
UNAUTHORISED USE OF YOUR IMAGE

Introduction

What can you do to stop someone using your image in a photograph, film or video without your permission? With the introduction of new technologies such as digital video cameras and computerised enhancement, your image (or a distorted version of it) could appear on the internet and be accessed by millions of people without your knowledge or permission. Unlike the United States of America (**USA**), where the law creates a 'right of publicity', Australia has no specific law aimed at preventing the unauthorised use of your image.

Reforms to Australia's privacy laws began in 2008 and culminated in the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) which comes into effect in March 2014. The amendments impact on the way companies and government agencies collect and deal with personal information. The amendments DO NOT introduce a general right of privacy thus, in normal circumstances, a person's consent is not required for their photo to be taken or their image to be recorded.

The law in Australia

The areas of law in Australia which may be used to try and stop the unauthorised use of your image include:

1. Defamation;
2. The *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**) and State *Fair Trading Acts* where applicable; and
3. The law of passing off.

Copyright law is of little assistance in preventing unauthorised use of your image because the person who owns the copyright in an image will generally be the person that created it (for example the photographer) rather than the person who appears in it.

Defamation

Defamation is a communication from one person to at least another that lowers or harms the reputation of an identified or identifiable third person, where the communicator (the publisher) has no legal defence.

The publication of a person's photograph without his/her consent is not in itself proof of defamation. The unauthorised use of the image would need to either lower the public's opinion of the person, expose the person to hatred, contempt or ridicule, or cause the person to be shunned or avoided.

For example, Andrew Ettinghausen, a well-known rugby league player, mounted a successful defamation case against HQ Magazine when it published a photograph of him in the nude without his permission. The court found that the photograph led him to be ridiculed because it showed his genitals to readers of a magazine with widespread readership. The court accepted that the publication lowered the public's estimation of Ettinghausen by implying he had authorised the taking and publication of the photograph.

For more information see Arts Law's information sheet on [Defamation](#).

The Australian Consumer Law

Misleading and deceptive conduct

Sections 18 and 29 of the ACL and the equivalent sections of the State *Fair Trading Acts* prohibit misleading or deceiving commercial conduct. To prevent the unauthorised use of an image under this law, it is necessary to show that the use of the image would mislead or deceive the public.

Possible misleading and deceptive use of a person's image

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. When a person is well known by the public as an endorser of products, the unauthorised use of his or her image in connection with a product may constitute misleading and deceptive conduct if the public is lead to believe that the celebrity is endorsing the product. For example, the Olympic swimmer Kieran Perkins successfully sued Telstra for the unauthorised use of his image in an advertisement. The advertisement used a photograph of Perkins wearing a swimming cap bearing the Telstra logo, accompanied by a statement promoting its services in preference to those offered by Optus. The court held that the use of the photograph together with the statement inferred that Perkins preferred Telstra's service to that of Optus when in fact he had not made a statement about his preference. Perkins' status as a celebrity known by the public as an endorser of a variety of products assisted the court to find that Telstra's conduct was misleading and deceptive.

However, the court will not find in favour of the person whose image is used if there is nothing misleading or deceptive in the unauthorised use of the image.

Passing off

The law of passing off is similar to the law of misleading and deceptive conduct. It is designed to protect a business against a deceptive misappropriation of its reputation by a third party, usually a competitor. To succeed in an action for passing off, the plaintiff must establish the subsistence of some reputation

on his part, and a misrepresentation by the defendant which causes or is likely to cause damage to the plaintiff. As the subsistence of a reputation is required to successfully establish passing off, this law is of limited use for the "average person in the street".

For example, in the 1960 case of *Henderson v Radio Corp Pty Ltd*, a photograph of the Hendersons, two well-known professional ballroom dancers, was used without their permission on the cover of a ballroom dancing record. They sued in passing off. The court accepted that Radio Corp had falsely represented some affiliation between the Henderson and its record. Further, the court found that in using the photograph, the record company had denied the Hendersons the potential to exploit their image for their own gain.

Privacy laws

No right of privacy

There is no general right of privacy in Australia. Existing privacy legislation at federal and state level is primarily concerned with the privacy of information held by the public and private sector and the impact of business conduct on the privacy of individuals, and is therefore of little or no use in the prevention of the unauthorised use of a person's image. For more information see Arts Law's information sheet on [Privacy and the private sector](#).

Invasion of privacy

Whilst there is no right to privacy in Australia, recent developments overseas and in Australian courts leave open the possibility of a future tort of invasion of privacy in Australia. A tort is a private, civil wrong or injury for which the court may provide a remedy for any damage caused.

Unlike the USA where there is an over-arching, all-embracing cause of action for invasion of privacy, the United Kingdom (**UK**) only has limited privacy protection. However, recent decisions, and the development of privacy law spurred by the enactment of the *Human Rights Act 1988* (UK) have led to developments in the UK. For example, in *Campbell v Mirror Group Newspapers Ltd (MGN)* (2004) the House of Lords considered surreptitious photographs taken of model Naomi Campbell whilst she was leaving a narcotics anonymous meeting, which were then published in the Mirror newspaper. The House of Lords held that this was wrongful disclosure of private information as the details of Campbell's treatment were of a private nature, imposing a duty of confidence on MGN. This decision was also made with reference to Article 8 of the European Convention on Human Rights. As this is a decision of a court in another country, and Australia does not have Human Rights Bill to lend support such a decision, the case would only be persuasive in the Australian courts. Importantly, the case did not go so far as recognise a tort of invasion of privacy.

In New Zealand, the 2005 case of *Hosking v Runting and others* concerned photographs of the twin children of a well-known New Zealand television presenter taken whilst his wife was shopping. The parents tried to stop the images from being published. The court recognised that there is a tort of invasion of privacy but held that in this situation, the pictures were not offensive. Further, there was no reasonable expectation of privacy as the mother of the twins was out shopping. The court also stated that public figures should have a lower reasonable expectation of privacy due to the public nature of their lives.

In Australia, two decisions have raised the possibility of a tort of privacy. First, the case of *ABC v Lenah Game Meats* in 2001 involved the secret filming of possum slaughtering at a meat processing plant. Although this case does not concern the unauthorised use of a person's image, the decision is

significant as it recognised that according to contemporary standards, certain kinds of activities are meant to be unobserved and any disclosure or observation would be highly offensive to a reasonable person. The case left open the potential for the development of a tort of privacy in Australia.

Secondly, monetary damages were awarded for a breach of privacy in the case of *Grosse v Purvis* (2003). This case involved extreme circumstances in which Grosse was stalked, spied on and threatened physically and verbally by Purvis over a period of more than six years. The court held that Purvis committed many breaches of Grosse's privacy. However, it is important to note that this case concerned long-term harassment of an offensive nature and was decided in a Queensland court. Therefore, it is not binding authority outside Queensland, though it may be persuasive in other states and territories.

Consequently, despite a number of developments in the area of privacy law and the tort of invasion of privacy overseas and in Australia, there has been no introduction of a tort of invasion of privacy in Australia which would prevent an artist, photographer or filmmaker from using your image in his or her work.

Industry bodies and their codes

There is no government body which regulates advertising standards in Australia. However, there are two main advertising industry bodies in Australia to which a complaint may be brought: The Communications Council which is the peak body representing agencies in the marketing communications industry (TCC; www.communicationscouncil.org.au) and the Australian Association of National Advertisers (AANA; www.aana.com.au). In conjunction with the Advertising Standards Board, these bodies have codes of practice for their members and complaint procedures which may be useful in redressing any unauthorised use. For example, TCC's Code of Ethics states that its members should "respect all people. No stereotypes...individuals should be understood, not portrayed in a way that could bring disrespect." Complaints are dealt with by TCC with assistance from the St James Ethics Centre. The Code might be contravened by the unauthorised use of a person's image.

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