

# Opinion on Internet Map Retrieval Systems Containing Numerous Images of People and Residences

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Japan Federation of Bar Associations

## I. Summary of the Opinion

1. Regarding internet-based map retrieval systems, on which numerous images of people and residences can be viewed, it is illegal to publicize comprehensive images of large numbers of people, which have been taken without their consent. This is so, unless the necessity and social utility of such photography and publication is beyond the right of privacy and the right of publicity of the people subjected to such photography and publication. When there is no third-party body independent from administrative organs to assess the impact of such services on privacy, the services should not be extended to cover new areas. As regards the areas which have already been publicized, the Council on Protection of Personal Information in the respective local governments should conduct a post-investigation similar to that mentioned below in 2.-2), and its decision should be respected.
2. The following amendments should be made to the Act on the Protection of Personal Information as well as to prefectural ordinances on the protection of personal information. Until the amendments are made, the operation of the Act and ordinances should be improved accordingly.
  - (1) A third-party body independent from administrative organs should be established, which is authorized to research and monitor the protection of privacy, and in the case that there is a possible infringement of privacy, recommend taking corrective actions.
  - (2) Any person who wishes to take photographs of more than a certain number of people and residences in public places such as public roads for the purpose of publishing the photographs on a map searching system should consult the third-party body in advance and upon receipt of the request for consultation, the third-party body should assess the impact of the publication on privacy to determine whether the necessity and social utility of such photography and publication outweighs the right of privacy and the right of publicity.
  - (3) Until the establishment of such a third-party body, the Consumer Commission set up by the government and the Council on Protection of Personal Information of each local government should deal with this matter.

## II. Reasons for the Opinion

## 1. Internet Map Retrieval Systems Containing Numerous Images of People and Residences

### (1) Google Inc.'s Street View Service

#### A. Overview of the Service

“Street View” is a functional service launched by Google Inc. (“Google”) on August 5, 2008, which enables users to view on an internet map 360-degree panoramic photos taken by Google by actually driving through roads and streets. It started with 12 cities or regions including Sapporo, Tokyo and Osaka, but now covers several more cities that were added subsequently.

Frontal facial images are blurred in these photos in principle, but since the place of photography is clearly identifiable, it is possible for those who know the photographed person to identify such person. Further, images of persons without facial blurring have been found here and there, and besides, there are also images that look as if viewers are peeking inside private residences which is usually blocked by a wall because they were taken by a camera that was about one meter higher than a pedestrian's point of view.<sup>1</sup>

#### B. Overseas Situations Concerning the Provision of the Service

##### (a) Canada

In September 2007, the Privacy Commissioner Jennifer Stoddart sent a letter of warning to the Chief Legal Officer of Google Inc. saying that the service might violate the Personal Information Protection and Electronic Documents Act. Consequently, the provision of the service was temporarily suspended even though photographing was underway.

##### (b) EU

It was reported in the media in May 2008 that the European Data Protection Supervisor had released a view that Google's Street View service was likely in violation of the EU Data Protection Directive.

##### (c) Germany

In November 2008, the following decision was made at the general meeting of the

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<sup>1</sup> There are many websites created by third parties other than Google containing images gathered from those published on the Street View which people would not generally like to be published to others (a couple about to enter a “love hotel,” a man urinating in the street, students kissing on the street, etc.). Some of those websites release such images published on the Street View after storing them once in another medium personally, and thus, even if the data subjects succeed to have their images deleted from the Google's service, the images once released will be put to a secondary use by such third parties.

It is said that the position of the camera was adjusted to lower the photographing position to the eye level of pedestrians after the original launch of the service, but images photographed from a higher position are published for the areas expanded after October 8, 2009 (such as Okinawa).

German Data Protection Committee:

“It is not allowed to systematically provide images linked to geographical information if human faces, vehicle number plates or house numbers are identifiable.

Affected residents and residence owners should be able to make an objection to the publication of specific images and to enjoin the publication of clear images.

In order to secure an opportunity to make an objection before the data are acquired, such acquisition of data must be notified sufficiently in advance to make an objection.”

In Germany, procedures are guaranteed to refuse photographs of one’s residence to be taken in advance.

(d) Greece

It is reported in the media that on May 11, 2009, the Greek Data Protection Authority issued an order prohibiting Google Inc. from photographing for the Street View service in Greece on the grounds that its privacy protection policy is not sufficiently clarified.

(e) Switzerland

On November 13, 2009, the Swiss government announced its intention to file an action against Google Inc. It is reported that the reason is, contrary to the prior explanation from Google Inc., the images posted on Street View are comprehensive also including outside of city centers and that the recommendation for improvement by the data protection authority to blur human faces and vehicle numbers has not been complied with.

(2) Services other than Street View

A. Location View

Location View is a service provided by LOCATIONVIEW Co. on its website since October 2007, consisting of digitalized data of omnidirectional images photographed on urban streets. As of March 2009, data are published for 42 districts in total, ranging from Hokkaido to Okinawa.

B. Walk-through Video System

The Walk-through Video System consists of video clips of street scenes from several Japanese and overseas cities photographed and published on the internet by NTT Resonant Incorporated.

According to the hearing investigation of the company conducted by the JFBA, they have been published on the internet since April 10, 2007 and photography had been conducted half a year prior to the publication. Data published are mainly those of tourist spots that are often visited by foreign tourists (Kyoto, Akihabara, etc.) and the scope of subjects is significantly limited compared to Street View and Location View.

## 2. Situation of Protection of Portrait and Privacy Right in Japan

### (1) Portrait/Privacy Rights on Public Roads

It is unavoidable for people in public spaces to see appearance of others or to be seen by other people so long as people live in a group as social beings. However, it is a completely different situation if, instead of just seeing or being seen as a human physical function, appearances are recorded and stored as digital images and footage that can be put to a secondary or tertiary use regardless of the intention of the individuals seen, because it is absolutely impossible for the data subject so recorded as images or footage to control when, by whom and for what purposes such images or footage of himself/herself will be used.

Even on a public road, as one of the freedoms in an individual's private life, any person is guaranteed the freedom not to have his/her face or appearance photographed (portrait right, which is a type of privacy rights) without consent or good reason with respect to the photographing by public authority (Supreme Court decision on December 24, 1969; judgment on the case of the Kyoto Prefectural Federation of Students' Self-Governing Association).

It is a matter of course that photography and publication by a private person also pose the issue of whether such act constitutes a tort or not, and it has also been confirmed by court precedents that there exist portrait right and privacy rights which shall be protected even on a public road.<sup>2</sup>

Moreover, digital images and footage can be far more easily reproduced or used by countless people than film photographs, so the issue of invasion of privacy by digital images and footage will be far more serious than the invasion of privacy by photography discussed in the aforesaid Supreme Court decision.

### (2) Judgment of Illegality of Violation of Portrait and Privacy Rights

While the Street View service or the Location View service restricts the portrait and privacy rights of the persons photographed without consent, there is a certain utility in these services as well. Thus, the standard for the judgment of illegality becomes the issue.

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<sup>2</sup> The Sapporo High Court decision on February 23, 1977 (*Hanrei Times* No.349, P.270) held that "an ordinary private person should be deemed allowed to photograph the face and appearance of somebody without obtaining a consent of the person photographed in the following cases, as such photography cannot be said to be an illegal and unjust violation of the aforesaid freedom: (i) it is made for a legitimate purpose acceptable under normal social standard, such as for collecting news materials for legitimate reporting, preserving evidence for legitimate labor-related measures, preserving evidence to exercise legal rights in litigations, etc., (ii) there is an urgent need for such photography, and (iii) such photography is made by an appropriate generally accepted method." The Tokyo District Court decision on September 27, 2005 (*Hanrei Jiho* No.1917, P.101) held that the act of the incorporated foundation photographing a woman walking a pedestrian crossing without her consent and posting the photo on a website constituted a tort by violating her portrait right.

According to the past court precedents, etc., indicated above, illegality of an act of photographing someone's physical appearance, etc., should be basically judged by comparing and balancing between the necessity and social utility of such act and the interest of privacy of those who do not want to be photographed. And if the act of photography is judged illegal according to this standard, the act of publishing such images is also deemed illegal.

When making such comparison and balancing as aforesaid, factors such as the social status of those being photographed, the content of their activity, the place, purpose, mode and necessity of photography, etc., should be taken into consideration.<sup>3</sup>

#### A. Act of Photography by Google Inc.

- (a) First of all, the extent of restrictions of portrait and privacy rights is significant as discussed below. As for the social status and the content of the activity of those photographed, they are not public figures but countless ordinary citizens leading an ordinary life, and therefore the need for protection of their portrait right is high.

Photography is taken on public roads and is mainly focused on public roads, but images published include those in which someone in a house is photographed, those photographed in front of facilities offering adult entertainment services where visitors would like to avoid attention, as well as those in a residential area, place for a private life. In such places there exist numerous citizens who do not want to be photographed and published, and many local governments have indeed submitted an opinion against such photography. So, it cannot be said that they should tolerate such photography and publication inevitably at any time, and there are cases where the need is high to protect their portrait and privacy rights. Further, even though there are cases where the need for protection is relatively low, the number of people who are subjected to such photography is enormous, and therefore the extent of invasion of the privacy cannot be said to be small in aggregate, considering the total number of those who do not want such photography and publication.

In terms of the mode of photography, the actions of Google Inc. greatly invade the privacy rights of the residents of the target areas, since the images of a wide range and large number of unspecified citizens are photographed in virtually all areas of certain cities, and it was not explained in advance to those who live or act in the target areas that such photographing would be conducted for the purpose of publishing the

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<sup>3</sup> A case example of such comparison and balancing made based on these factors is the Supreme Court decision on November 10, 2005 (*Hanrei Jiho* No.1921, P.61), which held that the act of photography by a media organization for publication purpose and the act of publishing such photos were illegal.

images on the internet, as well as photographs were taken from such a high position that some images included scenes inside the premises of private residences.

- (b) By contrast, the necessity and social utility of photographing them without consent for the purpose of publishing on the internet cannot be said to be large as discussed below.

The purpose and necessity of photography for the Street View service, as explained by Google Inc., are for the convenience achieved mainly by “enabling exploration of the neighborhood in a visual manner”.

It is obvious that such convenience is offered, but being convenient for everyone means that it easily provides those who plan theft targeting private residences, robbery or other crimes with information for preparation. This is particularly a problem where detailed images of residential areas are offered.

Further, in relation to the protection of individuals’ portrait right, passers-by need not be included in the images for the purpose indicated by Google Inc.

Hence, it cannot be said that the necessity and social utility of the act of publishing such images as well as the act of photography for that purpose are always large.

#### B. Act of Photography by LOCATIONVIEW Co.

- (a) Similar considerations as in Section A above must be given to the extent of violation of portrait and privacy rights also with respect to the act of LOCATIONVIEW Co. Since images of a wide range and large number of unspecified citizens are photographed in virtually all areas of certain cities, and it was not explained in advance that such photography would be conducted for the publishing purpose, the extent of its violation of portrait and privacy rights is significant.

- (b) On the other hand, the act of photography by LOCATIONVIEW Co. can be deemed to serve certain public interest in some cases where it is conducted under commission from local governments to the extent images are collected within the scope of such commissioned work.

However, considering the fact that such act of collecting images is conducted without a consent of the individuals so photographed on the premise that they will be provided to third parties in linkage with maps on the internet, it is the same as in the case of Google Inc. that the necessity and social utility cannot be said to be always large to publish such a comprehensive and large number of images of individuals photographed without their consent as personal identifiable data.

#### C. Act of Publication

As for the act of publication, faces are blurred in principle both in the Street View service and the Location View service, but it is deemed appropriate to apply the

standard for judgment of illegality of portrait and privacy rights without modification for the following reasons.

In other words, since the portrait right is a right not to have one's "face or appearance, etc.," published without consent, one's "appearance" which an ordinary person would not generally want others to know should not be published without his/her consent unless the necessity and social utility of such publication outweigh it. Scenes of ordinary pedestrians just passing by also fall under "appearances," there are cases where those who know such persons could easily identify them based on how they are dressed and built and how they move since the location of photography is clearly identified as a specific point on the map.

And the extent of the violation of portrait and privacy rights caused by the act of publication by the Street View service is significant, and the necessity and social utility of such publication cannot be said to outweigh such rights for the following reasons: the images are not examined individually in advance to detect problematic ones; Google Inc.'s website is a powerful medium exposed to an extremely large number of citizens; unlike news programs on TV, etc., where images are displayed briefly in the background, they can be viewed repeatedly by anybody anytime in a manner that the location of photography is identifiable; and the images being electronic data can be characteristically put to a secondary use by third parties easily and semi-permanently.

The mechanism to delete images in response to users' requests (opt-out method) is effective in relation with those who view them after such deletion. But not all individuals will detect images in which they are captured in a manner that would be felt as a violation of their portrait and privacy rights if they would ever see them, and even if they are deleted after being published, it is highly likely that they have already been put to a secondary use and it is not possible to restore the original state where no violation of portrait and privacy rights took place at all. It cannot be said that it is necessary and socially useful to cause such situation.<sup>4</sup>

Similarly, the Location View service also lacks appropriateness and therefore is illegal since: (a) it cannot be said that its system to examine the images individually to detect problematic ones is adequate; (b) unlike news programs on TV, etc., where

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<sup>4</sup> At the emergency session on Street View held by the JFBA on November 21, 2008, Professor Tsuyoshi Hiramatsu called for legislation in Japan, stating that the act of Google would be held illegal under the German laws.

On December 19 of the same year, a group of 33 researchers including Professors Yasuhiko Tajima, Toshiki Odanaka, Ichiro Urata, Masaru Kaneko and Takeshi Kobayashi submitted to Google a written request to immediately suspend the Street View service on the ground that the acts of photographing and publishing both violate Article 13 of the Constitution by infringing on privacy rights.

images are displayed briefly in the background, they can be viewed repeatedly by anybody anytime in a manner that the location of photography is identifiable; (c) the images being electronic data can be characteristically put to a secondary use by third parties easily and semi-permanently; (d) even if images are acquired under commission for purposes of a considerable public nature such as to understand disaster situations, check whether electrical cables are installed according to standard, etc., their publication through the website is beyond the scope of such commissioned work and such act of publication itself is not deemed to serve public interest; and (e) the company has not so far complied with requests for deletion, giving priority to its own interest of retaining as many images as possible.

#### D. Acts of Photography and Publication for the Walk-through Video System

The act of photography for the Walk-through Video System is also suspected to be illegal as with the other services. However, since it cannot be said that a comprehensive and large number of images of individuals are subjected to such photography, and the areas subjected to such photography and publication at present are mainly tourist destinations popular among foreign tourists and quite limited to certain zones instead of photographing and publishing the images of the entire city, it is considered possible for those who would not like to be photographed to avoid such areas for a short time. Thus, it is thought that the issue of violation of portrait and privacy rights will be solved if certain requirements are satisfied, such as (i) the purpose shall be disclosed, and (ii) a system shall be established to publicize the fact that photography will take place and the time, date and locations of such photography, and so on.

Similarly, as for the act of publication, the scope of publication is considerably limited, as it does not publish the images of whole cities. In other words, it cannot be said that a comprehensive and large number of images of individuals are subjected to publication, and therefore, it is thought that the issue of violation of portrait and privacy rights will be solved if the requirement that “(iii) the images shall be visually examined individually to identify those which one would not usually want others to see and such images shall be voluntarily deleted in advance” is satisfied in addition to the aforesaid requirements (i) and (ii).

#### E. Other Information

In the Street View service and the Location View service, information other than appearances of individuals is published, such as private residences, nameplates, vehicle number plates, etc.

These also fall under the information that requires considerations for the protection of privacy rights. In particular, the fact that the photographs of residences can be viewed



freely in linkage with address information means that if address information is available for a specific person, it is possible to take a peek into the person's residence out of mere curiosity. Contrary to the conventional concept of privacy under which the necessity to protect house information was low, it should be better protected as privacy information.

#### F. Compliance with the Act on the Protection of Personal Information

In terms of compliance with the Act on the Protection of Personal Information, all of these three services are respectively in violation of Article 8, Paragraph 1 and Article 23, Paragraph 2 of the Act.<sup>5</sup>

The Act on the Protection of Personal Information requires that when an entity has acquired personal information, it shall promptly inform the data subject of or disclose to the public the utilization purpose except in cases where the utilization purpose has been disclosed in advance to the public (Article 18, Paragraph 1 of the Act). The images of persons photographed are personal information since it is identification information. But in the current case, Google Inc. has not sufficiently performed its obligation to publish the utilization purpose as required in case of acquisition of personal information, since it is not even included in its privacy policy at the time of photography/publication. Therefore, it is in violation of Article 18, Paragraph 1 of the Act.

It was on December 18, 2007 that LOCATIONVIEW Co. included in its privacy policy the provision for notification of use of the images for the project, which was later than the publication of such images in October 2007. Considering the fact that the act of photography was conducted even before the publication, a prompt disclosure was not made with respect to those photographed at the beginning. Thus, the publication of those images is at least in violation of Article 18, Paragraph 1 of the Act.

The Walk-through Video System is also in violation of Article 18, Paragraph 1 of the Act, since its acts of photography and publication are not disclosed in its privacy policy even now.

Further, the Act on the Protection of Personal Information allows for provision of personal data to a third party without the data subject's consent under certain conditions.

In short, procedures shall be set to cease such third-party provision of personal data in response to the data subject's request (opt-out), and more specifically, the following four points shall be notified to the data subject or put into a state where the data subject can easily know: (a) that the data will be provided to a third party; (b) categories of personal data provided to the third party; (c) the means or method of such provision; and (d) that such third-party provision will be ceased upon request from the data subject

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<sup>5</sup> The image of a person at the time of photography falls under personal information because it is identification information. Further, since such images, etc., are linked by address searches, they fall under personal data.

(Article 23, Paragraph 2 of the Act).

In the current case, Google Inc. collects and publishes data without publicizing in advance that various image information is to be published on its website and such act of publication may be ceased, and therefore, it is in violation of Article 23, Paragraph 2 of the Act.

Further, LOCATIONVIEW Co. does not only fail to make it easily knowable that the publication may be ceased, but has even been de facto refusing to comply with requests for deletion of images by persuading the requesters, probably because it does not consider such act of publication on its website as a third-party provision. Hence, it is also in violation of Article 23, Paragraph 2 of the Act.

Similarly, the Walk-through Video System also neither makes it easily knowable that the publication may be ceased nor complies with requests for deletion of images, so it is in violation of Article 23, Paragraph 2 of the Act.

(3) Necessity to Call for Cessation of Illegal Acts

As discussed, regarding internet-based map retrieval systems on which numerous images of people and residences can be viewed, it is illegal to publicize a comprehensive and large number of images of people taken without their consent as personal identifiable data, unless public interests are deemed to outweigh the privacy of numerous citizens subjected to such publication. And at present, it is difficult to find such public interests. As will be discussed below, to the extent that there is no third-party body independent from administrative organs to conduct the privacy impact assessment, the services should not, at least, be extended to cover new areas. As regards the areas which have already been publicized, the Council on Protection of Personal Information in the respective local governments should conduct a post-investigation similar to the procedures for privacy impact assessment and its decision should be respected.

3. Amendments of the Act on the Protection of Personal Information and Prefectural Ordinances on the Protection of Personal Information and Interim Improvement of their Operation

(1) Establishment of a Third-Party Body Independent from Administrative Organs

It is extremely easy today to collect the images of a vast number of people and information on a vast number of residences. However, it is not necessarily examined whether there is truly the necessity that outweighs the right of publicity and privacy rights of those subjected to such collection. The lack of such comparison between interests is thought to be the core of this issue.

The JFBA has repeatedly pointed out that a third-party body independent from administrative organs is necessary, which shall be authorized to investigate possible

violations of the Act on the Protection of Personal Information, including comparison between interests, as well as supervise and issue corrective orders to relevant entities.

Third-party bodies on the protection of personal information independent from administrative organs (data commissioners, data protection supervisors, etc.) are established in most developed countries (EU member states, Canada, Australia, Switzerland, etc.), and the lack of supervision by a third-party body over illegal and unjust use of personal information should be solved by amendments of the Act on the Protection of Personal Information and prefectural ordinances on the protection of personal information.

(2) Opinions of Third-Party Body and Privacy Impact Assessment

Moreover, the Act on the Protection of Personal Information and prefectural ordinances on the protection of personal information should provide that, when more than a certain number of people and residences are to be photographed in public places such as public roads for the purpose of linking the images with a map searching system, the third-party body independent from administrative organs must be consulted in advance for opinions, and upon receipt of such request for consultation, the third-party body should implement privacy impact assessment to determine in advance whether the public interest in such photography outweighs the privacy rights restricted by such act.

Procedures for prior examination as to whether or not an act with a substantial impact on privacy may be introduced are de facto operationally secured by a third-party body in the EU.

Further, the countries and regions that have independent procedures of privacy impact assessment in place include Canada, Australia, New Zealand and Hong Kong, and the Privacy Impact Assessment is adopted under the Electronic Government Act also in the United States, which is another country without a third-party body like Japan.

It is needless to say that a third-party body needs to be established and operated, but at least such examination procedures for the comparison between interests should be secured.

(3) Examination at the Consumer Commission, etc.

Until the establishment of a third-party body on the protection of personal information independent from administrative organs, issues like the current case concerning privacy protection should be handled and examined by the Consumer Commission set up under the Cabinet Office or the Council on Protection of Personal Information established under the ordinances of local governments and so on in order to deter invasion of privacy as much as possible that occur continuously in reality.

End.