

WHEN DOES SURVEILLANCE ART CROSS THE LINE?

Changes in technology and conventions are raising questions about
what it means to invade others' privacy in the name of art

BY BARBARA POLLACK



New Yorkers Martha and Matthew Foster are furious with photographer Arne Svenson. As residents of the Zinc Building in Tribeca—a glass-clad residence whose interiors can be easily observed from the street—the Fosters were shocked when they found depictions of their children in Svenson’s latest series, “The Neighbors.” For these color-saturated images, the photographer used his telephoto lens to catch glimpses of his neighbors, without their consent, as they napped, watched television, snacked, cleaned up, and otherwise went about their business within their apartments. According to the Fosters, Svenson is nothing more than a Peeping Tom, invading their privacy and exploiting their profiles for commercial gain.

The couple sued the photographer in May 2013, but the trial court dismissed the case, finding that it didn’t represent a commercial appropriation of the plaintiff’s image but was instead an artistic expression protected by the First Amendment. Currently, the case is back in court on appeal, although New York case law is clearly on Svenson’s side.

Did Svenson, a renowned fine-art photographer represented by Julie Saul Gallery in Chelsea and Western Project in Los Angeles, overstep his bounds when he picked up his camera and filmed the comings and goings of private citizens? Or are the Fosters, who chose to live in a glass box in the middle of a dense urban setting, naive and ignorant of the history of photography?

There is no law that prohibits people from looking into one another’s windows in New York City, where many denizens own telescopes and binoculars precisely to indulge in this pastime.

But what is the difference legally between looking at people or places and producing a photograph that is distributed and displayed in the public arena? And does any of this matter today, when Facebook, selfies and NSA data-gathering have expanded access to personal information to the point where many believe we are witnessing the death of privacy?

Over the past few years, a number of photography exhibitions seem to have anticipated the case of Foster v. Svenson in their examinations of voyeurism, surveillance, and privacy issues. As early as 2003, the International Center of Photography presented “Strangers: The First ICP Triennial of Photography and Video,” a survey that included many examples of photographic invasions, and in 2010 the San Francisco Museum of Modern Art presented “Exposed: Voyeurism, Surveillance, and the Camera Since 1870.”

Now, the Transformer Station in Cleveland is showing “Unknown: Pictures of Strangers,” the New York

Public Library is planning an exhibition scheduled for November 2014 titled “Public Eye: 175 Years of Sharing Photography (1839–2014),” and the Scottsdale Museum of Contemporary Art is planning “Covert Operations: Investigating the Known Unknowns,” scheduled to open in 2015.

“I discovered that as soon as you had a camera small enough to hide, you got surveillance photographers,” says SFMOMA curator Sandra S. Phillips, who cites Paul Strand, Walker Evans, and Garry Winogrand among those who caught subjects off-guard or unawares. “Some photographers didn’t think they were being invasive; they were just attached to this view of looking at people through a little peephole and seeing what the world looked like when people weren’t posing for the camera.”

Certainly, Svenson doesn’t view himself as doing anything invasive. “Being a photographer, I shoot what I see, and I am what I see,” he says. “I looked out the window of my studio and I saw this fascinating amalgam of Mondrian, Hitchcock, and Vermeer, and I had to photograph it.” Wanting to create a study of humanity rather than specific portraits of people, he avoided depicting faces or other identifiable details when shooting “The Neighbors.” “I thought, how can I represent humanity without specifically identifying the human being? They were representations of you and me in our most human moments,” he says. “I was looking at a certain kind of quietude.” Indeed, nobody knew who was in the photographs or even the location of the shoot until a news report tracked down the building and the residents themselves broke their anonymity.

Likewise, Michel Auder wasn’t thinking so much about spying when he trained his video camera on nearby apartment buildings and created the footage for *Untitled (I Was Looking Back To See If You Were Looking Back At Me To See Me Looking Back At You)*, 2014, his three-channel video installation presented at the 2014 Whitney Biennial. Watching the films the viewer becomes, in effect, a character in Hitchcock’s *Rear Window*, peering into lighted apartments on high floors. The subjects were filmed from enough of a distance that their features, and therefore their identities, were obscured. Still, it is easy to see their actions as they come home at night, undress, watch television, and make love. The video, however, is not quite as explicit as Merry Alpern’s 1993–94

Arne Svenson, accused of being a Peeping Tom, used a telephoto lens to shoot through uncovered windows. Opening: *The Neighbors #11* (detail), 2012; and, opposite: *The Neighbors #28*, 2012, pigment print.



Paolo Cirio's *No. 17 Berlin—26 Lychener Strasse, Germany*, 2012, from the artist's "Street Ghosts" series.

series "Dirty Windows," in which Alpern photographed through an airshaft leading to a makeshift brothel in New York City.

"I am an uneducated anthropologist. I am in one spot everyday, and I make observations from what's around me," says Auder, a veteran filmmaker. He shot the buildings featured in his video from the 20th floor, from an apartment in which he lived for over a year. "I don't think of myself as a voyeur," he says. "If you want to make a film about wild animals, you go where they drink water every day and place yourself so they don't see you. Is that voyeuristic? It's the same for me, though I am observing the activities of humans." Auder is well aware that the creep with a telephoto lens is a cultural stereotype, but he insists, "I am no more a pervert than you are, but if you use a camera, you have to look. I don't know how to escape this. What else can I do?"

Case law is on the side of artists like Svenson and Auder. The "reasonable expectation of privacy" is not

absolute, and it is governed, in many instances, by statutes. In New York State, the right to privacy is narrowly construed to apply only to situations in which a person's likeness is used without consent for advertising or other commercial purposes. The First Amendment has long exempted news organizations from such constraints, allowing them to photograph people without their permission so as to illustrate news stories. As the court found in Svenson's case, works of art have been extended a similar privilege, permitting artists to exercise their freedom of expression without the need for prior consent.

In a leading case, *Nussenzweig v. diCorcia*, photographer Philip-Lorca diCorcia was sued by an Orthodox Jew who was disturbed to see his portrait—a close-up shot in Times Square in 2001—included in the artist's series "Heads." The case was ultimately dismissed because Nussenzweig had waited too long to file suit, failing to meet the statute of limitations. The court, however, used the opportunity to reaffirm the photographer's



Paolo Cirio's *No. 20 Berlin—Dircksenstrasse, Rochstrasse, Germany*, 2012, from the artist's "Street Ghosts" series.

right to capture people without consent, even when using their image goes against religious strictures.

Much has changed since 2001 when diCorcia set up his tripod in Times Square. The rise of the Internet has unleashed a tidal wave of privacy violations, with people voluntarily posting personal pictures online and companies like Facebook and Google presuming to license and distribute them. More important, in the aftermath of 9/11, there has been a surge in government surveillance, most recently the NSA's stockpiling of metadata. In this situation, a "reasonable expectation of privacy" no longer seems to exist.

"Because of the proliferation of public surveillance cameras, you can't help being aware that you are being recorded by a camera, just by walking down the street. You have no idea who is collecting this information or how it is being analyzed and how close the analysts tracking you are," says ICP curator Christopher Phillips. "Surveillance is so pervasive that the attitude among

20-year-olds is almost blasé," Phillips notes. "They have grown up entirely in the digital era and have no concern or even awareness of the legal or ethical dimensions of this privacy issue," he adds. "To them, privacy is not something that you can expect or should expect."

A key factor that is contributing to this "death of privacy," Phillips observes, is that Facebook and other Internet companies now assert the right to possess all of the material that users post online, including photographs. "You and I are part of the transitional generation that has memories of legal and cultural battles around privacy issues," Phillips points out, "but a younger generation is unaware of those rights that are quickly wearing away in a digital culture. They think of the loss of privacy as just a price you pay for being connected to a digital network."

To underscore how troubling this situation is, many artists are using tools of surveillance and loopholes in privacy laws to create works that expose just how much has been lost. Paolo Cirio, for example, created a project

“I am no more a pervert than you are, but if you use a camera, you have to look. I don’t know how to escape this,” says Michel Auder.

called *Street Ghosts* in 2012, in which he tracked down pictures of random individuals who had been captured by Google Street View. He then printed them as posters and placed them at the very spots where the original images had been taken, injecting life-size representations of unsuspecting citizens into the landscape. According to Cirio, he did this to bridge the gap in people’s thinking about the difference between online and offline reality. Some people reacted negatively to the project, posting comments on the artist’s website. Others, however, asked Cirio to turn their Google Street View moments into life-size portraits.

“We worry about being naked on the street, but we don’t worry about being naked on the Internet,” says Cirio. By the same token, he notes that people are guarded about sharing information with strangers on the sidewalk, but seem comfortable posting personal details online. “I think there is still something called privacy, but we don’t have a dialogue about cultural norms around this issue on the Internet,” he says, adding that there are few laws governing Internet privacy, even as major companies seek greater access to personal information. And with lobbying clout to back these corporations up, it is unlikely that new laws will be passed to curtail this activity. Alternatively, just as individuals are relinquishing their privacy, businesses and government agencies are building walls to defeat intrusion. This lack of transparency was the target of Cirio’s latest project, *Loophole for All* (2013), which involved him hacking the Cayman Islands accounts of 200,000 offshore companies and allowing visitors to his site to open their own Cayman Islands mailboxes. “It is really important to determine where and when we need full transparency and where and when we need privacy,” the artist says. “These two things are going to change the world.”

When the story about Edward Snowden broke and the classified documents revealing government surveillance

of millions of phone records and e-mail accounts were released, artist Trevor Paglen experienced mixed emotions. For nearly a decade he has been “watching the watchers,” which was the title of his project earlier this year with Creative Time. For this work, Paglen photographed the NSA headquarters and two other secret intelligence agencies and distributed the images online. Hearing that the NSA was gathering widespread information, he felt that “it was a confirmation about things that many people had strongly suspected.” He adds, “I went from being sort of a conspiracy theorist to having a recognition of reality.”

Alert to the fact that surveillance is inherently secretive, Paglen has worked to give literal visibility to the government’s growing encroachment on individuals’ privacy rights. “These agencies seem very abstract,” he says, “because we don’t have images to help us make sense of what they are, and I assume my job as an artist is to generate images that help us see what we are living with.” By contrast, in creating his projects, he acts entirely above-board, even getting government permission to photograph the sites he chooses. He is concerned that because the government’s way of collecting metadata seems so abstract, most people were unable to understand the implications of this form of intrusion until the Snowden revelations.

Turning the tables on the “watchers” in the U.S. government by photographing their secret facilities and intelligence agencies is one way that Paglen tries to balance the scales. “Part of living in a democracy is that people get to know the maximum amount about the government, and the government gets to know the minimum amount about the citizenry—that’s how the balance of power is supposed to work,” Paglen says. “My job as an artist is to traffic in images and to see the world; I don’t do policy work. That is not my job.” ■

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