

# Privacy and Photography

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## Privacy and Photography

Is taking a picture of someone on the street an invasion of that person's privacy? Does it matter whether a photographer is taking the picture in a private or a public place? Is it only invasion of privacy if the photographer is going to make money from the photograph? All of these questions are important to artists whose goal is not to intentionally invade anyone's privacy, but rather to capture an image that ultimately becomes a piece of artwork.

The basic answer is that, if a person takes a picture from the street, the view of the subject is available to any bystander, and is considered public knowledge and available to the general public. As a result, this is not an invasion of privacy. However, problems may arise when the photograph is published, put up for sale, or sold. If you take a picture of someone or a group of people in a public place, and the picture is not such that a reasonable person would be offended by it, you have nothing to worry about. But if you think the picture you take might end up offending the subject(s), then it is better to err on the side of caution and get consent from your subject or subjects.

### **Historical Background:**

#### **Where did Invasion of Privacy come from?**

In 1890, two Supreme Court Justices penned an article for Harvard Law Review that examined the idea of invasion of privacy as a tort. Generally speaking, a tort is a civil cause of action (as opposed to a criminal cause of action), which a plaintiff brings against a defendant. If the court finds that the defendant caused an injury to the plaintiff, then the plaintiff can get a remedy by way of money damages. The law of torts is primarily judge-made, but in more and more states, this judge-made law is being modified by statute.

### **What Constitutes Invasion of Privacy?**

There are four different wrongs that fall under the tort of invasion of privacy.

- Appropriation of someone's name or likeness for one's own benefit
- Intrusion upon another's privacy or private affairs
- Public disclosure of private facts
- Placing a person in a false light in the public eye

The action for invasion of privacy is recognized in all jurisdictions, but not all of these four forms are recognized in all jurisdictions. Some states combine two of these into one, and others don't recognize some of these as a tort at all. In some jurisdictions, these four forms of invasion of privacy are affected by state statute. The definitions that follow are by no means a full legal description, but rather just a short introduction.

### **Appropriation:**

A defendant is subject to liability for using the name or likeness of a plaintiff for his own use or benefit. So if a photographer took a picture on the street and captured a passer-by in that photograph, and then the photographer used the photograph in an advertisement, the photographer would be liable to the passer-by if the passer-by sued the photographer for invasion of privacy. Generally, the likeness need not be used for commercial benefit. However, many states impose a commercial requirement on appropriation.

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### ***Intrusion:***

You may be held liable for either physical or other intrusion into the solitude, seclusion, or private life of another person, provided that a reasonable person would find the action unreasonably intrusive. This definition is very uncertain because it is difficult to determine both who a reasonable person is and what that person would find unreasonable. State statutes aim to clarify this, but in the end, the prior cases in a particular state determine what is and is not reasonable. Photographing someone is an intrusion only if it encroaches on someone's private space, whether through unwanted close physical contact or through photographing someone in their home from a distance. However, photographing someone from a distance in a public place is not considered an intrusion. The tort of intrusion is complete when the intrusion occurs. The photograph need not be made public or even developed. The act of taking the photograph is enough to constitute intrusion.

### ***Public Disclosure of Private Facts:***

If you makes some private fact concerning another person public knowledge, then that you can be subject to liability for this tort. The fact publicized must be highly offensive to a reasonable person and not a legitimate matter of public concern. The private fact does not need to be published, but only disclosed to the extent that it is likely to become public knowledge.

Photographers are not likely to encounter problems here because it is difficult to publish a fact in publishing a photograph. Furthermore, as long as the subject is in a public space, such as the street or in a park, these facts are already available to the public and there is no liability. The facts in question must be intimate facts, and a person's right to keep these facts private must be weighed against the public's right to know. Therefore, a famous person or a person in the public eye has fewer private facts than the average citizen does.

### **False Light**

If you publicize a fact about another person that:

- You know or have reason to know is false, AND
- Places that person in a light that would be offensive to a reasonable person

Then you can be liable for the tort of publicly placing a person in a false light. The idea behind this tort is that one should not be able to present a false image of another to the public.

### **Damages:**

In an action for invasion of privacy, a plaintiff can recover damages for:

- Harm to his or her interest in privacy,
- Mental distress, if it is of a kind that normally results from an invasion in privacy
- Any special damages resulting from the invasion of privacy
- These must be specifically explained by the plaintiff in his or her case

### ***Invasion of Privacy According to the States***

Invasion of privacy, like other torts, varies in definition from state to state. The law in this area is usually judge-made law, which means that the elements of what comprises an invasion of privacy are decided by the courts when they hear cases. The courts create tests which they then explain in the opinions deciding cases. These tests then become precedent and both parties can use them to argue their case. The court also uses this precedent when it makes a decision.

State legislatures have made an effort to clarify the law in this area with statutes. Some states have statutes specifying exactly what constitutes an invasion of privacy, but other states do not.

### ***Pennsylvania***

Pennsylvania recognizes invasion of privacy as a tort both through its state constitution and as common law. For photographers, the important thing to know about Pennsylvania law is that conduct that would amount to harassment, even in a public or semi-public place, might be construed as an invasion of privacy. In addition, some matters concerning the subject might not be apparent to the public, even if the subject is in a public place, and subjecting these matters to the public gaze might also amount to an invasion of privacy.

### ***New Jersey***

New Jersey seems to place importance on whether or not the photographs are going to be shown to third parties. This is a great concern for photographers because obviously, the photographs usually are. However, this is only important if the photographs as taken and then shown to third parties are such that the intrusion would be highly offensive to the reasonable person. Furthermore, if the information made public by the photograph is otherwise known and public, then the courts are reluctant to find an invasion of privacy. Thus, if you photograph someone in a public place in a non-intrusive manner, there is very little chance that a court will find an invasion of privacy.

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### *Delaware*

In this state, invasion of privacy is defined as making public any matters that might violate a person's ordinary decency. This is pretty much the same as the reasonable person standard of both New Jersey and Pennsylvania. However, just drawing unwanted public attention is not enough for the Delaware courts to find an invasion of privacy. The intrusion must also be into the private matters of another, matters that the person has made an effort to keep private. Again, if someone is in a public place, they have not made enough of an effort to keep themselves or their likeness private for a photographer taking a photograph to be considered an invasion of privacy.

If you have any more questions about this area of law, please call:

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