

The bottom line

Except in special circumstances (e.g., certain government facilities), **there are no laws prohibiting the taking of photographs on public or private property.** If you can *be* there, you can take pictures there: streets, malls, parking lots, office buildings. You do not need permission to do so, even on private property.

Trespassing laws naturally apply. If a property owner demands you leave, you must. But if a place is open to the public — a mall, office-building lobby, etc. — permission to enter is assumed, although it can be revoked.

In terms of the law, **trespass and photography are separate events**; the former is illegal, but the latter is not. Only if the use of photographic equipment itself violates a person's privacy (e.g., by using a long lens to look into someone's private room) might it violate privacy law. Further, while people have a right of privacy, businesses do not except as it relates to trade secrets.

Subject to specific limits, **photographers can publish any photos they take**, provided those photos do not violate the privacy of the subject. *This includes photos taken while trespassing or otherwise being someplace they shouldn't be.* **Taking photos and publishing photos are two separate issues.**

Risks

Photographers run a limited number of risks from taking and publishing photos.

- If they publish photos taken while trespassing, any trespassing judgments against them could be increased if the judge(s) feel it was inappropriate to take those photos.
- They risk being charged with intrusion if they use technology — e.g., long lenses — to access places where the subjects have an expectation of privacy.
- Although it is not against the law, they risk losing invasion of privacy lawsuits if their photographs reveal private facts about people that are offensive and not newsworthy (e.g., showing a person purchasing anti-HIV drugs) when the people had a reasonable expectation of privacy. Jennifer Aniston's suit against the photographer who published topless shots of her falls into this category.
- As with libel, they risk losing lawsuits if their photographs place people in a false light, e.g., mislabeling a photograph in a damaging way.
- They risk losing invasion of privacy lawsuits if their photographs inappropriately use specific person's images for commercial purposes, e.g., stating that the mayor endorses a product by publishing a photo of him using it.

The details

Whether or not you can take or publish photographs is a matter of privacy laws.

There are widely recognized to be four “prongs” of those laws — that is, four areas of which you can run afoul. Avoid them and you avoid civil and criminal penalties.

- Prong 1 (while gathering): Unreasonable intrusion upon seclusion (e.g., trespass)
- Prong 2 (if published): Unreasonable revelation of private facts (e.g., medical information)
- Prong 3 (if published): Unreasonably placing another person in a false light before the public
- Prong 4 (if published): Misappropriation of a person's name or likeness

So there are two separate questions with regard to publishing photos: 1) Are we allowed to take them? and 2) are we allowed to publish them?

Are we allowed to take them?

Whether we can take a photograph is determined by whether the subject has a reasonable expectation of privacy or seclusion. If not — if he's visible to the public (even on private property) — photography is legal.

The logic is simple: If you can see it, you can photograph it. If it requires extraordinary means to see (e.g., using a telephoto lens, or trespassing on property not open to the public such as a private office), then you may not be able to photograph it legally.

According to the American Law Institute:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.

—Restatement (Second) of Torts, § 652B

According to the Reporters Committee for Freedom of the Press's *Photographers' Guide to Privacy*, "If the subject of the photograph has no reasonable expectation of privacy, then no invasion of privacy is possible.

Photographs taken in public places generally are not actionable. Photos of crimes, arrests and accidents usually are considered newsworthy and immune from privacy claims."

A public place can be privately owned — examples are a mall, building lobby, or office building shared by multiple businesses.

Trespassing and photographing are two separate things. A photographer can trespass and still take legal photos, and a photographer can be in a public place and still take *illegal* photos.

The test of the legality of the photograph is whether it intrudes on a person's right to seclusion (e.g., using a telephoto lens to shoot into someone's private office, or simply entering that office when not invited).

A photographer is not trespassing, even on private property, if such a place is open to the public. There is no need to get specific permission to enter any facility that is open to the public, including office buildings, malls, banks, etc.

Of course, that permission can be revoked. Photographers can be asked to stop shooting or to leave, but are not at that point trespassing unless they refuse to comply.

But they do not have to turn over his film or digital media. According to *The Photographer's Right*, by Bert P. Krages, an attorney in Portland, Ore., and author of the *Legal Handbook for Photographers*:

Sometimes agents acting for entities such as owners of industrial plants and shopping malls may ask you to hand over your film. Absent a court order, private parties have no right to confiscate your film. Taking your film directly or indirectly by threatening to use force or call a law enforcement agency can constitute criminal offenses such as theft and coercion. It can likewise constitute a civil tort such as conversion. Law enforcement officers may have the authority to seize film when making an arrest but otherwise must obtain a court order.

Which brings us to...

Can we publish them?

The last three prongs of privacy law — private facts, false light, and misappropriation — guide whether or not a photo can be published without potentially incurring civil penalties, *regardless of how it was obtained*.

Even if a photographer violates a subject's right to privacy, publishing the photos is not *illegal*, although it could invite a civil suit.

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.)

Private facts. A photographer can be held liable for a violation of privacy if a published photo reveals private information about a person that is not newsworthy. What is private information? The definition 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

Examples from the Journalists' Right of Privacy Primer, by St. Louis attorney Mark Sableman:

[I]n a case from St. Louis, a court recognized a private facts case brought by a couple who were filmed at a reunion for participants in a hospital's in vitro fertilization program, even though the reunion was held in public and a television station was invited.

Yet the disclosure of the homosexuality of Oliver Sipple, who saved President Ford's life during an assassination attempt, was held to be a matter of legitimate public concern, even though he kept his sexual preference private and it had nothing to do with the actions that brought him into the limelight.

False light. This is similar to libel. 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.

Misappropriation. This is more an issue for celebrities and direct commercial use of an image — in advertisements, for example. You can't take a picture of someone drinking, say, a Diet Coke and use it in an ad without their 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

And 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.

An Example

A photographer goes to a local mall, camera in hand, without informing the mall that he would be there.

He shoots some people walking around and some of the store displays. *This is legal.* He shoots some of the kids playing in the little playground the mall has set up. *This is legal.*

In a drugstore, a woman gets a prescription and stands in a corner to read the instructions. The photographer uses a zoom lens and gets a nice, tight shot of her reading the paperwork, in which you can see that it's a bottle of Prozac. *Taking this shot is illegal because the woman, standing in the corner, has an expectation of privacy.*

While in the food court, a mall security guard spies the photographer and asks him to stop shooting. The photographer refuses and continues taking pictures. *Taking these pictures is legal.*

Angry, the security guard orders the photographer to leave the premises. The photographer refuses. *He is now trespassing.* He continues to take photos, including of the security guard. *Taking these pictures is legal.*

The guard then escorts the photographer to the mall offices, where he is asked to wait. While there, he walks around a bit and takes photographs of people working in their offices doing company business. *Taking these pictures may not be legal as the people in those offices have an expectation of privacy.*

The mall manager informs the photographer that he is banned from the premises and demands that he turn over his film or digital media. The photographer refuses. The manager then demands that he not publish any of the photos he took in the mall and has him escorted from the premises.

The photographer publishes many of the photos he took, despite the manager's demand. *This is legal.* He publishes photos of the kids playing in the playground, although he didn't ask their parents' permission. *This is legal as they had no expectation of privacy.*

He publishes the photograph of the woman examining her Prozac prescription. *The photographer risks a lawsuit as this reveals private facts about the woman that have no news value and that a reasonable person would not want revealed.*

He publishes the photos of the mall office, and of the people working there — none show what they are working on, or any private or embarrassing information. *The risk of a lawsuit is minimal even though taking the photos themselves may not have been.*

He adds a caption to one of the office-worker photos, "Roger McMurty of the Lone Pine Mall works on his résumé one Thursday afternoon." *The photographer risks a lawsuit as this portrays McMurty in a false light — implying that he is looking for a job and doing personal work on company time.*

Another of the office-worker photos shows a woman facing front and pointing to a chart. The photographer sells this to a stock-photo house which will then resell it. *This may not be legal as it may misappropriate the woman's image.*

The next day, the photographer returns to the mall despite being banned and takes more general pictures. *Being there is illegal; he's trespassing. But taking the photographs is not, as long as he is not violating anyone's privacy.* He is caught by security and escorted from the building. He publishes the photos he took. *This is legal.*

Resources

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:
<http://www.mobar.org/press/medhnbk3.htm>, 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*: <http://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 UVa Professor Kenneth S. Abraham (on the Harvard Law Web site): cyber.law.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm



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