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Legal Pitfalls in Taking or Using Photographs of Copyright Material, Trademarks and People

Introduction

Photographers and users of photographs face certain risks when taking and publishing photographs. This article provides an overview of the general legal principles applicable to taking photographs of copyright works, trademarks and people.

It is written for photographers. However, most lawsuits are filed against the person who *uses* a photograph rather than against the photographer. All businesses that use photographs (e.g., in their advertising, product packaging, website or business brochure), therefore, should be aware of potential liabilities.

It is true that the applicable laws of countries are, broadly spoken, similar. Yet, there are important differences.ⁱⁱ It is impossible to deal with here every law applicable to photographyⁱⁱⁱ, or to discuss the relevant laws of all the countries worldwide. This article, therefore, cannot be a substitute for legal advice in a particular business context. To know how the relevant laws apply to specific facts and circumstances, please seek advice from a competent local lawyer.

1. MAKING PHOTOS OF COPYRIGHT MATERIAL

Advertising, fashion, interior design and lifestyle photographers frequently include paintings, sculptures, craft items, architectural works, jewellery, clothing, toys or other artistic works in their photographs. Often, such items are protected by copyright. Only the owner of a copyright has the exclusive right to reproduce the copyright work. **Photographing a copyright work amounts to reproducing it.** Therefore, *before you take a photo* of any copyright work, you need the prior permission of the copyright owner. Photographers who infringe a copyright may be required to compensate for the economic loss, that is, to pay the damages they have caused and sometimes also other expenses, such as legal costs.

1.1 When do you need permission from the copyright owner?

The response to this question depends on your answers to a series of questions about the *subject or object* to be photographed, and the *use* to which the photograph would be put to.

1.2 Will the photograph contain an object that is protected by copyright?

Be warned: Copyright law protects a wide range of different types of material. Examples of copyright works that are routinely reproduced in photographs are:

1. Literary works (such as books, newspapers, catalogs, magazines);
2. Artistic works (such as cartoons, paintings, sculptures, statues, architectural works, computer and laser artwork);

3. Photographic works (such as photos, engravings, posters);
4. Maps, globes, charts, diagrams and technical drawings;
5. Advertisements, commercial prints, billboards and labels;
6. Motion pictures (such as films, documentaries, television advertisements);
7. Dramatic works (such as dance, plays, mime); and
8. Works of applied art (such as artistic jewellery, wallpaper, carpets, toys and fabrics).^{iv}

1.3 Has the term of the copyright expired?

You don't need permission to photograph a work if its copyright term has expired. For most works, and in most countries, copyright protection lasts for the lifetime of the author (artist) plus an additional period of at least 50 years. In a number of countries, this period is even longer. For example, 70 years after the death of the author in Europe, the United States of America and several other countries.^v

If several authors are involved, then the term of protection is calculated from the death of the last surviving author. Note also that special rules may apply to certain specific kinds of works. It is, therefore, a good practice to check the applicable copyright law.

1.4 Will you use a “substantial part” of the work?

Do not think that you don't need to worry about copyright issues if you include only a part of a copyright work in your photograph, or if this work occupies only a very small amount of space in your photograph. In general, you need a permission if the part of a copyright work so used is considered to be a “*substantial part*” of that copyright work. A substantial part is an *important, essential or distinct* part. However, there is (and can be) no general rule on how much of a work may be used without prior permission. Often, the *quality* of what is used may be more important than *how much* is used. The determination of a “substantial part” is done on a case-by-case basis, depending on the particular facts and circumstances.

Example: “The Son of Man,” a painting from René Magritte, depicts a man whose face is obscured by an apple. If you would only use the face with the apple, you may still require permission. While, in fact, this is only a small part of the total painting, it is seen as a vital or recognizable part of Magritte's painting.

Because there is no hard-and-fast rule, relying on the defense that you are using only a “non substantial part” of a work may be dangerous. The best advice is to ask prior permission from the copyright owner if you are in doubt.

1.5 Will you do something that actually constitutes an act which the copyright owner has the exclusive right to make?

As indicated earlier, photographing a copyright work is considered a way of reproducing the work, and this is an act which the copyright owner has the exclusive right to do. This is why you may need to get prior permission to include a copyright work in your shot.

Some other activities that only the copyright owner has the exclusive right to do (and for which you may need permission) are:

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- Making prints of a work, scanning it into digital form, photocopying it, copying digital works, etc.;
- Making a collage from several different photographs or images;
- Adding new artistic elements to an existing work (e.g., colorizing a black and white picture);
- Photographing someone's work and then displaying the photo to the public (e.g., exhibiting the photo in a gallery, supplying copies to the public in postcard form, putting it on a website, sending it to customers via e-mail, etc.).

1.6 Does a special exception apply?

Reckoning with the above, copyright considerations would place enormous restraints on photography since it is impossible to avoid including copyright items in many photographs. Fortunately, there are several legal exceptions that allow you to reproduce copyright works (in a photograph) without permission. However, the exceptions vary from country to country and are not always easy to determine. Exceptions are generally covered by what are known as limitations or exceptions to copyright which are specifically mentioned in the national copyright law, or by relying on the concept of "fair use" or "fair dealing."^{vi}

It is not the purpose of this article to provide a full list of all exceptions that you could benefit from. Rather, I explain hereunder some of the most common situations in which you may be free to photograph copyright material by an exception from copyright protection.

- ***Taking photos of buildings***

Architectural works are protected by copyright to some degree, but in most countries you may photograph a building, if the building is located in a public place or is visible from a public place. You may also publish and distribute the photo without permission.^{vii}

- ***Taking photos of copyright works in public places***

In some countries, you don't need permission to photograph certain artistic works that are permanently displayed in a public place (for example, in a park or on the street). You can also publish and commercialize the photograph without infringing copyright.

However, this exception applies only:

- To *certain types* of works: usually, only to three-dimensional works, such as sculptures and craft. So, you may still need prior permission to take a photo of a painting or a mural in a public place;
- If the work is displayed *in public*: to photograph a sculpture in a private house, a permission will usually be required; and
- If the work is displayed *in public permanently*: if you want to photograph a sculpture which is only temporarily sited in a public place, you would usually need permission.

- ***Taking photos to accompany news reports***

Usually, copyright works may be used for the purpose of reporting a news. For example, you could take a photo of a sculpture which won a major art prize, if that photo is to be used in a news report on TV or in a media article discussing or announcing the award-winner.

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However, you will usually have the obligation to identify the name of the creator, and maybe also the name or title of the work that you have captured in your photo.

- ***Taking photos to accompany a review or critique***

In most countries, copyright material may be used for criticism or review. For example, if you are taking photos of cartoons for a book which reviews, critiques or analyses the works. Just like for the exception of news reporting, you will usually be required to identify the copyright work and the name of the artist.

- ***Taking a photo of a copyright work to advertise its sale***

If you photograph a painting or other artistic work for the sole purpose of advertising its sale, for example, in an auction or sale catalogue, then you will usually not need prior authorization.

- ***Using a copyright work as a background in a photo***

In most countries, you will not need permission if you want to include a work in a photograph if it is merely a part of the background or is otherwise incidental to the principle object/subject represented in the photograph. However, it may be difficult to assess what is “incidental.” This will depend on all the facts and circumstances of each case. The question you need to ask is why you want to include that particular copyright work in your photograph. If it is essential to the purpose for which you create the photograph, then it is impossible to say that it is “incidental.” Conversely, if you just want to include the work as something casual and not directly relevant to any aesthetic purpose or commercial reason, then you probably need no permission.

Example: You publish a photograph in a newspaper to illustrate an article concerning some official gathering. The photograph incidentally contains a sculpture in which copyright subsists. Such use is likely to be allowed since the sculpture adds no meaning to the main subject matter. Conversely, if you would photograph that very same sculpture to print it on postcards and sell them, this would normally be a copyright infringement.

- ***Taking photos for purely private use***

In most countries, you are allowed to take photos without authorization, if you use them purely for private purposes. For example, taking a photo of a painting to post on your home refrigerator will generally not constitute copyright infringement.

1.7 From whom do you need permission?

You need permission from the copyright owner. In addition, permission from the owner of the work itself may also be required. Therefore, getting permission(s) may sometimes be difficult. Suppose that you are taking photographs of a painting in a friend’s private house. Your friend probably does not own the copyright in the painting, the artist does.

If the artist is represented by a gallery or an agent, the gallery or agent may be able to assist. Alternatively, there are collective management societies that grant copyright permission on behalf of the artists. If you cannot find the copyright owner or the artist, and you think you

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have made all reasonable efforts, then you will need to make a business decision as to whether or not to take or publish a photograph of a work protected by copyright owned by someone else.

1.8 What if you reproduce a copyright work without permission?

If permission was required, then the copyright owner can take legal action against you to prevent or stop the unlawful activity (e.g., publishing a book or selling posters with the work on it) and/or recover compensation or damages.

1.9 Do you need to identify the author of the copyright works you capture in your photographs?

Copyright law provides some additional legal rights to the authors to protect their reputation and their works against certain abuses. These are called “moral rights.” One of the key moral rights is the “authorship right” or “paternity right”, which is the right to be named as the author of the work.

If your photos include paintings, buildings, sculptures or other copyright works, and you or your client will be exposing them to the public (publishing, using on websites, exhibiting, etc.), then you and your client must make sure that the author’s name appears on or in relation to the work, whenever feasible and considered reasonable.^{viii} If you don’t want to give an attribution, it would be prudent to get the prior permission of the author or artist.

1.10 Can you make changes to a work?

It is a common practice for graphic artists and others to download images from the Internet and modify or adapt them by using graphics software. The altered images are often used in magazines, books or advertisements. One of the exclusive rights of a copyright owner is the right to create *derivative works* from his work – that is, new works based upon or adapted from the original work. You should take care when you digitally manipulate other’s images, as this is likely to be a copyright infringement unless you have obtained the copyright owner’s prior permission.^{ix}

In general, if you make any changes to or recontextualize someone’s work, you need to ensure that you respect the *integrity* of the work and that you do not damage the author’s *reputation* or *honor*. For example, including a religious sculpture in a pornographic photo is likely to damage the honor or reputation of the artist who created that sculpture and could provide the basis of a legal action against you.

1.11 Can you copy ideas from a copyright work?

Copyright does not protect ideas or facts. It only protects the way ideas are expressed in a particular creation. This means that you are free to copy someone else’s ideas but not the particular original expression of that idea.

Example: Photographer John takes a picture of the famous bridge over the River Kwai in Thailand. This may inspire you to do a series of photographs of the river scene. John’s original work is copyrighted, but not the bridge and the river. John can, therefore, not prevent

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you from taking pictures of that same bridge. However, he has the right to prevent you from duplicating in any manner his original picture.^x

2. MAKING PHOTOS OF TRADEMARKS

Since most enterprises want to keep control over how their trademark is used, the inclusion of a trademark in a photograph can be a sensitive matter.

2.1 Can you freely take photographs that include trademarks?

Unlike copyright law, trademark law as such does not restrict the use of a trademark in a photograph. What trademark law does forbid is using a trademark in a way that can cause *confusion* regarding the affiliation of the trademark owner to the image. If consumers are likely to mistakenly believe that a photograph was sponsored by the trademark owner, then there may be trademark infringement.

Example: Printing a photograph containing the Nike trademark on sportswear could result in trademark infringement. In fact, by such use it would be assumed that you are trying to appropriate some of the goodwill associated with the Nike trademark. Consumers will presumably think that the fabrics are affiliated with the Nike trademark.

3. MAKING PHOTOS OF PEOPLE

3.1 What should you bear in mind when photographing people?

There is no *general* legal requirement to obtain someone's authorization to take his or her photograph. However, there are situations where photography can infringe on important social interests such as national security, protection of children, right of privacy, etc. Most of these situations are strictly controlled by national laws and regulations. Irrespective of the legalities, there are also some things a photographer should not photograph for ethical reasons. Certain photographs of people may amount to exploiting the persons concerned or misrepresenting the truth. If you, as a photographer, know the law and one's legal rights, you will also be in a better position to find solutions that minimize your legal risks.

Often, you may be free to take a photograph of a person, but the way the image is *used* may give the person shown in the photograph a right to take legal action.

3.2 Are people protected by intellectual property rights?

People are not protected by intellectual property rights. But be cautious when you photograph someone who is wearing something protected by copyright, industrial design or trademark rights. For example:

- A model wearing a piece of haute couture or some jewelry;
- An actor wearing a theatrical costume; or
- A sportsperson wearing a t-shirt with a badge or logo on it.^{xi}

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3.3 When is a permission particularly recommended?

When you snap a picture of another person, two fundamental rights often come into play: the right of the photographer to free expression and the right of the subject to privacy (the right to be left alone). Many countries have *privacy laws* that affect the circumstances in which you may photograph people and, to a much broader extent, the circumstances in which you may use images of people.^{xii} Hereafter are described some potential restrictions in many countries on taking and using images of people.

- ***Intruding one's privacy***

Photographers may be liable for violating the privacy rights of others when they intentionally intrude in an offensive way upon someone's private domain. You can usually photograph someone in a public place. But if you surreptitiously or without permission view and photograph people inside their homes, business or other private areas, then you are likely to violate their privacy rights. An offensive intrusion can be anything from, say entering an individual's house under false pretense, to setting up hidden cameras in order to spy.

- ***Publicizing private facts***

Disclosing a matter concerning someone's private life to the public could also raise issues of privacy rights. Unless you have permission, you should refrain from publishing or distributing any photo that reveals private affairs of a person, especially if the matter publicized is of a kind that (a) would be highly offensive, and (b) is not of concern to the public. Photographs revealing sexual affairs, private debts, criminal records, certain diseases, psychological problems, etc. are likely to violate privacy rights.

Example: Suppose a beer brewery is selling a calendar that depicts an unknown person driving a car with a refreshing pint in his hand. This could raise issues of privacy because it discloses private or sensitive matters about the person.

However, in most countries, the right of privacy does not protect against disclosure of matters of *legitimate public concern* such as newsworthy events. This means that politicians, celebrities and other newsworthy persons may lose their right to privacy to the extent that their private facts are relevant to legitimate news.

Example: You would generally be allowed to publish photos of a top football player taking performance-enhancing drugs, because this is a newsworthy fact. But revealing his sexual activities may be an invasion of his privacy because this disclosure is highly personal and has no bearing upon his public role.

Furthermore, many laws do not protect private matters if they are *in public view* (unless the portrayed person has taken care not to disclose private details to casual observers). Thus, a photo of a mother grieving for her daughter who was victim in a car accident, if it was taken while she was on the street, is usually not considered to be an invasion of privacy. But this does not mean that all such photography is ethical. There are situations where photographers should consider refraining from photographing people, even if it would be legal.

In case of doubt, the best way to protect yourself from being sued for infringement of privacy rights is to obtain written permission from the person you want to photograph.

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- ***Using someone's image for commercial benefit***

Many countries recognize that individuals have a *right of publicity*. The right of publicity is the direct opposite of the right of privacy. It recognizes that a person's image has economic value that is presumed to be the result of the person's own effort and it gives to each person the right to exploit their own image.

Under this right, you could be liable if you use a photograph of someone without their consent to gain some *commercial benefit*.

Although the right of publicity is frequently associated with celebrities, every person, regardless of how famous, has a right to prevent unauthorized use of their name or image for commercial purposes. However, as a matter of practice, right of publicity suits are typically brought by celebrities, who are in a better position than ordinary individuals to demonstrate that their identity has commercial value. You should, therefore, act with special caution before using a photograph of a *celebrity* for your own commercial gain. If you consider selling photos of celebrities or using them in advertisements or on your website, then you should certainly obtain photographic releases (that is, permission to do so) from the people portrayed in your shots.

Example: Putting an unauthorized photograph of the tennis star Kim Clijsters on the cover of a sports magazine after she wins a grand slam final, would probably not be considered an infringement of Kim's right of publicity, since the use is mainly informative. Conversely, if you print that same picture on posters and market them, you are simply trying to make money by exploiting her image. Kim Clijsters would have grounds to file a lawsuit for infringement of her right of publicity. This can result in monetary damages against you, and/or forced removal of the posters.

Example: A photographer who displays someone's portrait, without having first obtained the permission, in his shop window or on his website to advertise portrait services, may in some countries be liable for violating the privacy rights of the portrayed person.^{xiii}

While an individual's right to privacy generally ends when the individual dies, in many countries, the publicity rights continue many years *after death*.^{xiv} This means, for example, that it is illegal in some countries to use a photo of Marilyn Monroe or Elvis Presley for commercial purposes without the consent of their estates. As a matter of fact, many representatives of well-known authors, musicians, actors, photographers, politicians, sports figures, celebrities, and other public figures continue to control and license the uses of those persons' names, likenesses, etc.

- ***Suggesting that someone is authorizing or endorsing^{xv} a product or service***

Golf star Tiger Woods acts in Buick commercials, tennis player Anna Kournikova promotes Omega Watches and Nicole Kidman is the face of Chanel No 5. Businesses have long appreciated the value that celebrities bring to the promotion of their wares. The presence of a celebrity seems to be an effective tool of quickly attracting consumer attention to a product or service and creating high-perceived value and credibility.^{xvi}

However, before using the photograph of a person in an advertisement to sell products or promote services, it is strongly advisable to get prior explicit permission of that person.

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Without authorization, that person would have grounds to take action against you for “passing off” or for “unfair trade practices.”

Example: If you put the face of Kim Clijsters on the packaging of tennis balls, you are suggesting that she endorses the tennis balls. Thus, you are capitalizing on her reputation.

- ***Putting someone in a false light or defame someone***

Photographs can place someone in a false light or defame someone.^{xvii} It can occur, for example, when a picture is airbrushed or altered in a way that exposes the subject to hatred or ridicule. It can also occur when a photo is used to illustrate text in a way that it creates a false impression. This often happens when significant information about someone is either omitted from or added to a story such that the person is portrayed in a false light.^{xviii}

Example: A photo depicts a man who is incidentally walking in front of a brothel. Publishing that photo to illustrate an article on child prostitution could lead to a lawsuit.

Example: Adding a caption under a photograph of a Buddhist leader that falsely attributes a quote on religious intolerance to him is likely to amount to defamation.

Example: Figure skater Nancy Kerrigan brought a defamation suit against a company that was selling pornographic photos fudged to resemble her. One photo showed a nude woman ice-skating. Nancy Kerrigan’s face was affixed onto the nude body. The photos were advertised on the Internet and could be bought on a CD-ROM.

Example: Photographers may be liable for defamation, false advertising or unfair competition if they help to create advertisements that lower the reputation of a competitor’s character, his business or his products or services.

Never use photographs in a way that exposes someone to hatred, ridicule or contempt, or reflects unfavorably upon one’s personal morality or integrity. A person who is portrayed in a false light or defamed may bring a lawsuit against you for the damages he has suffered (such as humiliation, the loss of a job or the ability to earn a living).

Tips for Photographers

- The best way to protect oneself against lawsuits - when feasible and appropriate - is probably to get a prior **written permission** from the subject of the picture, or the (copyright) owner of any object or property to be photographed. Remember, however, that the extent of what may be legally used will be governed by the terms and context of that consent. Even when it is lawful to photograph without any authorization, it may still be advisable to get a permission. In fact, many advertisers and other potential clients demand releases before they will buy the rights to use a picture.
- If you **license** a particular image to a client for purposes of manufacture, sale or publicity, require the licensee to **indemnify** you for any liabilities arising out of the licensed use of the image. This is usually done through an indemnification clause in the licensing contract.

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- If you have not obtained written permission for a particular photograph, it is a good idea to add a **disclaimer** on the back of the picture, such as: “This photograph cannot be modified for commercial or advertising use, nor can it be copied or reproduced in any form without the photographer’s permission.” This may limit your liability should someone else make unauthorized use of your photographs.

D. CONCLUSIONS

Photographers need to know about legal restrictions concerning taking of photographs that include any copyright material, trademark, identifiable person or private affairs. Each time, they need to evaluate whether they should obtain prior written permission, or whether they should warn their client of the potential legal issues.

Similarly, **businesses** that use images created by photographers need to know about potential legal liabilities. It is a good practice to require a warrant from the photographer that they own or have permission to use any material that they provide to you and that the contents do not violate any law or regulation.

To be in the clear from a legal perspective is not enough. While understanding the laws applicable to photography may help deal with the legal aspects of taking and using photographs, it is highly advisable that photographers and users of photographs also formulate their personal **ethical code**. Publishing photographs of people can cause the suffering or humiliation of the people depicted in situations that are embarrassing, painful or private. It is in such situations that photographers and users need to balance ethical considerations associated with the taking or publishing of photographs with their legal obligations under copyright and other laws. I would like to conclude with a quote from Bert P. Krages:^{xix}

“The personal choices that a photographer needs to make regarding material and the manner of execution not only reflect how he or she sees the world, but also reflect how the world sees the photographer as an ethical being.”

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ⁱⁱ This diversity in the law among the countries creates real problems for photographers exploiting their images worldwide, as well as for companies constructing international or internet marketing campaigns.

ⁱⁱⁱ There may be other legal limits of what may be photographed or published. For example, several laws prohibit or restrict the photography of currency, stamps, securities, military decorations, government trademarks, military installations, nudity and pornography, animal photography, deceptive advertising, etc. In addition, there may be restrictions of access to certain places, such as residential properties or industrial units.

- iv **Works of applied art** are artistic works used for industrial purposes by being incorporated in everyday products. In many countries, works of applied art are only protected by copyright to some degree.
- v In a few countries, the copyright term is even longer, going up to 90 or even 95 years beyond the lifetime of an author.
- vi **“Fair use”** or **“fair dealing”** is a concept that is applied in common law countries, such as the UK, USA, Canada, Australia and India. It recognizes that certain types of use of other people’s copyright-protected works do not require the copyright owner’s authorization. It is presumed that the use is sufficiently minimal that it will not unreasonably interfere with the copyright owner’s exclusive rights to reproduce and otherwise use the work. When you photograph copyright material, there is no simple rule to determine whether your use is “fair use.” Each case is to be determined on its own facts and circumstances, which means that it is not always possible to assess your liabilities with certainty ahead of time. In practice, courts apply various factors to decide this question, such as:
- the amount of the work used;
 - the nature of the copyright work;
 - the nature of the use; and
 - the effect of the use on the potential market for the original work.
- vii This exception generally applies only to buildings, a category which generally includes houses, office buildings, churches and garden pavilions. The exception does usually not apply to monuments (protectable as “sculptural works”). Also, artistic elements associated with buildings such as sculptural ornaments may receive independent copyright protection; a permission may be needed to photograph them.
- viii Note that, even if you are allowed to include a copyright work because it is “fair use” or because you benefit from an exception, you may still be obliged to attribute the work to its author.
- ix In *Mendler v. Winterland Production, Ltd.*, a photographer granted a textile company a license to use his photographs on t-shirts. The textile company scanned one of the photos and then digitally altered it: the image was flipped, some details were reconstructed and colors were changed. The photographer sued for copyright infringement. The court concluded that this use of the photograph constituted copyright infringement. See: laws.lp.findlaw.com/9th/9816061.html.
- x Sometimes, it is not easy to draw the line between copying the idea of a work and copying the expression of a work. For example, if John were to set up a particular scene of a mother with her child at the River Kwai, in a highly unusual and original way, then this arrangement is likely to be protected by copyright in itself. So, if you would slavishly recreate the scene of the mother with child, with the same arrangement of the persons, items, location conditions, camera position, lighting, angle, etc., then this would likely amount to copyright infringement.
- xi Source: Photographers: copyright and moral rights. A Practical Guide, Australian Copyright Council, April 2004.
- xii Privacy laws vary from country to country. If you distribute your work throughout the world, it is prudent to comply with the most severe country requirements.
- xiii Some countries have special provisions in their copyright laws, however, permitting a photographer to exhibit photographic portraits at the studio unless a written objection is made by the person in the photograph.
- xiv The time the **right of publicity** extends after death varies among the countries, from a few years, to eternally, if continuously used in commerce.
- xv **Endorsement** refers to a person informing the public that he/she approves of the product or the service or is happy to be associated with it.

^{xvii} False light and defamation are very similar. A photograph may place someone in a **false light** when it falsely represents that person, and the portrayal would be offensive to a reasonable person. (It is not necessarily required that there be damage to the person's reputation). A photograph may become **defamatory** when it is used in a way that someone's reputation is damaged by a false statement.

^{xviii} In these cases, it is not the act of taking the photograph, but rather the *use* of the photograph that constitutes the infringement. However, the photographer may be drawn into the suit because it might be presumed that he authorized or permitted the use in that manner.

^{xix} Bert P. Krages, Legal Handbook for Photographers, Amherst Media Inc., Buffalo, NY, USA, 2002.

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