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It's the Law!

Can you be sued or arrested for taking pictures? Do you need a model release to publish your photos? Here's the lowdown on photography and the law by a photo-savvy lawyer.

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Disclaimer

There is only one answer to every question ever put to a lawyer, "It depends." That is because the answers to legal questions are always based on two things: the law and the facts. Lawyers may know the law, but they probably won't know all of the facts, and a slight change in what seems like a minor detail can result in a completely different answer.

There is also a huge difference between not being held liable for something and not being sued for it. In our legal system, almost anyone can sue almost anyone for almost anything. Winning is a separate matter, but being on the receiving end of a lawsuit is almost always expensive, stressful, and time-consuming. Your willingness to leave yourself open to a possible lawsuit, even one that you will win, should take into account your ability and willingness to deal with a suit.

The following answers, then, are guidelines, and they may not apply to your specific case.

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RELEASE ME! Will this photographer need a model release? How about the one who took this shot? Much depends on how the pictures are used.

• *When do I need a model release?*

The deciding factors here are: which jurisdiction(s) apply, who the subject is, and what you are going to do with the photos. Model releases are used mainly to deal with rights of privacy. These are matters of state law, so you could have very different answers depending on whether you're talking about New York or California. Some states also have rights of publicity, and if your subject is a celebrity or a public figure, you may face some additional restrictions.

The basic, general rule is that you need a release from people to use photographs showing a recognizable likeness of them for purposes of trade or advertising. The other side of the general rule is that you usually do not need a release for strictly editorial uses, such as a news story or photo contest. So the first question is whether the person is recognizable from the photo. If not, you don't really need a model release.

If the person *is* recognizable, the second question is whether the proposed use is for an advertisement (which is *very* broadly defined). If it is, you need a release; if not, go on to the final question.

Is the usage for a commercial purpose? This broad category includes corporate brochures, product packaging, calendars, or web sites, or any use intended to enhance or promote a business interest. If it is, then you need a release.

• *What are the differences between a photograph appearing in an ad and one published in a news piece or a magazine's editorial pages?*

The two differences are the need for model releases (see the last answer) and money. Generally, photographs used for advertising are worth substantially more money to everyone involved than photographs that are used for editorial or news purposes.



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• *If I photograph a pro baseball/football/basketball game, can I sell the pictures for editorial use?*

How about for ad use?

Here, the answer depends largely on the fine print. When you go into a ball park or arena, there is almost always some kind of fine print that you need to read. Sometimes it's on the back of your ticket, sometimes it is posted as a notice on a wall, and often it is on both. The chances are pretty good that the league and/or club has told you that you cannot make any commercial use of any photographs unless you have their permission. If you are a pro and shooting from a press area or some place other than the stands, your press pass or other credentials will read like a *Reader's Digest* version of an insurance policy or the Internal Revenue Code in outlining what you can and cannot do. That fine print creates the rules, and you are generally agreeing to those rules by using the ticket or press pass.

Some leagues and/or teams have taken the position that you cannot license or publish any photos of their athletes or show their uniforms or stadiums without their permission because the photos show registered trademarks. That may be their position, but it is not necessarily right. As with model releases, it depends on the details of the use of the photograph. Not every use showing a trademark is a trademark use. To violate a trademark, the use has to be likely to create confusion in the mind of the public as to the source of origin of the product; or it has to be likely to make the public think there is some kind of implied endorsement of a trademark owner or its product; or it has to damage or reduce the value of the trademark in some specific way.

So, if you have the legal right to make the photograph, and if you aren't violating the contractual rights in the fine print, you can probably license the use of the photos for editorial purposes. You *may* be able to license them for advertising use, if the way the ad looks and the identity of the advertiser are not likely to cause confusion in the mind of the public, lead it to believe there is some sort of relationship between the parties or endorsement of one by the other, or diminish the value of the trademark. Ad use, of course, assumes that you have a release from any person who is recognizable.

• *If I'm photographing in a public place such as Times Square in New York City can the police prevent me from using a tripod?*

As a practical matter, a police officer *can* do almost anything he or she wants in this kind of situation. By the time you get through protesting or appealing the officer's actions, the photo you

wanted to make may well be gone. As to whether he or she has the right to prevent you from setting up a tripod, it will depend on exactly where (what city, town, etc.) you are (because local ordinances and laws vary) and on the specifics of the situation. Setting up a tripod in Times Square may be perfectly fine at sunrise on a Sunday morning, but it could be considered a public nuisance that creates a risk of injury if you did so minutes before curtain time on a Saturday night.

• *Am I legally permitted to photograph strangers in public places? Are city and state parks considered public places? What constitutes a public place?*

Yes, you can photograph strangers in public places, unless you do it to such an extent and in such a

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way that you become a harasser instead of a photographer. City and state parks are generally public places. Figuring out what is or isn't a public place is usually easy, but not always. If the public is allowed free and unrestricted access to a place, like streets, sidewalks, and public parks, it is probably a public place. Once you go indoors, you are probably no longer in a public place, and some person or entity can probably make the rules, including restrictions on making photographs.

• *Can a property owner prevent me from taking pictures of his building, car, etc., from the outside? What about from the inside?*

If you are taking the picture from a public place, and the subject is visible from that place, the owner does

WHOOPS! Can the guy in the picture sue you for "subjecting him to public ridicule"? Sure, but he probably won't win, unless he's identifiable and the caption calls him a klutz or a jerk.

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not have a legal right to prevent you from taking photographs (although you could end up with damaged equipment and/or anatomy). The answer is different if you are taking the picture inside (or on) private property. There, the owner gets to make the rules, and if he/she/it says no photos, then you can't take photos.

• If a magazine refuses to return pictures I have sent—or loses them, what is my recourse? How can I determine how much such pictures are worth?

There are white papers, chapters, articles, and even whole books on this subject, so it's very hard to

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BIRTHDAY SUIT?

Will the photographer in the buff need model releases from all five nudists? If the subjects are recognizable and the shot is used commercially, you betcha.

answer this in a few words. Generally, there is no responsibility to take care of, or return, works that have been received unsolicited.

Things are different when a magazine has requested or commissioned the submission of the pictures. The key is preventive medicine which, in this case, is good paperwork. When you deliver the photos, a delivery memo should accompany them. That document should lay out the important conditions under which you are handing the photos over to the recipient. Those conditions include how and to what extent the recipient may use the photos, how much these uses will cost, the responsibility of the magazine to keep and return the photos in the same condition in which they were delivered, and a reasonable value for each photograph that the magazine will consent to pay in the case of loss or damage to your material.

For valuation, let's assume that we are talking about professional-quality original slides or negatives. Let's also assume that there are no in-camera or digital dupes, or similar originals that are almost indistinguishable from the originals. Remember that, for purposes of reproduction, there is a huge difference between an original and a dupe. Also remember that the destruction or damage of an original is the functional equivalent of the destruction of the copyright to the image, since there is no longer any way to exercise that copyright.

Valuation is troublesome because every image is unique. Some are worth very little, and some are worth a small fortune. Unless the specific image that has been lost or damaged has an established earnings history, valuation becomes very difficult. An established photographer is in a reasonable position to look back at his past earnings and make a quite accurate estimate of what a particular photograph would likely yield over the life of the copyright. Really unique images—and photographers who have a less consistent earning pattern—raise bigger problems. In an attempt to deal with this, there have been more than a few court decisions that have suggested that, without any better proof, professional-quality original photographs may have a value of \$1,500 apiece. However, even if you use a \$1,500 valuation in your paperwork, you will have to be ready to prove to a court that \$1,500 was a reasonable estimate of the true market value of the image; otherwise the court may throw out that valuation as an unenforceable provision.

• If I sell one-time rights only to a magazine to use my photo on the cover, can the magazine also use the magazine cover with my photograph in ads to promote the magazine?

Here, the crucial factor is the exact language you used when you granted the magazine the rights to use the photograph. These days, most magazines will be sure that the agreements gives them extremely broad rights, such as putting low-res images up on their web site. Assuming that you and the magazine did not say anything one way or the other, you would fall back onto the custom and practice of the trade to fill in the unspoken provisions. In this case, the general practice is for magazines to use reproductions of their covers and the photographs on the covers for advertising, so it would probably be allowed.

• If I photograph a man doing something silly, such as slipping on a banana peel, and the picture appears in a newspaper, can he sue me for holding him up to public ridicule?

Anybody can sue almost anybody for almost anything in this country. The real question is whether

he will win. In the areas of defamation, libel, etc., truth is almost always a good defense. Assuming the photo is not staged or manipulated, i.e., that it is a true and accurate image of what really happened, and if it is used for editorial purposes and not trade or advertising, the photograph, by itself, will probably not be a source of liability. However, if the newspaper decides to do something like run it with a headline that says “King of the Klutzes,” followed by an embarrassing or humiliating story, there could easily be a successful lawsuit. The liability, though, would belong to the publisher of the newspaper, not the photographer (although the photographer would probably be stuck having to defend him- or herself in the suit).

• *If I photograph a crowd at a baseball stadium and it's published, but the boss of one of the people in the audience recognizes him as an employee who called in sick that day and fires him, can he sue me for causing him to lose his job?*

If it is published as an editorial photo, not as part of an ad or used for other trade purposes, he would be unlikely to win such a suit.

• *What are the rules about photographing nudes?*

This is a huge and volatile topic, so let's try to narrow the scope a little. First, we'll assume we're talking about subjects who are legally competent adults. Let's also assume that you are taking the photographs with the models' permission and that they have given you valid model releases. That leaves the question of whether the photos are obscene. If they are, you could be charged with violating state and/or local obscenity laws.

What is obscene? The U.S. Supreme Court has struggled with this question. Justice Potter Stewart characterized it as “trying to define what may be indefinable.” The Court's guidelines, if you can really call them that, are hardly more than the instinctive reactions of the people in the street:

“Whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to prurient interests; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and whether the work, taken as a whole, lacks serious literary, political, or scientific value.”

The kicker is the “community standards” part, especially in this Internet era. A San Francisco couple running an Internet web site recently found themselves indicted for violating obscenity laws in Tennessee; the community standards in those two communities are presumably quite different.

• *What is the advantage of copyrighting a photograph, and how do you do it?*

You copyright a photograph the moment you click the shutter, assuming that the camera is loaded with film (or some digital image-capture medium). You do not have to do anything else. However, if you ever plan to do anything with any of your pictures beyond putting them in a photo album or up

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on your walls, you should register them at the U.S. Copyright Office. If you ever have to sue someone for infringement, you *must* register before the suit, and there are huge advantages to registering early. Registration generally costs \$30 a time and may include more than one image. The Copyright Office has lots of information available, both in print and on the web. The easiest place to get started is on this organization's web site, lweb.loc.gov/copyright/.

• *If I photograph a large group of people and plan to sell the picture, would I need model releases from every person who's already identifiable?*

If you just want to sell fine-art prints, or even posters, you should be OK without releases. If you license the picture for use in a book, you should get by without any releases as long as you don't allow the publisher to put the photo on the cover of the book or use it in promotional materials. If you put it on coffee mugs or allow its use in any way that would be for purposes of trade or advertising, you are probably going to be liable for the invasion of someone's right of privacy unless you have gotten releases from every person who is recognizable in the photo. A bank once made a photo of about 300 employees standing in one of its

KIDDIE PORN?
Hardly, but you could get into a peck of trouble if your photo lab thinks your nude baby shots are otherwise and reports you to the police.

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lobbies. When the picture ran in an ad campaign, some of the employees sued the bank, and won.

• *If I photograph my young children in the bathtub and send the film out for processing, could the processor turn the film over to the police? Could I be prosecuted for child pornography?*

This area is a real hornet's nest of emotions and political sensitivity. Yes, the processor could, and might, turn the film over to the police and yes, you could be prosecuted for child pornography. You wouldn't necessarily be convicted, but the whole process could be enough to ruin—or at least severely damage—your life and reputation.

There are occasional reports of over-zealous lab employees inappropriately blowing the whistle over photographs no more offensive than the classic naked baby on a bearskin rug. These days, you're better off using digital cameras and printing your own photos when unclothed children are in the picture.

• *If I photograph a clown in the circus and the picture appears in a magazine, can the clown sue me for depicting his trade dress without obtaining explicit permission?*

If the photo appears as an editorial illustration, rather than an advertisement, he could sue you, but he probably wouldn't win. Just like trademarks, trade dress can be shown in photographs as long as the use does not create confusion in the mind of the public as to the origin or ownership of the trade dress and the usage doesn't damage the value of the trade dress.

• *If I take a picture of a seedy neighborhood and a magazine editor writes a caption describing it as a red light district, can I be sued for defamation by someone shown in the picture?*

Yes! That is why your paperwork with the magazine has to make it clear that there is no model release (if there is none). Ideally, the magazine should indemnify the photographer against any damage from publishing the picture, since the magazine controls the use of the photo. Unfortunately, in the real world, that seldom happens and the photographer can be held liable.

• *When does the right of privacy protect someone from having his picture taken?*

When a person has taken steps to insure a reasonable expectation of privacy. If you go into a room with closed doors and window shades pulled down, it would be reasonable to expect privacy. Someone putting a fiber-optic lens under the door and taking your picture would probably be liable for invading your privacy. If you are sitting at a window table in a restaurant, you are probably fair game since you're on view to passersby.

• *If I stand outside a store and take a picture for publication of someone inside either through the door or the store window, is that a violation of some sort?*

Probably not. Standing in a store with glass windows and doors is not a situation that would give a reasonable expectation of privacy.

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• *If I sell the electronic rights to a photograph to a magazine and subsequently someone downloads my image and uses it, what is my recourse?*

It depends on exactly what electronic rights you granted. Usually, you would not have granted the magazine the right to authorize people to download and make further uses of the image. Depending on the exact uses made by the person who downloaded it, you may have a copyright infringement or you may not. If he uses the image to illustrate a college thesis, the usage might qualify as a fair use. If he uses it in a sales brochure for the company he works for, you have an infringement. Your recourse in that case is to make a demand for payment and/or send a cease and desist letter, both of which are best prepared by (you guessed it) a copyright lawyer.

BAD NEIGHBORHOOD?
It sure looks that way, but if the caption calls someone a "gang girl" or says something equally derogatory, you could be sued for defamation of character.