
FILMMAKING WITH A SMARTPHONE OR HIDDEN CAMERA

Introduction

Making short films or videos using mobile phone technology is increasingly common. In 2012, Tropfest had a specific category for films made on phones. Generally, the same legal issues need to be considered whether your film is made on a phone, or any more traditional equipment. However there are some important legal matters that are particularly relevant to the making of films on a smartphone or surveillance device. Those issues arise because people can easily be recorded on such devices without their knowledge.

Surveillance and listening devices

There is legislation in each State and Territory concerning surveillance and listening devices (which would including mobile recording devices such as mobile phones), intended to protect peoples' private activities and conversations. In all States and Territories, there is a specific prohibition on the use of a listening device (such as a mobile phone or hidden film camera) to record a private conversation without the consent of the participants to that conversation¹.

Such legislation also generally restricts publishing or 'showing' unauthorised recordings that were obtained by using such a listening device. Though the legislation is slightly different in each State, the best practice for film makers who record or capture peoples' conversations on film and/or to use such footage in their film is to get the explicit consent of anyone whose conversation they record.

Breaches of this legislation constitute a criminal offence in most States.

Confidential information

'Breach of confidence' or misuse of confidential information – including information of a private nature – may also come into play in the context of filming with a hidden camera or smartphone. If an individual is filmed while they are engaged in a confidential conversation they may be able to take action against the person who filmed them, even if this occurs in a public space. Businessmen discussing the terms of a proposed business deal in a café or park in the belief that their conversation is completely private might be able to claim a breach of confidence.

‘Happy slapping’ (filming crime in a public place)

Mobile phones are often the means by which criminal activity is filmed without the knowledge of the criminal participants or victims. In many cases, such footage is later released on the internet. While this may breach the legislation relating to the use of surveillance devices as discussed above, it also raises other even more serious issues concerning the criminal law. Such footage may be used by the police as evidence in the prosecution of the perpetrators of the crime. If the illegal act involved a sexual assault or underage sexual activity, the person responsible for the filming and/or uploading may also be prosecuted under the laws concerning the creation and dissemination of pornography.

At present there is no law in Australia which considers people who film illegal assaults to be held responsible for the criminal act. As at December 2013, the [NSW Police Media Policy](#) expressly states that police have no specific powers to stop the media from taking photographs of them or of crime scenes as long as the media stays outside of the crime scene itself and obeys all other laws. However, there are limited circumstances in which police can prevent members of the public from filming such events, for example under anti-terrorism legislation and where the filming or photography constitutes an offence such as offensive conduct. As at December 2013, no other state or territory has a publicly available corresponding policy.

There has also been some confusion recently in Australia about whether it is legal for individuals to film police officers performing their duties. The [NSW Police Media Policy](#) clarifies the meaning of the Surveillance Devices Act in NSW, outlining that it is not illegal for individuals to film police officers in public.

In 2007, a law was passed in France that meant that anyone who “knowingly” filmed illegal acts of assault and distributed the images could be considered an accomplice to the violence. [\[see AL article 2007\]](#). Mobile phone cameras were apparently a main mechanism for this filming. The French law contained an exemption for professional journalists. The media advocacy group Reporters Without Borders said it understood the French government’s need to combat youth violence (following a wave of rioting, car burnings and violence in Paris and other cities in 2005); however, it feared the impact of the law would create a “dangerous” distinction between “regular citizens” and journalists in terms of punishment for “happy slapping.”

While there is no comparable law in Australia at this time, film makers who film overseas need to take care to adhere to the specific laws of the country they are operating in and also to be aware of the climate of sensitivity towards these practices.

Privacy and public figures

Film makers and artists filming with mobile recording devices have no need to be concerned about rights to privacy, personality rights, or image rights as such in Australia. However, there is growing concern with these issues. Particularly in relation to children or other vulnerable members of society it is increasingly problematic not to seek the permission or consent of subjects (or in the case of children, a responsible adult). Further, it is worth noting, especially in the context of online distribution of footage captured via a mobile recording device, that other jurisdictions such as the UK and the USA do have privacy and personality rights regimes.

Film makers ought to be aware that particularly since the ‘phone hacking’ scandal in Britain, there has been increased support in Australia for a statutory privacy tort (even before this, in a report tabled in August 2008, the Australian Law Reform Commission recommended the introduction of this kind of law). While as at 1 December 2012, there is still no legal ‘right to privacy’ in Australia, that position may change and film makers should seek legal advice if they are intending to film activities that may be

considered 'private' in circumstances where the people are unaware that filming is occurring. A couple discussing their relationship in a park or a person undressing at a public pool or beach are examples of the kinds of activity that might be regarded as private.

(See Arts Law's information sheets for Australia generally and for States and Territories, '[Children in the Creative Process](#)' in [ACT](#), [NSW](#), [NT](#), [QLD](#), [SA](#), [TAS](#), [VIC](#), [WA](#).)

Consent

Most of the legal issues addressed above can be resolved by obtaining the permission or consent of the people whose activities or conversations are being filmed (or in the case of children, the permission of a responsible adult). Obviously actors whose performances are filmed implicitly consent by participating willingly in the film process. There is an argument that members of the public who are aware that a film crew is operating in their vicinity may be taken to have given implied consent to being filmed – although the prudent course would still be to obtain their express consent.

However, it would be very difficult to argue any sort of implied consent by people caught on a hidden camera or mobile phone. Many people might think the filmmaker was simply making a call or taking a photo.

The best course of action is to obtain a written release from each person appearing in the film.

Arts Law has a [Model Release](#) that is suitable for use by commercial film makers.

Other issues

The law in relation to copyright, moral rights, performers and ICIP (Indigenous cultural intellectual property) applies to films made on smartphones in the same way as it applies to films made on more traditional film equipment. See Arts Law's information sheets on [Copyright](#), [Moral rights](#), [Performers' Rights](#) and [ICIP](#).

See also other useful information sheets for film makers

- [Film Location Deed of Release \(no payment\)](#)
- [Film Location Deed of Release \(with payment\)](#)
- [Film/Video Partnership Deed](#)
- [Filming in public places](#)
- [Film competitions](#)

Australian Copyright Council information sheets:

- [Film & Copyright](#)
- [YouTube & Copyright](#)

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The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.



ⁱ Surveillance Devices Act 1999 (Vic) www.austlii.edu.au/au/legis/vic/consol_act/sda1999210.txt ; Surveillance Devices Act 2005 (NSW) www.austlii.edu.au/cgi-bin/download.cgi/au/legis/nsw/consol_act/sda2007210 ; Invasion of Privacy Act 1971 (Qld) www.austlii.edu.au/au/legis/qld/consol_act/iopa1971222.txt ; Surveillance Devices Act 1998 (WA) www.austlii.edu.au/cgi-bin/download.cgi/au/legis/wa/consol_act/sda1998210 ; Listening and Surveillance Devices Act 1972 (SA) www.austlii.edu.au/cgi-bin/download.cgi/au/legis/sa/consol_act/lasda1972326 ; Listening Devices Act 1991 (Tas) www.austlii.edu.au/au/legis/tas/consol_act/lda1991181.txt ; Surveillance Devices Act 2007 (NT) www.austlii.edu.au/cgi-bin/download.cgi/au/legis/nt/consol_act/sda210 ; Listening Devices Act 1992 (ACT) www.austlii.edu.au/cgi-bin/download.cgi/au/legis/act/consol_act/lda1992181