising"*.

Sample Model Release Forms

See the following URLs for examples of (mostly) Australian release forms. Use them as a guide when creating your own:

- Art Forum Australia Model Release
- Lonely Planet generic Model Release
- Reed Creative Services Standard Photography Forms

- Australian Portraits Talent Release form
- Arts Law Centre of Australia Photographer's Model Release

What About Property Releases?...

Broadly speaking, Property Releases are *not* required in Australia to photograph buildings or private land. See the Arts Law Centre *" Do I need a Film Location Release? "* web page and also further below for architectural photography copyright exceptions.

NSW And Commonwealth Privacy Acts

Owing to federal/state jurisdiction and constitutional issues, both federal and state Privacy Acts are limited to the regulation of Government Departments and large corporations (ie. only those with an annual turnover of more than $3 million).

*Therefore current privacy legislation does **not** apply to the taking and display of photographs by **individuals**.*

As the NSW Privacy Commissioner noted in 2004:

> *" Privacy laws, which deal with the handling of personal information, don't generally regulate the behaviour of individuals. "*

Even if legislation was extended beyond corporations and departments, *" candid photography "* would still fall outside its scope, for current law is aimed at the collection, storage and transmission of public records (such as address, health, credit reports or financial details etc.), and not the blanket concealment of people's intimate lives — see this OAIC Privacy overview as well as the index of Federal Privacy Commissioner cases.

In 2005 the *Commonwealth Senate Legal and Constitutional References Committee* conducted a thorough review of the *Commonwealth Privacy Act* 1988. In June 2005 they published their report. Despite rumours of restricting certain kinds of photography due to fears raised by camera-enabled mobile phones, the 186 page report barely mentioned photography at all, and even then only in a medical record or biometric security context.

Meanwhile state attorneys-general and privacy commissioners regularly circulate papers calling for restrictions on all *" unauthorised photography "* (eg. 2005, 2006). Luckily things have not gone that far — yet. For as many commentators have remarked for many years, the Privacy Act is thankfully *not* a defacto Secrecy Act.

What about **Press or Privacy Council guidelines**? Frankly they don't apply to non-members or (again) individuals. At best they are recommendations only, not enforceable obligations arising out of Law.

2006-9 LRC Privacy Reviews

In 2006-9 both the NSW Law Reform Commission and the (federal) Australian Law Reform Commission reviewed the current state of Privacy law. Both produced lengthy papers which, among many other things, proposed the creation of a **Statutory Cause of Action for Breach of Privacy** to protect individual privacy rights (eg. NSWLRC R120, Recommendation 4 and ALRC 108, Recommendation 74).

To balance *"freedom of expression"* concerns raised by artists and the media, both LRC's also recommended the creation of a *"Public Interest"* defence to use as an exception to new privacy right.

So if you film a person or publish photos of them on the internet, without their consent, then it is proposed they would now have statutory rights to take you to court for *"Breach of Privacy"*. In order to avoid damages or injunctions, you would have to argue that your actions were *"in the public interest"*. A sad development this: it took decades to get rid of the hopelessly subjective *"public interest"* test in NSW Defamation actions, now lawyer-academics nostalgically wish to bring it back.

Thankfully Law Reform Commission proposals are only speculative recommendations by academics, and fall a long way short of being law. It is also important to remember that Law School bookshelves groan with LRC reports which were never implemented. Nevertheless in April 2008 The Australian newspaper reported that the new Federal Labor Government *were* considering adopting the bulk of the ALRC reform proposals. Wait and see…

(Presumably this is why Google Australia rushed into photographing their *"Google Maps Street View"* panoramas of Australian cities in November 2007. Even if the LRC Privacy recommendations do eventually get adopted, it is unlikely they will apply retrospectively.)

Meanwhile see below for more detail on the Australian Law Reform Commission report released in August 2008.

ACMA — Privacy By Other Means?

ACMA is the *"**Australian Communications and Media Authority**, a statutory authority within the federal government portfolio of Broadband, Communications and the Digital Economy"*. As part of its duties, it creates and supervises guidelines for Broadcasters and Internet Providers to

" promote self-regulation and competition in the communications industry, while protecting consumers and other users ".

In December 2011 the ACMA renewed their privacy guidelines for broadcasters. Although the advice is specifically targeted at broadcasters only (eg. TV and Radio), their case studies of privacy breaches are a fascinating indication of the restrictive trend that administrative privacy law is trying to take.

Luckily the ACMA's ambit is (currently) limited to the activities of broadcasters and internet service providers. How long, however, before their scope is extended to *all* people who publish content on the internet?…

Abuse Of Privacy Examples

Meanwhile, for those who like to worry about invasion of privacy, have a look at how professionals *really* do it:

» CCTV Public Surveillance

Let's get the obvious one out of the way quickly. Every time you walk into a bank, railway station or supermarket, you are photographed by CCTV Surveillance cameras. Every time you walk across the Harbour Bridge or go to the cricket at the SCG, your snapshot ends up on a disc. Visiting the Sydney Casino? Glance up and wave at the dozens of high-rez cameras watching you from the ceiling.

Like most global-economy cities, it is impossible to go five minutes in Sydney and not have your photo taken by a security camera. And do not imagine they are low-resolution B&W shots typical of 1980's technology. Think instead of close-up zooms of your face (or bust or crotch), in colour, from any angle.

» Facebook, LinkedIn, Instagram Etc.

Social networking sites offer a free and easy way to set up web pages and keep in touch with friends. But first you have to register, whereupon you must supply details of your name, age, education, address and — either directly or indirectly — favourite film, TV, music, book and food preferences etc.

Therein lies a marketers' El Dorado. Countless millions conscientiously tapping away about their likes and dislikes, just begging to be sorted and analysed by Eastern Suburbs Marketing Creeps.

Some people are savvy about this and intentionally give false biographical detail (eg. *" widow, 72, pensioner "*), whilst others block access to their pages to non–friends. Unfortunately most aren't so cautious, so they chat and post in the open, much to the brand consultants' delight. Facebook also has a habit of

de-registering false profiles, along with aggressively selling their data behind the scenes, so the privacy vs. profit permutations are endless.

» IP Address Tracking

Every computer on the internet must have a unique IP address (eg. yours is **"118.208.3.150"**). This is required by networked machines so they can identify themselves when passing messages — ie. "packets" — between each other. They are built into the TCP-IP header of every packet, and cannot be suppressed or (easily) faked. Which means your computer's IP is exposed every time you access a website, do a web-search, buy something online or post a comment to a blog. Although by itself an IP is just an anonymous number, interact with a website often enough and the webmaster can assemble a detailed profile of your computer's visits (how do you think Amazon or Google target their advertising?).

The good news about IP tracking is that it allows the police to nail evil-doers. It also allows server-guys to study and optimise website traffic. But tracking also has privacy implications in that it is done without your knowledge and that your *every* move on a website is exposed and can thus be recorded, whether you like it or not. The sheer intrusiveness of this can be staggering. Do a Google search; post a SMH comment; browse for books at Amazon; or even visit a girlfriend's Facebook page… and your IP address, the time of your visit, anything you write and all the pages viewed will be stored for later analysis.

Other developments are even more refined. By using *"Deep Packet Inspection (DPI)"* technology, web marketers can also track your movements on unrelated websites even *after* you leave their site — see the 2009 controversy surrounding BT's use of Phorm's behavioural advertising system.

» Global Shunning

He-said-she-said and a teenage girl commits suicide. A neighbourhood family is implicated but no charges are (initially) laid. Outraged friends/ citizens/ vigilantes/ trolls start a campaign to ostracise the people they imagine are responsible. So far so ordinary, except this time it has a global reach. Every detail of the accused family (photos, address, business clients) is published online for the entire world to gawk at and abuse, *ad infinitum*.

Having your photo taken on a public beach is one thing, but having your name, age, home address and exact GPS co-ordinates published on *"rottenneighbour.com"*, to act as an lightning-rod for *millions* of angry people, is something else.

» The Valuation Page At "My House Value"

Under the guise of providing free home valuations, the online estimator at My House Value insists you give your full name, address and contact details. Now

read their (well concealed) terms and conditions:

> *" [...] We advise that myhousevalue.com.au Pty Ltd may, from time to time, receive a fee for providing your personal information to real estate professionals in your area [...] "*

… and then admire their *" privacy policy "*:

" [...] You invite Us and Our sponsors and agents to use Your personal information for marketing purposes. This includes contacting You by telephone, mail or e-mail to discuss products and services [...] "

If this isn't personal-data harvesting to generate leads for Real Estate Agents, and thus outrageously against the spirit and intent of Privacy guidelines and legislation, then I'll eat my/ your/ everyone's hat.

Defamation

Until the introduction of nationally uniform defamation laws on January 1st 2006, even lawyers considered Defo a hopeless quagmire. Thankfully the new NSW Defamation Act 2005 (and its state equivalents) has — finally — swept away the judicial waffle and archaic dross.

Relatively speaking it is still early days, so the law has yet to be rigourously tested (eg. see Channel Seven Adelaide Pty Ltd v Manock [2007] HCA 60 and Bingle v Emap Australia [2006] FCA 1704). Consequently there is relatively little commentary online. For the moment see the UTS Communication Centre (2010) *" Defamation Fact Sheet "* and Andrew T Kenyon's (2007) *" Perfecting Polly Peck: Defences of Truth and Opinion... "*

Meanwhile, how does the new regime impact photographers?…

» The Truth Will (Finally) Set You Free

For decades in NSW you also had to show Public Interest if you wished to claim Truth as a defence. Not any more. Thanks to the new s.25 and s.26, truth alone is now sufficient. Which means provided you stay clear of re-enactments, digital mayhem, unflattering captions or Lara-Bingle-speech-bubbles, then it will be extremely difficult to construe un-manipulated photography as defamatory any more. Hence the notorious penis photographs in Ettinghausen v Australian Consolidated Press would *not* be actionable today.

» Claimant Must Have A "Reputation" To Defame

Defamation is ultimately a form of censorship to protect the interests of the Ruling Elite, not those of the general public. This principle has been enshrined in the new Section 33 defence of "Triviality". So if a mere commoner objects to your photo, then it is unlikely they will take the matter further because they lack a substantial enough reputation to damage. Poke fun at the nobility however, and you can expect a lot of trouble in a very short space of time. (How I wish I was kidding here…)

» Universal Jurisdiction

Keep in mind that thanks to the controversial 7-0 decision in Dow Jones & Company Inc. v Gutnick [2002] HCA 56, you may be still be liable for defamation in Australia if you publish your content overseas, or even on the remote planet where High Court Justices choose to be domiciled.

» Do Unto Others…

Legislation and case-law aside, use a little common sense. Whenever you take a photo of someone, ask yourself is it the kind of thing you wouldn't mind others taking of *you*. The bloke picking his nose; the other scratching his crotch; the Bogan shrieking at her kids… Ask yourself: do you really need to humiliate people in order to make a point?

When does irony and social criticism cross over into something less benign?...

Copyright?

Alongside ignorance about the Privacy Act(s), one of the commonest misconceptions about photography is that it can be prevented *"due to copyright"*. This is incorrect — no part of the Copyright Act prohibits any kind photography. Copyright only applies to the published duplication of original works, such as books, paintings, dramatic works, prints, drawings, motion pictures, DVDs, audio recordings etc.

In Australia still-photographs of 3D objects such as performances, buildings, statues or interior spaces (and the people in them), generally *cannot* infringe copyright, as one-off images cannot reproduce a substantial enough portion of

the original work. The only way to infringe copyright in these cases is to create a sufficiently similar 3D copy, or with respect to dramatic works, lengthy video recording (eg. see the *"Choreography G072"* information sheet on the ACC information webpage.) The same kind of thing applies to the *"performers' rights"* of actors or musicians during a performance — it is almost impossible to infringe these by merely taking an occasional still photograph. (FWIW many thespians and producers disagree with me on this point — see the Aug 2007 discussion at Theatre Australia. All I can say is: download and read the relevant ACC information sheets.)

All these principles have been adopted by the Commonwealth Copyright Act 1968. See for example Part III — Division 7 *"Acts not constituting infringements of copyright in artistic works"*, especially Section 66:

> *"The copyright in a building or a model of a building is not infringed by the making of a painting, drawing, engraving or photograph of the building or model or by the inclusion of the building or model in a cinematograph film or in a television broadcast."*

Thus due to our s.66 exemption, the internationally notorious SABAM Atomium building copyright heist would be very difficult to mount here. Unfortunately the Sydney Opera House Trust hasn't got the idea yet — see Peter Black's June 2007 analysis of (ab)using intellectual property law to restrict SOH photographs.

Furthermore according to s65 of the Act, a similar kind of exemption applies to photography in publicly accessible places where sculptures or other copyrightable works are *"otherwise than temporarily"* displayed.

So when a Sydney Opera House guide or a Paddys Markets Wigs-stall owner waves their arms and rushes towards you yelling: *"You can't take photographs because of Copyright!"* — smile and shake your head, because clearly they have *no* idea what they're talking about =)

Security guards be damned — taking photographs of civilian buildings cannot be prohibited in Australia 'due to copyright' ...

For further discussion about Copyright in an Australian context, see the Information Sheets index on the Australian Copyright Council (ACC) website.

In particular see the *"Duration G23"* and *"Photographers G11"* publications, under the *"D"* and *"P"* index headings.

Finally, unlike The United States or England, there is no need to register Copyright in Australia for an author's copyright to vest.

Ownership Sidebar

Since 30 July 1998 the *photographer* owns full copyright in their images, even if they were commissioned by a third party (see ACC info sheets *"G058"* and *"G035"*). There are a couple of caveats though. By Section 35(4) of the Act, copyright is owned by your employer if the image was taken as part of your job. Alternatively by Section 35(5), if the photograph was commissioned (by agreement and for money) for a "private or domestic purpose" — such as a family portrait or wedding or birthday party — then the *client* owns copyright, unless there is agreement to the contrary.

This exception is not as arcane as it seems. Say you were invited to a take photographs at a childrens birthday party. The Alpha Mom pays you $50 to cover expenses. You take the shots and one of them is a once-in-a-lifetime masterpiece. Guess who owns the copyright to the image according to s35(5)?…

Not you.

Duration Sidebar

Australian copyright law changed radically in May 2004 after signing the Australia-USA Free Trade Agreement. Of particular interest is the situation which now applies to photographs taken prior to 1955. Due to the AUSFTA, all such images are now deemed to have their Copyright expired . (See also p.4 of the *"Duration G23"* ACC publication above.) Which means, for example, that Frank Hurley's or Max Dupain's best work, and all of Harold Cazneaux's, are now in the public domain and can be freely appropriated, reproduced and sold at will (!)

Trademark Protection?

What if you take a photo of a person wearing a T-Shirt or standing in front of a poster which has (say) the Nike or Coca-Cola logo? Can the corporation take action to prevent you from infringing their trademark?

Generally speaking in Australia, they cannot. Everything hinges on the *context* of how your photograph is used. If it is shown on a website photo gallery or printed in a magazine as part of a monograph, then there should not be an

issue as the mark is not used for goods or services in respect of which the trademark is registered. If however the image is used commercially on (say) a T-Shirt, and the corporate logo is prominent enough, then there may be cause for the trademark owner to claim dilution of their brand, since — for example — Nike or Coke sell T-Shirts too. See this Bond Law Review article by Lynne Weathered, and also the remarks by Lien Verbauwhede on the WIOP website.

Alternatively, can someone prevent you from taking photographs because they have registered a trademark in a cityscape or building? Looking at famous USA examples, this appears very unlikely. See for example the failed attempts to trademark the The Rock Hall of Fame, or the Lone Cypress at Pebble Beach golf course.

It is partly because of the above failed cases that the *"H.R.683: The Trademark Dilution Revision Act of 2006"* was passed by the US Congress in April 2005.

In January 2008 Ford USA became the first corporation to flex their new trademark muscles when they learned the Black Mustang Club wanted to publish a wall-calendar featuring photos of Ford motor vehicles. There was no argument over the copyright of the images (they were legitimately taken by the club), Ford merely said they owned the intellectual property of the *"look and appearance"* of their cars — see this overview on the BMC discussion forum. Thankfully a week later Ford realised the international damage they inflicted on their brand. Panic + Meetings + Mea Culpa + Press-releases = BMC were free to publish their calendar again. (No wonder the Ford clowns needed a government bailout at the end of the year.)

It is difficult to take a casual photo in an urban environment and not include someone's brand. Thankfully Australian Trademark law has not developed as aggressively as in the United States...

Beach Candids Banned?

This was a Hot Topic in 2005. It arose from the arrest, guilty plea and $AUD 500 fine imposed on Peter James MacKenzie in November 2004, for secretly photographing topless women with his mobile-phone camera on Coogee beach.

In the following months there was a lot of concern and commentary about this (I was even interviewed off-air by a producer of the 702 ABC Sydney morning radio program). Although most critics considered PJ's actions offensive, even legal academics agreed that people could not expect any sort of privacy on a public beach. Furthermore, many worried about the incident's broader implications in perhaps banning all candid photography on Sydney's Beaches.

Luckily things never went that far. Wiser and cooler heads prevailed. When in February 2005 a couple of university students — Gaur and Singh — were similarly charged for (again) taking mobile phone photographs of topless girls at Coogee beach, Police prosecutors this time withdrew all charges, and on April 5th Magistrate Lee Gilmour formally dismissed the case.

That is the good news, the bad is that on certain high-profile beaches, Police officers, council rangers and surf lifesavers still remain photographer-adverse, if not downright hostile. This is illustrated by the extensive questioning of Rex Dupain by four Police officers in December 2006, for attempting to photograph sleeping backpackers on Bondi beach. Similarly in 2009 another photographer was instructed by police to leave Mooloolaba beach because someone had complained about pictures being taken of beach-volleyball players. Ditto Mooloolabah (again) on Christmas Day 2010.

Sigh. At least the hair-trigger reactivity has put photographers on notice to Behave Themselves. If self-restraint isn't enough, there are always the 2009 anti-voyeurism laws to help focus people's minds.

Surf Life Savers Ban Photography?

In November 2005 there was a flurry of indignation when the Sydney Morning Herald reported the SLSA wished to ban beach photography, especially at surf carnivals where young swimmers (*"nippers"*) were involved.

A few weeks later Shellharbour photographer **Barry Daniel** contacted **Sean O'Connell**, Surf Life Saving Australia's Communications Manager, for their view on the media coverage. The following was Mr O'Connell's (edited) response:

> *"[... November 29th, 2005 ...]"*
>
> *"The story in the Herald did not quite state our position correctly."*
>
> *"We have made a submission to the Standing Committee of Attorneys General who are currently reviewing the issue of unauthorised imagery on the internet. Our position is that while we support the rights of legitimate photographers and have no wish to hinder them, we also have a responsibility to our youngest members. Our submission contained a draft photography policy which would inform our members of their rights and responsibilities in this area. Generally our advice is that if our members are concerned that inappropriate*

> *photographs are being taken, they should report the person to the appropriate authority. "*
>
> *" In any event, we are now waiting for the outcome of the inquiry to finalise our policy and I will certainly [communicate the decision] when the outcome is known. "*

So the SLSA's *" ban on beach photography "* was merely a submission to a Cth government discussion paper — nothing more.

SLSA Photography Policy (Draft)

In March 2008 the SLSA finally circulated a draft copy of their much anticipated Photography Policy. To the surprise of many the language in the draft was quite moderate and reasonable. Indeed the initial paragraphs read like a summary of the arguments presented in this photo-rights article!

A discussion topic on the policy has been created at DPReview.com. See there for commentary and also to download a copy of the draft in PDF format.

Surf Life Saving Queensland Photography Policy

While (still) waiting for SLSA to finalise their photo policy, have a look at the policy concocted by SLSQ in March 2006. See their downloadable PDF file, listed on their Policies page.

Hmmm… take a pinch of misunderstood Child Protection issues and add liberal amounts of Paranoia, Rights Grab and Fascism… Time for a reality-check guys. We know some Clubbies like to believe they own the beach and everything that happens on it, but I hope SLSQ are aware their Photography Policy is little more than an ambit claim. It is totally unenforceable on non SLSQ members with respect to activities which take place on public land.

Council Attempts To Ban Photography

Waverley Council

In late 2004 Waverley local council tried to ban all "unauthorised" photography at all of its beaches (Bondi, Coogee etc.). To the council's dismay, this caused tremendous uproar, with many reminding the Council that, er, they didn't quite have the right to prohibit any photography in public areas! Only the NSW State Government can do this (and politically it is unlikely they ever will).

A couple of weeks later the Council reluctantly agreed. On January 16th 2005, Deputy Mayor George Newhouse admitted during a 6pm Channel 7 Sydney TV news report that, yes, it *was* impossible to ban photography on public

beaches. Nevertheless, the council were going to try to restrict photography anyway by giving Surf Lifesavers the right to ask certain "unauthorised" photographers to leave the beach.

No problems with that, but it turned out to be a moot point anyway, as the council failed to pass the anti-photography motion in early February 2005.

However in December 2006, Waverley Council found a different way to pursue their anti-photography agenda. Following the Police seizure of Rex Dupain's camera on Bondi Beach, it transpired that Waverley insisted on photography permits for $160 an hour. Years later they elaborated their *"pay-per-shoot policy"* into a detailed schedule of fees — see this web page summary by Arts Freedom Australia and Harry Phillips. Admittedly they have improved the legality of their position by only insisting on fees from professionals, but there is still a question about the legitimacy of local Council permits for activities conducted on *public* (ie. NSW State owned and controlled) land. For discussion about this, see Ross Barnett's photography blog.

Bondi Beach has practically become a photographer's no-go area. Things were already tense in 2003 when I took this shot of young girls mucking around in the sand. Nowadays I would not even dream walking along this beach with a camera...

Randwick Council

Taking their cue from Waverley Council, in February 2005 Randwick passed a motion banning parents from taking photographs of their own children at *council owned* swimming pools. If parents wanted pictures, then they could only obtain them, at $5 a print, from council or school accredited photographers.

Public Uproar Revisited. This time Mayor Murray Matson stood his ground. His colleagues — didn't. Support for the measure wavered and then evaporated. A few days later a new meeting was held, a rescission motion was passed, and the policy was officially suspended pending a report by Council Officers. No prizes for guessing its re-adoption was *not* recommended.

You have to hand it to Randwick though. Unlike Waverley they were clever enough to limit the prohibition to *council property* only, and not general public land. This would have made court challenges very difficult, for property owners have broad rights to restrict whatever happens on their land (see discussion

above). T'is Very Tricky. Not coincidentally, it was also a handy way to turn a quick buck ($5 X thousands of children = potentially a nice little earner).

Council Digital Camera Use

Many councils attempt to prohibit “unauthorised” photography on the basis of privacy or “protecting children”, but interestingly they have no qualms when taking candid photos themselves.

In March and June 2006 a number of reports appeared (eg. ABC Sydney, Sydney Morning Herald) noting that many councils equip their officers with digital cameras to record parking hazards and infringements; traffic violations; illegal rubbish dumping etc. It was claimed such photography was done for evidentiary purposes, to make proving cases easier should council fines be challenged in court.

Okay — but people who appear in such images have obviously *not* had their permission obtained. Indeed most pictures were taken surreptitiously to prevent alleged malefactors from being alerted. In which case, isn't this identical to the kind of *“unauthorised/ invasion of privacy”* activity councils wish to ban in the first place? Or is their idea of “authorised” carefully limited to only mean “authorised” by *them*?

Or to put it more cynically, maybe it is just another bureaucratic example of: *“When revenue is at stake — do as we say, not as we do”*.

Other Restrictions

What about **NSW recording devices** or NSW Workplace Surveillance legislation? Neither apply as the former is limited to sound recordings and telephone taps, whereas the latter is only concerned with the misuse of surveillance cameras in places of employment. What about *“performer's rights”*? In this case we have a copyright issue, dealing with the recording performances by musicians and actors — hardly relevant when taking the occasional still photograph of everyday people.

Keep in mind **court orders prohibiting photography** and/or the publication of images can also be obtained in **child custody and protection matters or witness protection**. I personally encountered this while taking general photographs of a spectator crowd at a football match in July 2003. After a few shots, a woman screamed at me and ran 50m down stairs demanding to know who I was, why I was taking pictures etc. It turned out a seven year-old in her custody was subject to a child protection order, and photographs of him were prohibited by court order. No problem, I made a note and used a different

image. Couldn't help wondering though about the wisdom of taking such a child to a public event bristling with cameras and media coverage…

Here's a tip from an experienced photographer: don't attend large public gatherings if you don't like others taking your photograph...

The Overseas Experience

A worldwide review of photo-privacy law is well beyond the scope of this article. For a general introduction, see the excellent overview of Privacy law in various international jurisdictions by the *Hong Kong Law Reform Commission* (2004).

New Zealand

Arising out of the *New Zealand Bill of Rights Act* 1990, in 2004 there was a watershed case (Hosking v Simon Runting [2004] NZCA 34) which found that in some circumstances photography in New Zealand *could* be an invasion of privacy. It was a fascinating departure from existing NZ law, and has subsequently been reaffirmed and even extended by R v Rowe (CA 374/04, 18 April 2005). Thankfully neither case has any application in Australia as we do not have an equivalent to the *NZBoRA* (outside of Victoria). It is something to keep an eye on though, as photo-ban advocates keep referring to it in a hope it will influence the development of Aus. privacy law.

Canada

In Canada, photographers are still coming to grips with the Aubry v. Éditions Vice-Versa (1998) 1 SCR 591 decision, where Gilbert Duclos had to pay

damages to a subject in one of his candid pictures (*"Pascale-Claude Aubry"*, then 17, sitting on the steps of Scotiabank) for *"invading her privacy"*. The image was used to illustrate an article *"Inside and Outside the Glass house"* by Giose Rimanelli, in the Issue #24 June 1988 edition of Vice-Versa magazine. Many argue the precedent only applies in Quebec, but read the judgement, the Supreme Court's language is far broader than just another Anglo-hating Quebec thing (see *"Privacy : a New Trojan Horse?"* (1998) by Marie-Philippe Bouchard, Senior Legal Counsel for the CBC, along with Eric Swetsky's article in Marketing Magazine, Aug 1998).

For a brief summary of Canadian photographer's rights, see the overview put together by Ambient Light.

USA

Attorney Bert P. Krages II is the man to consult here. Both his PDF summary *"The Photographer's Right"* (2003), along with his book *"The Legal Handbook for Photographers"* (2002), cover every possible aspect of photographer's rights in the USA. A slightly more recent (Dec 2005) *"Legal Rights of Photographers"* summary is also available by USAToday.com columnist Andrew Kantor. Ditto the National Press Photographers Association *"Memo on Photographer's Rights in Public Places"* (summary and PDF download, Aug 2005).

For a more whimsical overview, see this *"Land of the Free"* column by Mike Johnston. If you are specifically interested in how to respond to Police questions when taking photos in public, see the *"Should Photography be Illegal"* article by Jim McGee. Want to know about state-by-state Privacy Invasion standards? — see the *"Photographer's Guide to Privacy"* by The Reporters Committee for Freedom of the Press. Finally, for up-to-date news and discussion on USA photo rights, see <photopermit.org>.

In July 2005 photo-consent became a hot issue in the USA, when Philip-Lorca diCorcia was sued for $1.6 million by Erno Nussenzweig, for taking his portrait without permission in Times Square in 2001. As you can imagine this caused a lot hand-wringing by photographers worldwide. Luckily in February 2006 Nussenzweig lost.

England

For a detailed two-page summary of the law as it applies to photographers in the UK, download a copy of the UK Photographers Rights PDF (2009) by Linda Macpherson. Although Brits have historically tended to be lax on photo-

privacy, things tightened after the murder of Lady Diana Spencer in Paris in 1997. The *Data Protection Act 1998* and *Human Rights Act 1998* both feature language broad enough to include restrictions on all non-consensual photography — editorial or candid! See the discussion in the Redeye National Symposium 2004 Report, as well as the impact of the **Douglas v. Hello!** (2003) and **Naomi Campbell** (2003) cases, analysed on the Act Now UK website. Presumably it was the trend in these cases which tipped the appeal judges in favour of banning photos of J.K. Rowling's two-year old son in May 2008. Similarly the infamous Section 44 of the *UK Terrorism Act 2000* has also been (over)used by photo hating zealots — for more information see the London Metropolitan Police photography page.

France

With the passage of the *Presumption of Innocence and Rights of Victims* legislation in 2001, the publication of any photograph of a person without their express consent is prohibited in France. This applies to *all* photography, and is irrespective of editorial or artistic or personal or advertising use. There is anecdotal evidence that things are even more restrictive in practice, with some members of the public and Police occasionally trying to prohibit people from merely *taking* photographs, which in fact the PIRV law does not ban — only their *publication*! For more information see: *"Droit en photographie"* (French); *"Paris Sites in Pictures"*; Time Magazine Europe: June 26, 2000; *"France bans citizen journalists from reporting violence"* by Peter Sayer, and Tom Stoddart's *"Out Of Love"* in Black & White Photography Magazine (UK), Issue 3 Aug/Sep 2001 at pp.24-28.

Needless to say, were Kertész or HCB working in France today, then not only would they be harassed on a daily basis, but their photographs could be censored and even banned from publication in that country. Ah yes, but what about Luc Delahaye's *"L'autre"* ?… Actually his Paris metro hidden-camera photos were taken in 1995-7 and published in 1999 — a couple of years *before* the 2001 *"PoIaRoV"* law.

Kuwait

Why be halfhearted about this?…

It was reported in November 2010 that the Kuwaiti Ministries of Information, Social Affairs and Finance in had simply banned all public photography, by anyone for any reason, unless they were an accredited journalist.

A week later the report was retracted (see link above). I guess someone in government tested the waters and found them to be surprisingly cold. It is also interesting that a journalist thought such a ban legitimate enough to write + edit + publish a story about it, and then keep it alive for a few days before termination…

Slovenia

A year later the Republic of Slovenia decided to implement The Kuwait Solution™ with respect to *" not-newsworthy "* panoramic photography. According to **Bostjan Burger** in Dec 2011:

> *" The Information Commissioner of Slovenia has declared that Virtual Reality panorama is collecting and maintenance of the personal data. As a database it is under her jurisdiction. Such photography is illegal to be published on the internet unless it is with the blurred face. Published Virtual reality panorama with not blurred faces is legal only in case that the publisher has a written permit of all people on the panorama. The source images from which panorama were stitched need to be unrecoverable deleted e.g. destroyed. "*
>
> *" What about other images published on the internet? That is not a data collection but it doesn't mean that the publisher is without the responsibility. To be "safe", the publisher (photographer, videographer) needs to get (ex-post) the permit every individual documented on the image. "*
>
> *" That decree is valid for all images taken on the territory of Republic of Slovenia and retroactive (no time limit for the past). "*

See also: Geens, S. (2011) *" In Slovenia, panoramic photography comes under regulatory attack " [Website].*

So there you go. Want a taste of the future?… Come visit friendly Slovenia and have your (panoramic) photography banned.

Travel-photographers should remember that some foreign cultures can be amazingly hostile towards photography. For example these unlicensed street vendors in Moscow in 1991…

Epilogue

What About Other Australian States?

Does the information on this page apply to other states, say Queensland or Victoria?

In a nutshell, yes, most of it does. Federal law applies to all of Australia, so sections dealing with Privacy Law and Torts; Trade Practice issues; Copyright; Defamation; Private Land rights etc. apply as much in Toorak, Brisvegas or Geraldton, as it does in Sydney.

Only areas dealing with distinctly New South Wales issues, such as NSW legislation or attempts by NSW councils to ban photography, are (obviously) NSW specific.

If you only wish to know the law which applies in your state, please do not send me a note. See instead the Commonwealth or State links on the **Australian Privacy Foundation** website, or else study the relevant parts of the 60-page *"2005 Cth A-G discussion paper"* (see links below).

NSW Photo Rights Summary Sheet

In collaboration with fellow Australian Photographer Kolya Miller, we have created a two-page summary of the main issues in this article — for you to download, print, and take with you when out on a shoot. It is written from a photo-subject's perspective, and may prove useful when dealing with rent-a-cops, supermarket managers or hostile bystanders.

"NSW Photo Rights Summary" [PDF file] (87k bytes)

[N.B. This is a two-page document. If you have trouble viewing it, either right-click to *"Save Link As..."*, or else download the following ZIP compressed version: *"NSW Photo Rights Summary" [ZIP file]* (82k bytes)]

2006-8 ALRC "Protecting Privacy In A Wired World" Inquiry

In January 2006 the Commonwealth Attorney-General announced a broad-ranging review of the *Privacy Act 1988*, to be conducted by the Australian Law

Reform Commission:

ALRC 108 — Privacy Inquiry main page

In August 2008 they published their privacy *magnum opus*: "*ALRC Report 108 — For Your Information: Australian Privacy Law and Practice*". They have also produced a single-page media summary. Now it is a matter of wading through the three volume, 2700 page document and seeing what parts of it, if any, the Commonwealth government will (ever) adopt.

N.B. A year later the NSWLRC published a similar report, "*Report 120 (2009) — Invasion of Privacy*". Similar to ALRC 108 it recommends statutory protection of privacy. Again it remains to be seen if any of the NSW report will ever be implemented.

2005 Commonwealth Attorney-General Discussion Paper

In the meantime, if you wish to read more about Australian photography rights, then download a copy of the…

"*Unauthorised Photographs on the Internet and Ancillary Privacy Issues Discussion Paper — Standing Committee of Attorneys-General, Aug 2005*" (PDF 300k bytes)

(Original link at *ag.gov.au*)

The 60-page paper features the most spectacularly detailed analysis of Australian case law and legislation with respect to photography, consent, privacy and the internet. Mind you, responses to the A-G's paper closed in October 2005, so it is starting to get a bit old.

FWIW the discussion paper led to a few interesting responses:

- Electronic Frontiers Australia
- NSW Commission for Children and Young People
- Australian Press Council
- "*The RiotACT Blog*"

… but it appears the only legislative outcome was to prompt the A-G into conducting yet another review of the Privacy Act in 2006 (see above).

2007 Rights Of Photographer's Petition

In March 2007 a petition was started to advocate for and preserve the rights of Australian photographers to take photos in public places. As you can imagine, over time it has attracted a fair bit of flakiness and heat. See for example this discussion thread on the **Digital Photography Review Forum** (!)

Further Reading

- Arts Law Centre of Australia: “ *Street Photographer's Rights* ” (2010)
- Arts Law Centre of Australia: “ *Photography Information Sheets Index* ” (2010)
- David Petranker: “ *Street Photographer's Rights (Australia Only)* ” (2009)
- OCAU Wiki: “ *Photographers Rights, General Privacy, and Copyright in Australia* ” (2010)