Street photographer's rights

Can I take a photograph in public that contains images of people I don't know? Can I take a photo of a famous landmark or of the front of someone's house and later sell it? Read on to find out!

This information sheet aims to provide you with the answers to these and other questions that may arise when you are taking photographs in and of public spaces. It also aims to provide those you encounter with a statement of your rights to minimise the possibility of harassment or threatened legal action. So carry this in your pocket and be prepared.

Taking photographs in a public place

It is generally possible to take photographs in a public place without asking permission. This extends to taking photographs of buildings, sites and people. In a case involving street surveillance photography used as evidence in a criminal case, an Australian judge stated "a person, in our society, does not have a right not to be photographed."[1] There are, however, some limitations to this statement, which are discussed in this information sheet.

Some photographers have been approached by the police while on the street taking photographs. The police are usually responding to a complaint by some member of the public who is concerned about children being photographed and who have a mistaken belief that the consent of the parents or guardian must be obtained before children can be photographed. Street photographers should be prepared to respond to this situation, either by acknowledging the concerns of the parents and adopting appropriate strategies, such as explaining what you are doing and asking it is OK to take photographs; or otherwise have the information on street photographer's rights so that you can have a conversation in which you explain what you are doing and why you have a right to engage in street photography.

Photographing people

There are no publicity or personality rights in Australia, and there is no right to privacy that protects a person's image. However a person's image can constitute 'personal information' under the *Privacy Act 1988 (Cth)* with the consequence that there are circumstances in which businesses and agencies subject to that Act may breach the law by publishing a person's image. For further information see the Arts Law information sheet, Unauthorised use of your image**.**

There is also currently no tort of invasion of privacy in Australia, but 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.

The Arts Law information sheet, Privacy and the private sector, discusses the possible development of the tort action of invasion of privacy in the section, Developments: tort of invasion of privacy.

Some sports organisations have published photography policies. See for example: Surf Life Saving Australia Policy; Gymnastics NSW Photography – Acquiring and Displaying Images of Children Policy; and Australian Sports Commission – acquiring images of children. In public places, such as roads, parks and beaches, such organisations are unable to prevent photography by members of the public. However to the extent the sporting activities take place on private property, the sports organisation can rely on their rights as property owner, or as an authorised user of private property, to control the terms of access to the property including the use of cameras on the property, as discussed below.

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In some circumstances a sports organisation may, with the agreement of a local council, be given control over a public place, such as a beach, in order to conduct an event. The sports organisation will be able to control access by photographers to the area over which the organisation has control. However photography may still be possible from publicly accessible places that overlook the controlled area.

Photographing people for a commercial purpose

If you are using your shots for a commercial purpose, such as for an advertising campaign, you should obtain a model release form signed by the subjects you are photographing to ensure you have authorisation to use their image to sell a product. See the Arts Law information sheet, Unauthorised Use of Your Image for further information on defamation, passing off and trade practices law. A sample Photographer's Model Release form is also available on the Arts Law Centre of Australia website.

Photography on private property

Access to private land

In order to access a privately owned space you need permission from the landowner, and he or she has the right to impose restrictions on photography. Therefore, you may only be allowed to photograph certain objects or locations. This type or restriction is common in many museums, galleries and sporting grounds, and may occur on land owned by Councils. Even where the landowner allows you to photograph, keep in mind that he or she may not be the copyright owner in artistic works you might be photographing. In this case, you need the permission of the author of the artwork as well.

If you do not have permission to be on privately owned property, you will be liable in trespass. Trespass is committed with the slightest interference with the land (damage to the land is not relevant). The owner may take legal action in trespass against you for taking photographs after gaining unauthorised entry (*Lincoln Hunt v Willesee* (1986)) or may be able to get an injunction to stop you using whatever footage you gathered while trespassing (*ABC v Lenah Game Meats* (2001)). The landowner may use reasonable force to remove you from their land.

Just because people have free access to a place does not mean that place is a public place in which you are free to take photographs. Educational institutions (both government and non-government schools), child care services, hospitals, nursing homes, shopping malls, sports arenas, music venues (such as hotels and concert halls) are considered to be private property; even if they are owned by a local council or other government organisation. Open markets, such as Sydney's Paddys Markets and Melbourne's Queen Victoria Market are on private property so that photography at those markets can be regulated by the operator of the market. Museums, art galleries and amusement parks may also have photography policies on the basis the location is private property.

Legislation of a state or territory may determine the circumstances in which land can be considered private property. For example, the *Inclosed Lands Protection Act 1901 (*NSW) defines 'inclosed lands' as "any land, either public or private, inclosed or surrounded by any fence, wall or other erection"; and creates an offence of unlawful entry on enclosed lands.[2]

Entering onto private property without the permission of the owner or occupier can be both a crime of trespass,[3] in addition you can be sued in a civil court under the tort of trespass to land.

The taking of photographs at railway stations depends on which state you live in. Where the railway system has been privatised, such as Victoria, photography may be prohibited at railway stations. In contrast, NSW State Rail does not prohibit photography at railway stations. However disruptive photography at a railway station in NSW is likely to result in attention from State Rail personnel – you can always ask at the station master's office for permission if you are intending to use a tripod or otherwise disrupt the free flow of pedestrians on the platforms or other public areas of the station.

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Photography from a public place onto private property

There is no restriction on taking photographs of people on private property *from* public property. According to *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) there is no freedom from view, so people who are photographed on their property from a public location have no legal claim against you if what is captured in the photograph can be seen from the street. The same applies to photographs taken from private land when you have permission to take photographs. You should be careful that you are not being a nuisance and interfering with someone's right to use and enjoy the land (see the case of *Bathurst City Council v Saban* (1985)).

However there are criminal offences related to voyeurism and filming a person engaged in private act.

Can taking photos be a criminal offence?

There are criminal offences set out in state and territory statutes regarding behaviour that is a gross violation of privacy or the taking photographs and video or audio recordings result in the creation of material that offends community standards, the offences include:

The use of a camera or digital device (such as the camera function of a mobile phone) for indecent purposes;[1] or to make an image of a child engaged in a private act for prurient purposes;[2] or to make indecent images of a child under the age of 16;[3] or engage in the practice of 'upskirting';[4] and there are offences related to committing indecent or offensive acts in a public place. It is important to consider whether the behaviour of the photographer meets the requirements of the legislation as to what behaviour or state of mind the legislation intends to criminalise. For example, offences related to committing indecent or offensive acts in a public place require an "exhibitionist" element. That is, the purpose of the legislation is to address behaviour that causes a person to be insulted or offended by the acts of exhibitionism, rather than a person is offended by being photographed or offended at photographs being taken in a public place.

- In addition to the offences under state or territory law regarding the use of a camera or digital device; the use of the Internet to transmit, publish or access material that offends community standards can also be an offence;[9]
- Harassment or stalking is a criminal offence under the criminal law of most states and territories; and court orders can be obtained against any person who can be proved to intent to cause another person to fear physical or mental harm.[10] This may be an unlike response to any person engaging in street photography; however Paparazzi are a group of street photographers who can be exposed to legal action from the celebrities they photograph. Action has been taken against photographers by several celebrities who have obtained interim Apprehended Violence Orders ("AVOs") against photographers, under Part 15A of the *Crimes Act 1900* (NSW), One celebrity sought an AVO on the basis she feared for the safety of herself and her family; another sought an AVO because she alleged the photographer endangered her life during an incident on Sydney harbour. The often difficult relationship between paparazzi and celebrities is a factor that underlies the evolution of privacy law;
- Voyeurism and offences related to filming a person engaged in private act, when he or she has not consented to being filmed and installing device to facilitate observation or filming.[11] In the *Crimes Act 1900* (NSW) a private act is defined to include being in a state of undress and other acts where a reasonable person would reasonably expect to be afforded privacy,
- the use of surveillance devices and listening devices is regulated in most states and territories[12] For example, the *Surveillance Devices Act 1999* (Vic) and *Surveillance Devices Act 1998* (WA) make it an offence to photograph a "private activity" without the consent of the subject; s. 227A-227C of the Criminal Code (Qld) regulates observations or visual recordings of a "person in circumstances where a reasonable adult would expect to be afforded privacy". While some of the statures only refer to listening devices, most video cameras (including integrated smartphone video cameras) are likely to be classified as 'listening devices' under these statutes because they can record sound.

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A summary of the surveillance and listening devices legislation included in the Arts Law information sheet, Filming with a smartphone or hidden camera.

The question as to whether photographs and video or audio recordings result in the creation of material that offends community standards is discussed in the Arts Law information sheet, Classification and censorship, The state or territory criminal statute may require the image to assessed in order to determine whether it offends the standards of morality, decency and propriety generally accepted by reasonable adults.

Arts Law publishes information sheets on 'Children in the Creative Process' for Australia generally and for each state and territory: ACT, NSW, NT, QLD, SA, TAS, VIC, WA. Those information sheets looks at Australia's national, state and territory laws relevant to an artist working with children as part of the creative or artistic process working with children.

Taking of a photograph at a beach that includes a young child not wearing any clothes is a situation that is problematic – without necessarily being a criminal offence – the legal question is whether any photograph that includes the child meets the relevant test in the criminal law of being 'indecent', 'obscene', 'offensive' or whether it shows a child 'in a sexual context'. In the context of the attention given to sexual abuse and the availability of pornographic images, street photographers should use their discretion as to whether it is appropriate to take photographs as members of the public may challenge your right to take photographs in a public place.

You and the police

If you are ever stopped while on the street taking photographs, the first questions the police are likely to be to ask is for you to tell them your name and address. As a general rule, you do not have to comply, but there are some exceptions related to where the police have reasonable grounds for believing a serious offence or an arrestable offence has been committed. You should identify what are the specific powers of the police under the law of the state or territory in which you live. A good source of information is your local Community Legal Centre.

In New South Wales, as a general rule, you do not have to answer any questions of the police, even after you have been arrested. In New South Wales, the circumstances in which you have a legal duty to give your name and residential address under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**P & R Act**) include:

- If you are suspected of being involved, or are a witness to, a crime that is a serious offence. For example, an offence for which the penalties include imprisonment for an indictable offence, which is usually any offence that has as a penalty, a term of imprisonment for 2 years or more (P & R Act ss. 11-13). The NSW Police can also require you to provide proof of your identity (P & R Act s. 19).
- When you are the driver or passenger of a motor vehicle that the police officer suspects on reasonable grounds was being used in connection with a serious offence (P & R Act ss. 14-18);
- Where you are at the Sydney Olympic Park and are suspected on reasonable grounds of an offence against the *Sydney Olympic Park Regulation 2001* (NSW). In this case, failure to comply is an offence only if you are first warned that such failure is an offence.

Giving a false name or address is the wrong approach as it is an offence in many states and territories, including in New South Wales. Giving a false name can have implications if you are arrested – the use of a false name may be used as a reason to refuse you bail.

In New South Wales you have a right to be told the name of the police officer who is giving you the directions or is asking you questions. You also have a right to be told the name of their police station.

In New South Wales the police have the power of arrest without a warrant if the police officer suspects on reasonable grounds that you are committing or have committed any offence, including if it is necessary to obtain property in your possession that is connected with the offence (P & R Act s. 99). As a street photographer, the obvious thing in your

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possession is your camera.

In New South Wales the police also have powers in specific circumstances to stop, search and detain you without a warrant (that is, without authorisation from a court). For example, if they suspect on reasonable grounds that you have in your possession anything used in connection with the commission of a crime that is a serious offence (P & R Act s. 21(1)(b)). The question is therefore whether the police have reasonable grounds for suspecting that you have committed a serious offence (many, but not all, of the offences described above are serious offence (or as described in the P & R Act as 'indictable offences').

In New South Wales you are not under a legal obligation to explain or justify your photographic activities or to answer any questions, even if the police arrest you. If you are arrested you are obliged to go with the police to a police station. Resisting arrest is an offence. While the circumstances in which you have a legal obligation to answer questions is limited, you may consider that it is in your interests to persuade the police officer that your street photography is entirely within your rights. A course of action is to insist that the police obtain a search warrant before accessing and viewing the images stored on your camera. You will have to decide whether that course of action is the best approach as the police have the power to retain your camera following your arrest while they carry out further inquiries, including applying for a search warrant to inspect the images stored in the camera. You are entitled to recover your camera if its retention as evidence is not required (P & R Act s. 218).

Therefore when questioned by a police officer, who asked to view the photographs stored on a digital camera, the dilemma you faced is whether to co-operate with the police officer and give your consent to the police looking at the digital images stored in your camera or you can ask the police officer to explain what is the legal basis on which he or she can demand to view the stored photographs. If you have doubts as to whether the justification for the exercise of the power of search of your camera is lawful, a course of action that is open to you is to make a complaint, using the police complaints procedure or to the independent complaints authority (often the Ombudsman office) that the search of your camera was unlawful.

Legislation in other states and territories will establish the powers and responsibilities of the police e.g. *Crimes (Custody and Investigations) Act 1988* (Vic), *Criminal Law Detention and Interrogation Act* 1995 (Tas), *Summary Offences Act* 1953 (SA), *Police Powers and Responsibilities Act 2000* (Qld), *Criminal Investigation Act* 2006 (WA) and *Police Administration Act 2006* (NT). Do not forget the special powers that police and other authorised persons (such as park rangers) may have in certain areas, as discussed below.

Photography of crime scenes

In most states and territories, the police are given the ability to declare a place a crime scene and exercise specific crime scene powers that include directing a person to leave the crime scene or preventing a person from entering the crime scene.

The NSW Police Media Policy 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 lawful directions of police officers. 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 of May 2015 other states or territories do not publish their police media policies or when a police media policy is published it is limited to the relationship with news media.

Obstruction and public order offences

Resisting or hindering a police officer in the execution of his or her duty is an offence in most states and territories.[13] Resisting is understood to be the forceful opposition to any course of action which the police officer is undertaking; whereas, hindering, is understood to be the physical obstruction or interference with a police officer's actions that makes his or her duty substantially more difficult to perform. The offence of hindering the investigation of a serious offence may also exist under

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state or territory law;[14] however in NSW it is not an offence merely to refuse or fail to divulge information or produce evidence.[15]

It may also be an offence to refuse or fail to obey a direction given by a police officer in a public place, including where your conduct is believed on reasonable grounds to be obstructing another person or persons or traffic or constitutes harassment or intimidation of another person (P & R Act part 14). In New South Wales you have a right to be told why the police officer is giving you the direction. If you do not obey the direction you can be charged with an offence and a court will decide whether the direction was lawful. If you have doubts as to whether the direction is lawful, a course of action that is open to you follow the direction given by the police and then later make a complaint, using the police complaints procedure or to the independent complaints authority (often the Ombudsman office), that the direction was unlawful and should not have been given to you.

Setting up a tripod on a busy street and thereby impeding traffic is an example of an action that may amount to public obstruction. The *Summary Offences Act* 1988 (NSW) provides that it is an offence to prevent in any manner the free passage of a person, vehicle or vessel in a public place without reasonable excuse. Police have powers to arrest any person obstructing a public thoroughfare, although it is more likely that you would be asked to move on, and only arrested if you disobey.

For similar provisions in other states, see *Summary Offences Act 2005* (Qld), *Summary Offences Act 2007* (NT), *Summary Offences Act 1953* (SA), *Summary Offences Act 1966* (Vic) and *Criminal Code Act 1924* (Tas).

Photography of landmarks, buildings, monuments

There are provisions in the *Copyright Act 1968* (Cth) that allow people to take and publish photographs of buildings, models of buildings, sculptures and other works of artistic craftsmanship without infringing copyright. See below for more detail.

However, photography is restricted in some areas by local councils or authorities. For example, the *Sydney Harbour Foreshore Authority Regulation 2006* (NSW) prohibits a person from using a camera for a commercial purpose in a 'public area' without the Authority's permission. This applies to any part of the foreshore area that is vested in or managed by the Authority and the public can use, including Darling Harbour, Circular Quay, the Rocks and Luna Park. Non-compliance can result in a fine. A person who causes annoyance or inconvenience to other persons in a public area must leave the area when requested by a ranger or a police officer, who may remove the person with reasonable force if they fail to do so. Provided the ranger has warned you that failure to comply with the request is an offence, you can face a fine. For more details, contact the Sydney Harbour Foreshore Authority (SHFA). Except with the permission of the Opera House Trust, the taking of photographs or video recording for commercial purposes is prohibited in the Opera House or on the forecourt and other public areas around the Opera House.

Access to Luna Park Sydney is regulated by the *Luna Park Site Act 1990 (*NSW); while the board walk and foreshore area is under the control of the SHFA, therefore the operators of Luna Park or the SHFA can control commercial photography in and around Luna Park. The regulation of photos is primarily directed to commercial photography and disruptive photographic activities.

Similar provisions and penalties exist for Sydney Olympic Park, prohibiting the use for commercial purposes of a camera and causing annoyance or inconvenience to other persons (*Sydney Olympic Park Regulation 2001*). Furthermore, an authorised person may confiscate a camera used in contravention of the Regulation if he or she has directed you to stop using it and you continue nonetheless, although force cannot be used. If your camera is confiscated, you should be issued a receipt indicating the date and time when it was taken. It must be returned to you or delivered to a public pound within 24 hours after confiscation. If delivered to a public pound, you must be notified in writing of the address. Also keep in mind that you must abide by the admission conditions on the entry ticket to events and sports grounds, including Telstra Stadium, Sydney Showground, Sydney SuperDome, Sydney Olympic Park Aquatic Centre. For more details, contact the Sydney Olympic Park .

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Other penalties and provisions may exist for other areas in other states and territories.

Local government powers regarding photography in streets, parks and beaches

Restrictions may also be imposed by Local Councils on premises under their control, such as swimming pools, which they can do because an enclosed pool would be 'private property' as discussed above.

The legal power of a Local Authority to regulate photography in streets, parks and beaches can be derived from the Local Government Act of each state and territory; however the treatment of photography is not consistent across each state or territory or between local councils. You should check with your local council as to whether there are any council ordinances regulating photography in streets and other public places. Where councils do regulate street photography it is usually limited to high impact photography – that involving blocking streets, occupying parking for long periods or constructing a set for still or video photography.

For example, you need a permit to commercially photograph any outdoor, publicly-owned space in Waverley Council (NSW), including beaches, parks, streets and cemeteries.

The *Local Government Filming Protocol* (2009) is intended to guide local councils in NSW. It should be noted that this protocol are directed at film and television production and do not cover stills photography; this is because the grant of power to local authorities under the *Local Government Act 1993* (NSW)[16] is limited to regulating film and television productions[17] The Roads & Maritime Authority (NSW) publishes the guidelines *Filming Projects: Guidelines for parking and road closures*. The website of the state or territory film and television organisation should be consulted for relevant information regarding film projects working in areas under the control of a local council.

Commonwealth government property

It is illegal to enter certain property belonging to the government such as railway yards, electrical power stations and military bases. Trespassing in these areas may lead to arrest and prosecution. For example, under the *Defence (Special Undertakings) Act 1952* (Cth) it is an offence to gain unlawful entry into a "prohibited area" (including flying over it), punishable by imprisonment. The Minister can declare any area of land or water "prohibited" if it is necessary for Commonwealth defence. The same applies for taking a photograph of the area or anything in it. Merely possessing a camera while in a "prohibited area" can also result in imprisonment. Four Christian Pacifist activists were prosecuted under this Act for trespassing on the US Pine Gap military base in Australia and taking photographs in October 2006.

It is also illegal to photograph any defence installation in Australia under the *Defence Act 1903* (Cth). Your photos, camera and film can be confiscated and destroyed, and you can face potential fines or imprisonment. You can even be arrested without a warrant. Be aware of any warning signs displayed at such locations as you can be penalised even if you haven't taken any photos, but have photography equipment in your possession.

If you are in doubt about a particular location, always check.

Use/publication of photographs

There are circumstances in which legal action can be taken to prevent the publication or where use of photographs is illegal, for example:

- if the publication of the photograph of a person is a breach of the Privacy Act;
- if the photographs of person were obtained as the result of the photographer trespassing on private property (*Lincoln Hunt Australia v Willesee* (1986)); and

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- if the taking of the photography results in the breach of a duty, such as a duty to keep information confidential. There have been decisions of courts that have held photographs to be confidential information, such as the surreptitiously obtained photograph of a scene intended to remain confidential until published as the cover of *Oasis* CD; the wedding photographs of Michael Douglas and Catherine Zeta-Jones; and numerous cases related to intimate photographs being published by ex-partners.

See the Arts Law information sheet, Protecting your ideas for a discussion of when a duty to keep information confidential may exist.

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 (which may not be the responsibility of the photography; or the context in which the photograph appears; 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, see the Arts Law information sheet, Defamation law (for material published after January 2006)

Taking photograph of members of the public or models for use as 'stock' photography that are licences for commercial and advertising uses can result in claims for defamation related to the context in which the photograph is used or any captions given to a photograph. You should obtain a release of any person appearing in a 'stock' photograph that includes a release of you, as the photographer, from any claims that arise from how the photograph is subsequently published. A sample Photographer's Model Release form is also available on the Arts Law Centre of Australia website.

The law of passing off and the *Australian Consumer Law*

Complications arise if your photographs are used for a "commercial purpose" and you don't have consent from the persons in the photograph. "Commercial purpose" involves using the photograph to sell something *other than the photograph itself*. So if you have taken a photo of someone on the street for an advertising campaign and it appears that the person is endorsing the product or service (when in fact they do not), you may be liable. While there are no general publicity or personality rights in Australia, a person may have a claim that the use of their photo in a commercial context is a misrepresentation as to their endorsement of the product or service; or a breach of the tort of passing off or misleading and deceptive conduct under the Australian Consumer Law.

For a more detailed discussion, see the Arts Law information sheets, Unauthorised use of your image and Australian Consumer Law and Creators.

Photographs relating to Court proceedings

Photography in courts is restricted. The law of contempt of court also generally prohibits the publishing of any material, written or photographic, that is likely to prejudice the course of justice in a matter which is still before the courts. For example,

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in *Attorney-General for the State of NSW v X* (2000) the Sydney Morning Herald published an expose on organised crime, claiming that Mr Duong was "the top heroin distributor" and mentioned pending criminal charges against him. The Court of Appeal held that the article amounted to contempt of court because it implied Mr Duong was guilty. In coming to this decision, the judges were guided by the fact that the article was accompanied by two photos of Duong, each of which was "unusually large, in colour and of good quality".

Photography and the arts

Sculptures, monuments and artwork may be protected by copyright. Unless an exception applies, you need permission from the copyright owner of the work. Exceptions to this general rule are found in the *Copyright Act*. For example, photographing and publishing a photograph of a sculpture or work of artistic craftsmanship that is permanently situated in a public place, or in premises open to the public, does not infringe copyright (s.65). This does not apply to other public art, such as murals. If the public place is a gallery or museum, remember that your rights to photograph may be limited by the conditions of admission on your ticket. As previously discussed, you can also take pictures of buildings without infringing copyright.

Copyright and trademarks

You may be infringing copyright if you photograph the whole or a substantial part of a literary, musical, dramatic or artistic work, if the work is still protected by copyright. For further information see the Arts Law information sheet Copyright for a discussion of whether there is a reproduction of a substantial part of the work (which is the test for an infringement of copyright) and the consequences of the use of the work only being incidental to the main subject of a photograph.

Photographers are often concerned about taking photographs of trade marks, for example taking a shot of a streetscape that contains advertising or company logos on the side of buildings. A registered trade mark owner has exclusive rights to use the trade mark and to authorise use of the trade mark in relation to goods/services for which the trade mark is registered. Taking a photograph of a trade mark should not involve trade mark use and is not trade mark infringement as the trade mark, as it appears in the photograph, is not being used as a "badge of origin" (that is, a use that indicates the source of good or services). Also consider that there may be copyright subsisting in the trade mark if it is a logo containing an artistic work.

For further information, see the Arts Law information sheets, Trade marks and Using brands and products in film.

[1] R v Sotheren (2001) NSWSC 204 (20 March 2001) [25]. Dowd J.

[2] Section 4, *Inclosed Lands Protection Act 1901* (NSW), creates an offence where any "person who, without lawful excuse (proof of which lies on the person), enters into inclosed lands without the consent of the owner, occupier or person apparently in charge of those lands, or who remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands to leave those lands."

[3] e.g, *Summary Offences Act 1966* (Vic) s (1)(d) creates an offence of wilfully trespassing in any place and refusing to leave that place after being warned to do so by the owner, occupier or a person authorised by the owner or occupier.

[4] e.g. *Summary Offences Act 1988* (NSW) part 3B; In the *Summary Offences Act 1953* (Qld) part 7 the offence relates to production of indecent material for the purposes of sale.

[5] e.g. *Criminal Law Consolidation Act* 1935 (SA) s 63B.

[6] e.g, *Criminal Code* (Qld) s 210(1)(f). Child pornography offences are created by *Crimes Act 1958* (Vic) part 1 division 13; *Criminal Code Act* 1924 (Tas) ss 130–130G.

[7] e.g. *Summary Offences Act* 1966 (Vic) division 4A; *Summary Offences Act* 1953 (SA) part 5A.

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[8] e.g. *Summary Offences Act 1988* (NSW) s. 4; *Criminal Code* (Qld); *Police Offences Act* 1935 (Tas) s.13.

[9] The *Criminal Code* (Cth) s. 474.14, s. 474.19; s. 474.20; s. 474.22; s. 474.23, creates offences related to the use of a telecommunications network or carriage service to commit a serious offence or to transmit or access child pornography or child abuse material.

[10] e.g. *Crimes Act 1900* (NSW), Part 15A "Apprehended Violence Orders" (AVOs); s. 562 AB Stalking and or intimidation with intent to cause fear of physical or mental harm; s.562AB (1) requires proof that the *"person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person"*. See also s.34A *Crimes Act 1900* (ACT); s. 189 *Criminal Code Act* (NT); s. 19AA *Criminal Law Consolidation Act 1935* (SA); s. 21A *Crimes Act 1958* (Vic); Chapter XXXIIIB, s. 338E (1) & (2) *Criminal Code* (WA); *Criminal Code Amendment (Stalking) Bill 2004* (Tas); *Criminal Code* s.359B(c) – s.359E (Qld).

[11] e.g. *Crimes Act 1900* (NSW) ss. 91I-91M.

[12] Surveillance Devices Act 2007 (NSW); Surveillance Devices Act 1999 (Vic); Listening Devices Act 1992 (ACT); Listening Devices Act 1991 (Tas); Surveillance Devices Act 1998 (WA); Surveillance Devices Act (NT); Listening and Surveillance Devices Act 1972 (SA); see also s. 227A-227C of the Criminal Code (Qld).

[13] For example, ss. 58 & 346C *Crimes Act 1900* (NSW).

[14] The offence of hindering an investigation is usually limited to hindering the investigation of a serious offence, which is often referred to 'serious indictable offence' that means the offences that have a penalty of imprisonment for a number of years, that will be defined in the relevant state of territory criminal statutes.

[15] s. 315(3) *Crimes Act 1900* (NSW).

[16] *Local Government Act 1993* (NSW), Chapter 7, Part 1, Division 4 – Approvals for filming.

[17] In the *Local Government Act 1993* (NSW) "filming project" means a project (such as a film, a documentary, an advertisement, a television program or a specified set of television programs) involving filming.

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