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AUTHOR Huttenstine, Marian L.; Reddin, Debra D.
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ABSTRACT

Photojournalists who sometimes do freelance work should have an awareness of the legal issues relating to their work. The history of litigation involving photographers is clouded by misapplication of existing law, ambiguity in applicable law, and lack of knowledge on the part of all parties. Nonetheless, certain basic principles, if followed, provide a measure of guidance for photographers who sincerely wish to keep themselves out of costly legal battles. Four areas of mass communication law that bear particular relevance to the photographer are invasion of privacy, libel, contracts, and copyrights. A number of court cases involving photographers illustrate several tenets that photographers should try to follow, including the needs to understand privacy law, to know how captions under photographs can make them libelous, to use consent forms in all photographic work, to register photographic copyright, and to occasionally talk to local attorneys about current issues in media law. (A list of 13 principles/suggestions for photographers to follow is offered.) (RL)

PHOTOJOURNALISM
DIVISION

LET'S KEEP PHOTOGRAPHERS OUT OF COURT: A LEGAL PRIMER FOR PHOTOGRAPHERS

By
Marian L. Huttenstine
Assistant Professor
School of Communication
University of Alabama

Debra D. Reddin
Masters Candidate
School of Communication
University of Alabama

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Probably the most terrifying words any communicator can ever hear are, "I'm going to sue you." In the case of a reporter or a public relations practitioner, that sick feeling in the pit of one's stomach will be shared with some sort of corporate entity. Photographers, however, frequently face law suits alone because they either moon-light on the side, doing such things as taking wedding pictures, or because they make their living free-lancing.

Like any communicator, a photographer can get into legal trouble in three ways: genuine accident, idiosyncratic situation, or lack of legal knowledge. A photographer, by accident, may get something in the background of a picture--say a couple being rather amorous on a park bench--which he/she doesn't even notice until threatened with a suit for invasion of privacy. An idiosyncrasy in state law might require that a business person must set a firm delivery date for goods or services and then, if that date proves unworkable, must inform the client in writing of the delay. Or, if a photographer does not realize that some sort of identifying mark must appear on the prints in order for them to be copyrighted, ownership rights could be accidently lost.

In any of these situations, the photographer is almost certain to lose any insuing legal action. Just as it is vital that advertising executives have an understanding of FTC regulations, photographers must have a working knowledge of the areas of law which affect them as communicators. These areas of primary importance are invasion of privacy, contracts, and copyright law.

Privacy is probably the photographer's biggest legal headache. Due to the sophisticated nature of much of today's photographic equipment, it is possible for the photographer to take reasonably clear pictures at great distances without anyone realizing that a picture is being made. In the fall of 1979, a photographer in a small Alabama town was threatened with legal action when the paper he worked for printed a strike picture he had taken showing an irate teacher with a metal pipe raised against some of his fellow teachers. The strike was settled shortly thereafter; and in the midst of the general good will, nothing further was said about the threatened suit. A more serious problem might have developed had the strike been protracted or had persons been injured in the incident.

That same fall, a Louisiana newspaper was sued for printing a picture of a house under which a cutline ran, describing the home as being "weather-beaten." The state court decided the case in favor of the newspaper, holding that since the picture was taken in a public place (the sidewalk) of a site that anyone could see just by walking past it, there had been no actionable invasion of privacy.[1] Although the paper was lucky, nonetheless, the simple burden of defense was costly. Had that same photograph or one similar to it been used in a advertisement for a local business in the midst of a paint sale, the result would have been quite different. The photographer's responsibility or liability would depend upon the

circumstances of both how and why the original photo had been taken.

Because it is possible for a photographer to take pictures surreptitiously, there has been a wealth of litigation between photographers and those who have unwittingly and/or unwillingly had their pictures made. Probably the most famous illustration of the unwilling subject is the case involving Jacqueline Kennedy Onassis and photographer Ronald E. Galella.[2]

Galella made his living by photographing Onassis and her two children, John and Caroline. However, he did not merely stand back and calmly take pictures. Instead, he frequently used surprise tactics such as jumping out from behind bushes in Central park to frighten members of the family. On another occasion, Galella managed to frighten the horse one of the children was riding, causing it to throw the child. On another occasion in Central Park, Galella jumped onto a bicycle path in Central Park in front of Onassis' son, almost causing him to fall from his bicycle. Eventually Onassis petitioned for an injunction to keep Galella from coming near her or her children. The petition was granted. However, since the photographer made his living taking pictures of the Onassis family, the court allowed him to continue photographing them so long as he remained at least one hundred yards from the family residence and fifty yards from members of the family.[3]

Galella subsequently filed a petition for injunctive relief from the restrictive injunction. In the meantime, he did not allow the injunction against him to keep him from taking pictures in his usual way. As a result, Galella was called into court to show cause why he should not be held in contempt for violating terms of the court order. While on the stand, the photographer perjured himself so blatantly that the presiding judge was shocked into disbelief. Essentially, everytime the clock ticked, Galella's testimony changed. To say that the judge was displeased would be a gross understatement:

> We still find ourselves amazed at the non-stop character of plaintiff's false testimony. Blatant perjury for publicity. Plaintiff condemned his complaint and earned its dismissal out of his own mouth...Plaintiff was a litigant before us and as such entitled to be heard in full. He stretched it to the breaking point...What plaintiff accomplished was infinitely worse that "much ado about nothing"...We were simply aghast at trial, and continue to be at the unlimited effrontery with which plaintiff initated, attempted to sustain and failed miserably to establish, his spurious assertions.[4]

The court, in reaching its decision, differentiated Galella's work from that of a "news photographer, a news reporter or a photojournalist endeavoring to get a story about a woman and her two children who were, and in our opinion are still, the object of legitimate public interest." In other words, part of what the court was saying was that use of some of Galella's techniques might have been permissible had he been pursuing a news story of some sort. However, since his object was simply to get pictures of Onassis and her family, for direct personal profit with no "news"

stress or angle, his method of taking photographs was nothing less than harassment.

In all likelihood, Galella could have made a stronger case for himself had he not used his scare tactics. The court, in a discussion of the First Amendment aspects of this case, stated that under most circumstances, the comings and goings of public figures could be deemed newsworthy, in the public interest, and that any attempt by the court to completely restrain Galella from taking pictures would constitute a prior restraint on the press. The court seemed quite willing to consider the newsworthiness of the Onassis' family activities of greater importance than their right to privacy. However, Galella lost the case himself; the court did not look with favor upon the circus he created in the courtroom or in his professional activity.

Each photographer must decide for him/herself how to go about "getting the picture;" however, common sense dictates that some photojournalistic techniques will enable the photographer to do more than just get the picture--they will serve to cause a great deal of trouble. Harassment is unconscionable so far as private citizens are concerned. Aggressive news gathering, insofar as public persons[5] are concerned, is not only tolerable, but also desirable.[6]

Public figures are a constant source of trouble for photographers: first, because who will be considered a public figure depends upon a standard which is not absolute; second, because laws which protect the individual from unauthorized use of his/her picture for another's gain also vary in application. This sort of invasion of privacy is commonly known as appropriation--using another's likeness for personal gain.

Comedian Pat Paulsen, as a part of a national publicity campaign in 1968, announced that he would be a candidate for president that year. He made "campaign" appearances, had "campaign" buttons made and even received a few votes in some state primaries. A poster manufacturing company in New York produced a poster of Paulsen which carried the caption "Paulsen for President." The comedian sued the company for invasion of privacy through appropriation. In his arguments, Paulsen contended that his race for the presidency was only a joke. The court determined, however, that since Paulsen had announced his "candidacy," had made "campaign" appearances, had received some preliminary votes, and had done the sort of things which candidates tend to do, he was in fact a candidate:

> It is apparently plaintiff's position that since he is only "kidding" and his presidential activities are really only a "publicity stunt" they fall outside the scope of constitutionally protected matters of public interst. Such premise is wholly untenable. When a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. A poster which portrays plaintiff in that role, and reflects the spirit in which he approaches said role, is a form of public interest presentation to which protection must be extended. That the format may deviate from traditional patterns of political commentary, or that to some it may appear more entertaining than informing, would not alter its protected

> status. It is not for this or any court to pass value judgments predicated upon ephemeral subjective considerations which would stifle free expression...Thus whether the matter involved be considered as a significant satirical commentary on a current presidential contest, or merely as a humorous presentation by a well-known entertainer's publicity gambit, or in any other light, such as mere gossip or pure entertainment, it is sufficiently relevant and matter of public interest to be a form of expression which is constitutionally protected and 'deserving of substantial freedom.'[7]

Even though Paulsen won at his trial under a statute which allowed the use of an individual's picture for commercial gain, he lost his case because the court saw an even greater issue in publication--that is, the right of the people to be informed about all candidates in a presidential contest. The court protected the use of Paulsen's picture because of the political implications surrounding the manufacture and marketing of the poster.

The Paulsen case was used in 1973 as Howard Hughes attempted to keep his name, likeness and biographical information from use in an adult educational career game. The court noted that this area of the law is plastic and each case must be decided by weighing the policies: "The public interest in free dissemination of information, against the interest in the preservation of inviolate personality and property right. Among the relevant factors in such decision are the media used, the nature of the subject matter, and the extent of the actual invasion of privacy."[8] The photographer needs to consider more than the subject at the time the photograph is "caught;" consideration must also be given the projected use.

In 1962, actress Shirley Booth brought suit against Holiday magazine for unauthorized use of her likeness in an advertisement. The picture had originally appeared on the cover of the magazine. Subsequently, however, that issue of Holiday was included in an advertisement for the magazine. Booth sued under a New York statute which prohibited the use of an individual's photograph in an advertisement without the consent of that individual. The court ruled, however, that Booth's picture had not been used for advertising purposes per se. That the publisher happened to chose that particular issue of the magazine to be used in the advertisement because it was illustrative of the publication was enough to protect the use. The court wrote:

> ...it suffices here that so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statute was not violated, albeit the reproduction appeared in other media for the purposes of advertising the periodical...essential to the holding is that there was nothing in the reproduction which suggested...or could reasonably suggest that Miss Booth had endorsed the magazine...The case nevertheless serves to illustrate that merely the juxtaposition of a person's likeness with a commercial presentation is not determinative.[9]

The same New York statute formed tha basis of a suit brought by Pola Negri, an actress from the silent movie days, against Schering Corporation.[10] A clip from

a 1922 movie, "Bella Donna," was used as the illustration in an advertisement for a cold remedy, Polaramine. Negri was depicted in the picture standing full length with her features clear and recognizable although the picture had been taken some forty years previously. The court found that this picture had in fact been used for advertising purposes although the identity of the woman in the picture was irrelevant to the product the advertisement was attempting to sell. The court held that the statute had been violated since the woman in the picture could be construed to be recommending the product especially since the first four letters of the product name spelled the plaintiff's first name.

In 1971, a private citizen plaintiff brought suit against New York magazine for using his photograph on its cover without his permission. The picture had been taken two years previously when the plaintiff was at the St. Patrick's Day parade in New York City, dressed in Irish garb. The court ruled that even though two years separated the taking and the publishing of the picture, use of the photograph in connection with the parade was a matter of legitimate public interest. This determination was unusual; depending upon the nature of the picture, if a considerable amount of time separates the time a photograph was taken from the time of its publication, the picture is usually held to be of no news value.[11]

An Alabama woman brought suit against a small daily newspaper for invasion of privacy when the defendant newspaper published a picture of her which had been taken as she exited a Fun House at a county fair. Upon leaving the Fun House, a jet of air blew the woman's dress up so that she was "exposed from the waist down with exception of that portion (of her body) covered by her 'panties.'"[12] The court determined that, although the picture was taken in a public place, publication constituted an actionable invasion of the woman's privacy because it disclosed private, embarrassing facts about her. In the decision, the court quoted from an article written by William Prosser which appeared in the California Law Review:

> It may nevertheless be suggested that there must be yet some undefined limits of common decency as to what can be published about anyone; and that a photograph of indecent exposure, for example, can never be legitimate "news."[13]

The court also quoted from the Restatement of the Law of Torts, Vol. 4, Sec. 867, "(justifiable invasion of privacy is exceeded) where photographs of a person in an embarrassing pose are surreptitiously taken and published." If the embarrassing pose occurs during an official governmental action, the courts have reached differing conclusions.[14]

A slightly different result developed from the Fletcher[15] case. Mrs. Fletcher visiting a friend in New York, learned of the death of her daughter by reading the story in a newspaper and viewing the published photographs. She sued, alleging trespass and invasion of privacy, invasion of privacy, and intentional infliction

of emotional damages. She was successful at trial despite the fact that the photographers were invited into the home by the Fire Marshal and Police Sergeant. The photographers reported that they entered through an open door; they further said that there was no objection to their entry and that they did so quietly and peaceably. The state supreme court based its decision of "common usage, custom and practice." Because the material reported wasacknowledged to be true and in no way inaccurate, the newspaper and its photographer won. Apparently, then, a photographer does have fairly strong protection for those actions which follow the usual practice or accepted custom--if the subject is newsworthy and the results are accurate.

Invasion of privacy can occur not only through appropriation or public disclosure of embarrassing facts, but also through misrepresentations, or what is commonly called false light invasions of privacy. Edward and Mary Jane Russell brought suit against Marboro Books in 1959 for invasion of privacy through a false light representation.

Mrs. Russell had posed as a model for a picture which was later altered and appeared with a suggestive cutline. Although she had signed a release giving unrestricted use of the picture to the photographer, the alterations and caption were sufficient to state a cause of action because together the caption and the altered picture placed Mrs. Russell in a false light.[16]

Local court records are littered with cases involving the modification of photographs. Although the actual rules vary from state to state, significant problems develop, when, as in the Russell case, the "spirit" of the original is violated. Even the traditional consent form has been ruled invalid in the trial level when the resulting use is a drastic modification of the initial photograph. On several occasions the losses have been based in privacy law, in others that base has been libel. It is important to know that violation of contract terms, such as nonpayment of promised fees, does not establish grounds for an invasion of privacy finding.[17]

Intrusion into a person's solitude may also constitute a legal wrong even if the picture isn't used. The mere violation of another's right to be let alone is looked upon with displeasure by most courts. In a case which developed in Maine, the court determined that photographs taken of a patient in the final stages of a fatal illness constituted intrusion although the photographs were taken by the patient's physician for his own personal use.[18]

In another intrusion case, two Life reporters, in collusion with the police, went to the home of a quack healer. One of the reporters complained of a lump in her breast and asked to be examined. The other reporter, ostensibly the woman's husband, was wired for radio transmission to a police van parked nearby. He also ha a hidden camera on his body. The court ruled that the healer was innocent not only because of the entrapment issue, but also because his privacy had been invaded.[19]

Frequently, whether a photographer will win a privacy suit depends upon the mood of the court. The best protection is to obtain consent of the subject of the photograph. Without such a form (i.e. a written release), the photographer is on shaky ground. The second best defense against invasion of privacy would be a claim that the picture is of a socially significant, newsworthy event about which the public had both a need an a right to know. If the photographer has not obtained a release or cannot prove that the event was newsworthy, the best action would be to find a very good attorney who can keep damages at a minimum. There is really no way for a photographer to completely avoid the possibility of privacy actions; however, it is possible to reduce the number of suits filed and the amount of damages awarded the plantiff by being aware of and taking steps to avoid potential problem areas.

Libel is another area of concern for photographers. Three elements must be present in order for a photograph to be considered libelous--publication, defamation, and identification.

Publication may be accomplished either by printing the picture in some sort of book, magazine, or newspaper, or by showing it to another individual. The courts have consistently considered showing either a defamatory article or picture to a third party sufficient enough to warrant a finding of publication. Defamation occurs when a picture lowers a person in the eyes of peers or business associates or in some other way does damage to the reputation so that he/she suffers emotional stress or is precluded from earning a living. Identification does not necessarily have to be by name. Anything which will enable even one other person to identify the injured party will be considered sufficient identification. And, as the old cliche goes, a picture is worth a thousand words.

Probably the first rule for photographers to follow in order to avoid problems with libel is this: don't stage a picture if it is going to be presented as a straight-forward representation of the truth or actuality of an event. In 1974, the Supreme Court handed down a decision based on the publication of a story and pictures about the family of a man who had been killed in an automobile accident five months earlier. The man's widow was not at home when the reporter and photographer arrived, so the two interviewed the children who were home. Before leaving, the photographer asked the children to make certain changes in the home environment prior to taking the photographs. The ruling was in favor of the woman and her family because of the pretentious, false and misleading nature of both the pictures and the story.[20]

In a 1956 New York case a photographer lost a libel suit initiated after he sold a file picture to a magazine. The picture was taken of a dress designer's model, but it was used as a cover picture and as an illustration of one of the stories in the magazine. On the cover, the picture was headed "Shameless Love;"

interior use was as an illustration entitled, "Man Hungry." The court held that both the picture and the story libeled the woman because it held her "up to possible scorn and ridicule."[21] It would seem that prudent photographers should refrain from using a picture for anything other than its original intended use and to avoid using misleading captions.

Photographers also need to be cautious about exactly what does appear within the finished photograph. Two business people on a downtown street, if photographed usually do not have a cause of action. If, however, in the photograph the two persons are pictured beneath a sign for a topless club, or seemingly emerging from an infamous club, then a cause for action is probable. In most cases in which the photograph itself establishes the defamatory cause, the problem usually developes in distance reduction. The three diminsions of life become distorted drastically when they are reduced to the two dimensions of the photographer's art.

There is no question that stock photographs used as illustrations can create legal problems. In 1974 a federal appeals court ruled against McGraw-Hill, Inc. because of a picture it had run of an auction notice posted on the side of a building which belonged to a trucking firm. It was run with an article about trucking firms going out of business.[22] Taken together the combination became libelous. The courts have been consistent in their decisions holding that even if printed matter and photographs alone are not libelous, but when combined they cause defamation, then an actionable libel has been committed.

Photographers, then, need to be extremely careful with captions. Courts tend not to appreciate casual humor. Photographs, considered in isolation, are infrequently libelous. Put with words, however, they sometimes present legal problems.

Most photographers probably already have a vague notion of the libel and invasion of privacy problems which face them, but few realize the extent to which their livelihoods are tied to contract and copyright law. The inherent nature of the process itself makes it more important for a photographer to have a firmer working knowledge of contract law than is necessary for any other sort of communicator. Unfortunately, photographers tend to rely on common use and custom in potentially dangerous areas.

Perhaps the most frequently misunderstood area of contract law is the nature of a photographer's relationship with clients. Many photographers work under the notion that they own the negatives they produce for their clients, forgetting the master-servant implications of the working arrangement.[23] In more than one instance, however, the courts have ruled that clients rather than photographers retain the proprietary rights (ultimate ownership control) connected with not only the prints produced from the negatives, but the negatives as well.

Dogs seem an innocent enough subject, however, in a 1945 New York case, a woman petitioned the court for an injunction to stop a commercial photographer from

selling pictures of her pet. The pictures had been made at the woman's request and the photographer had been paid for the work. Several months later, the photographer sold a print of the dog to an advertising agency; the picture was then used in an advertisement which appeared in several newspapers. The court granted the petition which enjoined the photographer from ever again publishing or selling pictures of the woman's dog without consent. The court wrote:

> The relationship between a photographer and his customer is that of employee and employer respectively and exists a contract between them whereby the customer obtains all proprietary rights in the negative and in the photographs purchased by him.[24]

A New York municiple court the following year used Ylla as the basis of its decision in a similar case.[25] In this decision, however, the court went even further and ruled that although the photographer's invoices stated that the photographer retained possession of the negatives, proprietary rights remained with the client due to the master-servant nature of the relationship:

> Plaintiff offered in evidence, as further proof of his ownership of negatives, a form of label, which was pasted on some invoices and bills sent to defendant after dissolution of his partnership with another, and long after he had begun his business transaction with the defendant, which bears the inscription "All Colten and Seigler negatives are property of and in possession of Colten Photos." It was not shown that the defendant assented to this inscription, nor was this proof that it was placed on the labels as a result of some specific agreement to such effect with defendant...The labels placed on prior bills indicated no such alleged ownership of the negatives by plaintiff's firm. No legal authorities need be cited to show that such an inscription could not, in any way, affect the defendant's legal ownership of the negatives, without agreement on its part to be bound therby.[26]

The court wrote that although the photographer claimed ownership of the negatives, the law did not allow such since he was paid by his client to produce the pictures and the negatives could, therefore, be considered a work product. It is an accepted legal tenet that "an employee's possession of his employer's property by permission is lawful, but it is not legal possession in the sense..that term is used in contrast with mere physical possession without any right of ownership."[27]

Not only do photographers surrender proprietary rights to their paying clients, they also necessarily surrender the copyright privilege due to the employer/employee nature of their dealings with clients. This surrender, however, applies only so long as the client is paying the photographer. Therefore, if the photographer hires a model or takes the picture gratuitously for personal benefit and at his/her own expense, the copyright privilege is retained.[28] In this instance, the photographer also retains property rights.[29] In yet another case,[30] a free lance photographer was hired to make a composite photograph of a high school class with the agreement that the only payment would be for those copies of the picture which he might be able to sell. The court in this case ruled that the photographer held the copyright, "Where...the photograph is taken at the expense of the photographer and

for his benefit, the sitter loses control of the disposition of the pictures and the property right (any copyright is) in the photographer."[31]

Problems associated with contracts and copyrights in a photographer/client relationship can be avoided, however, by drawing up a written contract before the picture is taken. In Avedon the court wrote,"...there is a general rule of law that a photographer, employed to take a picture of a client, retains no rights after delivery except such as are expressly reserved."[32] In order to feel secure in their work, then, photographers should discuss ownership of negatives and reproduction rights with clients before the pictures are taken. The terms decided upon should be put into written form.

According to the United Commercial Code §2-201, a letter or memorandum of confirmation is sufficient to satisfy legal requirements in most instances. Both the photographer and client, whether the agreement is a formal contract or merely a letter of confirmation, must sign said document. Thus, so long as the photographer has some sort of written documentation to testify to the agreement and so long as the further use of the picture is within the "spirit" of the agreement, further use is reasonably safe. However, as the Russell case illustrates, where a photographer makes alterations to a photograph after entering into an agreement with a client, even if the agreement provided for unrestricted use, the photographer may be liable for damages.[33] The court, in its opinion, wrote:

> ...the model who...at time of taking of picture had signed release by which she consented to unrestricted use of picture by photographer and client had waived all right, to approve its use, alleged oral agreements between photographer, client and model, restricting photograph's use, could not be used to vary term of the release..The complaint alleging breach of oral agreements regarding use of photograph was insufficient to state a cause of action by the complaint alleging damages from use of altered picture with suggestive captions was sufficient to state a cause of action.[34]

Client/photographer relations are not the only source of employer/employee contract problems for the photographer who also does free-lance work. For the most part, a photographer who is not self-employed is under an absolute contract. This sort of contract provides for the employee to be on a twenty-four hour call, seven days a week. Anything the employee, in this case, the photographer, produces, even if it has only the most tangential connection with the job, belongs to the employer. Therefore, in many instances, any profits photographers make from free-lance work is subject to seizure by the employer. This means, for example, that if a photographer submits a photograph taken for the employer to a contest and it wins the contest, any monetary award may legally be claimed by the employer. Or, if the subject of a news photograph asks the photographer for a print and the photographer supplies the print for a fee, the employer has a legal claim to the money received for the print. If, however, the photographer takes pictures while on vacation, or can otherwise prove that the pictures were taken while acting in

the capacity of a private person and not as an employee, the employer can make no claim to the photographer's work.

In those instances where a photographer has negatives processed and printed by someone else, the courts have protected the photographer's right to sue for damages due to the contractral nature of the relationship if the film is ruined or damaged by the processor.[35]

In the Van Dyke case, a photographer purchased a quantity of Kodak film. On the boxes which contained the films, a disclaimer appeared stating that the film contained therein would be replaced if it were found to be "defective in manufacture, labeling or packaging, or if damaged or lost by us or any subsidiary company. Except for such replacement, the sale or subsequent handling of this film for any purpose is without warranty or other liability of any kind."[36] After purchasing the film, the plaintiff used it in Alaska where he was fulfilling a contract. Upon his return, he took the film to a processor to be developed and printed. The processor, however, damaged the film, making it impossible for the photographer to fulfill the terms of his contract with his client. He sued for damages, including the expense of returning to Alaska to retake the pictures; the court, presuming negligence on behalf of the processor, awarded the plaintiff's requested damages. However, the court found two contracts had been entered into in this case--one when the film was purchased (this was covered with the warranty printed on the package) and one when the photographer returned the film to be processed. This second contract, the court said, was outside the bounds of the package warrantly. It was an implied contract and the processor was therefore liable for negligence in his handling of the film. The court wrote:

> Furthermore, even if as defendant contends, the terms of the notice upon the label accompanying the sale by it of the film did survive and become incorporated into the subsequent contract for processing, nevertheless, such terms would not be construed to have the effect claimed by defendant. The notice was drafted without the plaintiff being consulted on the contents or working thereof.[37] Inasmuch as the parties were then contracting with reference to the sale of the film, with processing expressly excluded, the statements in the notice, strictly construed, are referable only to the warranties and liabilities in connection with the sale of the unexposed film.[38]

In another New York case, however, the court determined that the plaintiff was entitled to only the replacement cost of the film although the damaged film had been shot in Florida. In this case, the plaintiff had also sued for the cost of returning to Florida to re-shoot the pictures.[39] The difference in the courts' determinations of these two cases may lie in that the first case involved a photographer who had gone to Alaska to fulfill a business contract whereas the second case involved a man who had simply lost vacation pictures due to processor ineptitute. Generally damages in this sort of case are assessed by the value the plaintiff places on the property lost.

> Where personal property is without market value, evidence as to cost or other considerations affecting its valuation, real or intrinsic, are admissible to establish value. Where there is the destruction of personal property without a market value, it does not mean the property is valueless and that damages cannot be recovered by the plaintiff. It is entitled to damages based upon its special value to the plaintiff. [40]

Photographs, however, have yet another type property value. Because they have artistic merit, photographs are copyrightable under U.S.C. 17 § 101. This leads directly to another area of legal concern for the photographer. Without copyright, the creator has no legal protection regarding the use and re-use of the work.

In order to qualify for copyright, the photographer need only insure its "uniqueness;" this is usually accomplished by affixing some identifying mark to the picture. This may be situated in an obscure portion of the finished work, but the photographer must be able to point it out to the viewer. Additionally, of course, the familar pattern --©, name of creator, date -- must be placed on the reverse of the print or the back of the matted work. It is absolutely essential that both these aspects be present; first, a means of establishing the uniqueness of the work and, second, the copyright legend which carries an implicit warning regarding further use. Although the end of the creative process marks the beginning of the copyright protection under the present law,[41] to insure protection in the courts should such action ever become necessary, registration is required. This is accomplished by completing a VA (visual arts) registration form. This, plus a $10 fee, must be sent to the copyright office, along with the materials to be protected.[42] Most photographers keep a supply of these forms available.[43]

The material to be protected by registered copyright may be presented in a number of ways. Single pictures may be protected with registration and fee. When time is a genuine issue, although single work registration is expensive, it may be the most economical in the long run. Contact prints or composite photographs may be used to protect a group of photographs. The composite may be created by simply placing a group of prints on the floor or any other flat surface and photographing the entire lot at one time.[44] It is also possible to combine photographs by subject or time orientation and have the "book-like" collection protected under a single registration. Others prefer to submit transparencies and strips of transparencies for protection. Here, however, it is necessary to run the copyright legend information on a label which may be affixed to the side of the mount or at the beginning or end of the strip. The major advantage of registering a number of works at one time is the cost reduction...one registration, one fee.

Copyright registration, although not required to allow protection, ensures that the copyright holder has additional bases for punitive action taken against

the infringer. Without a copyright, photographers have no legal recourse should another reproduce their pictures without permission. Not only does a copyright protect the work itself from further use, it also protects against reproduction by drawing or painting. An Alabama magazine which had run a photographic cover and a related cover story, sued a newspaper for infringement for its use of a sketch of the cover, used as art, in a story on the same topic. Although the case was never litigated, the newspaper would probably have lost because of the deliberate nature of the use. Infringement also occurs when one photographer intentially and purposely goes out and "re-creates" a picture another photographer has already taken and copyrighted.

Certain uses of copyrighted materials, however, are permitted under the fair use section of the code.[45] In general, purpose and character of the use, the nature of the protected work, the amount to be copied, and the effect upon the potential market, are the major factors considered. Allowed uses include criticism, comment, news reporting, teaching (including production of multiple copies for classroom use), scholarship or research. At times, even the commercial or nonprofit status of the nature of the use will be considered.[46]

Because copyright protection attaches to the creator of the artistic work, determining just who is the creator can become an issue. Copyright becomes somewhat complicated when dealing with pictures taken for someone else. These works, commissioned and paid for by someone other than the photographer, are referred to as "works made for hire." These works are "prepared by an employee within the scope of his or her employment." The copyright period for such work is 100 years from the date of creation, or 75 years from the date of publication, which ever is shorter.[47] Works created by photographers for their own use may be copyrighted by that photographer, as creator. The duration of such a copyright is life of the photographer plus fifty years. Should unauthorized publication occur within that period, the photographer or his/her estate may sue for copyright infringement.

Despite the cost and paper-work hassels of obtaining copyrights for photographs, they are still the best protection any photographer can have for his or her work. Without a copyright, the photographer is essentially without legal recourse should an infringement of his/her work occur. And although registration is not required in order for a copyright to be valid, having a registration certificate can prevent a long and uncertain court battle which the photographer could lose.

Unfortunately, the history of litigation involving photographers is clouded by misapplication of existing law, ambiguity in applicable law, and lack of knowledge on the part of all parties. Nonetheless, certain basic principles, if followed, provide a measure of guidance for photographers who sincerely wish to keep themselves out of costly legal battles.

1) Invasions of privacy are best defended by newsworthiness or consent. Prudent behavior allows these defenses to be effective.

2) All that happens in public, within sight of the public, is not "public." Both the content or subject and the use given the finished photograph are evaluated by the court.

3) Trespass on private property and harassment of the subject in the taking of the photograph are almost certain to result in findings against the photographer.

4) Appropriation or commercial gain resulting from the use of photograph without consent, is a practice about which the courts have been most consistent in assigning liability to the responsible party.

5) Newsworthiness is time bound; any news photograph used later for other purposes might be actionable under privacy invasion.

6) The use of model consent forms for all work, including news photographs which might have a later secondary use, is strongly advised.

7) Public figures are not universally newsworthy. The court considered the nature of the individual's "publicness" and the use given the photograph.

8) Libel can occur in a photograph, usually because of the missing dimension of distance. All photographs should be carefully viewed prior to public dissemination to avoid this problem.

9) Cutlines and captions can make a photograph libelous.

10) The acceptance of money for photographic service usually initiates a master-servant or employee-employer relationship with regard to copyright, thus allowing the commissioner of the effort to be the "creator of record."

11) Registration of copyright is a valuable means for protecting the efforts of the photographer.

12) All contracts for employment need to be examined carefully for a variety of reasons: ability to engage in free-lance work, shared liability, copyright responsibility, etc.

13) Occasional discussions with local media attorneys about current issues is a must.

This summary of applicable law, like a primer of how to use a camera, cannot cover everything necessary but it can help photographers stay behind their cameras, -- and not in courtrooms, without their cameras.

[1]Jaubert v. Crowley Post-Signal, 5 Med. L. Rptr. (1979).

[2]Galella v. Onassis, 353 F. Supp. 196 (U.S. Dis. Ct., S.D. New York (1972)).

[3]It should be noted, however, that Galella was given the opportunity to have the distance reduced if it was too great to allow him to take marketable pictures. He did not object to the conditions imposed by the judge.

[4]Galella at 206.

[5]Public persons today are usually found to be those who by virtue of their position in the corporate society have influence over the lives of others or who by virtue of their status assume persuasive roles in society. The Supreme Court wrote: Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed role of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment....Absent clear evidence of general fame or notoriety in the community; and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. Gertz v. Welch, 487 F.2d 986, quoted here from 1 Med. L. Rptr. at 1642 and 1644.

[6]The court, in the instant case, went so far as to say that a degree of harassment will generally be sustained when the subject is a public figure. However, the court was using a carefully controlled meaning of the word and, as the case illustrates, harassment to the point of terrorizing a family will not be permitted.

[7]Paulsen v. Personality Posters, Inc., 299 N.Y.S. 2d 501 (1968), at 507-508. As an aside, it may also be assumed that the courts will protect the use of pictures of political candidates in just about all circumstances. It has generally been held that, if a picture does in fact paint a thousand words about a politician, then use of the picture will be protected. A prime example is the picture of Vice President Rockerfeller using an obscene gesture.

[8]Rosemont Enterprises, Inc. and Howard Hughes v. Urban Systems, Inc., 340 NYS 2d 144 (1973, here at 147.

[9]Booth v. Curtis Pub. Co., 233 N.Y.S. 2d 737 (1962), at 744.

[10]Negri v. Schering Corp., 333 F. Supp. 101 (U.S. Dis. Ct., S.D. New York (1971)).

[11]Case is unreported.

[12]Daily Times Democrat v. Graham, 276 Ala. 380 (S. Ct. of Ala. (1964)).

[13]48 Cal. L. Rev. 416, n. 270. Prosser, "Privacy."

[14]If the embarrassing pose occurs during an official governmental action, the courts have reached differing conclusions.

[15]Florida Publishing Company v. Klenna Ann Fletcher, 2 Med. L. Rptr. 1088, a Florida Supreme Court reversed and remanded a district court decision.

[16]Russell v. Marboro Books, 183 N.Y.S. 2d. 8 (S. Ct. of New York (1959)).

[17]Castagna v. Western Graphics Corp, 590 P. 2d. 291 (1979).

[18]Estate of Berthiaume v. Pratt 365 A. 2d. at 797.

[19]Dietman v. Time, Inc. 449 F. 2d. 245 (9th Cir. (1971)).

[20]Cantrell v. Forrest City Publishing Co., 95 S.Ct. 465 (1974).

[21]Martin v. Johnson Publishing Co., 175 N.Y.S. 2d. 409 (1956) at 411.

[22]Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F. 2d. 830 (8th Cir.(1974)).

[23]The master-servant concept of law vests ownership rights in whomever pays for work that is done. In the case of a commercial photographer who takes portraits, those persons who pay to have their pictures made own not only the prints which are produced, but the negatives as well. As ownership implies, the proprietary rights remain with the person and include the right to control further use. In other words, if the photographer wants to reproduce a portrait for himself, he must have permission.

[24]Lawrence v. "Jane" Ylla, 184 Misc. 907 (S. Ct. of New York (1945)).

[25]Colten v. Jacques Marchais, Inc., 61 N.Y.S. 2d. 269 (1946).

[26]Colten at 272.

[27]Colten at 269.

[28]Lumiere v. Robertson-Cole Dist. Corp., 280 F. 550 (2nd. Cir. (1922)).

[29]In this instance, the photographer also retains property rights.

[30]Avedon v. Exstein 141 F. Supp. 278 (U.S. Dis. Ct., S.D. New York (1956)). See also Altman v. New Haven Union Co., 254 F. 113.

[31]Altman at 113.

[32]Avedon at 279.

[33]Russell v. Marboro Books.

[34]Russell at 8.

[35]Van Dyke Productions, Inc. v. Eastman Kodak Co., 228 N.Y.S. 2d. 330 (S. Ct. of New York, A.D. (1962)).

[36] Van Dyke at 332.

[37] Van Dyke at 335.

[38] Van Dyke at 336.

[39] Goor v. Navillo 331 N.Y.S. 2d. 619.

[40] Rhodes v. United Airlines, Inc., 224 F. Supp. 341 (1963).

[41] Copyright Act of 1976.

[42] Copyright Office, Library of Congress, Washington, D.C. 20559.

[43] They are available from the copyright office and may be ordered in lost of 100; there is no charge for the forms.

[44] Robert Cavallo and Stuart Kahan, Photography: What's the Law? Crown, 1976, p. 66.

[45] §107, Title 17.

[46] For Further information regarding fair use, see §107, Title 17.

[47] 17 U.S.C. §302 (a).