

"SEXTING" AND THE LAW – 15 MINUTES OF FAME, AND A LIFETIME OF SHAME

by

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Sexting – the electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner – may have serious implications for the persons involved. From a legal perspective, such conduct may, for example, give rise to issues under defamation law, privacy law and copyright law. Even more seriously, where the content portrays a person who is underage, the sender, receiver and any intermediary involved in the communication can be charged with child pornography offences under criminal law.

This paper examines some of the legal implications of sexting.

KEYWORDS

Sexting, non-professional images, sexual manner, defamation law, privacy law, child pornography.

1. INTRODUCTION

Sexting – the electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner – has gained considerable attention lately. Having defined what sexting is, and having discussed a range of consequences of sexting, this paper describes sexting as a process involving up to four steps, each associated with serious legal considerations. For example, sexting may give rise to issues under defamation law, privacy law and copyright law. Even more seriously, where the content portrays a person who is underage, the

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sender, receiver and any intermediary involved in the communication can be charged with child pornography offences under criminal law.

Two case examples are then used to highlight particular concerns. Then finally, a proposal is presented as to how sexting is to be addressed.

2. SEX + TEXTING = SEXTING

Sexting is a relatively broad concept not limited to the stereotype of teenagers sending semi-nude images to each other via mobile phones. A more useful definition takes account of the multiple ways in which the content in question can be collected and distributed. Further, such a definition must also be both gender and age neutral. Elsewhere I have advocated the following definition of sexting:

*Sexting means the electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner.*¹

A study carried out by Girlfriend Magazine showed that 40 % of the 588 Australian teenage girls that participated in the study had been asked to send a nude or semi-nude image of themselves over the Internet.² Studies in other countries give somewhat similar results. In the US, a study involving 653 teenagers found that 20% had engaged in sexting.³ Another US study involving 1,247 youths between 14 and 24 provided the following statistics:⁴

- 10% of the participants indicated that they had sent naked pictures of themselves to someone else;
- 11% of the participants indicated that they had been pressured by someone to send naked pictures or videos of themselves;
- 18% of the participants indicated that someone had sent them pictures or videos portraying the sender in the nude; and

¹ One could arguably also include audio recordings and pure text messages, but the focus here is on images and videos.

² Kids Helpline <<http://www.kidshelp.com.au/teens/get-info/hot-topics/sexting.php>> at 12 January 2010.

³ National Campaign to Prevent Teen and Unplanned Pregnancy, Sex and Tech: Results from a survey of teens and young adults 1 (2008) <http://www.thenationalcampaign.org/SEX-TECH/PDF/SexTech_Summary.pdf> at 12 January 2010.

⁴ MTV-Associated Press Poll, Digital Abuse Survey conducted by Knowledge Networks September 23, 2009 <http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Full.pdf> at 12 January 2010.

- Of those who had received such pictures or videos, 17% indicated that they subsequently shared the pictures or videos with someone else.

As Australian youths share similar access to technology, and are exposed to a similar pop culture, it is possible that the US figures are also indicative of Australian conditions, as well as the conditions in many other countries.

3. CONSEQUENCES OF SEXTING

As noted, sexting is a broad concept and people who object to some forms of sexting may find other forms acceptable. For example, there is a difference between a situation where an adult person engages in sexting with another consenting adult, and a situation where an underage girl is pressured by an adult to send nude images that the adult subsequently makes available on a website.

3.1. CONSEQUENCES FOR SENDERS, RECEIVERS AND INTERMEDIARIES

Whether one views sexting as harmless fun or a serious offence is also partly dependent on one's values – a matter of opinion. This article does not take sides in that debate. However, it is undisputed that sexting can have serious consequences. Indeed, there are several examples of young people being exposed to criminal prosecution, or threats thereof, as a result of engaging in sexting in the United States.⁵ Recently, an 18-year old man in the state of Florida was convicted of child pornography charges and placed on the sex offender registry. The events leading to the conviction were as follows:

He [Philip Alpert; the 18-year old in question] had been battling his 16-year-old girlfriend for some time when she left him an angry voicemail in the middle of the night, and he decided to exact revenge. To that end, he signed into her email account – she previously gave him her password – and accessed nude photographs of the girl that she had stored online – photos she, in fact, had once sent to Alpert. He then hit "select all" and distributed the

⁵ See Robert D. Richards and Clay Calvert, 'When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case' (2009) 32 *Hastings Comm. & Ent. L.J.* 1.

*photographs to some seventy individuals that his girlfriend had set up as part of her personal email list.*⁶ (internal footnotes omitted)

Perhaps with the exception as to how Mr Alpert gained access to the images in question, this scenario is a rather typical example of sexting leading to legal consequences. Interestingly, however, as is discussed below, some cases are more complicated in that they involve young people being both the victim and offender in child pornography prosecution after having sent images or videos of themselves to another person.⁷

Another instance of sexting having serious implications occurred in 2008, when about 20 teenage girls were found to have been involved in sexting at one particular school in Pennsylvania (US). The District Attorney responded by announcing potential charges of possession and distribution of child pornography.⁸ As an alternative, the District Attorney 'offered' the girls the opportunity to take part in an extensive re-education and counselling program.⁹

Some of the girls and their families decided to resist the District Attorney's approach and the matter ended up before a District Court as an application for a motion for a temporary restraining order. The girls and their parents argued that their constitutional rights – the right to free expression, the right to be free from compelled expression,¹⁰ and the right as parents to direct their children's upbringing – were being violated.¹¹ The Court ruled in favour of the girls and their parents:

The court here offers no final conclusion on the merits of plaintiffs' position. Testimony and evidence at the TRO [temporary restraining order] hearing, as well as allegations in the verified complaint, however, indicate a reasonable likelihood that the plaintiffs could prevail on this aspect. While the court emphasizes that its view is preliminary and not intended to absolve the plaintiffs of any potential criminal liability, plaintiffs make a reasonable ar-

⁶ Ibid 7.

⁷ See Mathias H. Heck Jr, 'Sexting and Charging Juveniles - Balancing the Law and Bad Choices' (2009) 43 (1) Prosecutor, Journal of the National District Attorneys Association 28(2), 29.

⁸ Vivian Berger 'Stop Prosecuting Teens for "sexting"', (2009) The National Law Journal <<http://find.galegroup.com/gtx/start.do?prodId=AONE&userGroupName=bond>>.

⁹ Ibid.

¹⁰ Part of the re-education would have involved the girls having to write an essay about why what they did was wrong.

¹¹ Miller v. Skumanick 605 F. Supp. 2d 634, 640.

gument that the images presented to the court do not appear to qualify in any way as depictions of prohibited sexual acts. Even if they were such depictions, the plaintiffs [sic] argument that the evidence to this point indicates that the minor plaintiffs were not involved in disseminating the images is also a reasonable one. Thus, a reasonable likelihood exists that plaintiffs will succeed on the merits, and this factor weighs in favor [sic] of granting a TRO.¹²

Either way, it is interesting to note that, in this case, the 'victims' of, and the parties responsible for, the act of child pornography are the same – a somewhat absurd situation bearing in mind the serious purpose for which child pornography laws exist.

Bearing in mind that a person has limited possibilities of controlling what type of content one receives, the issue of possessing child pornography deserves some further attention. Imagine that a person receives a MMS or an e-mail containing underage sexting images. Imagine further that the recipient does not check the inbox on a regular basis or, for some other reason, does not delete the images. Is the recipient then guilty of possessing child pornography? This would seem to depend on how the recipient has acted after becoming aware of the content, and Australian law provides the following defence for possession of child pornography:

It is a defence in proceedings for an offence against section 91H not involving the production or dissemination of child abuse material that the material concerned came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its nature, took reasonable steps to get rid of it.¹³

Recipients of underage sexting are thus well advised to delete the images or videos promptly, even where the content is provided on the sender's own initiative. Otherwise, they risk being charged with possession of child pornography.

Turning to the potential liability of intermediaries, it is worth noting that with serious offences such as child pornography offenses, the law is not only focusing on the conduct of the sender and receiver; it also regulates intermediaries. Looking at Australian law, for example, it is an offence to do

¹² Ibid at 645-646.

¹³ Crimes Act 1900 (NSW), s 91HA(2).

any of the following using telecommunications services: "Access, transmit, publish, possess, control, produce, supply or obtain child pornography"¹⁴ (emphasis added).

3.2 HUMILIATION, BULLYING, HARASSMENT AND BLACKMAIL

It seems that sexting frequently leads to humiliation, bullying and harassment. News reports on sexting are dominated by examples of people who have sent images or videos of themselves to persons that they trusted at the time, only to find that the images or videos have been re-distributed later on. The resulting humiliation, and in some cases bullying and harassment has, on at least one occasion, been so severe as to drive the victim to suicide. In 2008, 18-year-old Jessica Logan committed suicide following bullying and harassment resulting from her ex-boyfriend having sent explicit pictures of her to other students at Jessica's school. Such situations may give rise to liability issues for schools or other organisations:

*[T]he parents of Jessica Logan [...] filed suit in May 2009 against a host of defendants [...] including Sycamore High School, where their daughter attended school, the City of Montgomery, OH, and several students who the parents believed to be involved in their daughter's harassment.*¹⁵

Further, some reports on sexting indicate that there are instances where a person who has sent one image or video, is then exposed to threats of the image or video being forwarded (for example to the victim's parents) unless the victim sends even more revealing images or videos.¹⁶

3.3 CONSEQUENCES FOR EMPLOYMENT

Finally, for years, there have been reports of employers and employment agencies searching the Internet for profiles of potential employees.¹⁷ Once content is available on the Internet, it is extremely difficult to ensure that it

¹⁴ Criminal Code Act 1995 (Cth), ss 474.19 and 474.20

¹⁵ Don Corbett, Let's Talk About Sext: The Challenges of Finding the Right Legal Response to the Teenage Practice of "Sexting" (2009) *Journal of Internet Law* 3, at 5.

¹⁶ Technology Fuelling Sexting Craze: Study', *The Age* (May 12, 2009) <<http://news.theage.com.au/breaking-news-national/technology-fuelling-sexting-craze-study-20090512-b1k3.html>>.

¹⁷ See Amy S Clark, 'Employers Look At Facebook, Too', *CBS News.com* (Boston), 20 June 2006 <<http://www.cbsnews.com/stories/2006/06/20/eveningnews/main1734920.shtml>> at 12 January 2010.

is completely removed. As a result of the somewhat permanent nature of the Internet, sexting may impact on a person's employment prospects, and in some cases students involved in sexting have been forced to leave their educational institutions.¹⁸ For example, the above-mentioned case involving Philip Alpert, caused him to be forced out of his community college and made it 'impossible [for him] to secure employment' at the time of writing.¹⁹

4. SEXTING AS A PROCESS – THE FIRST STEP TOWARDS UNDERSTANDING THE PROBLEM

The first step we must take if we are to address the problems associated with sexting is to understand sexting as a process; it is too simplistic to focus only on the distribution of sexting content. To help illustrate the sexting process, so as to create a level of understanding that makes it possible to find a solution to the problems, I have produced the following table:

Activity	Examples of relevant issues	Examples of relevant areas of law ²⁰
1. Collection	<ul style="list-style-type: none"> • Collection by subject of images or video, or collection by another person? • Consensual or non-consensual collection? • Object of images or video aware or unaware of collection? • Legal or illegal collection? • Injunction or damages? 	Privacy, surveillance laws, nuisance, and criminal law such as stalking, cybercrime and child pornography law.
2. Use by collector	<ul style="list-style-type: none"> • Legal or illegal use? • Injunction or damages? 	Child pornography law, privacy, intentional infliction of harm, copyright and criminal law such as obscenity and indecency law.

¹⁸ See e.g. Robert D. Richards and Clay Calvert, When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case, 32 *Hastings Comm. & Ent. L.J.* 1, at 9.

¹⁹ See e.g. Robert D. Richards and Clay Calvert, When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case, 32 *Hastings Comm. & Ent. L.J.* 1, at 9.

²⁰ The examples of areas of law that may be of relevance for each step are based on Australian law.

3. Distribution by collector	<ul style="list-style-type: none"> • Intentional or unintentional? • Consensual or non-consensual distribution? • Commercial or non-commercial? • To object of images or video or to third-person • Method of distribution (e.g. MMS, e-mail, social networking)? • Injunction or damages? • Intermediary liability? 	Privacy, defamation, intentional infliction of harm, confidentiality, copyright, child pornography and criminal law such as cybercrime, obscenity and indecency law.
4. Subsequent use/disclosure	<ul style="list-style-type: none"> • Consensual or non-consensual collection? • Object of images or video aware or unaware of use/disclosure? • Intentional or unintentional? • Commercial or non-commercial? • Method of distribution (e.g. MMS, e-mail, social networking)? • Legal or illegal collection? • Injunction or damages? • Intermediary liability? 	Privacy, defamation, intentional infliction of harm, confidentiality, copyright, child pornography and criminal law such as cybercrime obscenity and indecency law.

A source: D. J. B. Svantesson

This table shows sexting as a step-by-step process, highlights a selection of issues arising at each step, and mentions a few relevant legal causes of action for each step.²¹ Importantly, as problems and legal issues arise in each of these four steps, any potential solution must work with the conduct associated with each of the four steps. In other words, it is inadequate focusing exclusively on step 3, which perhaps is the typical focal point of sexting discussions.

²¹ I have here opted to use Australian law as the basis for the listing of the relevant causes of action.

5. CASE EXAMPLE 1: GILLER V PROCOPETS²²

While not a sexting case as such since it did not involve any electronic transmission of the content in question, the dispute in *Giller v Procopets*²³ has many characteristics of a sexting case. There, Mr Procopets had filmed his sexual activities with Ms Giller. On the first five occasions, Ms Giller was unaware of the filming, but on the other occasions she was aware of, and acquiesced in, her sexual activities being captured on tape. When the parties' relationship deteriorated, Mr Procopets showed the video tape to some people and attempted, and threatened, to show it to others (including Ms Giller's parents and 17 year old brother).

In the courts, Ms Giller argued that Mr Procopets' conduct amounted to a breach of confidence, intentional infliction of harm and a violation of her privacy.

In the Supreme Court of Victoria, Gillard J declined to award damages for any of the pleaded actions. While the Court found that Mr Procopets' conduct amounted to a breach of confidence, it was held that Ms Giller could not be compensated for mental distress falling short of psychiatric injury.²⁴

On appeal to the Court of Appeal, Ms Giller was awarded \$40,000 for injury to feelings as a result of the breach of confidence.²⁵ The question is of course how one is to put a monetary value on the harm caused in a situation such as this. Just how serious the law views reputational damage is illustrated when, as I have previously done elsewhere²⁶, comparing the level of compensation awarded in two reasonably recent Australian cases. At first instance in *Ettingshausen v. Australian Consolidated Press* (1991) 23 NSWLR 443, the plaintiff was awarded Aus\$350,000 to compensate for the humiliation of having his penis showing in a grainy picture published in a magazine (with the imputation that he had consented to the publication). In comparison, in a case where a young boy had the head of his penis cut off during a circumcision, the plaintiff was only awarded Aus\$ 275,000 – i.e.

²² This part of the article is partly based on research findings previously presented in Dan Svantesson, "Sexting" and the law – how Australia regulates electronic communication of non-professional sexual content", *Bond Law Review* Vol 22(2) 2010, at 41-57.

²³ [2008] VSCA 236.

²⁴ *Giller v Procopets* [2004] VSC 113.

²⁵ *Giller v Procopets* [2008] VSCA 236.

²⁶ *The Right of Reputation in the Internet Era*, *International Review of Law, Computers & Technology* Vol. 23, No. 3 (2009); pp. 169-177.

Aus\$ 75,000 less than what was originally awarded in the Ettingshausen case.

While the technology has changed, and is constantly changing, the issues that arose in *Giller v Procopets* are seemingly timeless. But while the issues remain the same, it may be that the change of scale, caused by the change of technology, in reality represents a change of kind. What I am trying to say is that the rapid and virtually global distribution of content that can be achieved online stands in stark contrast to Mr Procopets' prospects of distributing his video tape. Furthermore, as has been seen on numerous occasions, once content is placed on the Internet, it is often quite simply impossible to get it completely removed. In light of this, the harm that can be caused today is much greater than was the case with previous technologies.

6. CASE EXAMPLE 2: LARA BINGLE'S BUNGLE

Lara Bingle gained considerable attention in Australia in 2006 when she played a main role in Tourism Australia's "Where the bloody hell are you?" campaign. In 2006, she had an affair with married AFL²⁷ player Brendan Fevola. Sometime during that affair, Mr Fevola used his mobile phone to take a photograph of Ms Bingle while she was in the shower.

On 1 March 2010, at a time when Ms Bingle was engaged to Australia's cricket captain Michael Clark, a magazine called *Woman's Day* published the photograph taken by Mr Fevola.

The *Woman's Day* publication gained enormous media coverage, particularly after Ms Bingle announced that she was looking to take legal action against Mr Fevola.

On March 8, the situation took a bizarre turn when *Woman's Day* published an exclusive interview with Ms Bingle in return for what is thought to be a considerable amount of money. In the article of March 8, Ms Bingle described how she felt about the March 1 article.

At the time of writing, there are no reports of Ms Bingle having pursued any legal action against Mr Fevola. However, this series of events still raise considerable issues in the context of sexting.

First of all, without commenting on Ms Bingle's intentions in this matter, one may perhaps allow oneself to speculate that, in some cases, so-called celebrities may have a different agenda to 'ordinary' people in sexting matters. The simple truth is that a story such as that involving Brendan Fevola

²⁷ Australian Football League, better known as 'Aussie rules'.

and Lara Bingle would most likely not interest the tabloid press if the people involved were not well-known to the public.

Furthermore, events such as these, and the constant flow of 'leaked celebrity sex recordings', have been said to be capable of 'normalising' sexting in the minds of vulnerable groups, such as teenagers.

Finally, this relatively simple scenario raises a broad range of legal issues and is a good illustration of why it is important to approach sexting as a process. In particular, it is interesting to view this matter in light of defamation law. Can an image such as the one of Lara Bingle be defamatory? If so, what defamatory imputations would it give rise to?

In Australia, whether or not the image is defamatory would be judged 'by reference to the standard of the hypothetical referee, namely ordinary, reasonable, fair-minded members of society.'²⁸ Applying this standard, an imputation is defamatory if it:

1. 'is likely to injure the reputation of the plaintiff by exposing him or her to hatred, contempt or ridicule.';
2. 'contains a statement about the plaintiff which would tend to cause the plaintiff to be shunned or avoided.'²⁹; or
3. "'has the tendency to lower the plaintiff in the estimate of others.'³⁰.

In light of the fact that the image of Ms Bingle shows her visibly unhappy with the photograph being taken, and attempting to cover her breasts with her arms, the imputation could not be that she has consented to being photographed in the situation. In fact, it seems the only possibly defamatory angle would be to argue that the image is exposing her to contempt and/or ridicule.

However, even if Ms Bingle were to successfully prove that, the defendant in such an action has several defences to rely on, based both on common law and on legislation. The most significant of those defences is so-called justification.

Using the Queensland Defamation Act as an example, section 25 makes clear that: 'It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of

²⁸ Des Butler and Sharon Rodrick, *Australian Media Law* (3rd ed, 2007), 35, referring to *Reader's Digest Services Pty Ltd v Lamb* [1982] HCA 4.

²⁹ *Ibid.*

³⁰ *Ibid.*, referring to a range of cases.

which the plaintiff complains are substantially true.³¹ Interestingly in the context of sexting, justification provides a complete defence even where the publication was motivated by malice.³²

7. TOWARDS A SOLUTION

It seems clear that to deal with sexting we have to turn to, what I call the holy trinity of reg, tech, and ed. We need regulation, technological solutions and education.

This conclusion is, however, not unique to discussions of sexting. In fact, the same conclusion can be reached at the end of virtually every discussion of a technology related problem or issue.

In that sense, the most important conclusion I draw here has nothing to do with sexting. It is much broader in scope – every time we are faced with the type of problems that arise in the context of sexting, we can usefully start with the assumption that the solution lies in reg, tech and ed. And the primary question will then be the balancing and details of those three things.

8. CONCLUDING REMARKS

If one were to draw some conclusions from the above, one may start by noting that sexting is such a broad and diverse phenomenon that it is impossible to address all situations in the same manner – one size does not fit all! Let me describe, and then contrast, two very different scenarios. Imagine that a man in his 50s is seeking to convince a 13 year old girl to send him nude images of herself, by pretending to be a 15 year old boy. Now imagine instead that a 17 year old girl sends a semi-nude picture of herself to her 17 year old long-term boyfriend. While both these situations involve sexting, and while both situations involve unlawful conduct as the law stands, they are extremely different. The law must be able to distinguish between these types of situations and address them both appropriately.

Furthermore, as is made clear above, while the law plays an important role in addressing the sexting phenomenon, we also need to look to technological solutions as well as education.

³¹ Defamation Act 2005 (Qld), s 25.

³² Des Butler and Sharon Rodrick, *Australian Media Law* 3rd ed. (Thomson Legal, Pyrmont, 2007), at 52.

Finally, while focused on sexting and the law, parts of the discussion above have broader application. For example, it made clear that the law cannot keep up with the technology. This observation is by no means unique to the area of sexting and the law – it could probably be brought up as a factor in all discussions of technology law. Other such observations of broad relevance are as follows:

- Technological neutrality can be as dangerous as technological specificity – If we are drafting a technology neutral regulatory solution to sexting today, there is a real risk that, in relation to future technologies, it will (1) not always be applicable where it should be, and (2) be applicable in some situations it should not be applicable. At the same time, the alternative of a technology-specific regulation is of course also unattractive, not least due to the fact that such regulation risk becoming obsolete very quickly.
- Technological developments are likely to highlight generational differences with legal implications – As noted above, whether or not a publication is defamatory may be judged by reference to the standard of the hypothetical referee, namely ordinary, reasonable, fair-minded members of society. The question is of course whether a teenage victim and/or offender in a sexting matter shares the same standards as the judge placed to apply this standard.
- The legal profession struggles to understand the technology – It has been noted that “Judges and legislators faced with adapting existing legal standards to the novel environment of cyberspace struggle with terms and concepts that the average American five-year-old tosses about with breezy familiarity.”³³ The difficulties that this gives rise to should not be ignored.
- Small acts can have big implications – Last but not least, as referred to above, the implications are typically far greater when content is placed on the Internet compared to the same content having been distributed offline.

Going slightly off topic, it strikes me as somewhat surprising that lawyers and legal academics working in the IT law field have, in general,

³³ American Libraries Association v Pataki (969 F.Supp. 160, 170 (S.D.N.Y.,1997)) Per Preska J.

shown so little interest in identifying the type of common themes of the discipline outlined above. After all, much of our legal training is focused on giving us the ability to identify similarities and differences in patterns of events. So while unrelated to sexting, I wish to finish this article by encouraging further research into the common underlying themes that in many ways control our discipline, whether we call it Internet law, ICT law or IT law.

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LEGAL ACTS AND DECISIONS

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