

## PREFACE TO THE SECOND EDITION (2021)

Since this book was first published in 2015, the impact and debate over ethical and moral issues relating to photographic images in global society has continued to increase dramatically. So have the ethical issues. On December 19, 2016, 22-year-old Turkish police officer Mevlut Mert Altintas shot the Russian Ambassador to Turkey, Andrey Karlov, at a gallery in Ankara as Karlov was addressing the audience. A photographer, Burhan Ozbilici, worked for the Associated Press and took the photograph of the gunman brandishing his weapon as Karlov lay dying on the floor. Among the statements made by the photographer were the following:

“I thought it was a theatrical flourish.”

“Guests ran for cover, hiding behind columns and under tables. I composed myself enough to shoot pictures.”

“Everyone ran away and threw themselves on the ground, or behind walls, or under tables, shouting and panicking. I thought running away was not a solution anyway, and decided to remain calm to risk antagonizing [sic] the gunman further. I just kept shooting, changing my position to get a better angle, trying to capture this moment.”

“I didn’t pay any attention to [how people might distribute it in social media, or how they might use it]. I was trying to do my work. The assassination was of course political but I am not about this, I am only a journalist. I am trying to record, to document, to witness history.”<sup>1</sup>

The picture was named World Press Photo of the Year.

Images dominate our means of communication. In the current cyber environment, they are instant, global, and powerful. Memes permeate

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1. See Lauren Easton, *AP Photographer: “I Composed Myself Enough to Shoot Pictures,”* AP (Dec. 19, 2016), <https://blog.ap.org/behind-the-news/ap-photographer-i-composed-myself-enough-to-shoot-pictures>; <https://www.bjp-online.com/tag/mevlut-mert-altintas/>; Dunja Djudjic, Burhan Ozbilici Wins the World Press Photo of the Year, *PHOTOGRAPHY* (Feb. 13, 2017), <https://www.diyphotography.net/burhan-ozbilici-wins-world-press-photo-year>.

social media and often serve in place of extended prose commentary. We also have entered what is called the “cancel culture,” where images are used to embarrass and censure, no matter how long ago they were made. An extreme example is “revenge porn,” the subject of its own legislative fix.<sup>2</sup> We now live on the island featured in William Golding’s prophetic *Lord of the Flies*. Lives are destroyed and careers made by images. The photograph, originally heralded in the 19th century as the mechanistic depiction of reality, is no longer afforded that presumption. “Photoshop” is often used as a verb, now a defined term in the English language; to “photoshop” an image is to edit or distort reality.<sup>3</sup> Since the first edition of this book, we have also seen significant increases in the use of drones for photography, as well as the expanded use of the “cell phone” (such a quaint term for these extraordinary multipurpose devices, i.e., “smart phones”) for photography. In addition, certain “social media” sites have faded in popularity while others, either new or resurgent, have increased in their importance. Artificial intelligence continues to move beyond science fiction to science fact.

If and when a third edition of this book comes out, these statements will remain the same but with different technologies and companies. The First Amendment in the United States, and comparable principles of freedom of expression in other jurisdictions, often embodied in photographs, are also under attack, if not siege, as never before, as fear of being canceled has institutionalized a kind of self-censorship. Increased regulation of privacy also impacts freedom of expression. Some of the more iconic images in the canon of photography could not be taken today without mob reaction on social media.

The purpose of this book remains the same—to provide practical advice to photographers about the parameters of the law. Each chapter has been reviewed, and where the law has changed or clarification is needed, I have sought to address that. Pursuant to ABA Model Rule 2.1, the lawyer’s obligation to provide legal advice means the lawyer also acts as an advisor, and is supposed to bring moral, economic, political, and other factors into consideration when advising a client. Although this book is not providing legal advice (individual lawyers must always be consulted in particular factual situations), it would be irresponsible to ignore the factual reality of the world in which we now live.

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2. <https://www.cybercivilrights.org/revenge-porn-laws>.

3. <https://www.merriam-webster.com/dictionary/photoshop>.

In the course of reviewing the *VHT v. Zillow*<sup>4</sup> case, I visited the website at issue and found my house, replete with two cars visible (license plates blurred out). There were two people on the street a few houses down; their faces were blurred out (though I thought one's features were still vaguely recognizable). It has been a theme of this book that freedom of speech and the right of privacy have become more and more in conflict.

As much as I sought to ensure accuracy in all statements in the first edition, either by way of comment from others or my own review and rethinking, emendations may have been made to clarify or for other purposes. In some cases, the conclusory statements made have been revised to provide more nuance and detail. Where mistakes may be deemed to have been made, they have been corrected. With that in mind, it is often neither feasible nor possible to run to ground every nuance and investigate every rabbit hole, and explain each case, without destroying any sense of narrative flow.

I have also sought to add more case examples. It would not be practicable to identify and discuss every case. Often the fact patterns are long and complex, and the cases involve multiple causes of action. In some instances, cases were cited for one proposition when they could have been used to explore multiple propositions. Adding to the difficulty is that different cases are decided at different stages; while the legal principle may be the same, a case decided on its facts at the pleading stage (a motion to dismiss) may have a different result than the same case decided at the summary judgment stage. Although this book is meant to be accessible to lay persons, the law must be understood in context. General statements, as I have seen in some books that offer a guide to the law affecting photographers, are helpful to a point, but my approach has been to go beyond those general principles and provide more detailed examples. Cautionary notes are valuable, but, as is said, a little knowledge is a dangerous thing. In situations where the image is important enough, the photographer is well-advised to seek appropriate legal advice in the relevant jurisdiction.

Finally, this book is meant to be informative and survey relevant case law that affects the rights and obligations of photographers. **It is not meant to be, nor is it, legal advice.** It is not a substitute for consultation with a lawyer with regard to any factual situation. Opinions and interpretations are my own. Others may disagree. It is meant to highlight the issues facing photographers and provide insight into the parameters of the legal terrain in which they function.

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4. Discussed in the section on Internet issues.



## PREFACE (2014)

The law as it relates to photographers is constantly evolving as technology continues to change, and the diversity of means and ends of photography also changes. From its generally acknowledged birth in 1839, photography has lived a passive-aggressive existence. Passive in the sense that the photographer is engaged in the making of art or utilitarian functions, and aggressive in that the subject matter of photography often impacts directly on the rights, both personal and institutional, of others. Both professional and amateur photographers wrestle on a daily basis with the parameters of this passive-aggressive status and, in more cases than not, cannot be absolutely sure of the outcome of their work. Will an image lead to acclaim or a lawsuit? Or both?

Photography also entails two critical acts: the taking of the photograph and the use of the photograph. Each step implicates particular legal rights as well as potential liabilities, and in some cases the taking or use of an image might have criminal repercussions. Some commentators have added a third act: the subsequent application of the photograph by others, but I consider this part of the “use” act.

Unfortunately, no matter how clearly certain legal principles are stated, in most cases the resolution will be fact-sensitive and, worse, the same set of facts might not even yield the same result if decided by different judges or because the law might differ somewhat from jurisdiction to jurisdiction, even within the United States.

Nonetheless, there are baselines. Statutes, rules, and precedent do exist, and we do well to note them, even if sometimes they are ambiguous or incomplete. As Supreme Court Justice Oliver Wendell Holmes famously observed in his book *The Common Law*, “The life of the law has not been logic; it has been experience.” As a lawyer, I am able to read and comprehend cases, understand precedent, read and extrapolate from statutes, and do the other things that lawyers do to ascertain as much certainty as possible. As a photographer, I am often in doubt and governed by a different set of concerns. If the lawyer is conservative in advice, the artist is often radical in application, seeking to expand the contours of aesthetic application.

The purpose of this book is to provide a pragmatic and personal perspective on photographers' rights and obligations. As both photographer and lawyer, I have listened to many people comment on what photographers can and cannot do, much of it not necessarily legally tenable one way or another. I wanted to fill in the cracks and address certain issues relating to travel photography—such as, for example, the implications of foreign law and what happens when you take photographs overseas and then publish them online. Among other things, I wanted to pursue an understanding of the increasingly precarious contours of privacy law. As a practicing lawyer and photographer, I wanted to provide what should be a working guide—the kind of book I wanted to read. Photographers want short answers: Can I photograph that? If so, can I sell it? On the other hand, there are many nuances, and often easily stated principles lead to page upon page of analysis by the courts in their application to the particular facts before them. I have attempted to cite a variety of cases for those who want to probe more deeply or gain a broader understanding.

I have organized this book around eight basic topic areas, by chapter; there remains some unavoidable overlap. Sometimes a case is based on several different theories and appears in two different sections. I have attempted to write in plain language and set out basic “rules” or, more correctly, general principles and how they have been applied in the real world. I provide actual case discussion to show the tensions and resolution and have often quoted from the cases themselves so the principles can be seen and understood in their “legal” language. In this way, you can see exactly how the rules and principles are stated, rather than relying on secondhand rephrasing. This is not a form book and not a book on running a photography business. It is not meant to be, nor can it be, a comprehensive treatise addressing all manner of intellectual property law. It is meant to be illustrative. One of the first things you learn as a lawyer is that, in many cases, law is unpredictable at worst and ambiguous at best. There are few black-and-white rules that really are black-and-white.

To give an example: Suppose you are standing across the street from Fort Whatever, a military base in your state. You are not trespassing; you are on a public street. Across the street is the gated entranceway into the fort. A bored soldier sits in the small kiosk in the entrance; a movable bar rests across the driveway. A ten-foot-high brick wall extends on either side of the base, with no windows, for quite some ways in each direction. A billboard-like sign over the driveway tells us this is “Fort Whatever” in three-foot-high letters.

What catches your eye is the sky—it is a moment of luminescent light, particularly just over the sign and below an extraordinarily emotive

cloudscape. You lift your camera and photograph the sky, clouds, light—and the sign that says Fort Whatever, to anchor the image to the earth. That sign accounts for less than 10 percent of the space in the picture. The subject matter is the sky, the clouds, and the light. The sign helps identify the place and, you feel, adds an aesthetic touch.

How would a lawyer figure this out?

We start with the statute that covers photography of a military base. It is 18 U.S.C. § 795(a), and it states:

Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station, or naval vessels, military and naval aircraft, and any separate military or naval command concerned, or higher authority, and promptly submitting the product obtained to such commanding officer or higher authority for censorship or such other action as he may deem necessary.

Assume that Fort Whatever has been so designated, and you have not asked permission of anyone to take your image. Have you violated the statute? Is the sign, which is certainly a part of the military installation, *the* military installation? How much of the base do you need to photograph to meet the definition? Similarly, suppose (and still from across the street), you zoom in to the brick wall and photograph just a section of bricks. You like the color and texture. Anyone looking at the image will have no clue where it is, or even what it is—a wall? A building? Once again, you have photographed “the military base,” but have you violated the statute? There is no magic to the law; it is a question of reading statutes and cases and understanding and applying principles. The ambiguities arise when we are forced to apply literal language to, perhaps, nonliteral situations.

What would a court say? Run a search on this statute or on photographing military bases, or planes at an air show, and not surprisingly, you turn up a host of free advice on the Internet. Be careful of this; often there are no citations, and you are not always able to check it out. So you decide to talk to a lawyer, and she turns up a case in which the statute,

and photography of a military base, is at issue. Does this give you guidance? Let's see.

In *Genovese v. Town of Southampton*,<sup>1</sup> Nancy Genovese stopped her car at the side of County Road 31 in Suffolk, New York, on Long Island. According to the decision, she wanted to take pictures of a restored helicopter she saw outside Francis S. Gabreski Airport. She also had a semi-automatic assault rifle in a gun case in her car. An off-duty police officer saw her photographing the airport fence line. Because he observed Genovese then driving in a stop-and-go fashion, he followed her to the airport entrance, watched her take more photographs, and then questioned her as to whether she was aware of the signs that prohibited photography of the airport. Such signs constituted the “designation” called for under the statute, so the statute applied to this base. She said she was photographing the helicopter, but the photographs nonetheless did contain “barbed wire areas and other security features of the fence.”<sup>2</sup>

The off-duty officer contacted the local police, and when one of the airport guards finally joined her, they noticed the gun case. Genovese said she had been to a shooting range. Ultimately, Genovese was arrested and charged with criminal trespass, which was subsequently dismissed. She was not charged with violating the federal statute or for possession of the gun. Genovese, feeling aggrieved, then sued under 42 U.S.C. § 1983, a civil rights statute pursuant to which you can sue a governmental entity for violation of your rights by someone acting under color of authority.

Genovese, in her deposition, said she “pulled over on the side of the road and take [sic] pictures of the display helicopter that is sitting on the road.” Her purpose: “I was making a web page to support our troops, and they're the rescue for the space shuttle. There is a sign joining the two. I wanted to make a web page [for the troops] for Christmas.” It was not a planned expedition and she used her daughter's camera. Genovese said she was an amateur and testified: “I tried to put on my glasses, they were broken. The leg was broken, so I couldn't see very well trying to take the photographs. So, I kind of got my thumb, pictures of my thumb, my leg, the sky, the fence, it's a mess. Pictures of everything. I have pictures of everything. In other words, I was snapping. I didn't know how to use the camera. My glasses were falling off.” She shot the pictures from her car;

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1. 921 F. Supp. 2d 8 (E.D.N.Y. 2013).

2. *Id.* at 15.



she then got out of the car and managed to take one or two photographs of the helicopter from outside the car and without telephone wires.<sup>3</sup>

The defendants' (Southampton and the off-duty officer, Lieutenant Iberger) brief, available on PACER, summarized Genovese's activity in this way:

While approaching the Gabreski Airport, the plaintiff noticed a restored helicopter that she desired to photograph, thinking it might be a worthy addition to a planned website that she was going to build for the purpose of demonstrating support for our troops overseas. . . . At the time that the plaintiff was taking these pictures in July of 2009, there were warning signs on the fence at Gabreski Airport indicating that it was a military facility, as well as signs warning that photographing the facility was in violation of federal law. . . . Either unaware of the signs, or in knowing violation of them, the plaintiff nonetheless began snapping photographs from different positions along the roadway, allegedly trying to obtain a useful one of the helicopter in question. The photographs showed: "the signs indicating the name of the airport, of the fence, of the barbed wire areas and security features on the fence, consisting of a cable that ran along the fence."

In a footnote to its brief, defendants noted that "While the plaintiff may in fact have been lawfully coming from a shooting range, and further truthfully attempting to obtain a photograph of the helicopter, in light of the illegality of this activity, Lt. Iberger's investigatory stop was not only reasonable, but justified."

There was no question that the photographs contained pictures of the helicopter and that the helicopter was outside the fenced-in portion of the airport.

Of relevance to us was her motion for summary judgment on the issue of false arrest. The officer claimed there was probable cause to detain her for violating 18 U.S.C. § 795—that is, "for photographing a vital military installation."<sup>4</sup> In discussing what she was doing, there was no distinction between her just photographing the helicopter. The officer saw her photographing the base. The court dismissed her suit against the Southampton police officers.

Was she really photographing the military base, though?

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3. References to documents available through the docket for this case on PACER.

4. *Genovese*, 921 F. Supp. 2d at 18.

There was no discussion on a photograph-by-photograph basis; as noted, she was not charged with violating the federal statute. Had she been, perhaps there would have been a discussion as to just how much of the installation needed to be in the image, or whether any portion was sufficient. There was the picture of the fence, as an apparent result of shooting the helicopter with the fence as backdrop.

Interestingly enough, I was able to go to [google.com/maps](https://www.google.com/maps) in satellite version and pull up the helicopter just off County Road 31, outside the fence. You can see inside the base and, using the street-view icon, you have a clear view of the helicopter and the fence—including signs that have, in capital red letters, the word “WARNING.” I was unable to read the rest of the wording on the sign, but I assume those contained the prohibitions. A sign near the helicopter identifies this as a base.

So, if anyone can view the photographic image of the base on Google, including from street level, despite the warning signs, what does that say with regard to probable cause for stopping someone from making the same photograph from the public street? What does that say for enforcement of section 795? Did Google have permission? On the other hand—and here is the point—who wants to be the test case? Again, as photographers and artists, we may want to take the chance, but as lawyers, we may well be counseling a far more cautious approach. Understanding photographers’ rights and potential liabilities, like any other decision, is an assessment of costs and benefits, risks and advantages.

For our purposes, though, we see an example of what can happen when a photographer decides to go up against the line. Can you take a picture of a helicopter as your main subject if it is in front of a military installation that has signs prohibiting photography? In the *Genovese* case, even if ultimately she was not charged with violating the statute, it is a case study in what can happen if you are observed making the image. You need to understand that being right is not always enough; as a photographer, do you want to spend an afternoon in a police station?

The bottom line is there is a statute, and there is a real world of practical experience of photographers being stopped or prohibited or arrested.

It is therefore difficult to write with any authority about what is or is not “acceptable” behavior in every situation. And as *Genovese* demonstrates, there are practical considerations we will discuss. The American Civil Liberties Union (ACLU) website tells us that as long as you are standing in a public place, you can photograph a public building and, further, that no one can make you delete your image once taken.<sup>5</sup>

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5. [www.aclu.org/free-speech/know-your-rights-photographers](http://www.aclu.org/free-speech/know-your-rights-photographers).

I also was once stopped from photographing the Uhlerstown-Frenchtown Bridge, which crosses the Delaware River in its upper reaches along the Pennsylvania–New Jersey border. A police officer stopped me and told me he would permit it, but his partner (across the bridge at the moment) would not. Why? I asked. Security, I was told. This was sometime after the first Gulf War, but before the second; Saddam Hussein was still in power. I recall asking whether he was seriously suggesting that Uhlerstown and Frenchtown were key strategic points regarding any invasion of Washington. He seemed to agree and enlightened me as to the ability at that time to use Google satellite features to see online what I was not being permitted to photograph. We will discuss security concerns later, but we also have to recognize a certain amount of “cosmetic” security concerns. Stopping someone from taking a picture of the George Washington Bridge, when so much of its visual and engineering detail is clearly viewable on Google Maps, and has been available for decades, seems difficult to rationalize.

A colleague from a photography club who photographed the changing colors of the lights on top of the Empire State Building some years ago told me a police officer stopped him. I told him he had the right to make those images. He replied, essentially: “You’re a lawyer and you know these things. I am not a lawyer, and a cop with a gun at his side told me to stop.” The happy ending to the story was that the photographer ended up licensing his photos for sale. On a more personal level, I have heard stories of photographers being stopped from taking pictures of bridges that are under the jurisdiction of the Port Authority of New York and New Jersey, and yet my book, *The Bridges of New Jersey*, which features (among others) the George Washington Bridge, is on the Port Authority website for its informational value.

Not everything is a function of national security. Once, in Toronto, I was stopped by an individual who wanted to make sure I had not photographed him (I had not, and I showed him). In Frankfurt, Germany, a museum guard made the same inquiry of me (again, I had not photographed him). The laws in Canada (and in this case, Ontario) and in Germany are not the same as the laws in the United States. The photographer needs to understand concepts of territoriality and the vast difference in laws across jurisdictions.

So we see that there is the law, and there is the way things are.

At the other end of things, of course, photographers have to deal with perceptions. The photographer is an artist, and the question of how important “art” is does arise. I have had people ask how important is it, really, for photographers or artists to make images, when there are

life-and-death issues at stake. I would suggest it is a false dichotomy, but paparazzi invading people's lives and, in some cases, causing physical injury colors the issue in a negative way.

How important is it? As we shall see, photographers have rights under the First Amendment. But beyond, or at least before, all that, I note a short story written by Ray Bradbury called "The Pedestrian," published in 1951.<sup>6</sup> In that story, a man was taking a walk on a crisp winter night while everyone else was watching television. The police stopped him and asked what he was doing. He said he was walking. The police asked why. The man said just walking. For air. To see. The police pressed him:

"But you haven't explained for what purpose."

"I explained; for air, and to see, and just to walk."

They arrested him.

In his book *Why Photography Matters*, the photographer and critic Jerry L. Thompson writes:

Photography matters now for two interrelated reasons: One, because of how it works, not only as an artistic but also as an epistemological medium; and Two, because it presents an instructive example of what might be called *present-day understanding*. How we now—today—understand what photography is and how it works tells us something about how we understand *anything*. And it may appear that how we understand anything is not unrelated to how photography works.<sup>7</sup>

We look at iconic photographs, such as Dorothea Lange's *Migrant Mother*, and never forget them. We are moved by them. They inform our existence. They resonate. We go to the Museum of Modern Art in New York, look at Vincent van Gogh's *Starry Night*, and are thrilled by the original, by the insight, by what it does to us. We react. Our ancestors must have felt the same: cave drawings from 40,000 years ago attest to the compelling nature of us to record our surroundings in interpretative ways. To those who ask what is so important about the ability of someone to take a picture, the answer is that it is essential to our humanity and our being. And that needs to be protected.

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6. Originally published in THE REPORTER, Aug. 7, 1951, and reprinted in the collection THE GOLDEN APPLES OF THE SUN (1953).

7. JERRY L. THOMPSON, WHY PHOTOGRAPHY MATTERS (MIT Press 2013) (emphasis added).