
Legal Rights of Photographers

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Even before 9/11, photography had been under siege. Anyone with a camera larger than a cell phone was considered some sort of threat, and since 9/11 it's only gotten worse.

There's an incredible amount of misinformation about what rights photographers in the United States have. People have written to me about how they were told, "You can't take pictures of police," and "You can't shoot children without their parents' permission" and "You can't take pictures on private property without permission."

None of these are true.

Photographers have been harassed, threatened, and killed — all for capturing a moment on a memory card or on film. Images have been deleted or confiscated, police have been called, and innocent people have had to deal with know-nothing guards, cops, and ordinary folks.

In 2005, I was a newspaper reporter. Many of us carried point-and-shoot cameras, but our photo department couldn't give us definitive guidelines of what we could and couldn't legally shoot. So I set out to learn. I read, sent e-mail, and made phone calls until I was satisfied. (My list of sources is at the end.)

It didn't take long for a clear consensus to emerge, from people who know these things, about what's legal and what's not. So I wrote it all out in a document called "Legal Rights of Photographers."

I wrote it to satisfy newspaper editors who wanted, not surprisingly, a detailed list of sources and a legal argument. The end result was a bit clunkier than I would like. And since its publication I've had a lot — a *lot* — of questions sent to me, which demonstrated what I left out of that first document.

So here it is again, easier to read with a bit broader coverage to address the questions I got. I hope you find it useful.

—Andrew

I am not a lawyer. *I have not had legal training. I am just a guy who did some research on this topic. Don't consider this document as legal advice; it may be wrong. Consult your own attorney if you have questions; this is just one person's understanding and overview.*

Let's start with the basics.

If you can see it, you can shoot it.

You can legally take pictures of anything that is visible to the general public (without special equipment — e.g., a telephoto lens), whether it or you are on public or private property.

That means you can legally take pictures of children, athletes, people on the street, beach bathers, buildings, cars, policemen, accident scenes, government officials, airplanes, airports, trains, and so on.

You can legally take pictures when you are on private property, if that property is open to the public (e.g., a mall or office complex).

Perhaps a better phrase is: ***If anyone can see it, you can shoot it.***



A school field trip. Do I even know all these kids? Nope. But I don't need permission to publish this.

You do not need permission to take pictures. The answer to the question, “What law says you can take that picture?” is “You’ve got it backwards. What law says I can’t?”

All that said, there are two important caveats.

1. While there are few exceptions to what you can photograph, there *are* exceptions to what you can *publish*. (More on that in a moment.)
2. Although it is legal to take pictures while on private property, you could still be guilty of trespassing if the owner of that property tells you not to, or if he demands that you leave.

What you can't photograph

- **Where photography has been prohibited by law.** That's *by law*, not by private “No Photography” signs. What's prohibited by law? Photography of certain government facilities (usually of a military nature) — you will be well aware of this prohibition if you encounter one. For example, it is apparently against the law to take photographs of bridges in the New York City area. Stupid, but true.
- **Things that require special equipment to see** — i.e., they wouldn't be visible to the public. So using a long lens on a rooftop to shoot a woman on the fifth floor of an apartment building is a no-no. That's invasion of privacy. (Technically, taking the photo isn't what's illegal. Violating the person's privacy is. But they're tied together in this case.)



Note that using a long lens to shoot pedestrians from a rooftop (or high school soccer plays on a field) is fine; they have no expectation of privacy.

All *that* said, just because you can shoot something doesn't mean you can *publish* it.

What you can't publish

Let's get the easy stuff out of the way: When it comes to non-human subjects, the only things that you cannot publish are copyrighted images (more on that in a moment) and potentially images that give away a secret (in which case you would have been someplace inaccessible to the public to get the shot — in the vault holding Coca-Cola's secret formula, or on a military base) .

When it comes to people, though, there are a few more rules. **Breaking one (or more) isn't against the law, but you could lose a civil suit** for invasion of privacy or (in one case) libel.

In fact, publication of photos is all about three parts of privacy law — private facts, false light, and misappropriation. They tell you whether or not a photo can be published without opening yourself to a lawsuit — and this is important — *regardless of how the photo was obtained*.

In other words, even if a photographer violates a subject's right to privacy, publishing the photos is not *illegal*.

From the *Photographers' Guide to Privacy*:

Even if a news organization arguably violates a subject's right to privacy, the subject's remedy usually will not include the ability to bar the publication of the picture. (See CBS, Inc. v. Davis, 114 S.Ct. 912.)

Here are the questions to ask if you want to know whether it's all right to publish a photograph of someone.

Did the subject of the photo have an expectation of privacy? It doesn't matter whether she was on public or private property; was she making a reasonable effort to avoid being seen?

If not, the picture is probably all right to publish — meaning your risk of losing an invasion or privacy lawsuit is slim. But if you need to take any kind of extraordinary means to get the shot — the long lens mentioned earlier, or a hidden camera, for example — forget it.

But what if the person *does* have an expectation of privacy, whether she's in her bedroom or he's sitting on a park bench huddled over a medicine bottle? Then there are some more questions to ask.

Is the picture embarrassing to a typical person? Does it reveal private and non-newsworthy information that a reasonable person wouldn't want publicly known? Sneaking into your ex-girlfriend's apartment and getting a shot of her in the bath — that's a no-go. Ditto for a shot of someone, say, taking AIDS medication.

The definition of private information is fairly specific.

From the American Law Institute:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
(a) would be highly offensive to a reasonable person, and
(b) is not of legitimate concern to the public.
—Restatement (Second) of Torts, § 652D

Does it put the person in a false light? That is, is it published in such a way — perhaps with a particular caption or in a particular collection — that it implies something untrue about the person? A Web page of “My Favorite Drug Addicts” that included a shot of your high school teacher taking an aspirin in the men's room could be considered libelous.

Context is (almost) everything. From the *Photographers' Guide to Privacy*:

A photograph or videotape by itself will rarely place a subject in a false light. Rather, the accompanying text, caption, or voice-over could be misleading and portray the person in a false context. However, an accurate depiction of a person in a publication the person finds offensive does not, in itself, state a false light claim.

If a photo doesn't make someone look bad or embarrass him, chances are it's legal to publish. But there's still one more thing to consider before publication.

Misappropriation

Everyone has the right to the commercial use of his or her image. That means you can't sell a picture of, say, Eli Manning without his permission.

Per the American Law Institute:

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.
—Restatement (Second) of Torts, § 652C

There's an important exception to all this: News value. You can take anyone's photo — including Eli Manning's — and put it in a newspaper, magazine, or Web site in a news context (e.g., "Eli Manning makes surprise shopping trip to Smallville," or "Quarterback John Doe takes a drink before the start of the 3rd quarter").

As the *Photographers' Guide to Privacy* explains:

Under these laws the use of a relevant picture to illustrate a newsworthy article will generally not lead to liability. The unauthorized use of a celebrity's picture in an advertisement often will.

But what if it's not in a news context? What if it's just a great photograph? Whether you're allowed to publish (without fear of lawsuit) comes down to this: *Is the value of the image based on the identity of the person pictured in it?*

If it doesn't matter who is in the shot — it's generic cute kid or beach bums or mall shoppers, there's a good chance you can use it for commercial gain without anyone's permission. Put another way, if what's important in the picture is what someone is *doing*, not who it is, you're probably in the clear.

For example, if you have a picture of Generic Guy playing touch football on the beach, you can probably publish it — the value of the picture is in what he's doing, not who he is. But if it's a picture of Dante Culpepper playing on the beach, the picture is valuable because of him. And he owns the right to his image.

It's not just big-name celebrities. The local high-school quarterback, for example, also owns the right to his image; you might run into problems if you try to sell a shot "Bobby McGillicuddy, start of the Newton High Raptors." But if it's a general picture of the team at play, that's another story.

That's why there are model releases for professional shoots. They protect the photographer by giving him permission to publish and sell those images (depending on the wording of the release). That way a high-school student can't sue if her senior picture is used to advertise the photographer's services.

Now, if you shoot Eli Manning or Dante Culpepper or Bobby McGillicuddy when they are visible to the public — maybe you run into them walking down the street — you can still publish those images as long as you don't cross the line into commercial gain. (If you have Google AdSense ads on your site, is that considered "commercial gain"? That's for a court to decide.)

What about selling?

One of the most frequent questions I get is along these lines: *I shoot my kid's soccer games. Can I sell the pictures on my Web site? Can I sell pictures of individual kids to their parents?*

If you've got general action shots of a game, yes, you can publish and sell them on your Web site. When it comes to individual shots, though, it's a different matter.

Remember, people own the rights to their images. That means you can't sell a photo of "Billy Stevens, goalkeeper" without his permission — at least not to the public. But you *can* sell it to him (or his parents) because the act of buying it from you indicates they're agree to your profiting from it... at least from them.

You can also put them on a Web site. You can't sell images of individuals (except as just mentioned), but you can show off your skills. Just be careful — if one of the players claims that his particular image is worth something, and that you are profiting from having a picture of "Billy Stevens, star goalkeeper" — you may have to take it down. But that's a tough argument to make if he's not a celebrity.

Trademark and copyright

Some inanimate objects are protected by trademark or copyright law, and selling pictures of them could violate those laws.

One of the more famous of these is the Hollywood sign. You can shoot it and publish the image (the Hollywood Trust even has a "list of suggestions for safe, legal spots where you can go to get that perfect picture of the Sign") but you can't sell it. Ditto for some other private buildings, as well as things like Hershey's Kisses, Crayola crayons, Lego bricks, Las Vegas hotels, and more.

Remember, this only applies to *selling* images. So yes, you can publish a picture of your six year old drawing with a Crayola crayon on your Web site. And if there's news value, you're also in the clear.

What people can do to you

If you are on public property, you have the right to be left alone. People cannot badger you to stop taking photos, nor can they threaten you (physically or otherwise, and that includes threatening to call the police).

Private citizens, including security guards, do not have the right to confiscate your equipment or to require you to erase your memory cards (or film). They do not have the right to threaten you in order to make you do so “voluntarily.”

If you are on private property, the owner of that property (or his representative — e.g., a security guard) can make permission to be on that property contingent upon your compliance. In other words, “Stop taking pictures and erase your memory card or I’m kicking you out.”

Failure to abide by this could make you guilty of trespassing, *but the photos you take would probably still be legal.*

What can a store owner or manager legally do?

- Ask you to stop photographing. Failure to stop could mean you are trespassing.
- Ask you to leave. Failure to leave could mean you are trespassing.
- Ask you to erase your memory card as a condition to remaining. You can choose to erase it or leave the property; failure to do either one or the other could mean you are trespassing.
- Ask you to do stop shooting and leave. Failure to comply could mean you are trespassing.

He or she can’t demand you erase your memory card or turn over your equipment. That’s called theft. He can’t threaten you physically or by saying he’ll call the police. That’s coercion. He can’t prevent you from leaving until you comply. That’s kidnapping or false imprisonment.

Law enforcement officials similarly cannot confiscate your equipment without a court order or if they are placing you under arrest. Neither can they destroy your property — and that includes deleting images or exposing film — without a court’s permission.

Of course, they tend to have muscles and guns, which may make it hard to assert your rights. They also, however, have badge numbers and superiors.



What you can do

Know your rights. When someone says, “What gives you the right to take these pictures?” know the proper response: “We’re in a public place” or “I actually don’t need permission.”

If a security guard demands your camera or memory card and won’t let you leave without turning it over, ask (as Burt Krages suggests) whether you’re free to go and what they will do if you attempt to leave. Let them know that they are about to be guilty of kidnapping or false imprisonment and yes, you will press charges.

Always be polite — firm, but polite. Tell the person that you understand his concerns, but what you’re doing is legal. If someone asks you not to take a photo of her (or her kids, or whatever) and it’s no big deal, don’t. The more polite photographers people encounter the better it is for all of us. That doesn’t mean back down whenever someone asks you not to shoot, but weigh the long-term cost of making a big deal about it.

Stand firm with the police. If it’s the police demanding that you destroy your pictures or turn over your equipment, say (politely) that you don’t want to. If they press the point, ask what law you are violating, and under what authority he is asking you to do so. Ask if you are under arrest. If you are not, remind him that he can’t confiscate you property.

Keep phrases like this in mind: “I’m sorry, but you can’t demand that I destroy my property just because you don’t like it.”

Unless you are interfering with the police’s ability to perform their jobs — standing in the middle of the street, or getting in their way — you can’t be arrested for “Not doing what a cop tells you to.”

Correction: A cop can arrest you for whatever he likes. But it won’t stand up in court and won’t look good for him. But being polite and reasonably accommodating can go a long way to avoiding the whole situation. If he asks you to “move over there,” maybe it’s a good idea to do so.

Carry a voice recorder. Most digital models have enough storage to record for six, eight, or even more hours. If you get into a situation that might be, shall we say, dicey, start recording. If a cop claims you were being belligerent and you can produce a recording of just the opposite, you’re in good shape. Ditto for private citizens. I speak from experience.

Important: In 12 states — CA, CT, FL, IL, MD, MA, MI, MT, NV, NH, PA, WA — you need to have the consent of all parties in a conversation in order to record it. So if you’re in one of the 38 states with a “one-party consent” law, you should be all right. But in these 12, either have the recorder in plain view, use a video camera in plain view, or skip it.

Get photo-recovery software. It allows you to recover deleted images from your memory cards. Many products (see “Resources”) are free and relatively simple to use. If put in a position where you are forced to erase your pictures, even if it’s not legal for someone to demand it, you can always recover them later.

A list of such software is available at www.ultimateslr.com/memory-card-recovery.php. You can also search on the words *photo recovery freeware*.

References

Photographers' Guide to Privacy, from the Reporters Committee for Freedom of the Press:
www.rcfp.org/photoguide.

Journalists' Right of Privacy Primer by Mark Sableman of Thompson Coburn in St. Louis:
[tinyurl.com/6f7tjr](http://www.mobar.org/4d443753-26ac-4b19-b05e-d5b54122bcb3.aspx) (<http://www.mobar.org/4d443753-26ac-4b19-b05e-d5b54122bcb3.aspx>), from the Missouri Bar's Missouri Media Law Handbook.

Interview with Mr. Sableman, December 16, 2005. Key quote:

I don't see why the act of trespass would turn something that occurs during the trespass into a tort if it wasn't one already. Particularly in the case of a shopping mall, where there is a reasonable basis for someone to believe that he or she has rights to be there like any general business invitee, and that situation doesn't change until an authorized person utters the magic words "get off my property!", I don't see why things done in the course of leaving the property would take on any special liability.

The Photographer's Right, by Bert P. Krages, an attorney in Portland, Ore and author of *Legal Handbook for Photographers—The Rights and Liabilities of Making Images*:
www.krages.com/phoright.htm.

Interview with Mr. Krages, December 16, 2005. Key quote:

[S]tates generally will treat this issue in one of the following ways (1) making publication a factor that goes into the damages for trespass or (2) not finding liability for the publication aspect.

The American Law Institute's *A Concise Restatement of Torts* by University of Virginia professor Kenneth S. Abraham (on the Harvard Law Web site):
cyber.law.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm



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