

“Whose Photograph is It Anyway? The Law Related to Photography”

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ABSTRACT

Everyone loves a good photograph. But photography is not as simple as grabbing a camera and shooting away, at least legally! Taking the picture is not the whole picture.

The use of images and photographs has increased in today’s digital age. But photography raise different copyright issues compared to textual content. The answer to the following pertinent questions depends on the context and the background of each case:

- Whether the person who took the photograph or who commissioned the photographer owns the copyright
- Whether the objects included in the photograph have a right to privacy
- Whether copyright and privacy rights change in the context of the location and context of where the photograph is taken.

The copyright and privacy rules are broadly similar across the world, and follow the rules laid down by the World Intellectual Property Organization (WIPO). But notable differences exist in certain finer points. In India, the Copyright Act, 1957 deals with the issues related to copyright for photographs and images.

The right to privacy, a fundamental right enshrined in the Constitution of India, applies for objects featured in photographs. But such right is not absolute as clarified by various case laws. The question of what constitutes a public place is pertinent to decide if an object featured in an image or photograph can expect privacy.

KEYWORDS: Copyright protection, Intellectual property, photography, Indian Copyright Act, 1957, copyright act, World Intellectual Property Organization, WIPO

INTRODUCTION

In today’s age of information overload, people realise the merit of the old adage “a picture is worth more than a thousand words.” Human brains recognize, process and recall images and

pictures much more easily and effortlessly than words¹. Several publishers, websites, marketers, and others now rely on imagery rather than text to convey their message.

Professional photographers have various themes – nature, travel, wedding, food, people, culture, and anything else. They maintain websites or social media accounts and upload photographs taken by them. For instance, wedding photography sites, maintained by professional wedding photographers, upload various photographs taken at different weddings and related events. A good chunk of these collections comprise of candid photography, including pre-wedding and post-wedding photo-shoots. These “portfolios” effectively become commercial tools for the photographers or their bosses to attract clients. Photographers who cover various other events, both private and public, follow a similar model.

Most websites featuring photography allow site visitors to download photographs in actual size, and often in high-quality resolution. Objects of nature are in public domain, and free for anyone to enjoy. But allowing third-party download or use of photographs featuring people or private property raise privacy issues.

Are photographers within their rights to use or share photographs taken at private functions, or even candid photographs? Do the objects of the photograph have any say in preventing such third-party downloads, or have they given their implicit consent to the photographer to use the photographs, commercially or non-commercially?

ANALYSIS

The issue in question relates to copyright protection and privacy laws.

Photographs are intellectual property, covered under copyright acts. The individuals featuring in these photographs have right to privacy. The moot point is the context in which these legal protections apply.

- The WIPO convention of 1967² dealt with the issue of copyright for photographs.
- As a general rule, permission is required when the photo features any human or object
- Most literary, artistic and photographic works attributable to an author benefit from copyright protection. Copyright protection also extends to maps, globes, charts, advertisements, labels, jewellery, wallpaper, carpets, furniture, toys, fabrics, and just about any object which has an owner.

¹ Dewan, Paul (2015) “Words versus Pictures: Leveraging the Research on Visual Communication,” The Canadian Journal of Library and Information Practice and Research Vol 10 No 1. Retrieved from www.journal.llb.uoguelph.ca

² WIPO (World Intellectual Property Organization) is an intergovernmental organization, which replaced the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. In 1974, it became one of the specialized agencies of the United Nations in 1974. India is a signatory of the constituent WIPO Convention held at Stockholm on July 14, 1967.

Whether or not permission is required for featuring a copyrighted work in a photo also depends on the portion of the work that appears in the photograph. As WIPO states, prior consent is required to reproduce a *substantial part* of the work. But what constitutes “substantial” is not set in stone. For instance, "The Son of Man," a painting from René Magritte, depicts a man an apple obscuring his face. Permission would be required if the photographer reproduces only the face with the apple, which is only a small part of the total painting³.

Provisions in the Indian Copyright Act, 1957

Section 13 of the Indian Copyright Act, 1957 offers copyright protection for original artistic works. Section 2c of the act includes photographs under artistic work⁴. Section 4 of the act prevents publishing the copyrighted work in public without the licence of the owner of the copyright. The copyright owner can use the photograph in any way, even commercially.

Section 17 of the Copyrights Act, 1957 confers the first owner of copyright as the author of a work. The author, in respect to a photograph is the person taking the photograph, or the artist, unless there is an express agreement stating otherwise. This position derives from the WIPO convention of 1967, of which India is a signatory⁵.

There are, however, certain caveats associated with the general provision of Section 17 of the Indian Copyrights Act, 1957.

As per Section 17 (a), when the work is made by the author in the course of employment, the employer owns the copyright. When a newspaper hires a photographer under a contract of service, the newspaper, or more specifically the proprietor of the newspaper, will own copyright for the photographs clicked by the photographer during the course of employment, in the absence of any agreement to the contrary.

Section 17(b) of the act provides that “where a photograph is taken or a painting or a portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person, in the absence of any agreement to the contrary, shall, be the first owner of the copyright therein.” The services of an independent contractor hired for creating or doing a work on a given subject fall under this definition. Most photographers do not have regular 9 to 5 jobs and choose to work as freelancers.

³ WIPO (April 2006) “IP and Business: Using Photographs of Copyrighted Works and Trademarks.” Retrieved from https://www.wipo.int/wipo_magazine/en/2006/02/article_0010.html

⁴ Copyright Act, 1957. <https://indiankanoon.org/doc/1136195/>

⁵ Ibid

A landmark case to clarify ownership is *V. T. Thomas v. Manorama*⁶. Thomas, or “Toms” was the cartoonists who drew the extremely popular Boban and Molly cartoon series, for Malayala Manorama. On his retirement from Malayala Manorama, he began to draw the same characters and series for other magazines. Malayala Manorama went to court, where it was held that when employment terminates for any reason, the ex-employee has copyright for the works he creates subsequently, even if the theme was similar to the work during employment. The employer retains copyright only over the works already created for him, during course of employment. The copyright in a work done by an employee on his own time and not in the course of his employment belongs to him.

Extending the analogy to wedding photographs, the copyright of the wedding snaps belongs to whoever has paid the photographer to take the snaps, unless there is an express agreement assigning the copyright of the photographs to the photographer. But if the photographer clicks some photographs outside the scope of the contract, the photographer retains copyright for such pictures. For example, if the agreement is to click 100 pictures, the copyright for these 100 photographs is for the person who paid for these photographs. If the photographer takes an additional 20 photographs, he retains copyright for these photographs.

Two pertinent questions crop up at this stage.

1. Can the photographer publish the contracted photographs, copyrighted to someone else, in the social media or any other platform, or maintain a portfolio of snaps. In other words, can the photographer use the photographs clicked by him but copyrighted to someone else for his advertisement or promotion. This is answered through the issue of fair use.
2. Is the photographer entitled to click photographs outside an agreement or contract? For instance, if he has been contracted to click 100 photographs at an event and he clicks 120 photographs at the same event, does he retain copyright for the 20 additional photographs. The copyright issue aside, what is the legality of the 20 additional photographs? This is answered through the issue of privacy.

The Issue of Fair Use

Section 52 of the Indian Copyright Act 1957⁷ deals with fair use. The section lists out specific instances or conditions when the general rule regarding copyright does not apply.

Section 52 (1) (a) of the Indian Copyright Act, 1957 allows the use of copyrighted work for private or personal use, including research, criticism or review. As per this exemption, the photographer can maintain a personal portfolio of the pictures he has taken for someone else.

⁶ AIR 1989 Ker 49

⁷ The Copyright Act, 1957 (14 of 1957), Copyright Office, Government of India. Retrieved from <https://copyright.gov.in/Documents/CopyrightRules1957.pdf>

This exemption does not give him unbridled rights to exploit his portfolio commercially, or sell photographs from the portfolio to third-parties.

Section 52 (h) of the Indian Copyright Act, 1957 exempts the publication of extracts limited to two passages, but this is specifically for published literary or dramatic works, and not applicable to photographs.

Section 52 (d) of the Indian Copyright Act, 1957 allows the reproduction of any work for judicial proceeding or for the purpose of a report of a judicial proceeding. Thus if the wedding photograph is a vital clue to a crime scene, or later in the course of divorce proceedings, it can be freely used and shared for the purpose, without fear of copyright infringement.

The Issue of Privacy

Is there any legal recourse to a person who finds herself in print without her consent? For instance, has a lady given her implied consent for using her image in the advertisement of a matrimonial site, a fashion store, or fertility clinic, by attending a wedding?

The right to privacy is a natural right, enshrined as fundamental rights by most legal jurisdictions of the world. For instance, taking photographs without consent is violation of Article 8⁸ of European Convention of Human Rights (ECHR.)

In India, the right to privacy is a fundamental right, guaranteed under Article 21 of the Constitution of India⁹. Various courts have also enshrined the right to privacy under common law, principles of equity, and the law of breach of confidence.

Based on such natural and fundamental rights, anyone in a private place has a legal and reasonable expectation of privacy. But such right is not absolute. Most legal jurisdictions do not extent the right of privacy to public places. Anyone in a public place, such as a sidewalk, a street, or a town hall event, has no legal expectation of privacy.

The moot question is do people who attend private functions such as weddings have a right to privacy. Can celebrities and others who attend private or public functions expect privacy?

Section 52 (1) (a)(iii) of the Indian Copyright Act, 1957 exempts copyright infringement for reporting of current events and current affairs, including the reporting of a lecture delivered

⁸ European Court of Human Rights. "Guide on Article 8 of the European Convention on Human Rights. Retrieved from https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

⁹ The Constitution of India. Retrieved from https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf

in public. This exemption allows the paparazzi¹⁰ to take snaps of celebrities attending public events, and publish their photographs in newspapers, magazines, or social media.

The landmark US case, *Martin Luther King Jr Centre for Social Change v American Heritage Products*¹¹ elucidates the “direct commercial exploitation of identity” test to identify who is a celebrity. When a person's reputation is used to promote a product or service, then such a person is considered as a celebrity in publicity sense, under the direct commercial exploitation of identity test¹².

The law in India does not define who is a celebrity, this exemption covers even the plebeians.

The landmark case in India is *Justice K.S Puttaswami & another Vs. Union of India (August 2017)*¹³. Here, the Supreme Court of India recognised the right to privacy as a fundamental right under Article 21 of the Constitution, as a part of the right to “life” and “personal liberty”. The court stated that every person should have the right to control commercial use of his or her identity and that the “*right of individuals to exclusively commercially exploit their identity and personal information, to control the information that is available about them on the internet and to disseminate certain personal information for limited purposes alone*” emanates from this right.

This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent". "Aside from the economic justifications for such a right, it is also justified as protecting individual autonomy and personal dignity. The right protects an individual's free, personal conception of the 'self.' The right of publicity implicates a person's interest in autonomous self-definition, which prevents others from interfering with the meanings and values that the public associates with her."

What Constitutes a Public Place?

The law is clear that taking unsolicited photographs is allowed in a public place, but not so in a private place.

The first question is, “what constitutes a private place?”

¹⁰ Paparazzi are people who take photographs without permission. The term is mostly used to denote photo-journalists, but could extend to any person who takes random clicks at a wedding or some other occasion. Such random, unsolicited photographs may focus on a person or an object.

¹¹ 694 F2d 674. <https://indiankanoon.org/doc/127517806/>

¹² Souvanik Mullick, & Narnaulia, Swati (2008) “Protecting Celebrity Rights through Intellectual Property Conceptions.” <http://nujlawreview.org/wp-content/uploads/2016/12/souvanik-mullick-and-swati-narnaulia.pdf>

¹³ Writ petition (Civil) 494 of 2012.

A private place is any private property, including homes, and wedding halls hired for a private function. But any private space with public access is public space¹⁴.

The paparazzi have no legal right to take photographs of any person on private place, or any object situated in private place. Doing so violates the right of privacy of the subject, or the copyright of the owner of the object. But the moment the subject leaves the private place and step onto public space, including the streets, the paparazzi is free to click, without consent. Thus if a wedding takes place on a private hall hired by a party, no one other than the party or their agent-photographers may legally take unsolicited photograph.

The next question is the privacy of the persons who feature in the photographs. For instance, can the photographer legally assigned by the wedding party click a photograph of a guest, without the consent of the guest.

The law in the USA does not recognize right to privacy on public property, including streets. Thus, for wedding processions taking place through the street, anyone can photograph anyone as they wish, and even sell or otherwise commercially exploit these photographs without consent or a release form.

However, the right to click photographs on public land is not a free-for-all pass. Using such photos commercially in any derogatory, defamatory, or slanderous way, or even using the photograph to promote something without the consent of the object still violates the person's right to privacy. The crime here is not violation of copyright per se, but violation of privacy.

Different countries have different laws restricting the activities of paparazzi. The state of California, USA, for instance, passed a bill in 2013 stopping paparazzi from taking pictures of children in a harassing manner¹⁵.

In 1972, paparazzo photographer Ron Galella sued Jacqueline Kennedy after the former First Lady ordered her Secret Service agents to destroy Galella's camera and film following an encounter in New York City's Central Park. Kennedy counter-sued claiming harassment. In what became the landmark *Galella v. Onassis*¹⁶, the US court awarded Kennedy a restraining order.¹⁷

In 2006, a paparazzo filmed Daniella Cicarelli, the Brazilian model having sex with her boyfriend on a beach in Spain. The video was posted on YouTube. The Brazilian court

¹⁴ The New Indian Express, 11 March 2019. "Private space with public access is 'public space': Telangana High Court" Retrieved from <https://www.newindianexpress.com/states/tehangana/2019/mar/11/private-space-with-public-access-is-public-space-tehangana-high-court-1949554.html>

¹⁵ Pulver, Andrew (26 Sept 2013). "Anti-paparazzi bill backed by Halle Berry now California law." Retrieved from <https://www.theguardian.com/film/2013/sep/26/halle-berry-anti-paparazzi-law>

¹⁶ 487 F.2d 986 (1973) <https://www.quimbee.com/cases/galella-v-onassis>

¹⁷ The trial is a focal point in *Smash His Camera*, a 2010 documentary film by director Leon Gast.

initially ordered YouTube to block the video, and YouTube itself was blocked for two days in the country for non-compliance. But the block was removed, as YouTube successfully argued and the court accepted that Daniella Cicarelli had no expectation of privacy by having sex in a public location. On Cicarelli's appeal, the Supreme Court of São Paulo ruled that there is no public interest with the video, and there had been an invasion of privacy. Google, which owns YouTube, was ordered to pay \$64,000 as damages.¹⁸

In a similar case in September 2012, a paparazzo published the pictures of Catherine, the Duchess of Cambridge sunbathing topless at her husband's cousin's holiday home in France. The Duchess claimed right of privacy whilst at the home. The magazine which published the photograph retorted that the pictures had been taken from the public highway. The French court granted the duchess an injunction, restraining the magazine from publishing the photographs in France, not to sell the images, and hand over the original material of the published pictures under threat of a €10,000 fine for every day delay in doing so. The court awarded €100,000 (£91,000) in damages and interest. The magazine's editor and the CEO of the publisher was further fined €45,000 each¹⁹.

Indian courts have also followed a similar trajectory.

A landmark case in India is *ICC Development (International) v. Arvee Enterprises and Anr*²⁰. The Delhi High Court observed that “The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser {non-human entity} of the event would be violation of Articles 19 and 21 of the Constitution of India. No persona can be monopolised. The right of Publicity vests in an individual and him alone is entitled to profit from it. For example, if any entity, was to use Kapil Dev or Sachin Tendulkar's name, persona or indicia in connection with the 'World Cup' without their authorisation, they would have a valid and enforceable cause of action.”

¹⁸ Fox News, (Jan 22, 2017). “Google to pay model \$64K, not \$24 million, over 'sex on the beach' YouTube clip.” Retrieved from <https://www.foxnews.com/entertainment/google-to-pay-model-64k-not-24-million-over-sex-on-the-beach-youtube-clip>

¹⁹ The Guardian, (5 Sept 2017.) “Court awards Duchess of Cambridge damages over topless photos,” Retrieved from <https://www.theguardian.com/uk-news/2017/sep/05/topless-photos-of-duchess-of-cambridge-were-invasion-of-privacy>

²⁰ 2003 (26) PTC 245 Del. <https://indiankanoon.org/doc/358048/>

In *Sonu Nigam v. Amrik Singh (alias Mika Singh)*²¹, the parties to the case were to appear at the Mirchi Awards 2013, and were shown through photographs on the official posters of the event, with their due consent. Mika Singh, in order to promote himself displayed hoardings and posters, which were different from official hoardings and posters of the event, carrying huge pictures of himself along with smaller pictures of the other artists, including Sonu Nigam, without their consent and permission. The Bombay High Court restrained the defendants from displaying the pictures of the Plaintiff without consent and ordered the defendant to pay Rs. 10 Lakhs as damages towards specified charities, as consented by the parties.

In *Shivaji Rao Gaikwad v. Varsha Productions* ((2015) 2 MLJ 548) superstar Rajnikanth filed a suit seeking injunction to restrain the respondent from using the applicant's name/caricature/ style of dialogue delivering etc. in its forthcoming film "Main Hoon Rajnikanth" in any manner whatsoever alleging infiltration of his personality rights by such unauthorized use. Rajnikanth also expressed distress that the film had scenes of immoral nature and the respondent was trying to cash in on his popularity. The court observed that it cannot be disputed that intellectual property right is a recognized valuable right under the modern laws being followed by all civilized countries. As per Article 21 of the Constitution, everyone is entitled, not only for his life and personal liberty from taking away the said rights, except by procedure established by law, but also guaranteed to lead a dignified life in a society and hence, no one can cause damage to the fame or reputation of any person against law. From the available materials of the film, the Court held that the film's title and caricature of Rajnikanth in the film would degrade his reputation.

In *Rajat Sharma v Ashok Venkataramani&Anr* [CS(COMM) 15/2019], the Delhi HC restrained the unauthorised use of plaintiff's name in print media, TV Channel etc. by defendant.

These analogies make it clear that photographs taken at a private space, and featuring individuals who have not given their consent can be used only for the purpose for which it was taken. Thus, a wedding photographer cannot use the wedding snaps commercially. The guests, by attending the function, have given implied consent to get themselves photographed. But such photographs shall be used only for the purpose for which it was taken – to preserve the wedding memories, and circulation among a closed, private group of friends and relatives. Neither the photographer nor the party who conducted the wedding ceremony and owns the copyright of these photographs has the right to use such photographs commercially.

²¹ MANU/MH/0517/2014 <http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=314102951100>

CONCLUSION

Based on the above legal rules and precedents, the rules of photography may be summarized as follows:

1. If a photographer takes snaps in at a private premises or a private function, such as a wedding hall, without permission, it is an illegal act, and also violates the right of privacy of the object included in the photography. The photographer has no right to use, publish, or benefit from such photography. A court may order any developed photographs to be destroyed or given to the persons who feature in the photograph.
2. Photographs taken at private functions in a private space, with permission, but featuring people whose consent has not been taken for the photograph can only be used for the purpose for which it was taken. The permission may however be implied by the object's act.
3. If a photographer has clicked snaps at a public place, even if it is of a private function, the act of taking the photograph itself is not illegal. But the photographer can publish or commercially exploit these images only if he has also obtained the consent of the person or object included in the photograph.
4. If the photographer has clicked snaps at a public function at a public place, the photography is legit, and the photographer may use these photographs commercially. The same law applies to public functions held at private space, where the public, including the photographer is legally allowed entry, with or without a fee. Thus photography from a sporting event, or from atop a lighthouse is legitimate, unless there are specific "photography prohibited" restrictions put in place by the concerned authorities.
5. If the photographer has taken the snaps on behalf of someone else, he can retain those snaps for personal purposes, but cannot use it for any commercial purposes. The rule holds regardless of whether the photographer was paid or not for his effort, or whether the photographs were taken at public functions or private functions.

RECOMMENDATION

Copyright sets in the moment a copyrighted work is created. Registration by the copyright owner is optional. But to prevent copyright infringement or disputes, it is always recommended to specify the copyright along with the images. For instance, photographers uploading wedding photography online as part of their portfolio would do well to watermark across the images, to prevent third-party download and illegal commercial exploitation. If a copyright infringer falsely claims copyright for the image, the original copyright owner will have to prove antiquity of the image under his possession. Attribution and a date-stamp makes the task easy.

The issue of privacy may be dealt with by release forms. In the USA, any commercial use of any photo shot on a person or on a privately owned object requires a release form. In India, it requires the consent of the object, which may be in the form of a formal release form, agreement, contract, or even informal verbal consent.

Professional photographers execute a photo release form or a contract with the subject or owner of the object captured by the photograph. This contract give the photographer legal permission to publish the images, even commercially. Model photography, wedding photography, and other event photography take place on the strength of such agreements or contracts.

The terms of a release form is not set in stone. The permission to publish may be universal, or limited to a specific area. It may be indefinite or for certain duration. It may be limited to a specific purpose or medium. It may include specific criteria or rules for publication. It may be with or without consideration. The standard law of contract, applicable in the geography where the photo release form is executed, usually applies. Whatever the terms and condition, release forms eliminate grey areas when a photographer indulges in a professional shoot of a client or an object belonging to someone.

Defence for commercial use of a photograph containing individuals or objects who have not given a consent form is implied consent. For instance, it could be argued that the individual, by attending a wedding and posing with the bride and groom, with the full knowledge of cameras pointed and clicking at them, and taking no action to stop it, has given their implied consent to feature in those snaps. The validity of such arguments would depend on the circumstances and background concerning the case, how the images have been used, and judicial interpretation of the laws.

Photographing the most beautiful moments or places preserves it for eternity. As long as the photographer plays by the rules and the law in place, the photograph becomes a thing of joy.

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