
Street Photographers Rights

***Can I take a photograph in public that contains images of people I don't know?
Can I take a photo of a famous landmark or of the front of someone's house and later sell it?***

This information sheet aims to provide you with the answers to these and other questions that may arise when you are taking photographs in and of public spaces. It also aims to provide those you encounter with a statement of your rights to minimise the possibility of harassment or threatened legal action. So carry this in your pocket and be prepared.

Taking photographs in a public place

It is generally possible to take photographs in a public place without asking permission. This extends to taking photographs of buildings, sites and people. There are, however, some limitations.

Photographing people

There are no publicity or personality rights in Australia, and there is no right to privacy that protects a person's image. Existing privacy laws are more concerned with storage and management of personal information and are of limited relevance to the present issue.

There is also currently no tort of invasion of privacy in Australia, but in *ABC v Lenah Game Meats* (2001) the High Court did not exclude the possibility that a tort of unjustified invasion of privacy may be established in the future. Based on this view, the Queensland District Court found in *Grosse v Purvis* (2003) that a tort of invasion of privacy had been made out on the facts and awarded the plaintiff damages. However, this case concerned a long history of harassment over many years and has limited application. As a result, taking photographs of people in public places is generally permitted.

Photographing people for a commercial purpose

If you are using your shots for a commercial purpose, such as for an advertising campaign, you should obtain a model release form signed by the subjects you are photographing to ensure you have authorisation to use their image to sell a product. See the Arts Law information sheet "Unauthorised Use of Your Image" for further information on defamation, passing off and trade practices law. A sample photographer's model release form is also available on the Arts Law Centre of Australia website.

Photographing people on private property

There is no restriction on taking photographs of people on private property from public property. According to *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) there is no freedom from view, so people who are photographed on their property from a public location have no legal claim against you if what is captured in the photograph can be seen from the street. The same applies to photographs taken from private land when you have permission to take photographs. You should be careful that you are not being a nuisance and interfering with someone's right to use and enjoy the land (see the case of *Bathurst City Council v Saban* (1985)).

Can taking photos be a criminal offence?

The *Summary Offences Act 1988* (NSW) outlines a number of circumstances where a person's privacy must be respected. For example, it is an offence punishable by a fine or imprisonment to photograph a person to provide sexual arousal or gratification if the person is undressed or engaged in a private act in circumstances where a reasonable person would reasonably expect to be afforded privacy, and he or she has not consented to being filmed. A private act includes using the toilet, bathing and engaging in sexual activities not ordinarily done in public. Similarly, the *Surveillance Devices Act 1999* (Vic) and *Surveillance Devices Act 1998* (WA) make it an offence to photograph a "private activity" without the consent of the subject.

The *Crimes Act 1900* (NSW) also makes it an offence punishable with imprisonment to be in or near a building with intent to peep or pry upon another person. It is also an offence to stalk a person with the intention to cause fear of physical or mental harm. In serious cases, this may lead to an application for an apprehended violence order (AVO).

Also be aware that any photography construed as child pornography can result in criminal charges. For example, the *Criminal Code 1899* (Qld) makes it an offence to take any "indecent" photograph of a child under the age of 16 without legitimate reason. You could face significant jail time, especially if the child is under 12. Similar provisions apply under the *Criminal Code* (NT), *Criminal Code 1913* (WA), and the *Criminal Law Consolidation Act 1935* (SA).

Photography of landmarks, buildings, monuments

There are provisions in the *Copyright Act 1968* (Cth) that allow people to take and publish photographs of buildings, models of buildings, sculptures and other works of artistic craftsmanship without infringing copyright. See below for more detail.

However, photography is restricted in some areas by local councils or authorities. For example, the *Sydney Harbour Foreshore Authority Regulation 2006* (NSW) prohibits a person from using a camera for a commercial purpose in a "public area" without the Authority's permission. This applies to any part of the foreshore area that is vested in or managed by the Authority and the public can use, including Darling Harbour, Circular Quay, the Rocks and Luna Park. Non-compliance can result in a fine. A person who causes annoyance or inconvenience to other persons in a public area must leave the area when requested by a ranger or a police officer, who may remove the person with reasonable force if they fail to do so. Provided the ranger has warned you that failure to comply with the request is an offence, you can face a fine. For more details, contact the Sydney Foreshore Authority (<http://www.shfa.nsw.gov.au>).

Similar provisions and penalties exist for Sydney Olympic Park, prohibiting the use for commercial purposes of a camera and causing annoyance or inconvenience to other persons (*Sydney Olympic Park Regulation 2001*). Furthermore, an authorised person may confiscate a camera used in contravention of the Regulation if he or she has directed you to stop using it and you continue nonetheless, although force cannot be used. If your camera is confiscated, you should be issued a receipt indicating the date and time when it was taken. It must be returned to you or delivered to a public pound within 24 hours after confiscation. If delivered to a public pound, you must be notified in writing of the address. Also keep in mind that you must abide by the admission conditions on the entry ticket to events and sports grounds, including Telstra Stadium, Sydney Showground, Sydney

SuperDome, Sydney Olympic Park Aquatic Centre. For more details, contact the Sydney Olympic Park (<http://www.sydneyolympicpark.com.au>).

Other penalties and provisions may exist for other areas in other States and Territories.

Restrictions may also be imposed by Local Councils on premises under their control, such as swimming pools. Following public concern and outrage due to "incidents" involving the photography of unwilling bathers on beaches, Councils were prompted to prohibit photography in these and similar areas. For example, you need a permit to commercially photograph any outdoor, publicly-owned space in Waverley, including beaches, parks, streets and cemeteries. It is therefore advisable to check with the Local Council whether there are restrictions on photography, however most restrictions seem to apply to commercial photography.

Government property

It is illegal to enter certain property belonging to the government such as railway yards, electrical power stations and military bases. Trespassing in these areas may lead to arrest and prosecution. For example, under the *Defence (Special Undertakings) Act 1952* (Cth) it is an offence to gain unlawful entry into a "prohibited area" (including flying over it), punishable by imprisonment. The Minister can declare any area of land or water "prohibited" if it is necessary for Commonwealth defence. The same applies for taking a photograph of the area or anything in it. Merely possessing a camera while in a "prohibited area" can also result in imprisonment. Four Christian Pacifist activists were prosecuted under this Act for trespassing on the US Pine Gap military base in Australia and taking photographs in October 2006.

It is also illegal to photograph any defence installation in Australia under the *Defence Act 1903* (Cth). Your photos, camera and film can be confiscated and destroyed, and you can face potential fines or imprisonment. You can even be arrested without a warrant. Always obey any warning signs displayed at such locations as you can be penalised even if you haven't taken any photos, but have photography equipment in your possession.

If you are in doubt about a particular location, always check.

Photographing number plates

A number of photographers have asked Arts Law whether it is illegal to photograph car number plates on the street. While State and Commonwealth legislation permits police and roads authorities to use various Automatic Number Plate Recognition systems (like Safe-T-Cam) to monitor criminal activity such as speeding, the law does not prevent photography of car number plates.

You and the Police

Some photographers have been approached by the police while on the street taking photographs. The police may ask you to identify yourself. Generally, you do not have to comply, but there are some exceptions:

- where you are in lawful custody, or the police suspect on reasonable grounds that you may assist in the investigation of an indictable offence (*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)); or
- where you are at the Sydney Olympic Park and are suspected on reasonable grounds

of an offence against the *Sydney Olympic Park Regulation 2001* (NSW). In this case, failure to comply is an offence only if you are first warned that such failure is an offence.

Under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the police do not have powers to stop, search and detain you without a warrant unless they suspect on reasonable grounds that:

- you have in your possession or under your control anything stolen or unlawfully obtained, or to be used in connection with the commission of a relevant offence; or
- you have in your possession or under your control in a public place a dangerous article that is being or was used in connection with the commission of a relevant offence.

For similar provisions in other states, see *Police Powers and Responsibilities Act 2000* (Qld), *Crimes (Custody and Investigations) Act 1988* (Vic) and *Police Administration Act 2006* (NT). Do not forget the special powers that police and other authorised persons (such as rangers) may have in certain areas, as discussed above.

Obstruction and Public Order Offences

Setting up a tripod on a busy street and thereby impeding traffic is an example of an action that may amount to public obstruction. The *Summary Offences Act 1988* (NSW) provides that it is an offence to prevent in any manner the free passage of a person, vehicle or vessel in a public place without reasonable excuse. Police have powers to arrest any person obstructing a public thoroughfare, although it is more likely that you would be asked to move on, and only arrested if you disobey. Police have powers to give a person in a public place reasonable directions if they believe on reasonable grounds that his or her behaviour or presence is obstructing another person or traffic, or constitutes harassment or intimidation of another person (*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)). Failure to comply may be an offence punishable by a fine.

For similar provisions in other states, see *Summary Offences Act 2005* (Qld), *Summary Offences Act 2007* (NT), *Summary Offences Act 1953* (SA), *Summary Offences Act 1966* (Vic) and *Criminal Code Act 1924* (Tas).

Photography and the Arts

Sculptures, monuments and artwork may be protected by copyright. Unless an exception applies, you need permission from the copyright owner of the work. Exceptions to this general rule are found in the Copyright Act. For example, photographing and publishing a photograph of a sculpture or work of artistic craftsmanship that is permanently situated in a public place, or in premises open to the public, does not infringe copyright (s 65). This does not apply to other public art, such as murals. If the public place is a gallery or museum, remember that your rights to photograph may be limited by the conditions of admission on your ticket. As previously discussed, you can also take pictures of buildings without infringing copyright.

Private Land

In order to access a privately owned space you need permission from the landowner, and he or she has the right to impose restrictions on photography. Therefore, you may only be allowed to photograph certain objects or locations. This type of restriction is common in many museums, galleries and sporting grounds, and may occur on land owned by

Councils. Even where the landowner allows you to photograph, keep in mind that he or she may not be the copyright owner in artistic works you might be photographing. In this case, you need the permission of the author of the artwork as well.

If you do not have permission to be on privately owned property, you will be liable in trespass. Trespass is committed with the slightest interference with the land (damage to the land is not relevant). The owner may take legal action in trespass against you for taking photographs after gaining unauthorised entry (*Lincoln Hunt v Willessee* (1986)) or may be able to get an injunction to stop you using whatever footage you gathered while trespassing (*ABC v Lenah Game Meats* (2001)). The landowner may use reasonable force to remove you from their land.

Wildlife and National Parks

The *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) includes provisions restricting the taking and use for commercial purposes of photographs in Commonwealth Reserves, including Kakadu National Park, Australian National Botanic Gardens, Christmas Island National Park, Norfolk Island National Park, Commonwealth Marine Parks and Reserves. To take photographs for commercial purposes in a Commonwealth Reserve, you should contact the reserve for a permit. Conditions may be imposed on the taking of the photographs. If in breach of the limitations, you may be fined and required to surrender all copies of the photographs and the camera used to take them. For further information contact the relevant Commonwealth Reserve.

Use/publication of photographs

Now that you have taken your photographs you need to be aware that their use or publication may also be illegal when carried out in a certain fashion. For example, the subject of a photograph may seek an injunction to stop the publication of photographs that are indecent, offensive or demeaning (*Lincoln Hunt Australia v Willessee* (1986) 4 NSWLR 456).

Defamation

Defamation is the law that deals with injury to someone's reputation. The unauthorised use of the photographs would need to lower the public's estimation of the person portrayed, expose the person to hatred, contempt or ridicule, or cause him or her to be shunned or avoided. The unauthorised publication of the photograph in itself is not proof of defamation. Since defamation deals with reputation, the likelihood of an action in defamation will be higher the more famous the person photographed.

For a more detailed discussion, see the Arts Law information sheet "Defamation".

The law of passing off and the Trade Practices Act

Complications arise if your photographs are used for a "commercial purpose" and you don't have consent from the persons in the photograph. "Commercial purpose" involves using the photograph to sell something *other than the photograph itself*. So if you have taken a photo of someone on the street for an advertising campaign and it appears that the person is endorsing the product or service (when in fact they do not), you may be liable.

For a more detailed discussion, see the Arts Law information sheet "Unauthorised Use of

Your Image".

Photographs relating to Court proceedings

Photography in courts is restricted. The law of contempt of court also generally prohibits the publishing of any material, written or photographic, that is likely to prejudice the course of justice in a matter which is still before the courts. For example, in *Attorney-General for the State of NSW v X* (2000) the Sydney Morning Herald published an expose on organised crime, claiming that Mr Duong was "the top heroin distributor" and mentioned pending criminal charges against him. The Court of Appeal held that the article amounted to contempt of court because it implied Mr Duong was guilty. In coming to this decision, the judges were guided by the fact that the article was accompanied by two photos of Duong, each of which were "unusually large, in colour and of good quality".

Copyright and Trademarks

You may be infringing copyright if you photograph the whole or a substantial part of a literary, musical, dramatic or artistic work, if the work is still protected by copyright. For further information on copyright, see the Australian Copyright Council information sheets at www.copyright.org.au.

Photographers are often concerned about taking photographs of trade marks, for example taking a shot of a streetscape that contains advertising or company logos on the side of buildings. A registered trade mark owner has exclusive rights to use the trade mark and to authorise use of the trade mark in relation to goods/services for which the trade mark is registered. Taking a photograph of a trade mark should not involve trade mark use and is not trade mark infringement. Also consider that there may be copyright subsisting in the trade mark if it is a logo containing an artistic work.

Conclusion

For further information on any of these issues please contact Arts Law on (02) 9356 2566.

Disclaimer

This information is intended as a guide only. It does not replace legal advice obtained from a legal practitioner. The information was correct at the time of writing but the author takes no responsibility for changes in the law since that time.

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