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INTELLECTUAL PROPERTY LAW

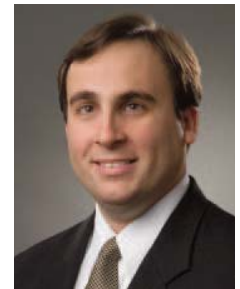
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Google's Street View: Is personal privacy at risk?

By Robert J. Rose & Marc Karish,
Sheldon Mak Rose & Anderson PC



Robert J. Rose



Marc Karish

A woman is looking at a busy street and spots her brother-in-law. She looks at the shops and businesses nearby and notes that he seems to be heading toward a seedy massage parlor. Unfortunately, she is only viewing a static photo of the street scene on the Internet, and cannot determine when the photo was taken, or whether her brother-in-law actually entered the massage parlor. This story may or may not have a happy ending, but, regardless, it is one demonstration of the privacy concerns raised by Google Inc.'s new Street View mapping product. Depending upon one's point of view, current privacy law may not provide adequate balancing of the competing policy interests in the Internet age.

Street View allows you to travel virtually down the streets of selected cities, including San Francisco, New York, Las Vegas, Miami and Denver, and look in every direction as if one were in the middle of the scene. Street View is extremely helpful in viewing, for example, the appearance of a destination to which someone is traveling, the buildings and businesses near a new house someone is considering purchasing or historic sites of interest. Street View, however, has also become a tool for voyeurs and the nosy to see more of other people's lives.

The innovative technology behind Street View is owned by Immersive Media Corp., and uses a patented 11-lens video camera mounted on a moving vehicle. As the vehicle drives down a public street, the camera takes simultaneous photographs in several different directions and indexes the photographs to location using global positioning system data. More than 40,000 miles of geo-referenced spherical video are now in the Immersive database.

Unfortunately, those cameras often take photographs of a lot more than just buildings, including people and personal property. Sometimes, people have no idea they are being

photographed or that their images may be accessible by millions of Internet users. The lack of context can create false or misleading impressions and the belongings visible in the photographs can reveal personal information about people that they wish to keep private.

Although Google's Street View is not the first product that offers photographs of public places, it is the extensive and sometime titillating visual detail it offers that is hitting a nerve. See, e.g., Miguel Helft, "Google Zooms In Too Close for Some," N.Y. Times, June 1, 2007, at C1. There is every reason to expect that the scope of data being recorded will expand, as the Immersive camera system weighs only 22 pounds and can be carried on a backpack. Thus far, the database has been captured at a maximum resolution somewhat analogous to the cellphone camera range, but of course that could improve in the future.

It is possible to remove one's photo from Street View. The subject has to know about the photo, however, and that knowledge is likely to come from someone else who has already seen it. The removal process requires an individual to click on the link to report an inappropriate image. If Google agrees that there is a concern, it will remove the image. Eric Benderoff, "Google feature takes a closer look at Chicago," Chicago Trib., Oct. 9, 2007, at Bus. 1.

Google supporters argue that the photos were taken on public streets and that there was no reasonable expectation of privacy as to anything in the photos. As the numerous articles and blog postings reveal, however, something does not feel right. In a world where traffic cameras automatically photograph motorists, and an estimated 2,400 cameras reside in New York's Times Square, Street View still has an unsavory quality about it.

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On the other hand, street photography, at least when accomplished by individual photographers such as Garry Winogrand, Henri Cartier-Bresson, W. Eugene Smith, Paul Strand, Roman Vishniac, and others, is indisputably expressive, communicative and informative. The classic image of the lone photographer using a Leica rangefinder camera to chronicle the human condition has become an iconic figure. Some commentators argue that photography should be accorded First Amendment protection, and that any regulation of street photography should be given heightened judicial scrutiny. See, e.g., Note, "Privacy, Photography, and the Press," 111 Harv. L. Rev. 1086 (1998). Expressive intent does appear absent, however, in Street View images.

The four torts of privacy

In 1890, Samuel Warren and Louis Brandeis published their now-famous Harvard Law Review article on privacy. Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890). Warren and Brandeis argued that the right of privacy had been established in the common law in response to "political, social, and economic changes" including the increasing zeal of newspapers and photographers. Privacy law has evolved since then into a quartet of torts, recognized by the Restatement (Second) of Torts under the umbrella "Invasion of Privacy." These consist of unreasonable intrusion upon the seclusion of another (intrusion); appropriation of an individual's name or likeness (appropriation); unreasonable publicity of private facts (embarrassing disclosure); and publicity that places a plaintiff in a "false light" in the public eye (false light). Restatement (Second) of Torts §§ 652A-652E (1977). Adoption of these four torts of privacy varies state by state, while California is the only state that also guarantees a right of privacy in its constitution. Cal. Const. art. 1, § 1.

The Restatement standard for intrusion upon seclusion requires that the intrusion be "highly offensive to a reasonable person." Section 652B. Presence in public or visibility from a public place will typically defeat a claim for intrusion: "Nor is there liability for observing him 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." *Id.*, Comment c; *Jackson v. Playboy Enterprises, Inc.*, 574 F. Supp. 10, 13 (D. Ohio 1983) (no intrusion for photograph of boys with policewoman which was published in Playboy magazine along with other

photographs of the policewoman, because the boys were on a city sidewalk in plain view of the public eye); *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964) ("One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status.") As a general statement, then, Street View would appear to entail no intrusion.

Courts are cognizant of the type of camera being used and, using a "Peeping Tom" analysis, have found intrusion when a telephoto lens has been used. *Souder v. Pendleton Detectives*, 88 So.2d 716 (La. App. 1956) (private detective looked into the windows of upstairs bedroom through a telescope and took intimate pictures with a telescopic lens). Clearly, whether Street View allows zooming, and by how much, is a relevant question.

On the other hand, even in a public place there may be some matters that are not intentionally exhibited to the public gaze, and as to such matters there may be intrusion. For example, a subway vent might blow a woman's skirt over her head, revealing her underwear. A Street View photograph of her in that position may be an intrusion. *Daily Times Democrat*, 162 So. 2d at 478 ("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."). On the other hand, courts still persist in entertaining arguments that a woman assumes that risk by wearing a skirt. See, *Kristin M. Beasley*, "Up-Skirt And Other Dirt: Why Cell Phone Cameras And Other Technologies Require A New Approach To Protecting Personal Privacy In Public Places", 31 So. Ill. U. L.J., 69, 78 (2006).

The Restatement standard for appropriation requires a taking "to his own use or benefit the name or likeness of another." Restatement (Second) Torts § 652C. Despite the possibility that a celebrity photograph may appear on Street View, few likely scenarios come to mind where this tort could be successfully asserted against Google.

The Restatement standard for embarrassing disclosure requires that the matter publicized be of a kind that "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement

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(Second) Torts § 652D. Courts have held, however, that photographs of people taken in public places do not concern the private lives of the people. E.g., *Gill v. Hearst Publishing Co.*, 253 P.2d 441 (Cal. 1953). Moreover, this tort has been limited to the point of being essentially worthless. The *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2613 (1989) ("where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order").

The Restatement standard for false light requires that "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement (Second) Torts §652E. Not all states, however, recognize this tort. See e.g., *Denver Publishing Co. v. Bueno*, 54 P.3d 893, 906 (Colo. 2002) (false-light invasion of privacy duplicative of defamation and could have a chilling effect). Because of the automated nature of capture and the sheer volume of photographs on Street View, however, it may be difficult to argue that Google had knowledge of any given situation, or that they acted in reckless disregard as to the falsity of particular photographs. Of course, Google's response to a request to remove the offending image would be relevant to any subsequent charge of false light.

The obvious shortcomings in each of the four torts of privacy have led some commentators to argue for an expansion of the right of privacy to include a right of "public privacy." This would entail expanding the intrusion tort to highly offensive public intrusions of a serious nature, regardless whether there was a trespass or where the intrusion occurred, and would take into account wide dissemination, such as over the Internet. Andrew Jay McClurg, "Bringing Privacy Law Out Of The Closet: A Tort Theory Of Liability For Intrusions In Public Places," 73 N.C. L. Rev. 989 (1995).

There may be technological solutions on the horizon. The Laboratory for International Data Privacy (also known as the Data Privacy Lab) at Carnegie Mellon University has been working on privacy technologies that allow collection of data while protecting privacy through, in the case of photographic images, a variety of image processing filters. It is now possible to de-identify facial images, so that facial characteristics remain in the photograph, but individuals cannot be reliably identified either by facial recognition software or by visual inspection. The Data Privacy Lab algorithm, called k-Same, creates new realistic faces for individuals in a photograph, while keeping the overall image the same. This is not your typical partial black bar mask or pixilation. Those techniques, or even covering one's face with a hand, are surprisingly ineffective against sophisticated face recognition software. Elaine M. Newton, Latanya Sweeney, & Bradley Malin, "Preserving Privacy by De-Identifying Face Images," 17 IEEE Trans. Knowledge and Data Eng'r 232, 240 (2005).

What now of the photo of the woman's brother-in-law in front of the massage parlor? He was on a public street, and no zooming into a private space was needed to identify him. No private facts have been disclosed. Even a new tort of "public intrusion" would be unlikely to help him, since the intrusion just doesn't seem all that serious. Until technology comes to his rescue, he should consider running when he sees that camera festooned car coming.

Robert Rose is managing director of Pasadena, Calif.-based Sheldon Mak Rose & Anderson, an intellectual property firm. He is a registered patent attorney, holds a master's degree in imaging science, and is a senior member of the Institute of Electrical and Electronics Engineers. He can be reached at robert.rose@usip.com.

Marc Karish is a member of the firm, and is also a registered patent attorney. He can be reached at mkarish@usip.com