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Camera Privacy: From Hulk Hogan To Kappa Kappa Gamma

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Todd Bonder

The security camera had been installed in the chapter room of a Dallas sorority house to protect the young women living there. But after several of the sorority sisters danced in various stages of undress during what was supposed to be a private ritual, that camera was turned against them.

Those are the allegations of a $1 million lawsuit filed against Kappa Kappa Gamma by a sorority member at Southern Methodist University.

Before the Jan. 13 ritual, freshmen and seniors alike surrendered their cellphones, assuming this would prevent the possibility of any images of the ritual being captured.


Ryan Lapine

The plaintiff, a Jane Doe, claims that sorority officials at the national level later used the secretly recorded video in a negligent manner that invaded the plaintiff's privacy when they viewed the surreptitious recording and used it to pressure sorority members to identify others who participated. The officials then expelled 18 seniors from the chapter, including the plaintiff, and put 10 on probation.

As Doe's attorney has asserted, "This was their home. You have a reasonable expectation of privacy in your own home that you're not being recorded."

On a broader scale, the lawsuit highlights an unfortunate irony: The omnipresence of cameras, which is supposed to make us more secure, also can be yet another source of the types of unwanted invasions of privacy that we've dealt with hundreds of times as intellectual property litigators for the entertainment industry.

This is a tough area. Unlike Snapchat videos and sex tapes, security cameras are an essential crime-fighting tool.

Take the Delvin Barnes case.

In Virginia in 2013, a teenager arrived at a gas station dazed, injured, naked and reeking of bleach. A violent young man had brutally assaulted her, and a DNA sample quickly revealed his identity — Delvin Barnes.

But Barnes was nowhere to be found. Given his rap sheet, Virginia law enforcement eagerly sought him; his history suggested that he was likely to assault another young woman, and soon.

Hundreds of miles north, a security camera continuously recorded the street in a pocket of Philadelphia struggling to curtail frequent criminal activity. Distrust lingered from the Philadelphia Police Department's decision to helicopter bomb a neighborhood less than a generation earlier, making law enforcement a challenge. A 22-year-old nursing aide named Carlesha Freeland-Gaither walked by the security camera as a Ford Taurus parked. A man jumped out of the Taurus, snatched Freeland-Gaither off the street and dragged her into his car, driving away.

The police in Philadelphia quickly released the security video footage to the public. Detectives investigating the Virginia assault saw the video and showed it to Delvin Barnes' father, who identified the car in the video as his son's. The video footage also revealed another important detail; the emblem of a particular Ford dealership.

It turns out that the dealership installed GPS devices on cars sold to buyers with poor credit without the buyers' knowledge. The video and Barnes' identification of his son allowed the dealership to activate the car's GPS device. Quickly thereafter, police apprehended Barnes in a Jessup, Maryland, parking lot. Freeland-Gaither was found injured but, thankfully, alive.

So here, a security camera and a surreptitiously installed GPS device likely saved the life of a 22-year-old, taking a violent offender off the streets before he could harm more young women. This crime was solved despite a community fissure that rendered assistance with criminal investigations unlikely, at best.

For decades, we've understood the need for security cameras. If Chi Omega at Florida State University had one back in January 1978 when two sorority sisters were violently murdered, Ted Bundy might have been caught sooner.

Privacy-invasion problems can occur because the cameras indiscriminately record everything regardless of whether there's a criminal present. Of course, there may be ways to modify how a security camera is used — perhaps by restricting the viewing of surveillance recordings to solving crimes. But such privacy rules typically are implemented years after the need surfaces.

And such rules are likely to go right out the window when there's a large opportunity for profit. In such cases, such as Hulk Hogan's sex video with his friend's wife, Hogan had to take his case to a Florida jury — saying that he had a reasonable expectation of privacy in Bubba the Love Sponge Clem's home while having intimate moments with Clem's wife. In that case, the jury this month awarded Hogan a nine-figure damages award against Gawker Media LLC for posting that intimate exchange.

Certainly, one can well imagine that Hogan did not want this intimate encounter available on the Internet for anyone to view. Then again, Delvin Barnes most assuredly also was not thrilled that a security camera and unknown GPS device installed in his own car resulted in his name and visage being broadcast on the Internet, as well as in his eventual apprehension.

These extreme examples may be easy to differentiate — one has a reasonable expectation of privacy in one's bedroom but not while committing a violent crime in public. But on second glance, does one have an expectation of privacy while engaging in intimate moments with his best friend's spouse in that best friend's bedroom? And does even a violent criminal have an expectation that a car dealership would not surreptitiously equip his vehicle with a GPS device that can map his every move for no reason other than a bad credit history? And what of the sorority sister, who is essentially living in university housing in the

middle of Dallas, a large city with its own violent crime issues?

The U.S. Supreme Court, in a per curiam decision issued on March 21, 2016, overturned the Supreme Judicial Court of Massachusetts' decision upholding a state ban on stun guns. The Massachusetts court had asked "whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment."[1] No doubt, it is highly unlikely that technology of that sort entered the debate more than two centuries ago. No matter, concluded the Supreme Court, as "the Second Amendment 'extends ... to ... arms ... that were not in existence at the time of the founding.'"[2] Thus, while the Second Amendment is poised to withstand the nuances of technology, the fact remains that privacy laws typically lag far behind innovation.

Hernandez v. Hillsides, Inc., the leading California case on whether undisclosed videotaping may give rise to a privacy violation claim, was decided in August 2009.[3] To put that into context, Snapchat was then not in gestation; it was released more than two years later. And Instagram was more than a year from being released to the public.

In Hernandez, a residential treatment center for traumatized children discovered that in off hours, an unknown individual was frequently accessing and viewing pornographic images on center computers in a particular office. Beyond the ordinary concerns this conduct would raise, the center treated children who had themselves been forced into pornography. Appropriately concerned, the center relocated surveillance equipment from other areas of its facility to secretly film that office in order to discover the culprit's identity.

It did not, however, provide a surveillance-camera advisory to the occupants of that office, who were not suspected of returning to the center late at night to access and view pornography. Unaware of the secret video equipment, those workers continued their practice of changing into gym clothes in the office at the conclusion of their shift. Upon discovering the video equipment, the workers sued the center for violating their privacy.

The Hernandez court held that to sustain such a claim, "first, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person."[4] It noted that "even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, 'California tort law provides no bright line on ['offensiveness']; each case must be taken on its facts.'"[5]

The Hernandez court concluded that the conduct at issue was not "highly offensive to a reasonable person" such that the plaintiffs' claim could survive summary judgment. It noted that the surveillance was limited in time, was necessary to identify the perpetrator, was narrowly focused on the offending computer, and in fact did not record the plaintiffs at all. In reaching that conclusion, it asserted that "no community could function if every intrusion into the realm of private action' gave rise to a viable claim."[6]

And certainly, that is true. But, if "each case must be taken on its facts" — and California is hardly alone in this approach[7] — how do we know when the conduct at issue is "highly offensive to a reasonable person" such that the conduct in question is tortious? It seems obvious that secretly videotaping one's spouse during intimate moments in their bedroom is "highly offensive to a reasonable person."[8] But what about videotaping your best friend — be they Hulk Hogan or your average Joe or Jane — sleeping with your spouse to confirm the existence of an affair? Or selling that tape to a media outlet? Is it highly

offensive to make that tape available to the public, while commenting on the intimate details of the subject's body?

And while the SMU sorority sister's attorney may be correct that the filmed students had a reasonable expectation of privacy in their putative home, is it highly offensive to a reasonable person to install a security camera in a common room to protect the safety of young female students, such that the claim can survive summary judgment, particularly in light of the Chi Omega massacre?

Could the sorority have even expected a secret topless dancing ritual? Should it have?

I suspect not.

And while the Barnes GPS device quite literally saved a woman's life, isn't it highly offensive to track car owners based on their credit history? Don't people with bad credit have a reasonable expectation of privacy in their movements? One would think so, though as the adage goes, bad facts make for bad law.

And what of secretly recorded Snapchat videos? Though the videos are expected to expire and disappear, there are ways to capture and preserve such videos. Do the authors have an expectation of privacy in those videos, simply because they expect them to be ephemeral? Is preserving and posting a self-made pornographic video that the original distributor expects will disappear "highly offensive to a reasonable person" such that the conduct amounts to a tort?

These questions and others have yet to be definitively answered, and the case-by-case approach of the courts, in California and other jurisdictions, coupled with the rapid evolution of technology, provide little guidance on what crosses the line.

Certainly, the security video capturing a violent assault and abduction would not amount to an invasion of privacy and, perhaps with equal certainty, the husband secretly videotaping his wife does amount to such an invasion. Between those two extremes, however, lays a murky middle ground lacking clear guidance. And it is in that muck that defendants like Kappa Kappa Gamma must decide how to navigate claims for privacy violations. Which, given the size of Hulk Hogan's verdict, perhaps leads to another common adage: When in doubt, settle.

—By Todd Bonder and Ryan Lapine, Rosenfeld Meyer & Susman LLP

Todd Bonder is co-managing partner at Rosenfeld Meyer in Beverly Hills, California, and chairs the firm's intellectual property and litigation groups. Ryan Lapine is a partner at the firm.

[1] Caetano v. Massachusetts (2015) 470 Mass. 774, 777.

[2] Caetano v. Massachusetts (2016) 577 U.S. ___ (quoting District of Columbia v. Heller (2008) 554 U. S. 570, 582).

[3] Hernandez v. Hillsides, Inc. (2009) 47 Cal.4th 272.

[4] Hernandez, supra, 47 Cal.4th at p. 286.

[5] Hernandez, supra, 47 Cal.4th at p. 287.

[6] Hernandez, supra, 47 Cal.4th at p. 295.

[7] See, e.g., Nelson v. Salem State College (2006) 446 Mass. 525 (Massachusetts); Miller v. Great Falls Athletic Club, LLC (2010) 357 Mont. 562 (Montana); Doe by Doe v. B.P.S. Guard Services, Inc. (8th Cir. 1991) 945 F.2d 1422, 1423.

[8] In re Marriage of Tigges (Iowa 2008) 758 N.W.2d 824.