

UNIT TWO: Legal and Ethical Concerns

It is important to know the legal and ethical issues in the area of photography to avoid problems. This is particularly true for professionals, who could face lawsuits and other issues for violating privacy or copyright laws. Knowing more about the legal and ethical issues in the area of photography is vitally important to any photographer, but it is especially important for professional photographers.



A photographer on the ruins of Sutro Bath

The Photographer

In general, photographers have the right to take a photo, publish or sell a photo, and copyright a photo, given that these acts do not interfere with the rights of someone else. This is where photography can become somewhat tricky, as other people have a right to their privacy and the way that an

image of them is used. Imagine for a minute that you take a photo of someone. You sell that image to a company that wants to use the photograph in an ad for one of their products. You make some money and the company is happy. Everything is good, right? Not so fast. You are using an image of someone else. By not seeking their permission to take or sell the photo, you have interfered with their rights, and this can land you in hot water. Perhaps the company used the image in a way that wasn't flattering to the individual in the photograph or the product was something that the individual disagreed with. This is why it is always important to gain specific permission from the individual if you want to sell a photo with his or her likeness.



Photographer in safety gear prepares to film fires.

In the United States, the First Amendment gives the freedom of speech, which can extend to photographs taken. Yet, the freedoms of the photographer are not absolute. There are a number of situations when photographers are not allowed to photograph or have restrictions on what

they may do with photographs in order to protect the rights of others.

Photographers are limited by the privacy rights of others. In other words, photographers cannot photograph within a private residence unless permission has been given by the homeowner. Shooting into the windows of someone's house, for example, would violate the owner's right to privacy. Some government buildings, military bases, prisons, and other privately owned buildings have the right to restrict or even ban your photography. Photographers may publish photographs, such as in a magazine or newspaper, as long as the photograph does not interfere with a person's right to privacy or present the person in a false light.



State Fair, Rutland, Vermont, 1937, with photographer selling portrait photos

As a photographer, you are also limited in selling your photographs. The law states that people have the right to control their own image. Think about whether you'd like if someone took your picture and then sold that picture to others without asking your permission. Many of you would probably agree

that this is not an ethical thing to do as a photographer. The selling of photographs is also limited if the photograph contains the trademark of another company. For example, if a photographer takes a picture of someone wearing a T-shirt with a trademark on it (such as the Nike swoosh mark), the photograph often will be restricted from being used commercially.

Who Owns a Photograph?

The issue of who owns a photo and who may use that photograph is another area that is important to know. We may assume that when someone takes a photo they own the photo, but it is not always this straightforward. When we talk of image ownership, we often talk about copyright. **Copyright** is essentially the right to copy a photo. In other words, the individual holding the copyright to a photo may use the photo, but others cannot.

Copyright is an important legal concept in photography because without it, people would be free to use any photograph that you take without paying you any money for its use. The issue of copyright has become even more important in the digital age where photographs are posted to online photo websites, or they are posted on the photographer's business website to showcase his or her work for potential clients. Copyright protects the work of the photographer and, theoretically, keeps others from making money on something that you've created.

Copyright affects everything from photographs and written works to paintings and music. The idea of copyright extends back to the 1500s in Great Britain, when it was used to protect printers and publishers. By the

1700s, this right had been extended to authors, although the law also created limitations on this, such as the length of time that a work (whether it was a book or a painting) could be protected under copyright. Since that time, copyright has been adopted by a number of countries and the exact legal issues have changed somewhat.

You may be most familiar with copyright from seeing the copyright symbol, which is a “c” with a circle around it. It looks like this: ©. The copyright symbol is often accompanied by the photographer’s name, such as © 2010 Jane Smith, which indicates that the copyright belongs to Jane Smith since 2010.

While the copyright symbol is often used, it is important to note that it is not required. **The Berne Convention**, which was adopted into law in the United States in 1989, automatically transfers the copyright to the photographer or producer of the work, with some exceptions, even if the symbol is not



Classic 35mm SLRs

present on a piece of work. Even though it is not required, many individuals still choose to include the copyright symbol

with their work. In the United States, this automatic copyright belongs to the photographers until they give the copyright to someone else or a certain time limit has passed (the lifetime of the photographer plus seventy years for photographs taken after 1978). Officially filing for copyright, however, does have some advantages for photographers, such as allowing for punitive

damages in a court case where someone infringes on the copyright of the photographer.

When dealing with copyright, it is important to note that copyright applies to the photo, but not the idea for the photo. In other words, let's say that you take a great picture from a really interesting point of view of a particular mountain in Glacier National Park. The photograph that you took would be copyrighted, but not the perspective that you used to take the picture or the idea for the picture. Another photographer would be free to take her own photograph from the same perspective that you did, even though the images would be very similar.

Related to the issue of copyright is fair use. **Fair use** permits the copying of a work in certain circumstances, generally private, educational, research, or editorial use. Fair use can be a tricky area, and court decisions on it are often made on a case-by-case basis, taking into account why the work was copied and how much of the work has been copied.

The issue of copyright can become a bit muddied when the photograph was made as a work-for-hire. For example, let's say that a company hires you to take photographs of their headquarters. The contract that you sign may indicate that you are turning over all rights to the photos. In other words, by signing the contract, you are turning over the copyright to the company. They now own the right to copy and use the photos as they see fit, while you no longer have a claim to the photo.

Personal vs. Editorial vs. Commercial

Another factor that often influences the legal and ethical issues surrounding

photography is what the photos will be used for. Taking pictures for personal use (to hang on your own wall or to put in a photo album) is a different situation than trying to sell photographs on a stock photography site or using photographs to promote your own photography business. In general, there are three different categories of photograph use: personal, editorial, and commercial. Each of these categories has its own legal and ethical issues.

Personal use when talking about photography means that you are taking the photograph for yourself and the image will not be sold or published. In other words, photographs made for personal use are those that we most often take. We take pictures of family, friends, travel locations, and events. We print the pictures, upload them to our personal social networking site accounts, and put them in photo albums. All of these uses are personal uses; we are not making any money from the images. So, if you wanted to take a picture of a painting or a statue and hang that photograph on your refrigerator, you could take the photograph because it is for personal use only.



New Orleans, 1941. "The City Park photographer. Exterior."

In terms of personal use, photographers are free to take almost any photograph that they would like, with some exceptions. Generally, photographers may take pictures in public places of people or buildings, without gaining consent to do so. The general rule is that "if you can see it and you are on public property," you probably have the right to take the photo. However, it is important to recognize that this does not end a person's right to privacy. If the person is in an area where he or she should expect a reasonable amount of privacy (the person's own home, a restroom, etc.), photographers should avoid taking the picture without the consent of the person. For example, you shouldn't use a telephoto lens to take a picture into someone's home, even though you might be able to do so from a public area like the street or a sidewalk. Photographers may also take photographs of privately owned areas if the photographer is in a public area when he or she took the picture.

It should be noted that while photographers may have the right to photograph in public places for their own use, there are instances where you may be asked to stop or the activity might best be avoided. In some cases, law enforcement may argue that photographing in a particular area is unacceptable because of terrorism risks. You may also be asked to stop photographing at crime scenes, in some public buildings, or on public transportation. While it may legally be your right to photograph in these places in the United States, these may be areas where requests to stop should be heeded. Another case that might look suspicious is to photograph children at a playground or school without their parents' permission. While technically legal, this can result in issues if parents or others object to your photographing.



Photographers, Indianapolis, 2003

Editorial use is a photo that is considered "newsworthy," and its use might include publication in a newspaper, accompanying an online news report, in a textbook, and so on. With editorial photographs, a person's right to privacy or copyright restrictions with buildings is weighed against the First Amendment's guarantee of the freedom of the press and

free speech. Most of the images that you take in public places would be eligible under the law to be used for editorial purposes. This also includes photographs taken at places such as crime scenes, fires, and other public events.

Commercial use is typically defined as the use of an image for “advertising” purposes. In these cases, the photos are used to create a profit in some way. Photographs used in advertising would be one example of commercial use photographs. Stock images, whether or not they are actually used for advertising, would be another example. Commercial images require the consent of individuals or copyright owners if the person or copyrighted item appears in the photo. Why? Including the person or copyrighted item without consent is viewed under the law as infringing on the economic interests of the person.

The other issue with commercial photography and why it is important to gain consent is that someone might assume that a person in a photo being used to sell a product endorses or supports that product or service. Think about how you would feel in this situation: someone takes your photograph and you find that the photograph is being used without your consent to sell a product that you don’t use or don’t like. This is one reason securing consent for commercial photographs is so important. While people may not consent to the actual product that their image may be used to sell (as in the case of stock images), they have given their consent to its use and are aware that it may be used to sell something that they don’t personally use or like.

Many buildings, statues, and public works of art are also protected by copyright. For example, an architect may own the copyright for a building



The Eiffel tower at sunrise, taken from the Place du Trocadero. Paris, France.

that he or she designed. If you take commercial photographs of this building and do not obtain consent from the architect, you could be infringing on the person's rights. If you want to use a building or public work of art in a commercial photograph, it would be a good idea to check on whether the building or work of art is copyrighted. There are websites that list some of the more well-known or famous examples of buildings that are copyrighted as well. Some of these famous examples include the Eiffel Tower in Paris, France.

Photographers may take

commercial photographs of the Eiffel Tower in the daytime, but the lighted Eiffel Tower at night is protected by copyright. Many museums, zoos, and amusement parks also restrict commercial photography, even though you may have paid to enter and the area might be considered a public spot.

Licensing Commercial Images

While copyright designates who owns a particular image, commercial images also often use one of several license types to help the buyers of the image know how and when the buyers may use an image. When a company

licenses an image, they are buying the right to use the photograph for a specific purpose, but the photographer retains the copyright to the photo. There are several different types of licenses that are commonly used, although alternatives can be negotiated between the photographer and buyer(s).



Spoonful of Cereal

Royalty-free licenses are becoming increasingly common today. **Royalty-free, or (RF)**, means that when people purchase an image, they may use the image for as long as they want to and as many times as they want without having to pay any other fees on the image. Generally, royalty-free images can also be bought by multiple people or companies and used at the same time. In other words, the images are often not exclusive. Microstock images typically use a royalty-free license, but the license fees are quite low (often around a dollar for a low resolution image). Today, there are a number of stock image websites where photographers can sell royalty-free images. The advantages for photographers of this type of license is that they

can sell an image multiple times, earning a commission on each sale. Popular images can be licensed hundreds, if not thousands, of times,



Reloj Despertador

creating income over and over.

However, the images tend to sell at lower prices, particularly microstock images, which means that the photographer only earns a small amount of money for each license agreement (usually a certain percentage of the image license cost).

Another type of license is a **rights-managed (RM) license**. In a rights-managed license, the buyer is given an exclusive right to use an image for a particular amount of time. In other words, the image

may be used only by the person who purchased the rights to the image and no one else, for a period of time specified under the license. Often, RM images are licensed for one particular project that a company has, and if they wish to use the image again, or use it in a different way, they have to license the image again. For photographers, rights-managed licenses offer a bigger payout than royalty-free images. It is not uncommon for a rights-managed license to cost thousands of dollars (or tens of thousands). While the photographer still only earns a certain percentage of the image license agreement, with the exact percentage differing from agency to agency, a photographer can earn a sizeable income by selling the rights to just a few photographs. However, photographers may only sell the item once at a time

(and for a given amount of time) so there are fewer license agreements to earn money from.

Extended or enhanced licenses are those that give the buyer more rights to the image than the original license (often royalty free) offered. Generally, extended or enhanced licenses are used for royalty-free images. For example, an extended or enhanced license may be used by a company to resell an image on a T-shirt or a calendar, if the original license excluded these uses.

Model Releases

As individuals have the right to protect their image, it may be necessary to obtain a model release when you have recognizable individuals in a photo. A model release is a document that spells out under which conditions a photographer may use a photo of someone. In other words, the individual in the photograph gives permission for a photo that he or she is recognizable in to be used in certain ways. In some cases, such as with professional models, model releases may spell out in great deal how, when, and where a photo may be used by the photographer. In other cases, a simple model release leaves the photographer free to use the photograph in many different ways. Model releases should always be written down and signed by the individual. If the agreement is only verbal, the individual could change his or her mind down the road, creating any number of issues for the photographer and anyone who may have licensed the image.

When is a model release needed? If you are taking a personal photo that will not be used commercially, you typically do not need a model release. If you are taking a photo that will be used in a newspaper or an educational book, you typically do not need a model release as these uses are generally

considered informational and educational. However, if you plan to use a photo commercially, such as in a business brochure, advertisement, or printed material, or you want to use the image as a stock image that you will license to others, you need to obtain a model release for any individual that is recognizable in the photo.

In general, if you are photographing someone and you think you might want to use the image commercially later, try to obtain a model release for the photo. This will ensure that you can use the photograph later if you decide to do so. In many cases, it may be difficult to find someone weeks, months, or years later to obtain that permission if you decide you want to use an image. Not everyone will give their permission, of course, and you will need to abide by their decision. However, many people will sign the release and you can always modify the release by writing in any conditions for use that they have before they sign it. It is customary to offer the individuals something in return for their permission to use their image. This might be a complimentary print(s) of the image, a donation, or a monetary payment.

Avoiding the Pitfalls

By now, you may be a little overwhelmed at the various restrictions on when you may take a photo, when you may sell a photo, and when you are infringing on others' copyrights. The issues that we've discussed are complicated ones, and many professional photographers are also confused by some of the distinctions. There are many gray areas within the legal and ethical areas of photography and these areas can be challenging for photographers to learn. Professional photographers should educate themselves as much as possible on their legal obligations in regards to what they may photograph and which photographs can be used in particular ways.

One of the ways that you can protect yourself and abide by the ethical considerations of photography is to obtain consent from the people that you photograph if you think you may be interested in selling a photo in the future or use it for your own advertising. You can also consider the people and places that you are photographing to help keep your photographs as ethical as possible.

In this unit, we discussed some of the legal and ethical issues in the field of photography. In doing so, we examined the rights of photographers, the rights of those who are photographed, and how the different uses of photographs influence the legal and ethical issues. We also discussed some of the different license types for stock photography and looked at the use of model releases.