# Unauthorised use of your image

This information sheet addresses unauthorised uses of your image, outlining that there is no specific law in Australia aimed at preventing this from happening. It suggests areas of law that may be used to try and stop an 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, however there are circumstances in which you may have a legal remedy in relation to how your image in used.

## 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 the law that deals with injury to someone's reputation. The test of whether the publication of a photograph is defamatory is: does the publication lower the public's estimation of the person portrayed, expose the person to hatred, contempt or ridicule, or cause him or her to be shunned or avoided. The defamatory nature of a publication of a photograph may result from the caption or the context in which the photograph appears (neither of which may not be the responsibility of the photographer); or the subject matter and how viewers could interpret the photograph.

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 Etttinghausen by implying he had authorised the taking and publication of the photograph.

For a more detailed discussion, including the defences to a defamation claim, see the Arts Law information sheet, Defamation law (for material published after January 2006)

## The Australian Consumer Law

### Misleading and deceptive conduct

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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.

For a more detailed discussion, see the Arts Law information sheet, Australian Consumer Law and Creators.

### 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 general right of privacy

There is no general right of privacy in Australia. The *Privacy Act 1988* (Cth) (**Privacy Act**) regulates the collection, use, storage and disclosure of personal information by some businesses and government agencies. The amendments impact on the way companies that are subject to the Privacy Act and government agencies collect, store 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.

However, it is clear that in some circumstances a person's image could be regarded as 'personal information' and its publication by an entity subject to the Privacy Act would breach that Act. The website of the Office of the Australian Information Commissioner discusses this issue in more detail.

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For more information, on the Privacy Act generally, see the Arts Law information sheet, Privacy and the private sector.

### Is there a legal action for invasion of privacy?

While there is no general 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.

In *ABC v Lenah Game Meats* (2001) the High Court did not exclude the possibility that a tort of unjustified invasion of privacy may be established in the future. The High Court also left open the question as to whether Australian law recognises a tort of harassment or stalking. *ABC v Lenah* has been considered in cases decided by state courts. Different conclusions have been reached. Some courts come to the conclusion that law of Australia has not developed to the point of recognising an action for breach of privacy, while others have held that an invasion of privacy was an actionable wrong which gives rise to a right to recover damages according to the ordinary principles governing damages in tort. Other courts have look to the UK development of a duty of confidence in relation to private information as the basis for legal remedies for an invasion of privacy.

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 an individual's image in his or her work,. Of course the application of the Privacy Act should still be considered. While that legislation may not apply to an individual creator or small arts organisation, it could apply to any public institution or media organisation exhibiting or promoting the creative 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**) and the Australian Association of National Advertisers (**AANA**). 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.

Australian commercial television channels observe privacy standards and the licensing of commercial television channels requires the compliance with codes of practice, which are published by the AMCA, that commit the channels to not use material relating to a person's personal or private affairs, or which invades an individual's privacy in circumstances where there is no clear public interest in disclosure. The code of practice also expects the consent of the person (or in the case of a child, the child's parent or guardian) to be obtained prior to the broadcast of the material that relates to personal or private affairs. The ABC & SBS also have editorial codes of practice related to the broadcasting of material concerning personal or private affairs.

## Further Information

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); collecting societies (Ch 7); resale royalties (Ch 8); securities, sales and galleries (Ch 9); art and the internet (Ch 10); Aboriginal and Torres Strait Islander artists (Ch 11); photography (Ch 12); sculptures (Ch 13); design (Ch 14); insurance and liability (Ch 16); debt (Ch 17); and tax (Ch 18).

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