Taking Photos on an Australian Fire Ground

Firefighters are called to deal with fires and accidents. To the firefighters these may be challenging but rewarding tasks, to the people involved they may be the worst event in their life. Recording the action may be useful for training, post event reviews or as a record of personal achievement but its broader distribution on social networks may be traumatic for those involved.

Dr Michael Eburn

The issue of using high quality cameras, including those found on mobile phones, raises legal questions of when can they be used and for what purpose. This brief review will outline the law in Australia.

Who owns the photo?
The ownership of artistic work, such as a photograph, is governed by the Copyright Act 1968 (Cth). A valid Commonwealth law qualifies over an inconsistent state law (Commonwealth Constitution s 100). The Copyright Act 1968 (Cth) s 55(1) says that a person who creates an ‘artistic work’, such as a photo, owns it. The relevant exceptions to this rule is that if the photographer produces the work as part of their employment then it is their employer owns the photo (s 55(5)). Further where the material, in this case a photo, is created or published under the ‘direction or control’ of a State or the Commonwealth government, then the intellectual property belongs to that government (s 176-178). The Australian fire services, such as the New South Wales RFS and the South Australian CFS are part of the state government so it is the State that will own the copyright where photos created or published under the services ‘direction or control’.

In Copyright Agency Limited v State of New South Wales [2007] FCAFC 80 Firenrew, J said:
...where the Crown has power to require a work to come into existence, the work is made under the “direction” of the Crown. If the Crown has dominion over the execution of the work then it is made under its “control”. The assumption that underlies each concept (direction and control) is the existence of a relationship between the Crown and the author that authorises the Crown to give the direction or exercise the control as the case may be.

If a fire fighter is asked to take a photo of something for use by the fire service, for example if it is observed that there is something that may help identify the cause of the fire or is useful for training and a senior officer, seeing that a firefighter has a camera says “take a photo of that, we’ll have a look at that in more detail later’, that would be taking the photo at the ‘direction’ of the Crown.

Control is more problematic. Members are subject to the control of the fire service for which they work or volunteer. It is the fire service that provides training and directs how tasks are to be undertaken; but if they stop and take a photo along the way they are taking the photo under the ‘control’ of the fire service? A fire service may well control, that is give instructions on how various fire fighting tasks are to be performed, but they are unlikely to give instructions on how to take photos.

The reality is that fire fighters will want to take photos of the scene, their colleagues, and the fire truck to record their memories and that they were there. To suggest that a fire service owns all the photos on a fire fighter’s smart phone is a step too far. If the service did own the photos they could insist that firefighters hand over the photos which the service could then use however it sees fit (subject to the obligation to acknowledge the photographer – Copyright Act 1968 (Cth) Part IX, Moral Rights). The service may have a legitimate desire to limit the use of the photos does not equate to ownership.

In short unless a photo is taken as part of the photographers employment of it, as a volunteer they have been instructed to take the photo for the purposes of the fire service, then it is the photographer and not the service that owns the photo.

Is there anything you can’t photograph?
In Victoria Park Racing and Recreation Grounds Co Ltd v Taylor [1937] 58 CLR 476, Taylor built a tower on his property so he could see over the fences into the race course run by Victoria Park Racing and Recreation Grounds. A person stood on the tower and reported on the races to Sydney radio station 2JUN. The plaintiff race course owner wanted an order to stop the practice in order to encourage people to come to, and pay to enter, the race course. In the High Court of Australia, Latham CJ said ‘I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff’s fences and to see what goes on in the plaintiff’s land’.

The shorthand from that case is that ‘there is no property in a landscape’, if you can see it you can report it or photograph it (subject to any express law to the contrary). This principle caused one television channel problems when they sought the exclusive rights to broadcast the 1999 Sydney News Year Eve Fireworks (Nine Network Australia Pty Ltd v Australian Broadcasting Corp [1999] FCA 1844). Despite having paid for the ‘rights’ the Nine Network could not stop the ABC recording and broadcasting images of the fireworks that were there for all to see.

It follows that a fire fighter can photograph that which they can see, just like anyone else; but it can become problematic if the only reason that the fire fighter can access the area is because he or she is a fire fighter. Generally there is no right to privacy and no tort of ‘breach of privacy’ but there are state and federal privacy laws. These laws relate to government agencies and how they collect, store and use private data (see Privacy and Personal Information Protection Act 1988 (NSW) and Privacy Act 1988 (Cth)). A fire fighter that takes a photo that reveals personal information, and who is in a position to get that photo only because of their role as a fire fighter, then it may be argued that the information recorded on the photo has been collected by a ‘public sector agency’ in which case the relevant privacy laws would apply. These laws would impact how the information can be used, stored etc.

For more information, go to www.emergencylaw.wordpress.com

References
The article is based on open source that appeared on my blog; Australian Emergency Law (https://emergencylaw.wordpress.com/), in particular: "Taking photos on the fireground in South Australia (January 15, 2015) and "Taking photos whilst on duty with the NSW RFS” amended (October 26, 2013).


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