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Your Boring Life, Now Available Online: Analyzing Google Street View and the Right to Privacy

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YOUR BORING LIFE, NOW AVAILABLE ONLINE: ANALYZING GOOGLE STREET VIEW AND THE RIGHT TO PRIVACY

By Jana McGowen

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I. INTRODUCTION

Whatever Google touches turns to gold, and its latest endeavor, providing quality images of every home, business, and street side to anyone with internet access, is no exception. Google states that its widely popular "Google-Earth Street View" (Street View) does not raise privacy concerns because Google takes the pictures in "public areas" where anyone could take the pictures.[1] Unlike an individual

1. Munir Kotadia & Chris Duckett, *Google Denies Street View Has Privacy Issues*, ZDNET AUSTL., June 5, 2007, http://www.zdnet.com.au/news/software/soa/Google-denies-Street-View-has-privacyissues/0,130061733,339278182,00.htm.

DOI: https://doi.org/10.37419/TWLR.V16.I3.6

taking a picture of his house, however, the photographer with Street View is much harder to spot, and the photos are available to millions. Although Google claims that "complete privacy doesn't exist,"[2] referring to the growing technology trend of satellites, closed circuit television (CCTV), and now Google street cars, the American people live in a nation of laws, and new boundaries, if set, could limit companies like Google from taking or publishing photos online. The fact that new technology is available to invade privacy in an unprecedented way does not mean that courts, lawmakers, and the American people should necessarily sit aside and watch their "right to be left alone" slowly vanish.[3] As Kevin Bankston, an attorney for the Electronic Frontier Foundation, warns, "with things like Google Street View . . . our concepts of privacy in public are necessarily changing, and not for the better . . . ."[4]

Bankston's concerns about American individual privacy in today's world of technology and the internet are likely warranted. The internet, along with greatly enhancing American lives and the availability of information, has diminished and complicated the practical application of many "pre-web" laws.[5] Lawmakers have tweaked old laws and have made new laws to deal specifically with the web's influence. These laws were enacted because many regulated industries changed when anything could be easily and cheaply duplicated and made available to millions.[6]

Courts and legislatures must recognize that Street View's current and future impact goes far beyond a private individual with a camera, and they will have to develop a new way to resolve these kinds of privacy concerns in the era of the omnipresent camera. This Comment will weigh the policies on both sides of the issue and will look at one's expectation of privacy not only as *where, location wise,* a person expects to be private, but also *in what circumstances* one expects to be private and the consequences of private camera monitoring and publishing on the internet. If Google is correct, and there is nothing new about taking photographs in public areas, perhaps the massive organization, monitoring, storage, and publication of photographs of citizens, streets, and homes online is the problem. Perhaps courts should give greater scrutiny to massive monitoring endeavors, especially

2. Maggie Shiels, *Google Accused on Privacy Views*, BBC NEWS, Aug. 1, 2008, http://news.bbc.co.uk/2/hi/technology/7536549.stm.

3. Amy Radil, *The Right to be Left Alone, in* THE SURVEILLANCE SOCIETY: THE EROSION OF PRIVACY IN AMERICA, http://news.minnesota.publicradio.org/features/199911/15_newsroom_privacy/leftalone.html (last visited Aug. 23, 2009).

4. Patrick Marshall, *New Threats to Privacy*, GOV'T COMPUTER NEWS, Sept. 14, 2007, http://gcn.com/articles/2007/09/14/kevin-bankston—new-threats-to-privacy.aspx (quoting Kevin Bankston, attorney at the Electronic Frontier Foundation).

5. *See generally* Communications Decency Act, 47 U.S.C. § 230 (2006); Electronic Communications Privacy Act, 18 U.S.C.A. § 2510 (West 2001 & Supp. 2009).

6. *See generally* § 230; § 2510.

when photos of Americans and their homes serve a limited public interest.

II. BACKGROUND

Google Street View uses car-strapped cameras to drive around neighborhoods and capture high-resolution 360-degree digital images of every public street. Google then publishes the images alongside its online mapping service, Google Maps.[7] The Street View images are also published alongside, and in addition to, its satellite views, called Google Earth.[8] Unlike satellite images however, Street View is a side view, so it captures faces, license plates, and anything else visible from the street.[9] Since its launch in June of 2007, Street View has raised privacy concerns with Canada,[10] Europe,[11] India,[12] and the United States Pentagon.[13] Potential concerns include that Google has already or could: (1) take pictures of abortion clinic patients as they walk inside; (2) take pictures of the insides of homes, through windows; (3) allow criminals to locate cars suitable for stealing or homes suitable for robbing without ever having to go near the scene; (4) give terrorists and others the ability to roughly map out the insides of homes or businesses, and plan some attack on a property or country they have never had to visit beforehand; (5) take pictures with high enough resolution to allow face recognition and license-plate lookup; and finally (6) make these detailed images publicly and freely available to millions.[14]

III. THE FOURTH AMENDMENT AND THE "RIGHT TO PRIVACY"

Today most Americans expect in-store security cameras and even parking lot cameras watching for potential shoplifters. Americans expect Closed Circuit Televisions (CCTVs) and may recognize the possibility of federal agents or police officers targeting them for criminal

7. Google Maps, http://www.google.com/maps (last visited Aug. 23, 2009).

8. Google Earth, http://www.earth.google.com (last visited Aug. 23, 2009).

9. Jesse Leavenworth, *WEBCAMMED!—Google Takes Man on the Street to New Places: Search Engine's Street View Taking Heat About Privacy Concerns*, HOUS. CHRON., July 1, 2007, at 5, *available at* http://www.chron.com/CDA/archives/archive.mpl?id=2007_4375088.

10. Andy Beal, *Google's Street Views Could Break Canada's Privacy Laws*, MARKETING PILGRIM, Sept. 13, 2007, http://www.marketingpilgrim.com/2007/09/googles-street-views-could-break-canadas-privacy-laws.html.

11. *See* Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 330 (2009).

12. Brian Craig, *Online Satellite and Aerial Images: Issues and Analysis*, 83 N.D. L. REV. 547, 555 (2007).

13. Jonathan Richards, *Pentagon Bans Google from U.S. Bases*, TIMES ONLINE, Mar. 7, 2008, http://technology.timesonline.co.uk/tol/news/tech_and_web/article3503624.ece.

14. *See* Craig, *supra* note 12, at 576–77; Blackman, *supra* note 11, at 340–42.

activity and secretly videotaping them outside their homes. However, Street View has captured the illegal activities of non-targeted individuals such as public lewdness and possible speeding violations.[15] Although currently Street View only captures new pictures once every few years, as technology increases one can imagine a world where technologies like Street View keep increasingly current data. Imagine cities ticketing individuals for minor traffic violations using private camera monitoring like Street View.

The "expectation of privacy" originates from the U.S. Constitution's Fourth Amendment, which protects individuals from warrantless government searches and seizures;[16] thus because Google is a private entity, it is exempt from the protections of the Fourth Amendment.[17] As private entities continue collecting, storing, and publishing information on individuals, it is important to analyze whether the Fourth Amendment does, or should, allow the Government to make arrests and sometimes even bypass warrant requirements by using privately collected information. Further, it is important to understand the extensive Fourth Amendment analysis of privacy in the public realm verses the private because similar "expectation of privacy of the reasonable person" concepts are analyzed by courts in both criminal and civil law.

A. *Governmental Use of Private Monitoring*

The Fourth Amendment promises that all citizens will be "secure in their persons, homes, papers, and effects, against unreasonable searches and seizures . . . ."[18] The Fourth Amendment protects citizens from unreasonable federal, state, and local government searches and seizures; however citizens do not have a Fourth Amendment constitutional protection from the actions of private entities.[19] To establish a Fourth Amendment claim, one must establish that the government has affected a search or seizure by invading an individual's reasonable expectation of privacy.[20]

Kyllo v. United States discussed when the Fourth Amendment prohibits technology used in public monitoring. The government is prohibited from using monitoring technology to invade privacy if (1) the information could not otherwise have been collected from a legal vantage point and (2) the technology is not generally available to the public.[21] In *Kyllo*, government agents used a thermal reading device to

15. Blackman, *supra* note 11, at 329–31.
16. U.S. CONST. amend. IV.
17. *Id.*
18. *Id.*
19. *Id.*
20. Katz v. United States, 389 U.S. 347, 351–53 (1967).
21. *See* Dow Chem. Co. v. United States, 476 U.S. 227, 228–38 (1986); *See also* Kyllo v. United States, 533 U.S. 27, 27 (2001).

detect heat lamps in Kyllo's roof which led police to believe he was growing marijuana plants.[22] The government argued that although information was gained from inside the home without a warrant, it was not intimate information. While the police could view specks of light from which heat was emanating, they could not identify intimate details inside the home.[23]

The Supreme Court disagreed however, and held that when government agents gain information from the interior of a home that could not otherwise be obtained without the intrusion of a constitutionally protected area, it is a search "at least where the technology used is not general public use."[24] Because thermal imaging technology was not publicly available, the court reasoned that society had no expectation that police would be able to use such technology to discover what was occurring inside the home.[25]

Putting aside the fact that Google is a private entity, the type of monitoring technology that Google uses in Street View is unlikely to be considered a "search" for two reasons. First, images like the ones captured by Google and placed on Street View are not a higher resolution than the naked eye could observe walking down the same street. Second, the 360-degree car-camera technology that Google uses is now publicly available to millions online. Therefore, society has a reasonable expectation of being monitored at any moment on public streets or in front of their homes, and the government may legally use its own car-camera technology or the information Google collects.

The technology that would make Street View appealing to the government is the sheer number of photos collected, the fast and simple global search capability, and the lack of notice given to those captured. Generally, there is no Fourth Amendment protection from private entities that use their own technology to collect information.[26] As private entities become more adept at collecting data on individuals, however, the government has been using private sources to find information.[27] The question, then, is what results from the government's use of legally gathered information from a private entity to make an arrest or just to collect information that could otherwise be found only by a search or seizure authorized by warrant.

In Jack Balkin's article *The Constitution in the National Surveillance State*, he argues that because the Fourth Amendment focuses on searches and seizures, but places few limits on collation and analysis, Congress "must pass superstatutes to regulate the collection, collation,

22. *Kyllo*, 533 U.S. at 27.
23. *Id.* at 30.
24. *Id.* at 28.
25. *See id.*
26. U.S. CONST. amend. IV.
27. *See* Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 7 (2008).

purchase, and analysis of data." The data Balkin refers to includes cameras, facial recognition systems, and location-tracking systems.[28] Because the Constitution does not reach private parties, "government has increasing incentives to rely on private enterprise to collect and generate information for [the government]."[29] As data mining technology becomes more and more prevalent and computers are able to store seemingly limitless amounts of information, Balkin advocates for some type of regulation on data collection, what he describes as government "data mining."[30]

Thus, a police officer making an arrest based on the image of a man smoking a marijuana cigarette captured on Google Street View, for example, would likely not be a warrantless search because the government use of privately gathered information has been held not to constitute a Fourth Amendment violation.[31] Even if future limits are set on government use of privately collected data, because Google does not use high magnification, night vision, or other visual enhancement, using Street View-type technology would likely not constitute a search.[32] Limits, however, should be placed on the amount of information the government may collect when not directly targeting criminals, but merely to collect information on untargeted citizens. Google's Street View technology is exactly the type of monitoring that goes too far in what it makes available to the public, and therefore, what it also makes available to the government.

B. *The Reasonable Expectation of Privacy in Public Places*

After discussing how courts have viewed new technology used to monitor U.S. citizens in increasingly invasive ways, this Comment will focus on what types of privacy might exist, if any, once individuals leave their homes and enter public streets. Society's reasonable expectation of privacy is sometimes directly related to how public or private the place is. However, sometimes it is the converse. For example, one might have a greater expectation of privacy in a forest (an extremely non-public space) than in Times Square (a very public space). On the other hand, one might have a greater expectation of privacy on the streets of Manhattan than in a small town because in the latter, a stranger might be more conspicuous than on the streets of New York. As Justice Harlan reasoned when concurring in *Katz*, place is important and must be analyzed. But a presumption that there is a reasona-

28. *Id.* at 13, 20–21.
29. *Id.* at 16–17.
30. *Id.* at 17.
31. *See* Dow Chem. Co. v. United States, 476 U.S. 227, 227 (1986) (holding there was no Fourth Amendment violation when the government used commercial aerial photography to search Dow Chemical's private curtilage).
32. *See* Kyllo v. United States, 533 U.S. 27, 27 (2001) (holding that individuals do not have a reasonable expectation of privacy if officers can view the suspicious activity from a legal vantage point).

ble expectation of privacy does not necessarily exist simply because a place is public.[33] In the case of Street View, a person on the streets of Manhattan is as viewable as a person on a mountain, a private road, or in a small town.

As discussed in *Katz*, although the Fourth Amendment specifically designates and protects a *place* (the "home") as private, it also protects an *individual* from warrantless invasions of his "person."[34] The Fourth Amendment does not protect places, it protects people.[35] The following discussion examines the various monitoring technologies that exist and how courts have dealt with the Fourth Amendment's impact when people are "monitored" in public by (1) satellite technology and (2) Closed Circuit Television (CCTV).

1. Satellite Technology and Google Earth

Google responded to privacy concerns over its satellite program, Google Earth, by stating "Google Earth contains only information that is readily available from both commercial and public sources. For example, this same information is available to anyone who flies over or drives by a piece of property."[36] Google's focus on the fact that technology is available ignores the elephant in the room. It is theoretically possible for thousands of individuals in helicopters with telescopic lenses or cameras to capture what Google Street View does. But when a huge corporation, like Google, sends cars with cameras around all major and minor U.S. cities, organizes it, and publishes it online, the act becomes more invasive, not less. In *Florida v. Riley*, officers used a helicopter to fly 400 feet above Riley's property to view his greenhouse and see marijuana plants growing inside.[37] The agents tried to see inside the greenhouse from the street level legal vantage point, but were unsuccessful.[38] In *Riley*, the Supreme Court held that whatever can be seen from aerial views above the home was not a search because there is a reasonable societal expectation that planes and helicopters can fly above one's home and see into our backyards.[39]

Unlike satellite photos taken from above, Street View captures zoomed in side-views of homes, streets, and businesses. The images show faces, license plates, and even the inside of homes through windows. Thus courts may find that although a person expects the public to be able to view homes, an individual may not expect cars with cam-

33. Katz v. United States, 389 U.S. 347, 361 (1967).
34. *See id.* at 353.
35. *Id.*
36. Craig, *supra* note 12, at 555.
37. Florida v. Riley, 488 U.S. 445, 446 (1989).
38. *Id.*
39. *Id.* at 450–51.

eras to drive by unnoticed and post the pictures online for millions to see.

2. CCTV

Closed Circuit Television (CCTV), unlike Satellite, captures side-view details beyond an aerial view. CCTV video cameras are generally held not to constitute an invasion of privacy, despite the quality of detail captured.[40] Because the information from CCTV surveillance can be stored forever, the quality of video surveillance raises concern despite the fact that CCTV captures the same information that individuals view when walking down a public street. Jack Balkin explains that privacy is decreasing because video is being captured, stored, and distributed:

> When people display unusual or embarrassing behavior, or participate in political protests in public places, their most effective protection may be that most people don't know who they are and will soon forget who did what at a certain time and place. But cameras, facial recognition systems, and location tracking systems let governments and businesses compile continuous records of what happens . . . which can be collated with records of different times and places. . . . Older surveillance cameras featured imprecise, grainy images, and the recordings were quickly taped over. New digital systems offer greater fidelity and precision and the declining cost of digital storage means that records of events can be maintained indefinitely and copied and distributed widely . . . around the country or even around the globe.[41]

Despite these concerns, the Ninth Circuit has held that "there is no constitutionally significant difference between evidence obtained by a secret camera scanning a public place and a private citizen or a police officer hiding behind a bush or standing behind the tinted window of a room overlooking the same place."[42]

However, CCTV may be distinguished from Street View because the policy that justifies CCTV is the strong government interest of eliminating crime and the harm to individual privacy is limited because cameras are not generally placed in residential areas.[43] The Ninth Circuit has held that there was no reasonable expectation of privacy from being recorded in a public place by CCTV surveillance. However, if a future court considers the limited public interest of Street View (helping individuals find new locations easier) against the powerful privacy interest (anonymity in public), it may reach a differ-

40. Max Guirguis, *Electronic Visual Surveillance and the Reasonable Expectation of Privacy*, 9 J. TECH. L. & POL'Y 143, 155–58 (2004).

41. Balkin, *supra* note 27, at 13–14.

42. *Id.* at 157 (discussing United States v. Sherman, No. 92-30067, 1993 WL 77236 (9th Cir. Mar. 18, 1993)).

43. *Id.* at 146–50.

ent conclusion regarding "the reasonable expectation of privacy" of Street View like technology.

In conclusion, the Fourth Amendment does not protect individuals from privacy violations conducted by private parties. Thus Google is not subject to a Fourth Amendment claim. However, as private parties become more successful and more adept in the business of gathering private information, perhaps courts and lawmakers should consider the government's ability to gather information from private sources. Further, although there is no "reasonable expectation of privacy" in criminal law regarding similar technologies to Street View, in the civil realm, the policy interests are very different. Therefore, courts and lawmakers should consider protecting the strong public interest of anonymity in public when the competing interest is limited.

IV. CIVIL ACTIONS AGAINST STREET VIEW: ISSUES AND ANALYSIS

Because the Fourth Amendment offers little protection from private monitoring of activities on public streets, possible privacy protections may be available in tort law. An example of attempting to use tort law as protection from private monitoring is the *Boring v. Google* lawsuit, the first and only lawsuit that has been filed against Street View that was recently dismissed.[44]

Currently tort law is not helpful against entities like Google Street View. First, some states have adopted a tort known as public disclosure of private fact. However, based on the Supreme Court's decision in *Florida Star v. B.J.F.*, the tort has lost strength.[45] Additionally, protection from being recorded in public is limited under this tort because public disclosure of private facts is interpreted only to apply when the matter is non-newsworthy, which is interpreted broadly. Further, another tort, intrusion upon seclusion, only applies in private locations.[46] An examination of the recent dismissal of *Boring v. Google* illustrates some of the limitations of current tort law.

A. *Boring v. Google*

On April 2, 2008, Aaron and Christine Boring sued Google in federal court seeking $25,000 in damages for invasion of privacy.[47] The Borings alleged that their Pittsburg home was desirable because of its privacy, and Street View's display of their home to online searchers diminished its value.[48] Once filed, the complaint led to an outcry on

44. Boring v. Google, Inc., 598 F. Supp. 2d 695, 704 (W.D. Pa. 2009).

45. Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 888 (2006).

46. Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 19 (2007).

47. Complaint of Plaintiff at 2, *Boring*, 598 F. Supp. 2d 695 (No. 08-694), *available at* http://www.thesmokinggun.com/archive/years/2008/0404081google1.html.

48. *Id.* at 3.

blogs and news websites. For example, Ken Boehm, chairman of the U.S. National Legal and Policy Center stated that although "in Google's world privacy doesn't exist . . . in the real world individual privacy is fundamentally important and is being chipped away bit by bit every day by companies like Google."[49]

The Borings' suit is the first of what could be more suits against Google regarding Street View, forcing courts to deal with the potential implications of traditionally non-invasive behavior—like a bystander taking a picture of a stranger's home from the curb—when it is broadcast online to millions worldwide. The lawsuit gives insight into Google's stance on what it believes is, and is not, off limits to its Street View cars, and gives insight into why the Pennsylvania District Court dismissed the suit.

B. *The Borings' Complaint*

The Borings' complaint accuses Google of "intentional and/or grossly reckless invasion" of their seclusion by taking photos of their home and posting them online.[50] The Borings claim that they purchased their home mainly because of its privacy because it is located on a private road.[51] The home is located on a private road that is "clearly marked with a 'private road' sign."[52] The Street View photos show the Borings' residence, two garages, and a swimming pool.[53] The Borings asked for: (1) an injunction requiring Google to destroy its images and stop posting the images online and; (2) $25,000 in monetary damages.[54]

C. *Google's Motion to Dismiss: "Privacy Doesn't Exist"*

Although Google voluntarily removed photos of the Borings' home from Street View, Google strongly attacked the Borings' complaint as frivolous. Google compared its camera-fitted cars to delivery trucks or other "customary" door-to-door services,[55] and stated that the Borings' "privacy claims fail . . . because the view of a home from the driveway that can be seen by any visitor, delivery person or telephone repairman is not private." Quoting the Restatement of Torts, Google's motion declared: "[c]omplete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he

49. Shiels, *supra* note 2.
50. Complaint of Plaintiff, *supra* note 47, at 3.
51. *Id.*
52. *Id.* at 2.
53. *Id.* at 7.
54. *Id.* at 4–6.
55. Preliminary Statement at 2, Boring v. Google, Inc., 598 F. Supp. 2d 695 (W.D. Pa. 2009) (No. 08-694), *available at* http://www.thesmokinggun.com/archive/years/2008/0730081google2.html.

[or she] is a part."[56] Google then stated that "today's satellite-image technology means that . . . complete privacy does not exist."[57] Google argued first that it did not trespass on the Borings' land because the sign stating "private road" was not sufficient to make Google's entrance a trespass.[58] Because there was no gate, no sign stating "no trespassing" or "keep out," and the property was accessible to satellite and low flying aircraft, the Borings had no reasonable expectation of privacy from third parties entrance onto their property.[59] Google further argued that even if the sign was sufficient, the area was not "privileged" because the road probably had customary, "even expected" invasions from delivery trucks that make the Borings' home an unprivileged area.[60]

What about instances, however, when the Google car drivers, likely not lawyers and perhaps not paying attention, *do* commit a trespass? Then not only has privacy been violated, but it is intensified by the online publication to millions worldwide. Despite the fact that the Borings' home was what Google referred to as "unremarkable," the Borings intended to keep their home private.

D. *Weighing the Competing Policy Interests*

If courts do not find that current tort law is adequate in protecting privacy, judges will likely weigh the competing policies involved. Google states the purpose of Street View as making it "easier for people to find where they are going by providing a photographic view of a particular address or destination . . . ."[61] It further declares its overall mission is to "organize the world's information and make it universally accessible and useful."[62] But the policies Google urges in support of Street View are distinguishable from other tolerated privacy invasions. The attacks of 2001 on the World Trade Center prompted the U.S. Government to increase surveillance, and the government justified privacy violations based on matters of national security.[63] However, national security is clearly a much greater public interest than organizing information or making it easier for individuals to find a particular location. Considering the potential loss of individual anonymity, Google's policy justifications may be inadequate.

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56. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

57. Preliminary Statement, *supra* note 55, at 5.

58. *Id.* at 2.

59. *Id.*

60. *Id.*

61. *Id.* at 1.

62. *Id.* at 4.

63. Kevin Werbach, *Sensors and Sensibilities*, 28 CARDOZO L. REV. 2321, 2324 (2007).

E. *The Problem of Going Public with Privacy Violations*

Google also attacked the Borings' claim as ironic because their lawsuit has drawn more attention to their home than the Street View service.[64] Putting Google's tone aside, this is an interesting issue in civil privacy suits. Any frivolous suit should always be set aside, but for those trying to stop online publications of private or embarrassing material, a Plaintiff's only recourse, court, can make a privacy invasion even worse. Fears of going public with potential privacy violations through a lawsuit may even keep those like Google Street View free from suits. If court and private action is the best pulpit for changing privacy law, it is unlikely to be used because those Americans who consider their right to privacy the most sacred often may not want the publicity of a lawsuit.

F. *The Court's Dismissal*

The court denied the Borings' privacy invasion claim. The court reasoned that the Borings did not suffer shame or humiliation, and that the images would not be offensive to a reasonable person. Interestingly, to support its analysis, the court repeatedly notes "the attention that the Borings have drawn to themselves and the Street View images of their property."[65] The court reasons that this shows that the intent of the parties was not to remain private. However, it seems unfair that the Borings have made it harder to substantiate their claim by simply filing suit. In regard to lawsuits against Street View generally, the court notes that "while it is easy to imagine that many whose property appears on Google's virtual maps resent the privacy implications, it is hard to believe that any—other than the most exquisitely sensitive—would suffer shame or humiliation."[66] Thus, although the court does seem to suggest that some individuals could bring a warranted claim against Street View using current tort law, the court recognizes this as a very small number of individuals. Further, the court did not address the privacy concerns of omnipresent monitoring in general as a new worrisome interference with individual privacy.

V. THE POLICY AND PRACTICALITY OF REGULATING PRIVACY ON THE INTERNET

In the mid-nineties when the internet was just starting to gather strength and popularity, commentator John Barlow of The Grateful Dead described the internet as the final free frontier, and advocated for free speech, free music sharing, and no government regulation of any kind online. Despite Barlow's dream, the internet is regulated by the government and courts enforce claims of private parties. There is

64. Preliminary Statement, *supra* note 55, at 1.
65. Boring v. Google, Inc., 598 F. Supp. 2d 695, 700 (W.D. Pa. 2009).
66. *Id.*

criminal enforcement of internet child pornography, commercial agreements like those on eBay are contracted and enforced, copyright infringement claims are abundant, and taxes are collected on internet sales. Some aspects of Barlow's idealistic view of the unregulated internet, however, still ring true.

The internet today allows new technology to spread a wealth of information and ideas to millions who before could not easily access or afford that information. Chat rooms and blogs are still generally a free place to share ideas and are anonymous to race, religion, national origin, and appearance. Stifling the creativity and usefulness of the technology by regulating websites like Google Street View does run the risk of violating first amendment rights and generally goes against how society views the internet as a free place for new ideas and new technologies. If the internet is a separate "place," and the laws of the brick and mortar world do not work online,[67] perhaps tort law can protect individuals from private entities like Google taking potentially embarrassing, incriminating, or offensive photos of Americans in public places.

A. *ISP Immunity*

Internet service providers (ISPs) like Google are generally immune from tort liability. The Communications Decency Act (CDA) provides broad immunity from civil liability on ISPs for content posted by others. Section 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[68] Thus, generally, ISPs are immune from tort liability.[69] Although Google Street View publishes images captured mostly by Google itself and not posted by other users, the policy of ISP immunity is applicable. Like most ISPs, it is impractical for Google to review every image individually before it publishes the images online. The CDA safe harbor provision was intended to prevent situations where ISPs opted not to regulate what was posted on their websites. When ISPs did try to regulate postings, they were held liable. But if they did nothing to police their websites for offensive or infringing material, they were let off the hook.

For example, before the CDA was enacted, Prodigy was held liable in a defamation suit despite its active efforts to screen the content of its users' websites.[70] The court looked to common law and reasoned that, although Prodigy itself did not post the defaming remarks, because Prodigy assumed "editorial control" by taking an active role in

67. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).
68. 47 U.S.C. § 230(c)(1) (2006).
69. *See id.*
70. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, § 230(c).

screening its sites, it was liable.[71] Had Prodigy done nothing to try to stop illegal activity, it would have been shielded from liability.[72] To combat this unfairness and give incentive to ISPs to filter content, the CDA was created to limit ISP liability.[73] In *Zeran v. America Online*, the Fourth Circuit held that by implementing § 230 of the CDA, Congress conferred "broad immunity" from civil liability on interactive computer service providers for content posted by others.[74]

Because Street View's images are posted by Google itself, it is likely not an ISP in this context. However, although Google posts Street View's images, it does not screen each image before posting it online. Thus, Prodigy and America Online's policy of limiting Google's liability—in order to allow for a service like Street View to exist—may still sway the court toward limiting Google's liability as well.

B. *Take-Down Notices for Online Material*

In its motion to dismiss, Google states that "out of respect for individuals' concerns," Google "makes it simple to request removal" of images on Street View by following the website's "report inappropriate image" link where one can remove: "(1) any image of the user's residence; (2) any image of the user's face or of the user's child's face; (3) any image of the user's automobile or license plate; or (4) any image of the face in Manhattan, New York."[75]

Although there is no case law regarding ISP liability when the ISP takes and posts its photos like Google, civil litigants have sued ISPs who take a more active role in regulating postings. In *Barnes v. Yahoo!*, a woman sued Yahoo! when a Yahoo! representative promised to remove inappropriate photos her ex-boyfriend posted, and then did not remove the photos.[76] The plaintiff argued that when Yahoo! promised to remove the photos, it created a duty upon which the woman relied.[77] The court, however, held that despite Yahoo!'s remarks, the CDA barred the claim.[78] Although it is not clear whether Google would be immune under the CDA, because Google's policy promises to remove photos when it receives a complaint, a civil litigant might have redress under a contract or negligence theory if it later delays or refrains from doing so.

Removing the images from Street View is one of the Borings' injunctive requests, and Google argues that many privacy concerns are

71. *Id.* at *2.
72. *See id.*
73. Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997).
74. *Id.* at 330.
75. Preliminary Statement, *supra* note 55, at 5.
76. Barnes v. Yahoo!, Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *1 (D. Or. Nov. 8, 2005).
77. *Id.* at *2.
78. *Id.* at *4.

relieved by Google's take-down policy. There are two potential problems with Google's take-down policy. First, Google is not required or compelled by law to keep the policy so it could stop taking down photos or blurring faces at any time. Second, once Google captures these photos, it likely saves or compiles them somewhere in-house. Because Google has the technology to blur images, it must also be able to restore a blurred image to its original state.

If Congress passed a law requiring Google and other ISPs to take down any images that raise privacy concerns, how would it work? We can look at statutes in other areas of law that require ISPs to take down images online as soon as a proper take-down notice is given. This is what the Digital Millennium Copyright Act (DMCA) requires of alleged copyright infringers on the internet.[79] Section 512 of the DMCA limits ISP liability for copyright infringement if the ISP follows a number of guidelines.[80] One such guideline is taking down any material when the ISP receives a take-down notice with a description and location of the infringing material and a signature that the material is infringing under penalty of perjury.[81] This was developed as a solution for the internet because of the vast amount of information that is uploaded every day to ISPs. For example, society views YouTube, a website where users can subscribe for free and then upload home videos, as a technological novelty. It provides a general entertainment and educational benefit to society. YouTube, however, likely couldn't exist if it was liable for every copyright infringing video uploaded to the website. Thousands of videos are uploaded to YouTube daily. The amount of resources required to check every video, not to mention the delays, would make YouTube a very different website than it is today.

Similarly, if Google was required to scan every single photo that it captured to check for whatever the court deems a privacy violation, it would likely be uneconomical for Street View to exist. Though generally seen as a necessary compromise, take-down notices can be seen as a First Amendment violation. Thus, Congress would have to weigh the policy interests of Google Street View, First Amendment concerns, and privacy concerns before requiring Google to respond immediately to take-down notices.

C. *A New Tort for the Internet: The Right to Your Digital Identity*

Although take-down notices are one potential solution for expanding privacy law to the internet, tort law might also be expanded to protect privacy in the digital realm. In *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Re-*

79. 17 U.S.C. § 512(c)(1)–(3) (2006).
80. *Id.* § 512(a)–(j).
81. *Id.* § 512(c)(3)(A)(i)–(vi).

cording and Disseminating an Individual's Image Over the Internet, Josh Blackman argues that tort liability is the proper place to expand the law to protect individuals from entities like Street View.[82] He calls entities like Street View "omniveillance," which means "omnipresent and omniscient digital surveillance in public places that are broadcast on the internet."[83]

Blackman distinguishes camera phones, security cameras, and webcameras from Street View because the recorded places or areas are "limited in scope." Further, the recordings are not stored, not as easily accessible, and the images are not as high quality.[84] Because "the two major privacy torts, public disclosure of private facts and intrusion upon seclusion . . . are largely incapable of remedying the intrusiveness of emerging omniveillance technologies," Blackman advocates for a new tort called "the right to your digital identity," which weighs First Amendment concerns against privacy rights in order to "remedy when a person's image is converted to a digital image and distributed over the internet."[85] The tort's four factors would include: (1) whether the party had a reasonable expectation of privacy not to be recorded; (2) whether the recording is offensive to a reasonable person; (3) whether the recording is intentionally disseminated to a wide audience; and (4) the newsworthiness of the recording including social value, intrusiveness, and whether the person voluntarily "acceded to the position of public notoriety."[86]

The leading court case to illustrate the inadequacy of tort law to redress an invasion of privacy in a public place is the California case *Gill v. Hearst Publishing Company*.[87] A Harper's Bazaar reporter photographed a couple embracing in a farmer's market for an article about love.[88] The couple did not see the photographer and wanted to keep their affections private.[89] The majority in *Gill* applied a balancing test of the right "to be let alone," "the public interest in the dissemination of news," and "freedom of speech and the press."[90] The court concluded that the photo was newsworthy and publishing the photo did not violate the plaintiffs' privacy because the couple was in public.[91]

The dissent strongly disagreed, stating that "there is no news or educational value whatsoever in the photograph . . . ."[92] For Justice

82. Blackman, *supra* note 11, at 314–15.
83. *Id.* at 314.
84. *Id.* at 331–33.
85. *Id.* at 314–15, 354.
86. *Id.* at 354–55.
87. *Id.* at 322.
88. Gill v. Hearst Publ'g Co., 253 P.2d 441, 442 (Cal. 1953).
89. *Id.*
90. *Id.* at 444.
91. *Id.*
92. *Id.* at 446.

Carter, the benefit or newsworthiness of the photo simply did not outweigh the invasion of such a private moment.[93] Justice Carter outlined in his dissent four factors that could analyze whether a tort has been committed by emerging technologies.[94] Blackman's digital identity tort is developed from the Carter factors.[95]

Blackman's digital identity tort is a possible solution because the factors balance the two competing interests of individual privacy and freedom of speech that courts will need to consider. However, it combines two distinct issues: both (1) the privacy invaded in the actual recording of the Google Street View images and; (2) the privacy invaded in the mass collection, storage, and publication of the images. As analyzed above in the section on the Fourth Amendment, it seems unlikely that Google's *recording* will be a privacy concern in tort law because it is not using any more sophisticated technology than a regular digital camera.

It might be more appropriate for courts to consider these potential invasions distinctly. The reasonable expectation of privacy of an image being captured in a public place relates to what can be observed with the naked eye, but the issue of large companies or government entities monitoring, storing, and publishing images online on a mass scale seems to be its own separate issue. As Street View grows in popularity, society will develop an expectation of public monitoring and publishing on the internet. If there is a reasonable expectation of entities like Street View capturing public behavior, there may not be that same reasonable expectation of privacy from such monitoring efforts. Thus, it is left to courts and legislatures to protect individual privacy from monitoring on such a large scale.

The Author believes the following factors are most important when deciding whether a "monitoring effort" invades privacy: (1) newsworthiness of the photograph; (2) how long it is kept in storage; (3) how widely it is made available to the public; and (4) how frequently the monitoring is done. A limited ban on Street View allowing for news gathering but not twenty-four hour surveillance would balance First Amendment and privacy interests.

VI. CONCLUSION

As Kevin Bankston stated in his interview regarding new technologies and invasion of privacy rights, attorneys "have to do our best to craft analogies to already existing doctrines as applied to already existing technologies. Sometimes that works well. Sometimes it doesn't." In the case of Street View, current laws do not adequately protect privacy from technology efforts that record and monitor activities

93. *Id.*
94. Blackman, *supra* note 11, at 324.
95. *Id.* at 325.

which were once reasonably private, albeit on public streets. Although some companies are doing their best to develop new inventive technologies while simultaneously protecting individual privacy, companies like Google are not legally required to do so. For example, some companies simply delete old surveillance information as new information is uploaded, so that the information is not stored or available to the government or the public indefinitely.[96] Other companies, like Google, however vehemently argue that complete privacy does not exist.

This Comment has examined the inadequacies of current laws to protect Americans from internet monitoring efforts. The Fourth Amendment currently does not consider a "search" to include information that can be gathered by the naked eye or by technology that is generally publicly available. Further, information gathered by the government from third parties that make the information available to the public is not considered a "search." Though Google does have a take-down notice policy, Google is not compelled by law to take any of its images down. Google could easily refuse these requests or in the future decide to discontinue this policy. Further, although Google can blur faces with face recognition software, it can just as easily unblur them. Finally, creating new torts or expanding current ones requires courts and legislatures to use careful consideration so as not to stifle the development of new technology or limit First Amendment rights.

Expanding the Fourth Amendment of the Constitution; legislative limiting of government monitoring of private individuals; requiring take-down compliance for ISP immunity; and limiting ISP immunity by creating new torts or expanding existing ones are all solutions that are fraught with challenges. But like old copyright laws were modified after hearing lobbyists' concerns to protect copyrights on the internet, the invasion into American individual privacy through the internet must also be considered. Coincidentally, Bankston himself, who strongly opposes technology like Street View, has been caught smoking a cigarette on Street View walking to work. He warns Congress, courts, and companies like Google not to forget that, despite the excitement of new innovations, "it's really critical for us in order to operate as a free society to be able to move about in public with some level of anonymity."

96. *See* Loopt, Privacy & Security, http://www.loopt.com/about/privacy-security (last visited Feb. 29, 2009) (reflecting Loopt as an example of a company that tracks individuals, but once an individual reports their new position, it immediately overwrites the old position—so if the government or a civil litigant subpoenaed where an individual had been for the past X amount of time, it would not be available).