Filming in Public Places

This information sheet outlines the legal issues film makers should consider when shooting in public places, including filming live performances and public figures, whether they are filming or recording copyright material (e.g. graffiti, logos, music) and whether their film may be defamatory.

Introduction

Film makers and other artists utilising film footage in their works often want to shoot footage in public in order to capture a particular event or incident or as the whole or a part of their artistic vision. There are many legal issues that can potentially arise when a film maker or video or multimedia artist decides to film or record in public.

Copyright

Just as copyright protects your film, the script and the soundtrack, it may also protect material situated on the street or in another public place and caught on film. The use of another's copyright material without the copyright owner's consent amounts to a copyright infringement if:

- there is an unauthorised use of a **substantial part** of the work; and
- an exception permitting the use does not apply.

"Substantial part" means a vital or important part of the copyright material, based on the quality rather than the quantity of copyright material used. It is assessed by reference to the copyright material allegedly used, not the new work.

Examples of copyright material that a film maker might typically encounter when filming in public include visual art, sculptures, live theatrical or musical or dance performances, literary or artistic works that comprise part of an advertising or marketing campaign (for instance, on a billboard or poster), or a mural or graffiti on a building, laneway or tunnel. Different rules are likely to apply to each of these kinds of scenarios.

Film makers filming in public need to consider whether what they are filming may involve copyright material and might therefore require them to obtain the permission of the copyright owner. A failure to this may mean that the filmmaker is unable to provide the warranties and assurances that investors, distributors and film competitions usually require before they will invest in, or screen a new film.

For an explanation as to what is protected by copyright, see the Arts Law information sheet, 'Copyright'; and the Australian Copyright Council information sheets, 'An introduction to copyright in Australia' and 'Film and copyright'.)

Exceptions

There are exceptions or defences built into the Copyright Act that mean that it is not necessary to seek permission to film copyright material in certain circumstances. There are fair dealing exceptions for research or study, reporting the news, criticism or review, and parody or satire. Depending on what the ultimate use to be made of film footage recorded in public is (and the circumstances surrounding it), it may be that a film maker's use will fit one of the fair dealing exceptions. For example, news cameramen can usually film in public in order to report the news without needing to obtain the permission of the owners of copyright in the works caught on film. Factors such as the copyright owner's usual practice regarding licensing the work and whether or not their commercial interests have been prejudiced may be taken into account by a court determining whether or not the film maker's use has been fair.

(See the Australian Copyright Council information sheet, Fair Dealing: What Can I Use Without Permission.)

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Filming public, permanent sculptures, "works of artistic craftsmanship", and buildings

A film maker may film a sculpture, building or "work of artistic craftsmanship" that is permanently displayed in public without getting permission from the copyright owner.[1] It is important to note, however, that this does not apply to other types of public art (for example, murals or billboards) except where there is an 'incidental' use of the artistic work (as discussed below).

The important limitations in relation to the filming of sculptures or works of artistic craftsmanship is that the work must be displayed otherwise than temporarily, in a public place, or in premises open to the public. Public places can be understood to include streets and parks; premises open to the public would include public art galleries and private art galleries that are open to the public, however this exception would not apply to the filming of sculptures or works of artistic craftsmanship in temporary exhibitions.

While artwork, such as murals and graffiti in public places are not included in this exception, it is an interesting question whether a graffiti artist could object to his or her work being caught on film. Technically it would appear to be copyright infringement as copyright (and moral rights) may subsist in graffiti, or street art, as an 'artistic work' or possibly even 'literary work' but there may well be public policy reasons why a court would be reluctant to make a finding of infringement (for example in circumstances where the artist committed trespass or vandalism to create the work). This question has yet to be considered by an Australian court. In the meantime, filmmakers should be aware that they may need permission from the copyright owner.

Incidental filming of artistic works

There is an exception in copyright for the "incidental" filming of an artistic work whether in a public or private location.[2] So while a lingering shot focussed solely on a street mural may be copyright infringement if the artist's (or copyright owner's) permission has not been obtained, the same mural can appear 'incidentally' in the background without problem. An Australian court considered an advertisement that included the competitors' logos in the television ad; the court identified that the incidental use was at the core of the purpose of the ad as an explicit comparison was being made about competing products. Therefore it was difficult to argue that the use of the competitors' logos was incidental to the content of the ad.

This incidental filming exception involves questions as to the degree to which any use is merely incidental (and permissible) or whether the prominence given to the artistic work takes it outside the incidental filming exception.

However, it is important to note that there is no incidental recording of music provision in relation to the incidental filming of musical or theatrical performances. Shooting footage which has a radio playing music in the background or a street marching band or busker does NOT come within the incidental filming exception.

The incidental filming exception does not extend to still photography. So, a street mural in the background of a photograph may be a problem although the same mural in the background of a film scene would not.

Performer's rights

The Copyright Act gives limited rights to people engaged in live performance (for instance, anyone performing theatre, dance, music, circus or variety acts and mime). Filming a live performance – even if it is being staged in a public place for the public to enjoy – may infringe those rights. This is separate to any infringement of the particular musical or theatrical work being performed. Sport is not considered a "performance" under the Copyright Act. Similarly, people hanging around a park or in the street are not regarded as engaging in 'live performance'.

For further information, see the Arts Law information sheet, Performers' rights.

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Moral rights

In addition to considering the copyright in any works appearing in the film, the film maker must also consider the moral rights of the creators of such works. Moral rights include the right to be attributed; the right not to be falsely attributed; and the right of integrity (that is, not to have work subject to derogatory treatment, including unauthorised alteration or distortion).

So, in the context of filming in public spaces, the creators of works or subject matter appearing in the film – such as a sculpture, street mural or graffiti in a public park, or music recorded in the background – have moral rights to be attributed whenever their work is reproduced. This is the case unless it is "reasonable" not to do so or they have given their consent (in writing) to their work appearing in the film in a way that does not respect their moral rights. Some performers also have moral rights – the juggler in a fairground scene is an example of a performer who may have a moral right to be attributed if his performance is caught on film. The moral right of integrity prevents a reproduction which is prejudicial to the reputation of the artist or a derogatory treatment of the work. For example, a film about a street gang showing the gang members vandalising a public sculpture might amount to an infringement of the sculptor's moral right of integrity – by both the vandals and the film maker!

It is a defence to an infringement of the moral right of attribution or integrity that the failure to attribute or the alleged derogatory treatment was "reasonable". There is no defence of reasonableness for an infringement of the moral right against false attribution so a film maker who makes reasonable enquiries as to the identity of the artist of a street mural and mistakenly attributes the work to the wrong artist will not be able to rely on reasonableness as a defence to a claim by that artist for false attribution. Factors that are taken into account in determining reasonableness in relation to an action that would otherwise have infringed a creator's moral rights include:

- the nature of the work;
- the purpose, manner and context of use;
- industry practice;
- the context of creation (whether it was created in the course of employment or under a contract of service);
- in the case of more than one creator, their views about the failure to attribute or derogatory treatment.

When filming in public the consequences of infringing the moral rights of another creator may be significant. A successful claim for infringement of moral rights may result in a court granting:

- financial compensation to the creator (in other words, the film maker may be liable to compensate the creator of the underlying work);
- an injunction (an order to prevent or stop) a particular activity, which could stall the progress of the film;
- a declaration about the creator's moral rights having been infringed, which may potentially damage the reputation of the film maker;
- an order that the film maker apologise publicly for the infringement; or
- an order for the removal or reversal of false attribution or derogatory treatment of the work.

In addition, the film maker may find that this infringement causes a breach of the contractual warranties given to investors or distributors who will seek to recover any loss they sustain from the film maker by relying on indemnities given to them in the investment or distribution contract. The film maker may simply be unable to secure distribution or enter the film in competitions because he or she cannot provide the usual warranties sought by such entities.

(See the Arts Law information sheet, Moral rights; and see the Australian Copyright Council's information sheet, Moral rights.)

Remote piloted aircraft: filming using a drone mounted camera

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The Civil Aviation Safety Authority (CASA) regulates the use of remote piloted aircraft (RPA), which are also known as drones, unmanned aerial vehicle (UAV) or an unmanned aircraft system (UAS).[3] CASA publishes the *Flying with control* brochure, which summaries the current regulations over the operation of a RPA in controlled airspace (including near any airport or aerodrome) and over urban areas where the safety of people and property must be considered.

The use of a RPA to fly over private property while filming can be argued to be an actionable nuisance if it interferes with someone's right to use and enjoy their land. For further information, see the section on 'Photographing people on private property' in the Arts Law information sheet, *Street photographer's rights*. The evolution of the law related to an invasion of privacy are discussed in the Arts Law information sheet, *Privacy and the private sector*.

Indigenous Cultural Intellectual Property (ICIP)

Where filming in public involves capturing content that incorporates, is sourced from or refers to Indigenous stories, music, language, knowledge or works, ICIP should be considered. The term "ICIP" refers to Indigenous people's interests in their cultural heritage, including traditional songs, music, dances, stories, ceremonies, symbols, languages and designs. ICIP is a communal rather than an individual interest. The film maker may not be prevented by copyright or other laws from filming ICIP content in public; however they could be breaching the traditional rules and laws of the Indigenous custodians of that content. While ICIP is not recognised under Australian law, Arts Law believes it is important that it is acknowledged and respected. It is best practice to be respectful at all times in any dealings with ICIP.

Examples of material that may fall under ICIP include footage of rock art, sacred sites, traditional dances and ceremonies, and stories or depictions or images of people who have recently passed away. Being respectful of ICIP and its custodians involves being consultative and gaining the free, prior and informed consent of the appropriate traditional owners of any Indigenous cultural content or heritage. The traditional owners should be consulted on how the community should be attributed, and given the opportunity to approve the way in which the material is used. In some circumstances it may be appropriate to use a notice of custodial interest, which could read as follows:

Notice of Custodial Interest of the {NAME} Community

> "The Aboriginal dance performances in this film embody traditional ritual knowledge of the {NAME} community. It was created with the consent of the custodians of the community. Dealing with any part of this film for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the {NAME} community, and may also infringe the *Copyright Act 1968* (Cth)."

Protocols have been developed which provide guidelines for appropriate conduct for non-Indigenous filmmakers when interacting with Indigenous people and their communities. Protocols are made in good faith and encourage mutual respect. They are not legally binding (unless they are inserted into a contract making the parties bound by the protocols). Arts Law strongly urges film makers and all others dealing with works which embody ICIP to act consistently with the protocols described below.

The Australia Council for the Arts has produced a set of protocols including: *Media arts: protocols for producing Indigenous Australian media arts; Music: protocols for producing Indigenous Australian music,* and *Visual Arts: Protocols for Producing Indigenous Australian Visual Arts* that are available for free. These protocols can be ordered through, or downloaded from, the Australia Council's website or obtained from the Aboriginal and Torres Strait Islander Arts Board, Australia Council, Telephone: (02) 9215 9065, free-call 1800 226 912 or email atsia@ozco.gov.au.

Screen Australia, the former Australian Film Commission, has developed *Pathways and Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Content* which is currently available on Screen Australia's website. Additional protocols include Arts Tasmania's *Respecting Cultures: Working with the Tasmanian Aboriginal Community and Aboriginal Artists* designed as a companion text to the Australia Council's protocols providing a specific Tasmanian perspective. It can

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be downloaded from the Arts Tasmania website or telephone: (03) 6233 7308, free-call: 1800 247 308 or email: arts.tasmania@arts.tas.gov.au.

Filming logos

Copyright in logos and trademarks

As mentioned above, logos and trade marks may be protected by copyright as 'artistic works'. Usually logos and trade marks that appear on clothing or billboards in street scenes or other public places will be incidental or part of the background (such as a scene shot in Times Square in New York where there are trademarks on signage everywhere). However, if the use of the trade mark is not incidental, it may be that permission from the relevant copyright owner is needed before that logo or trade mark may be filmed. The moral rights of any creator of an artistic work in a logo or trade mark might also come into play.

The Trade Marks Act

Under the Trade Marks Act, a trade mark owner is given exclusive rights to use a registered trade mark (and to authorise the use of the trade mark) in relation to the goods and/or services for which the mark is registered. Trade marks appearing on signage and billboards in the background of footage taken in public places would not usually constitute use of those marks to indicate the source of particular goods and services in the course of business and would not generally be capable of infringing a registered mark. The trade mark, as it appears in the film, is not being used as a "badge of origin". Unless the film maker is using the trade mark to indicate the source of particular goods or services (for example in footage shot as part of an advertising campaign for those goods or services), there are unlikely to be problems with trade mark infringement. However, as discussed below under the heading **incidental filming of artistic works**, you should consider whether a trade mark, in the form of a logo, is an "artistic work'

Passing off and misleading and deceptive conduct

Passing off protects business reputation from wrongful appropriation or false association. In the context of filming in public, filming a branded product or a logo or trademark and placing it in a context which is misleading may amount to passing off or a breach of the Australian Consumer Law. Whether these laws concerning the goodwill or reputation of a business and protecting consumers will apply to someone filming in public will depend on the way in which footage of a relevant product, business or brand is ultimately used. In the context of film, a brand owner may claim that the inclusion of their product or service, advertisement for it, or a logo (perhaps included in footage featuring an outdoors café, a large billboard on a busy street, or attached to the used product discarded in a rubbish bin), suggests an association with or endorsement by the brand.

For example a scene in which diners stagger onto the street from a restaurant with a well-known name and logo (rather than fictional one) and get food poisoning might be considered misleading if viewers might actually think that they could get food poisoning by eating there. The restaurateurs may seek damages for the losses sustained by their business as a result.

Short of avoiding any filming of well-known products or businesses that might give rise to these sorts of issues, it is a good idea to include a disclaimer at the beginning of the film (or work including the footage). Such a disclaimer should state that the film is not endorsed by or associated with any product, service or person featured in the film.

The Tobacco Advertising Prohibition Act

A film maker may not use images of tobacco in their work unless it is incidental or accidental (and they don't receive any benefit from it, direct or indirect); or, if the purpose of using such footage is to dissuade people from smoking. This is because

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the Tobacco Advertising Prohibition Act 1992 (Cth) prohibits tobacco advertising in the context of “a moving picture”. A tobacco advertisement in the context of film is something that:

- gives publicity to, promotes or intends to promote
- smoking, the purchase of tobacco products, a particular brand of tobacco product, a specific tobacco manufacturer or any words or images closely associated with a tobacco product.

Fines of up to $13,200 may be imposed on a film maker if a tobacco advertisement is incorporated in the final, exhibited or broadcast work. A tobacco advertisement is broadly defined in the Tobacco Advertising Prohibition Act, although the Act permits smoking on screen where it is “an accidental or an incidental accompaniment” to other matter that is broadcast. Therefore the Act does not prohibit having actors, in character, smoking. However a care need to be taken in how smoking is represented in films (whether dramatic or documentary) or news and current affairs programs (such as interviews of people who are smoking) as it is possible to any prominence given to a brand of cigarettes could be interpreted as a tobacco advertisement rather than a segment of a film or program where the smoking is merely an “an accidental or an incidental accompaniment”.

In other words, a film maker must ensure that tobacco products, including those captured in footage filmed in public, are not the focus of the film.

Filming people in public places

There are no publicity or personality rights in Australia, and there is no general 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**.**

People do not own copyright in their own appearance or image and it is not an infringement of copyright to film or photograph people.

Other countries have legislation that protects ‘personality rights’, or ‘image rights’ and there is growing concern with these issues in Australia, especially in relation to a right of privacy. An Australian filmmaker has ended up in litigation with people interviewed for a documentary film in which they discuss intimate details of their lives. It is therefore best practice to consider the privacy implications of filmmaking. Arts Law recommends that film makers seek a release from all the people appearing their films wherever possible and to avoid misleading the people being filmed as to the use that will be made of the video material.

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 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) is 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.

While there is currently no tort of invasion of privacy in Australia, however 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.

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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.

Breaches of the Australian Consumer Law

Filming a well-known person and placing them in a context which is misleading may give rise to the types of problems discussed above in relation to trade marks. These include passing off or a breach of the Australian Consumer Law. A well-known person, such as a celebrity, captured in public on film, may argue that the way they are depicted is misleading to consumers (for example, because it suggests that they do or do not endorse or support a particular product) or that it harms their reputation.

Apart from avoiding altogether any filming of well-known people or celebrities that might give rise to these sorts of issues, it is a good idea to include a disclaimer at the beginning of the film (or work including the footage). Such a disclaimer should state that the film is not endorsed by or associated with any person featured in the film.

For further information see the Arts Law information sheet, Unauthorised use of your image & Australian Consumer Law and creators

Surveillance, listening devices and confidential information

Filming in public in Australia may give rise to issues under state and territory legislation concerning the use of optical surveillance devices and listening devices. Some statutes address the use of optical surveillance devices such as cameras. However, all states and territories prohibit the use of a listening device to record a private conversation. The sound recording facility of a film or video camera (including on a mobile recording or filming device such as a mobile phone), may be regarded as such a listening device. The legislation also generally restricts publishing or 'showing' unauthorised recordings that were obtained by using a listening device. Though the legislation is slightly different in each state and territory, the best practice for film makers and artists filming in public who record (or want to 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. A summary of the surveillance and listening devices is included in the Arts Law information sheet Filming with a smartphone or hidden camera.

Public nuisance – harassment or stalking

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. Paparazzi and television film crews can be exposed to legal action from the celebrities they follow.

For further information, see the section **Can taking photos be a criminal offence?** in the Arts Law information sheet, Street photographer's rights.

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, however because actors have the benefit of performer's rights you should obtain the written consent of the actors that authorises you to use their performance in your film. 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.

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The best course of action is to obtain a written release from each person appearing in the film. if that is not possible then make a video recording of the person giving their consent.

See the Arts Law information sheet, Film Location Releases. Arts Law has a Model Release that is suitable for use by commercial film makers.

Filming children in public

If filming children, it is advisable that the film maker follows the protocols available on the Australia Council website, Children in art protocols

In the Arts Law information sheet, Children in the creative process, Arts Law has recommended a number of best practice procedures for artists working with children. These practices are not required by law but are useful for the artist and/or their subject/s in ensuring that they develop a professional and trouble-free practice. Best practice recommendations that may be particularly useful, and are adapted here for film makers or artists filming in public, are as follows:

- While it may not be necessary legally for a film maker to seek permission from their subjects, a film maker filming children might seek permission if it would make a child and their guardian feel more comfortable.
- A film maker could use a Model Release to authorise the intended use of a child's image. Both a parent or guardian and the child should be asked to sign. A sample Model Release is available for purchase from Arts Law. An additional clause may be inserted that covers the release of the images on the internet.
- Works containing images of children that will be published online may require the use of digital rights management techniques so that it is more difficult for the images to be copied or manipulated by third parties. For further information see Arts Law's information sheet, Putting your film or photo online

(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.)

Obscenity and classification issues

Obscenity and pornography laws may apply if a film maker records children who are nude or placed in a sexual or threatening context, even if they are recorded in public and with the consent of their parents. State and territory criminal legislation prohibits the use of children for pornographic purposes or the possession and/or distribution of such material. Defences may apply, depending on the jurisdiction, including classification of the material by the Classification Board.

See Arts Law's information sheet, Classification and censorship**Children and court proceedings**

In some situations, the film maker may need to consider the effect of any legislation that protects the identities of children who are involved in court proceedings or under protection. You should identify the restrictions on reporting of Children's Court matters in your state and territory.

You cannot identify the parties or witnesses in any proceedings in the family court under the *Family Law Act 1975* (Cth). The news media and filmmakers can cover Children's Court cases provided the participants are not identified or identifiable. There are state and territory statutes that make it an offence, except in some limited circumstances, to publish any picture, video or written account of proceedings that would lead to the identification of a child or any other person involved in Children's Court cases or any child who is the subject of a Children's Court order. These statutes may include prohibitions on identifying victims and witnesses (whether living or dead), or identifying the particular Children's Court in which the child is appearing. As the identify of a child can be work out from information that describes the child's relationship to other people you must be careful in how you film and report on any matter involving children and court proceedings.

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It is not only in relation to Children's Court matters that you need to work out if there are reporting restrictions. Therefore in covering any matter in any court proceedings you should check whether there are court orders that restrict the publication of the identity of parties or witnesses or any other reporting restrictions. You can be held to be in contempt of any court order even if you were not aware that an order had been made.

Filming in certain locations

Getting the relevant permissions (releases and/or approvals) relating to filming in certain locations should be a key concern for anyone involved in the production of any film shot outside a studio. The consequences of failing to obtain a release or approval to film in a particular place can be severe. Such consequences may include the refusal of film festivals, funding bodies and distributors to support the film rather than to wear the risks associated with lack of permission. There are several sites that require permission and payment of a fee to film there.

See the Arts Law information sheet, Film Location Releases.

Local government powers regarding filming in streets, parks and on beaches

The legal power of a Local Authority to regulate photography in streets, parks and beaches can be derived from the Local Government Act[4] of each state and territory; however the treatment of filming 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 filming in streets and other public places. Where councils do regulate filming in public places under their control it is usually limited to high impact filming – that involving blocking streets, occupying parking for long periods or constructing a set for filming. For example, you need a permit to film in 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 to regulating film and television productions.[5] 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.

Defence Department 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 Defence Minister can declare any area of land or water prohibited if it is necessary for Commonwealth defence. The same applies for filming in a "prohibited area". However s. 7 of the Act limits what is understood to be a "prohibited area". For example, it does not include infrastructure like a wharf or aerodrome or runway for aircraft, unless it has been declared by the Defence Minister to be a "special defence undertaking". Merely possessing a camera while in a "prohibited area" can also result in imprisonment. This Act regulates access to, or overflying, a "prohibited area", it does not prohibit you using a defence installation as the background for filming.

It is also illegal to photograph any defence installation in Australia under s. 82 *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 or engaged in filming, but have camera equipment in your possession.

The website of the Defence Department has information on Film & Television Requests for Defence Assistance for filming on military installations.

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State, Territory and National Parks

The *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) includes provisions restricting the taking and use for commercial purposes of photographs in Commonwealth Reserves, including Kakadu National Park, Australian National Botanic Gardens, Christmas Island National Park, Norfolk Island National Park, Commonwealth Marine Parks and Reserves. The Australian Government – Department of the Environment provides guides lines and the application form for commercial filming in each of National Park.

State and territory legislation may also regulate filming in designated state or territory parks and reserves. You should look at the website for the relevant Department of the Environment or Parks & Wildlife Department for information on filming in designated state or territory parks and reserves. For example, New South Wales regulates filming in designated parks and reserves under the *Filming Approval Act 2004* (NSW), see the NSW Office of Environment & Heritage – Filming & photography licences.

Obstruction and public order offences

Obstruction and public order offences may become issues for artists or film makers filming in public if filming activity or equipment obstructs or prevents people or vehicles in a public place from exercising “free passage”. In addition to having the powers to arrest someone obstructing a public thoroughfare police may determine that a film maker is obstructing people or traffic or their behaviour constitutes harassment or intimidation. A film maker might obstruct a public thoroughfare by erecting a tripod on a busy street and then refusing to move it when asked, for example; or, by holding up a mobile phone camera in the middle of traffic, for instance.

For further information, see Arts Law’s information sheet, Street photographer’s rights.

Filming crime in a public place

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 captured on film. Mobile phone cameras were apparently a main mechanism for this kind of film making. The French law contained an exemption for professional journalists.

There is no comparable law in Australia at this time. Australian filmmakers who film in public in other countries, however (including amateurs using mobile devices to film), need to take care to adhere to the specific laws of the country they are operating in.

Nevertheless, filming criminal activity is not risk free in Australia. Complicity (or being an accessory to a crime), incitement (or urging someone to do something illegal), and contempt of court (or prejudicing a trial or breaching a court order), are the major issues that artists who film in public ought to be aware of.

Complicity

The criminal law concerning complicity or accessory is complex. For the purposes of highlighting the issues that might arise when filming in public, an accessory generally must have knowledge that a crime is being, or will be, committed. A film maker or artist with such knowledge may become an accessory to a crime by helping or encouraging the perpetrator in some way (for instance, with the objective of capturing a dramatic event on film and perhaps involving financial or physical assistance or concealment). For example s. 316 of the *Crimes Act 1900* (NSW) creates an offence of concealing a serious indictable offence. That is, if person who knows or believes that a serious offence has been committed and that he or she has information which might be of material assistance in securing the arrest of the offender, or the prosecution or conviction of the offender, fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority.

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Incitement

Again, while complex, the significance of incitement for filming in public involves seeking or encouraging the commission of a crime. Suggesting a specific location, agreeing upon a time or driving someone to a location so that they may commit a crime might fall under this offence. Similarly, it is possible that a finished work including a film of the criminal activity may be regarded as inciting, promoting or instructing an audience about a crime.

Contempt of court

Filming activity that may be criminal may constitute criminal or civil contempt of court if the film is published or broadcast before the subject is convicted. If someone is charged with a crime and a film maker broadcasts footage of that person's apparently criminal activity filmed in public before their full hearing (or for instance, other members of the public discussing or reacting to it), that footage could contribute to a jury being swayed. The significance of this is that it might amount to an interference with the due administration of justice.

Similarly a film maker or artist may be in contempt of court if they refuse to provide information about the filming in defiance of a court order. Likewise they may be in trouble if they destroy or alter footage to protect a source or participant. Contempt can be either a civil or, if 'wilful or contumelious', a criminal offence.

Filming crime scenes

In New South Wales, and in most other 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.

Classification

People filming in public who wish to show their work should be aware that classification of films is generally compulsory once there is any kind of public exhibition or dissemination.

A film (including moving images and video artwork), computer game or publication will be refused classification if it:

- describes or depicts sex, drug misuse, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that it offends the standards of morality, decency and propriety generally accepted by reasonable adults;
- describes or depicts a minor who is, or appears to be under 16 in a way likely to offend a reasonable adult; or
- promotes, incites or instructs in matters of crime or violence.

Further, a film, computer game or publication will be refused classification if it advocates performing an act of terrorism. A film maker filming in public may incidentally or unwittingly record material that falls into this category (in addition to doing so determinedly). If that footage may not be reasonably regarded as forming part of a public discussion or as entertainment and it is to be exhibited or circulated publicly then it may be refused classification.

For further information, see the Arts Law's information sheet, Classification and censorship.

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Defamation

Defamation is a communication from one person to another about an identifiable subject (a third person) which lowers the reputation of that subject. It applies to living individuals and organisations employing fewer than 10 people. If individuals within a group or class can be identified, it is possible that they may also bring an action for defamation.

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 video may result from the how the film is edited; what is said in any voice over; or the subject matter and how viewers could interpret the audiovisual information.

If the film suggests that a person may have engaged in criminal activity, the film may defame that person. Tasmania's longest serving prisoner, convicted child murderer James Ryan O'Neill, obtained an interlocutory injunction from the Supreme Court of Tasmania against the maker of a documentary that suggested that he was responsible for additional murders. That Court found that his reputation had been damaged by this suggestion. Although ultimately the High Court overturned that decision and decided that the ABC *could* broadcast the documentary, comments made by each of the Judges (who split 4:2), suggest that this outcome was very much related to the particular facts of this case. Had the complainant not been a convicted murderer or had the crimes been less heinous, such as shoplifting or theft, the High Court may have decided the case differently.

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)

[1] Section 65 of the Copyright Act 1968 (Cth) deals with filming and photography of sculptures and works of artistic craftsmanship in public places; Section 66 deals with buildings and models of buildings.

[2] Section 67 deals with the incidental filming or television broadcast of artistic works. Section 68 deals with the publication of a painting, drawing, engraving, photograph or cinematograph film that is with any of the exeption provided by ss. 65, 66, & 67.

[3] Civil Aviation Safety Regulation [CASR] Part 101 is the current regulation for the operation of a RPA/UVA/UAS. CASA is reviewing CASR Part 101, and will modernise it into CASR Part 102. See the website of Civil Aviation Safety Authority – Flight operations parts.

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

[5] 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.

Disclaimer

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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