

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

SHANNON THOMAS
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: January 8, 2004
TO: Councilmember Donna Frye
FROM: City Attorney
SUBJECT: Web Cameras

INTRODUCTION

You have asked our office to conduct a legal analysis of potential liability to the City of San Diego resulting from the placement of web cameras [webcams] in the beach area. You also asked that we present any options available to the City to control the placement of web cameras at the beaches.

QUESTIONS PRESENTED

1. Does the City have any liability if a person visiting a public beach is photographed without his or her knowledge or consent and the photograph is then placed on a website?
2. What are the legal options available to the City in response to the privacy concerns raised by filming by a webcam at Mission Beach?

SHORT ANSWERS

1. No, the City does not have any liability for the actions of a private party who films a public beach from a private location, and posts those photographs on a website.
2. None of the California Penal Code sections addressing the right to privacy are applicable to these facts. Although in theory the City could adopt a local ordinance penalizing the invasion of the right to privacy, it is not likely that on these facts there would be a legally

supportable claim that the right to privacy had been invaded. Private lawsuits are also available to individuals who believe their rights to privacy have been violated.

BACKGROUND

A recent letter to the *Union-Tribune* complained of the placement of webcams at Mission Beach. The specific webcam mentioned permits a visitor to the applicable website to pan, tilt, and zoom in and out at images within range of the webcam. The October 23, 2003, letter to the editor of the San Diego *Union-Tribune* provides, in part:

You state that San Diego has so far been spared the "deplorable invasion of privacy" resulting from beach cameras. I wish that were true. There are private cameras focused on our beaches right now, some which may be controlled by viewers over the Internet. For example, at www.dotworkz.com/demos/vci_missionbeach.asp anyone can freely turn, focus, and zoom a camera that spies on Mission Beach. A lot of the time the camera is pointed at women sunning themselves or walking on the boardwalk.

I went to where one of these cameras is located. There are no signs warning people that they are being broadcast live over the Internet, and no one I spoke with was aware of the camera until I pointed it out.

People in public places are on display, but they should be spared the close scrutiny of zoom lenses and the indignities of being used by perverts online.

It is important to note that the cameras described in the letter appear to be privately owned and on private property.

ANALYSIS

I. Civil Liability of the City

The above facts do not indicate that any actions or inactions by the City under these circumstances would create liability. The cameras are privately owned and on private property. The City is under no duty in these circumstances to take any action. The City may consider adoption of regulations in this matter; however, individuals may also have private remedies. The City enjoys broad immunity from liability for damages for acts or omissions. *See* Cal. Gov't Code §§ 814-823. Government Code section 818.2 specifically exempts a public entity from liability for an injury caused by the adoption or failure to adopt an enactment of law or by failing to enforce any law.

II. Personal Privacy in Public Places

The central inquiry into an alleged violation of a right to privacy is whether there was a reasonable expectation of privacy. Generally, where a person voluntarily exposes herself to public view in a public place, she has waived her right to privacy. *See Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 230 (1953). In *Gill*, the plaintiffs sued the publisher for printing a photograph taken of them at a market. The plaintiffs were seated at the counter and there were at least five other people visible in the photograph, near the plaintiffs. The court held that there was no violation of their right to privacy, and reasoned that “the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence.” *Id.*

Similarly, the publication of video footage over the Internet from the beach does not disclose anything which was previously private, but only extends knowledge of the incident to a larger public than is at the beach. However, the court did state that a right to privacy may exist when a picture has been published that is shocking, revolting or indecent in its portrayal of the human body, as those photographs go beyond the bounds of decency and are offensive to a person of ordinary sensibilities. *Id.* at 231.

Hence, a tort claim for invasion of privacy was upheld when a photographer snapped a photograph of a woman’s panties that had been exposed when air jets blew up her skirt. *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1962). The *Graham* court announced the following rule:

One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status. Where the status he expects to occupy is changed without his volition to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place.

Graham, 162 So. 2d at 478.

This rule is largely reproduced as a comment to the Restatement (Second) of Torts § 652B cmt. c (1977):

[T]here [is no] liability for observing [plaintiff] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.

Section 652B describes one of the privacy torts, intrusion upon seclusion, as follows :

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

III. Available Penal Code and Civil Remedies

There are several California Penal Code sections that address the invasion of privacy. There are also civil causes of action available to address allegations of an invasion of privacy.

A. The California Penal Code.

1. Penal Code section 632 addresses eavesdropping or recording a confidential communication. "Confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

Although there is controversy on the point, this section applies to videotaping, at least in the Fourth Appellate District. *People v. Gibbons*, 215 Cal. App. 3d 1204, 1209 (1989) (section applies to nonconsensual videotaping of consensual sexual encounters, considered "confidential communications," in a private residence). However, this section would not be applicable to the videotaping of a person sunbathing on a public beach, because merely being on a public beach would be neither confidential, nor a communication.

2. California Penal Code section 647(k)(1) prohibits looking through a hole or opening by means of any instrumentality, including a periscope, telescope, binoculars, camera, motion picture camera, or camcorder, into the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. This section only applies when the defendant peers into the interior of areas in which the occupant has a reasonable expectation of privacy. California Senate Floor Analysis, AB 2051, page 3 (1996). This section would not be applicable to capturing images on a public beach, because it does not involve peering into the interior of an area.

3. California Penal Code section 647(k)(2) prohibits using a concealed camcorder, motion picture camera, or camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. This section is aimed at two types of image captures: (1) so-called "upskirt" images; and (2) infrared imaging, which can permit a view beneath clothing in normal light. California Assembly Floor Analysis, AB 182, page 2 (1999).

The webcam described by the letter in the *Union-Tribune* is not concealed. Instead, it appears to be attached to the exterior of a structure on Mission Beach. Further, the webcam does not appear to be aimed at capturing images either "under or through the clothing being worn by" another person. Instead, it is aimed at capturing images of people freely available to the public. Further, it is questionable whether any images captured by the webcam identified, of a person and his or her outer clothing on display on a public beach, could be considered to have been captured under circumstances in which the other person has a reasonable expectation of privacy. Attempts to zoom in caused the picture to become fuzzy and lose detail. In fact, less detail was visible than if the observer were actually at the beach in person, and certainly less than would be visible to an observer at the beach with a pair of binoculars or a camera with a zoom lens.

Finally, it is conceivable that the City could adopt its own ordinance to punish conduct that the Council determined violated individual privacy. Cal. Const. art. XI, §§ 5 and 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.") Nothing in the legislative history of the Penal Code sections cited above, or in the applicable judicial decisions rendered, indicate an intent on behalf of the Legislature to preempt local regulation in the area of privacy protection. *See Gates v. Municipal Court*, 135 Cal. App. 3d 309, 317 (1982), and 78 Op. Cal. Att'y Gen. 22 (1995). Further, the state's current regulation of the area does not provide a comprehensive scheme indicating an intent to preempt local regulation. Indeed, the failure of the Legislature to address this exact issue suggests the lack of such a comprehensive scheme, and invites complementary local regulation. The problem would remain of identifying when an invasion has occurred into a reasonable expectation of privacy, given the public nature of the beach.

B. Private Civil Remedies.

1. California Penal Code section 637.2 permits anyone injured by a violation of, among other things, California Penal Code section 632, to bring a civil claim for damages for the greater of \$5,000 or treble actual damages. Actual damages are not required.

2. A common law tort claim of "Invasion of Privacy- Intrusion upon Seclusion" may be brought. This privacy tort is described as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. Restatement (Second) of Torts § 652B.

While generally, there is no liability for observing a person, or even taking his photograph, while he is in public, because he is not then in seclusion, and his appearance is public and open to the public eye, "[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." Restatement (Second) of Torts § 652B, cmt c.

It is questionable whether images of an individual, who has exposed herself to the public's gaze, captured by a camera, could be an intrusion into her privacy, at least absent a change in status, such as where a woman's undergarments are accidentally exposed by air jets blowing up her skirt (*e.g.*, *Daily Times Democrat v. Graham*, 162 So. 2d 474).

3. California Civil Code 1708.8(b) creates liability for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

This anti-paparazzi¹ statute is aimed at audio or video recordings captured "under circumstances in which the plaintiff had a reasonable expectation of privacy." As described above, it is questionable whether any images captured by the webcam identified, of a person and her outer clothing on display on a public beach, could be considered to have been captured "under circumstances in which the other person has a reasonable expectation of privacy." See *Gill*, 40 Cal. 2d at 230, and *Aisenon v. American Broadcasting Co.*, 220 Cal. App. 3d 146, 162-163 (1990).

¹See California Senate Floor Analysis, SB 262 (1998).

CONCLUSION

The City of San Diego does not have any liability for the actions of a private person who photographs from a private location and posts those photographs on the Internet. The City exercises no control over either the person or the location of the filming.

There are civil remedies available to an individual who believes he or she has suffered an invasion of privacy. None of the California Penal Code provisions protecting against an invasion of privacy were applicable to the facts presented.

A local ordinance could be drafted to regulate the use of web cameras. However, whether an action proceeds as a civil lawsuit or a prosecution of a municipal code violation, there must have been a reasonable expectation of privacy. An individual on a public beach would not usually be able to establish this fact. Furthermore, based on the web camera footage available on the web site provided by the *Union-Tribune* writer, there was nothing observed that would be characterized as an invasion of privacy, *i.e.*, a “shocking, revolting or indecent portrayal of the human body.” Therefore, it is unlikely that the footage on the web site would be found to be an invasion of privacy, given the present technology and the location of the filming.

CASEY GWINN, City Attorney

By

Shannon M. Thomas
Deputy City Attorney

SMT:cdk
ML-2004-1