

# Photography and the Law

## (Part One)

**Is it legal to photograph someone in a public place without their permission? In a new two-part series dealing with photography and the law, Sharon Givoni addresses some common misconceptions. In part one, she looks at the issues that arise when it comes to photographing people without their consent.**

**T**aking photos is not as simple as it used to be. These days, if you are taking photos it helps to know something about the law. In this two-part series, we will look at some of the main legal questions that arise in discussions about photography. Here, in part one, we'll explore the question of when you can photograph people in public spaces without their consent and how you can use those images. Next month, we will consider where you can shoot when it comes to public spaces. The last thing you want is to be harassed, have your equipment confiscated, harm your reputation, or have to deal with the threat of legal action. Read on to navigate some of the legal issues in this ever-changing area of the law.

### Photography & evolving law

Taking photographs in the past, whether professional or otherwise, was arguably a relatively straightforward affair. However, with the growing use of advanced technologies, the mass dissemination of images online, the increased awareness of individuals' privacy and concerns of the post-9/11 era, the boundaries of what photographers can and can't do has been redefined. This is particularly relevant in a professional context. As a consequence, the laws and regulations which impact on professional photographers often pose legal and professional challenges. A fine balance needs to be struck between freedom of artistic expression and an individual's right to privacy. However, this is often easier said than done.

### Capturing people on film without their consent

Privacy scandals such as the Murdoch Press phone-tapping activities, the shots of a topless Kate Middleton published on



THINKSTOCK

the internet and the revelation that Justin Bieber required guests to sign a \$5 million non-disclosure agreement before entering his home have brought privacy issues under the spotlight more than ever.

### Busting a myth

Despite what most people tend to think in Australia, there is no general right to privacy that protects a person's image. Existing privacy laws under the Privacy Act 1988 (Cth) are more concerned with storage and management of personal information and are of limited relevance to the present issue.

Thus, subject to specific exceptions, individuals have no legal right to stop a photographer from taking their photograph.

### Shades of grey

However the law always has shades of grey! The general rule therefore is that a photograph is permissible as long as it is:

- taken freely in a public space;
- taken on your own property;



- not offensive;
- not used for commercial purposes or featuring a celebrity to imply an endorsement;
- not misleading or deceptive;
- not a result of trespass;
- not defamatory; and
- not a breach confidentiality.

The above list is not exhaustive, but it covers some of the main considerations of which you need to be aware.

## Freedom of expression & privacy rights

Some readers may recall headlines in 2010 when near-naked images of Sydney socialite and model Lara Bingle were circulated online between AFL football players. Later that year, nude photographs of two AFL St Kilda football players were also posted on social media by a teenage girl.

These incidents attracted headlines such as:

- Lara Bingle ‘caught in nude photo scandal’;
- Lara Bingle could score big as Brendan Fevola tells his side of the nude photo scandal, and
- “Dikileaks” St.Kilda photo scandal

Again this ignited the debate over the rights to publish people’s images without their consent.

Typically, the challenge is addressing this issue in a balanced manner. The freedom to take photos must be maintained and yet the privacy interests of the individuals must be recognised.

Further, the law is one thing, but a photographer’s reputation must also be taken into account. Photographers largely rely on trust relationships with their clients, and, to that end, basic rules of courtesy are generally borne in mind.

Professional photographer Brad Hill explains how he considers the privacy of others:

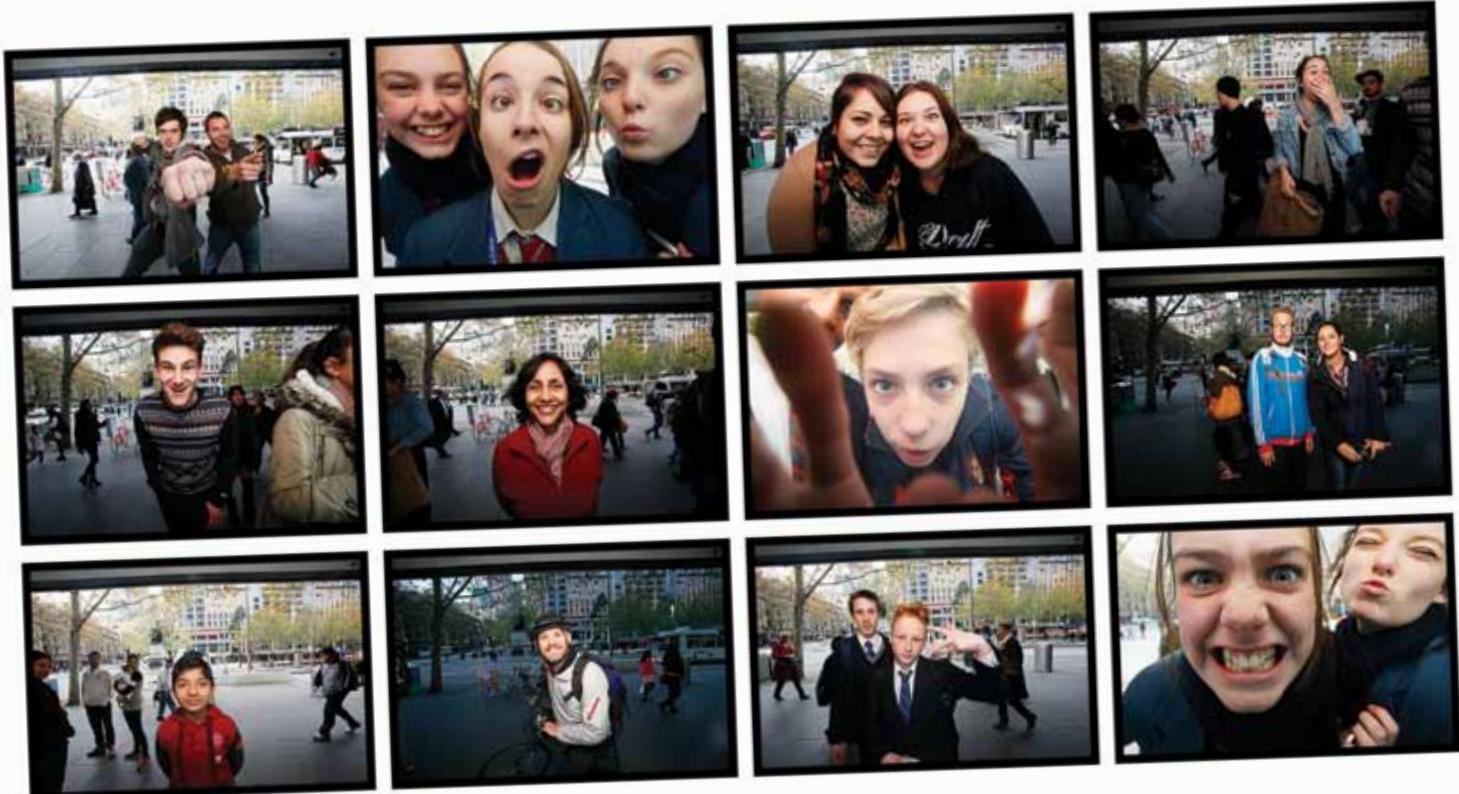
“Most of the commercial work I undertake is shot on private property. My policy is therefore to approach people who will clearly be visible and explain what’s going on. I usually do this after taking the photo, especially if I want a candid feel. Only rarely do I get

**ABOVE:**  
The rise of technology, which has allowed photographers to shoot images anywhere at any time and to post them online, has meant the privacy of individuals has become a major issue.

## THE WINDOW PROJECT

FIVE SECONDS OF FAME

SAVILLE COBLE



### ABOVE

The 2013 Window Project. Commercial photographer Saville Coble in collaboration with Blue Tree Studios launched an interactive art initiative in the city of Melbourne titled 'The Window Project'. With an exercise such as this, where the public could have their picture taken, consent was implied and no model releases were necessary.

objections and in fact many times people get excited about the idea."

The media also, on balance, tends to be sensitive to peoples' objections and feelings when it comes to the use of their image. For example, a newspaper will often blur images of people if they have been taken randomly for the purposes of news.

According to its website Fairfax Media has a general condition of use which requires that any material uploaded must not exploit any person, nor can it contain an image of a person without their consent.

Melbourne Airport sometimes has signs which read: "Channel 7 is filming its Border Security TV show here today. Please contact the TV crew if you do not wish to be filmed."

Professional photographer Estelle Judah recalls advice she was given as a newspaper photographer: "When I worked for *The Age* I was told that, besides the courthouse steps, any person out in public can be photographed without any legal ramifications."

However, she adds that, "this was purely for editorial jobs." Today, she says, "much of my commercial work involves hired talent or taking photos of clients where they have provided their express consent and the context is a lot clearer".

Express consent, if easily obtained, is always preferable but not always practical. One area where it does come up a lot is schools.

### Photography in schools

Upon enrolment, schools often ask parents to specifically consent in writing to their children being photographed in an educational setting. One Melbourne-based private school

for example, has policies which allow the reproduction of photographic and video images of students undertaking school-approved activities.

These images are able to be used in written, audio or visual materials. The college asks the parents to grant a non-exclusive worldwide license on behalf of the student to allow the use of the images.

### Five seconds of fame

The image on this page was compiled as part of a project where the photographer set out to take photos of the general public. Leading commercial photographer Saville Coble, in collaboration with Blue Tree Studios, launched an interactive art initiative in the city of Melbourne titled "The Window Project, Five Seconds of Fame."

A shop front was set up at the corner of Swanston and Collins Streets with a giant camera behind it, the essence of the project being that passers-by could pose in front of the window and a photo was taken every five seconds for the course of a month. Out of the thousands of photos taken, the Blue Tree team intermittently selected photos, turned them into portraits and uploaded them to a Facebook page.

This is a situation where the consent of members of the public could be taken to be implied from the circumstances. However, consent will not always be implied so easily. For example, if an image will be used for money-making purposes, exercise caution. This leads us to the topic of model releases.

## Model releases

While you can draft a model release yourself, ideally they should be drafted by a lawyer. This is particularly important if the model hasn't been paid, in which case the release may need to be in the form of a deed.

Unlike an agreement, a properly drafted deed is legally binding, even where the model has not been paid or given something of value.

A model release could cover matters relating to any image, such as:

- the duration of the use;
- the uses to which the model agrees (eg, use of their image on a corporate vehicle);
- any specific limitations on use;
- whether the model agrees for their photograph to be altered or modified;
- whether the model has the "final say" as to which photographs will be used in a campaign (often they don't);
- whether the model can use the photographs (eg, for his or her own professional portfolio, on Facebook and other social media and so forth); and
- whether the model is entitled to ongoing payments in the future.

Naturally, the above list is not exhaustive as each case turns on its facts and therefore there's no such thing as a standard model release (or any legal document for that matter!).

## Case Study No 1: Unauthorised use of a photo for an advertisement

Photographer Karl E Scullin took the photograph on the right for a 'Fabulous Diamonds' record cover, with the consent of the subjects.

Naturally, he wasn't impressed when he discovered the photo reproduced in the context of an ad for laser hair removal!

In this sort of situation, there are a number of remedies which may be available, including a licence fee and public apology, however your lawyer could guide you based on the individual circumstances. Remember that just because you post your photos online, this doesn't mean you're giving a licence to anyone and everyone to right-click, copy and paste the photo and use it – it's still protected under Australia's copyright laws.

**TIP:** If someone reproduces your photo to promote their own business, without your permission, don't let them get away with it – especially if the photo depicts images of people who have also not agreed to the use in question.

## Case Study No 2: Website almost comes crashing down

In another matter, the owner of a children's party business spent thousands of dollars creating a new website using one of his own employees as a model, with a handshake agreement.

However, much to his dismay, the model later withdrew her consent when she commenced a competing party business. In order to avoid potentially spending thousands of dollars on redesigning the website, negotiations had to be entered into at great legal expense. Had a model release been signed, this could have been avoided.

**TIPS:** Try to avoid using employees as models if possible; and



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### TOP

Melbourne-based photographer Lisa Lloyd says that sometimes her models don't read releases and just want to sign them, but she makes sure they do read them thoroughly. Image by Lisa Lloyd.

### LEFT

Photographer Karl E Scullin took this photo for a 'Fabulous Diamonds' record cover with the consent of the subjects. He wasn't impressed when he discovered the image reproduced in the context of an ad for laser hair removal! A number of possible remedies were open to him.

always document peoples' consent to reduce the risk of legal claims arising later.

## Case Study: Almost famous

Sometimes people can become the face of a business, even though this may not have been intended at the outset – even more of a reason to insist on a release! Take the "Lucky you're with AAMI" insurance advertisements which have led to the almost-celebrity status of the call centre 'Amy girl'.

Although never a celebrity in her own right, the widespread image of her smiling face with the accompanying headset has become so well known that her face has (to some) become associated with the brand. For this reason, businesses need to get model releases signed right at the outset to ensure that they're not "held up for ransom" later.



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## ABOVE

Old News. This shot of a person in the public domain was taken by shooter Matt Irwin. He says, "This guy loved the shot; he continued to buy cards and prints."

## OPPOSITE PAGE

Splat. Pro shooter Matt Irwin shot this image in a Melbourne city laneway. The subject matter was publicly available and there were no restrictions on shooting it.

## The famous get special treatment

As a general rule, the law in Australia treats celebrity figures differently. The logic behind this is that public figures are known to endorse products in their own right and they often receive licence fees.

Jennifer Hawkins is a case in point. She models her own "Cozi" swimwear line as well as modelling for Mount Franklin, Myer, Siren Shoes, Lux and Range Rover. If an image of a celebrity is used to promote goods or services, this could wrongly imply that they have endorsed the brand and this in itself has led to numerous court cases. Paul Hogan took on a shoe company and won.

Some years ago, Paul Hogan successfully sued the company Grosby Footwear P/L for releasing a television ad which was a parody of a scene from the film *Crocodile Dundee*. [1] He argued the advertisement misled people to believe that he, as the star of *Crocodile Dundee*, had an association with the company and had been paid to endorse the product, when he had not. He won the case. But Olivia Newton-John took on a cosmetics company and lost. Use of an image which references a celebrity without giving the impression of an endorsement may not necessarily be seen as misleading. This was demonstrated by Olivia Newton-John's unsuccessful claim against Maybelline in 1985 [2], which used a lookalike of the well-known actress and singer in its advertisement with the tagline "Olivia? No. Maybelline". Common sense prevailed. At the time, the court took the view that the "advertisement tells even the most casual reader, that even at the first glance that in fact it is not Olivia Newton-John who is represented in the advertisement."

## Defamation law

Sometimes, defamation can also arise when publishing people's images. You can be exposed to a claim of defamation if that person is represented in an indecent or unfavourable manner which could have a negative impact on their reputation. For example, in 1991 National Rugby League footballer Andrew Ettingshausen succeeded in a defamation action in the New South Wales Supreme Court which involved an unauthorised publication of a photograph of him part-naked in the shower in *HQ* magazine.[3]

## Copyright ownership

While it's beyond the scope of this article to cover copyright ownership in any detail, as a final point, be aware that under copyright law a person can potentially prevent use and publication of their image. However, this relates to the copyright owner of the photo, rather than the subject.

For example, in a recent Federal Court case heard in April this year, publisher Allen & Unwin was restrained from distributing a book called *Sins of the Father* featuring family photos of convicted drug smuggler Schapelle Corby.

The images in issue were family photos, taken by various members of the Corby family, at the time with the consent of the subjects of the photographs. A journalist got hold of them and later was commissioned by the publisher to write a book based on his research. The Corby family issued legal proceedings to prevent the publication of the photos and the Federal Court concluded on the facts that Allen & Unwin did not have the appropriate 'licence' in copyright to use the images.



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The Federal Court awarded the Corbys \$9,250 in compensation and \$45,000 in additional damages given that Allen & Unwin proceeded with a further print-run despite being earlier warned of the copyright position.

### Conclusion

This is a loaded topic, but some basic points can be taken:

- be conscious of the law and your obligations when photographing people;
- be aware that the surrounding circumstances may require you to get consent;
- if someone is a celebrity they may have more rights; and
- model releases are important in commercial contexts.
- Also, remember not only who you are taking photos of, but also where you are taking those photos. This issue will be explored in the second part of this article. ☺

*Disclaimer: The contents of this article are of a general nature only and must not be relied upon as a substitute for tailored legal advice.*

Sharon Givoni is an intellectual property lawyer who runs her own legal practice with a strong focus on intellectual property and commercial law. She acts for clients Australia-wide and overseas, including photographers, and can be contacted by email ([sharon@iplegal.com.au](mailto:sharon@iplegal.com.au)). Her website is located at [www.sharongivoni.com.au](http://www.sharongivoni.com.au) or call her on 0410 557 907 or 03 9527 1334.

[1] *Pacific Dunlop v Hogan* (1989) 23 FCR 553.

[2] *Newton-John v Scholl-Plough (Aust) Ltd* (1986) 11 FCR 233.

[3] *Ettinghausen v Australian Consolidated Press* (1991) 23 NSWLR 443.

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