bytes

Unauthorised photographs on the internet — back on the Attorney-General's agenda

Many people believe that photographing people without their consent is an invasion of privacy and therefore against the law. However, in Australia there is no law against this and never has been.

This issue has come under the scrutiny of legislators, policy makers, civil rights proponents and private organisations alike on numerous occasions in Australia, particularly in light of the proliferation of new generation mobile phones. The compact size and high tech images have made it easy for people surreptitiously to take photos in swimming pools, changing rooms and underneath clothing (or 'up skirting').

In the September 2004 issue of this bulletin, Sonia Harris examined the laws that currently regulate mobile phones and considered the position in Australia, the US, Europe and South Korea, concluding that as people's expectations of privacy change, the debate over the scope of privacy rights will continue, particularly in a digital context.[1]

Paper launched by the Attorney-General's Department

In Australia, the latest policy development in this debate appears in the form of a discussion paper titled 'Unauthorised photographs on the internet and ancillary privacy issues', launched on 9 August 2005 by the Standing Committee of the Attorneys-General (SCAG).

The discussion paper, which was prompted by growing public concern about the increasingly frequent practice of unauthorised photographs being published on websites, aims to identify issues relating to unauthorised use of photographs on the internet and legislative and non-legislative options to address these issues. In doing so, it:

- identifies the issues surrounding the unauthorised publication of photographs on the internet;
- discusses the adequacy of current State and Territory laws; and
- identifies legislative and non-legislative options to address these issues.[2]

Background to the paper

At a meeting of the SCAG in August 2003, Ministers agreed that all State and Territory officers would work in consultation to develop options for reform and to address the issue of unauthorised publication of photographs on websites. A working party, which is led from Victoria and consists of representatives from each jurisdiction, has been established to examine options for reform and the discussion paper is an important step in this process.

The paper takes into consideration intersecting areas of the law including those outlined in Sonia Harris's article, that is, criminal law, privacy law, internet regulation and censorship law. It also considers the fine balance between privacy expectations and freedom of expression.

Often, the paper notes, it was not the taking of the photograph that raised the public's attention but rather how those photographs were used, particularly given that:

- people tend to present themselves differently in public places; and
- publishing images of a person without their consent removes their freedom to choose how they present themselves to the world.[3]

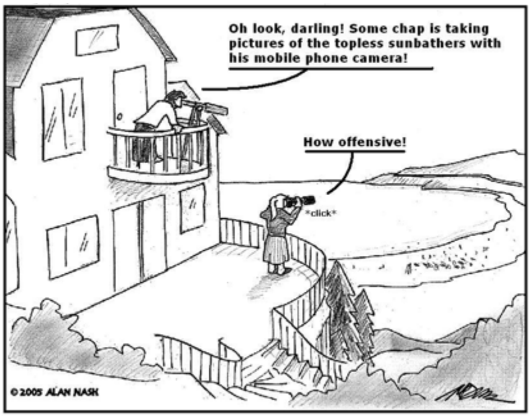
Consent to the use for which the photographs is put is also important because while it is possible that a person may consent to a photograph being taken, he or she may object to that photograph being used, for example, to advertise cigarettes or as an illustration on a story about obesity.

Who should be protected?

The paper raises the issue of whether the taking of unauthorised images of children[4] should be restricted and, if so, what form these restrictions should take. And is additional protection required for public figures such as celebrities, taking into account that they often have the resources to protect use of their image, and their reputations, through various legal means?[5] Another interesting question is whether the unauthorised taking of photographs in public places should be regulated and, if so, what types of use should be regulated.

Existing regulation

A large section of the paper is devoted to exploring existing regulation in this area and notes that the States, Territories and Commonwealth all have an array of different laws that to some degree have a bearing on unauthorised images published on the internet — for example, laws relating to surveillance devices, stalking, classification and internet content. This section of the paper would appear to be a very useful quick guide for practitioners advising in this area.



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Options for reform

The paper considers various options for reform and whether the existing law does have a gap that requires further regulation. Legislative reform options are considered, with particular attention given to the question of whether a new criminal offence should be created to deal with unauthorised use of photographs on the internet. The paper also asks on what occasions there should be some enforceable civil right in relating to the use of one's image.

In terms of non-legislative reform options, the paper considers educational campaigns to increase community awareness of the existing mechanisms for complaining about certain internet content and about inappropriate use of mobile phone cameras. It also raises the possibility of a process being established whereby individuals could request that their image be recovered from a website.

Comprehensive list of legislation

The paper concludes with what appears to be an extremely comprehensive table of legislation, attached as Appendix 1, that not only lists the relevant legislation, codes and so on, but also sets out the relevant section or sections.

International approaches to voyeurism

Appendix 4 of the paper sets out international approaches to voyeurism, covering jurisdictions such as Canada, the UK and NZ.

Conclusion

Submissions from interested parties closed on 14 October 2005. It will be interesting to see the final report, which will make recommendations regarding the development of an appropriate response. ●

Sharon Givoni, General Editor.

Endnotes

1. Harris S 'A picture speaks volumes — camera phones, digital voyeurism and privacy' (2004) 7(6) *Internet Law Bulletin* 77–81.
2. Available at <www.ag.gov.au>. The closing date for submissions to the Standing Committee was 14 October 2005.
3. Standing Committee of the Attorneys-General 'Unauthorised photographs on the internet and ancillary privacy issues' at 10.
4. Defined as less than 18 years old. See above note 3 p 13 at 3.4.1.
5. For example, Andrew Ettingshausen succeeded in 1991 in a defamation action which involved unauthorised use publication in a widely read magazine in which his genitalia were exposed. *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443.

Keywords and the competitor's brand

Recent reports that eBay has withdrawn the use of the term 'grays online' and that the *Trading Post* has withdrawn use of the keyword 'Stickybeek', each as keywords on Google, suggest an emerging consensus that ss 52 and 53 of the *Trade Practices Act 1974* (Cth) effectively prevent the use of competitor brands to draw clicks online. GraysOnline is an Australian online auction site and eBay rival. Stickybeek is a Hunter region site advertising local businesses including car dealers, rivalling, perhaps less directly, the *Trading Post*. eBay withdrew use of 'grays online' after a letter from the GraysOnline lawyers alleging a breach of ss 52 and 53(d).[1] The *Trading Post* responded to a letter from the ACCC making a similar allegation.[2]

The use of the name or brand of a competitor to draw clicks online first came to prominence in the US in the case of *Brookfield Communications Inc v West Coast Entertainment Corporation* 1999 US App LEXIS 7779 (9th Cir 1999). In that case the defendant used the address 'moviebuff.com' and used MOVIEBUFF repeatedly in the metatags associated with its site. MOVIEBUFF was a trade mark owned by the plaintiff. The plaintiff succeeded outright in its trade mark case. The Court considered separately whether using the trade mark in metatags (to draw search engine traffic where visitors had searched for 'Moviebuff') could be trade mark infringement. The Court found that even though the site itself did not display the MOVIEBUFF trade mark, drawing visitors by use of the plaintiff's brand was a form of infringement known as 'initial interest confusion'.

Shortly after the *Brookfield* decision, the Playboy company sued Netscape and Excite for allowing competitors to deliver banner advertisements when visitors entered Playboy trade marks as a search term. At first instance Playboy failed. The Court decided that the use made of Playboy's marks was not an infringement, that is, there was no use of Playboy's marks in relation to competing goods or services. However, early last year Playboy succeeded on appeal in *Playboy Enterprises Inc v Netscape Communications Corporation* 2004 US App LEXIS 442 (9th Cir 2004). The Court found that the delivery of the advertisements in response to input of a Playboy owned brand could suggest a sponsorship or affiliation that did not exist. Users were likely to visit the competing site based on their initial interest in the Playboy brand.

The US decisions have been criticised for reasons including that restricting the use of brands to present competing products restricts competition online. If the consumer is not misled at the time he or she transacts, what is the harm? So the argument goes. A similar argument can be made in relation to the alleged breach of s 52. If the visitor is disavowed of any misapprehension by the time he or she transacts, then how can he or she be said to have been 'led in to error'? This criticism does not apply to the 53(d) argument. If one enters 'grays online' and finds search results that include advertisements for eBay, does one assume that eBay owns GraysOnline or does one assume eBay paid to advertise to people interested in auction sites? Let's hope the debate is not over. ●

Patrick Fair, Partner, Baker and McKenzie, Sydney.

Endnotes

1. Gray P 'eBay gets a clicking off' *The Age* 27 September 2005, <http://tinyurl.com/85wr6>.
2. 'Trading Post changes its internet marketing after ACCC investigation', <http://tinyurl.com/bstfr>.

ACMA varies license to ensure short-range broadband

On 25 August 2005, the Australian Communications and Media Authority (ACMA) announced its variation of the Radiocommunications (Low Interference Potential Devices) Class Licence 2000 (LIPD Class Licence). The variation will support the use of short-range wireless broadband equipment with high data rates, and is one of many developments introduced by ACMA for the LIPD Class Licence to reflect developments in technology and industry requirements.

The move makes the Australian arrangements consistent with those in the US, Canada and Japan.

Further detail is available at <www.acma.gov.au>. ●

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More breaches under the Spam Act

On 17 August 2005, the Australian Communications and Media Authority

(ACMA) announced that it had fined two companies a total of $13,200 for contravention of the *Spam Act 2003* (Cth) (the Act) following complaints received from members of the public.

The ACMA found that between June and December 2004, the companies, Global Racing Group Pty Ltd (Global) and Australian SMS Pty Ltd (Australian SMS), had sent over 50,000 commercial SMS messages to Australian mobile numbers, promoting an investment scheme for software providing horse racing tips.

Although Australian SMS engaged an overseas operator to physically send the messages, the 'Australian link' provision of the Act was applicable because Global and Australian SMS, which are both managed in Australia, had authorised the sending of the messages, and the messages were received in Australia.

Global was fined $11,000 for sending unsolicited commercial SMS messages in breach of the Act. Australian SMS, which was contracted by Global to send the SMS messages, was fined $2200 and has provided ACMA with an enforceable undertaking to abide by both the Act and the Australian eMarketing industry code of practice.

Since the introduction of the Act in April 2004, 200 businesses have been required by ACMA to amend their practices in order to comply with the Act.

Further detail is available at <www.acma.gov.au/acmainter>. ●

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ABS issues Internet Activity Survey

On 12 August 2005, the Australian Bureau of Statistics (ABS) released its latest Internet Activity Survey (IAS) for internet service providers (ISPs) operating in Australia as at 31 March 2005. The IAS collects internet access services information provided by ISPs.

The IAS found, among other things, that:

- at the end of March 2005, there were 5.98 million internet subscribers in Australia, an increase of 4 per cent from the end of September 2004;
- the increase in internet subscriber numbers was driven by growth in non-dial-up subscribers and that most of the growth for non dial-up was in the household subscriber sector; and
- at the end of March 2005, the number of dial-up subscribers had fallen by around 6 per cent to 4.2 million.

The next survey is expected to be conducted for the year to March 2006. Further details and a copy of the IAS are available at <www.abs.gov.au/>. ●

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NetAlert Expo protecting children online

On 11 August 2005, the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, launched the NetAlert Expo, an online safety training roadshow and information campaign designed to educate parents, teachers and community groups about the risks children face by using the internet.

The NetAlert Expo is funded by the National CyberSafe Program, which is part of the government's National Child Protection Initiative to protect children and families from sex criminals. It commenced in Melbourne on 8 August 2005 and will tour every State and Territory in Australia. Further detail is available at <www.dcita.gov.au>. ●

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NSW Workplace Surveillance Act now in force

On 7 October 2005 the *Workplace Surveillance Act 2005* (NSW) (the Act) came into force.[1] The Act, which applies to (among other things) monitoring email and internet usage, prohibits surveillance of employees in certain parts of the workplace. It regulates other surveillance by requiring that employees enter an agreement with their employer or be given notice prior to surveillance occurring.

While the Act will not prevent employers from using surveillance on employees, it generally requires that they be notified of the surveillance. For example, it will require employers to take certain steps such as implementing procedures for giving adequate notice of surveillance systems used. For any surveillance in place on 7 October 2005, the Act requires that notification should have been sent out to employees by 23 September 2005. Until now, with the exception of video and voice, surveillance in the workplace was largely unregulated. ●

Sharon Givoni, General Editor.

Endnote

1. For full details about the Act, see Brookes T and O'Rourke J 'NSW Workplace Surveillance Bill — employee access to emails and internet' (2004) 7(8) INTLB 105.

PUBLISHING EDITOR: Bridget Brooklyn MANAGING EDITOR: Helen McKenzie PRODUCTION: Alexandra Mullan
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
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ISSN 1329-9735 Print Post Approved PP 244371/00049 Cite as (2005) 8(7) INTLB