

Global Regulatory Enforcement Alert

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Some Follow-Up Thoughts on ‘Public Privacy’

Last year we wrote an article about the concept of “public privacy.” While we all expect to lose some privacy when we’re in public places, we asked whether that means we should be subject to being recorded with the possibility that the recording be widely publicized on a site like YouTube. A host of legal questions can arise in such a scenario, whether it be about the legality of the recording itself or about the subsequent publication of the recording. We highlighted two cases in our previous article, both law enforcement cases. In one of those cases, the ACLU brought suit against the City of Newark on behalf of a high school student who was alleging that her First Amendment rights were violated after she was handcuffed and detained for using her smart-phone to record police officers confronting a disorderly man. Shortly after we posted our article, the case was voluntarily dismissed by the ACLU.

Courts continue to deal with this concept of public privacy, particularly in the law enforcement context. In a similar case, a Boston man was arrested for using his cell phone camera to film officers arresting a man in a public park. The charges, which included a violation of Massachusetts’ wiretap statute, were dismissed. The court reasoned that the wiretap charge requires that the recording be done secretly, and the officers admitted the man used his cell phone openly and in plain view. The arrestee later brought suit against the officers, claiming that his arrest constituted a violation of his First Amendment rights. In siding with the arrestee, the District Court said that, “in the First Circuit ... this First Amendment right publicly to record the activities of police officers on public business is established.” The First Circuit affirmed, reasoning that gathering information about government officials serves a “cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.” The court did note that the right to film is not without limitation, though it did not go into what those limitations are.

More recently, an Illinois state judge ruled that the state’s eavesdropping law is unconstitutional based on the fact that the law does not require a culpable mental state or criminal purpose for a person to be convicted. The judge noted that the statute serves an interest in protecting individuals from invasions of privacy, but felt that the means to accomplish this objective were far too broad. The judge cited his concern that the law had the potential to punish “wholly innocent conduct,” such as making a recording at a sporting event, but in doing so recording nearby conversations. One can’t help but wonder whether the judge would feel the recording was “wholly innocent” if it was eventually uploaded onto YouTube with millions of people to hear.

In these cases, we see a clash between two ideals. On one hand, many people feel as if they should be able to record and publicize whoever and whatever they want, so long as the recording is being done in a public space. The First Amendment is deeply instilled into our lives, and the values of shining light on information and having the freedom to publish it at will has long been an edifice of our society. And now, the ability to capture and record any moment in our lives is something that is becoming increasingly expected. This is especially true considering the type of information-rich society we live in with advanced recording technologies literally at our fingertips. But on the other hand, something can feel inherently unfair and invasive about being recorded and widely publicized, even if you are out in public. What is intended for some people to see, may not be intended for the whole world to see. Plus, we live in a society with constant media coverage on privacy issues that only heightens our awareness and sensitivity to these issues. And in the law enforcement context, there is a concern that being recorded and publicized might have a chilling effect on an officer’s willingness to act swiftly in critical situations, thereby endangering public safety.

In a different context, think about Google’s Street View, a product that offers panoramic views of roads, buildings, homes, and even people from the viewpoint of someone on a public road. Upon its initial launch, Google received – and in some countries, continues to receive – scrutiny for Street View’s alleged privacy invasions. (Since the initial wave of scrutiny, Google has decided to blur faces and license plates before publishing images.) People in favor of regulating a product like Street View likely feel that we are indeed entitled to some sense of public privacy. Other people may argue that if we start to regulate products like Street View, then we start to restrict our public space.

Whether “public privacy” exists may be a question with no clear-cut answer. Our traditional values continue to be tested and we’re likely to see, at least on the margins, a change in these values and some slight movement in the law. As we move forward in a technology-engrained society, we continue to think about what we, as lawyers and consumers, should reasonably expect.

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