

# Controlling Photography in (and of) Private Places

By Stephen L. Haynes<sup>\*</sup>

Security executives nationwide have confronted from time to time, and with increasing frequency since 9/11, the question of photography within premises their personnel guard, or photographs taken of those premises from elsewhere. Policies regarding such photography should be set by principals within the parent or contracting entity (*e.g.*, security professionals guarding a corporate headquarters should receive guidance from corporate officers), and those policies should be clearly communicated to personnel in the field. Occasionally, no guidance has been provided, and security professionals act independently and according to their own inclinations.

Not infrequently, however, those inclinations and even that guidance have been overly protective and wrong, and have led to unnecessary (and in some cases illegal or even criminal) confrontations of photographers by such security professionals.

This article examines the legal foundation for restriction of photography on private and public property, the “threat” of such photography in the wake of 9/11, appropriate and inappropriate responses by security professionals, legal dangers to security professionals from inappropriate responses, and recommendations for “best practices” by security professionals at all levels.

## Photography on Private Property

The foundation for prohibition of photography on private property is trespass. Everything else is secondary (or erroneous). Before we get to trespass, however, let’s talk a bit about the rights a photographer enjoys. Among them are:

1. A photographer has the right to take photos of nearly anything. The only legal prohibitions relate to a few military installations and nuclear power facilities. The taking of those photographs is legally considered to be a form of expression, and expression (“freedom of speech”) is protected under the First Amendment. Now, the First Amendment does not apply to private corporations or other private entities, but corporations need to think of prohibition of photography in terms of trespass, not in terms

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The content of this article does not constitute legal advice. The author advocates actions and analyzes situations based upon his understanding of legal principles, but laws differ from jurisdiction to jurisdiction and persons considering actions that may have legal consequences are advised to consult an attorney familiar with local laws.

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For those interested in this issue from the photographer’s standpoint, the one-page PDF published by attorney Bert Krages entitled The Photographer’s Right [<http://www.krages.com/ThePhotographersRight.pdf>] is recommended.

of the photographs that may have been taken. If a photographer raises camera to his eye and clicks the shutter, a photograph has been taken and becomes the (intellectual) property of the photographer, even if he was standing on private property when the photo was taken.

2. The photographer has the right to limited use of photographs, even those taken on private property. For example, the right to publish the photograph in a journalistic sense (newspaper, magazine, book, blog, etc.) is virtually absolute. Likewise, using the photograph for personal purposes (*e.g.*, posting to photo-sharing services like Flickr). If the photographer makes artistic prints of the photo, in most cases that will also be protected. A corporation might prevent use of photographs for commercial purposes, especially where the photograph is of a trademarked symbol (*e.g.*, the Coca-Cola sign over the Coke headquarters in Atlanta) or is of a copyrighted design (*e.g.*, a copyrighted statue or building).
3. The photographer expects equal treatment. This is more subtle.

Cameras these days come in all shapes and sizes. Cellphones. Small pocket cameras (“point-and-shoots”). And single lens reflex cameras (SLRs), that are either film or digital. For perhaps obvious reasons, security professionals give SLRs the greatest attention, and at least based on anecdotal evidence SLR users are overwhelmingly singled out and told they cannot photograph on private property. Cellphone and P&S users are sometimes not even noticed, and when they are security professionals may not consider them “photographers” worthy of attention. They may just be mothers photographing children, or friends photographing other friends.

SLR photographers notice this discrepancy, however, and security professionals and their parent or employer corporations are thereafter ridiculed in online forums for discriminating against “large camera users.”

In other words, a “no photography” policy should mean “no photography.”

When a person enters private property, generally he does so at the sufferance of the property owner. If he acts in a manner to which the owner objects, the owner (or its representative) may require the person to leave. If he does not leave, he becomes a trespasser, subject to civil and possibly criminal prosecution. This is generally applicable everywhere in the U.S.

This is all relevant because the owner may object to taking photographs on its property, but the photographer may not know this. Of course, the world would be better for everyone concerned if people asked permission before they did things like take photographs. Photographers, however, are often assertive types who, when they see a worthy scene, think first about taking the photo and only later (if at all) about whether permission was required. Owners for whom a “no photography” policy is important will post a notice near the entrance saying as much. That is usually sufficient. If a person enters the property and begins photographing, he is trespassing, and may be ejected. And possibly arrested.

What about the following situation, however? A public retail mall has a “no photography” policy but has not posted notice of it anywhere. A photographer enters the mall and before noticed by security professionals snaps off a number of photographs. A security professional approaches him and says, “No photography allowed in the mall, sir.” The photographer says,

“Fine,” stops photographing and leaves the mall. Was the photographer trespassing? No, he was not, because he had no notice of the policy.

If the photographer had ignored the security professional and continued to photograph, at that point he did become a trespasser.

Security professionals may be tempted to demand that a photographer on private property delete photographs he has taken. That is improper. The photographs are property, and their deletion would be destruction of property. In this situation no one has authority to require that a photographer delete such photos. Not even the police. Worse, if the demand is couched in phraseology such as “We won’t let you leave until you delete your photos” or “If you don’t delete your photos we’ll have you arrested for trespass,” the person making such threats has likely committed the crime of coercion, which is discussed later in this article.

Finally, regarding photographers on private property, security professionals should be very careful regarding possible charges of false imprisonment. If a photographer has not trespassed, he is free to leave the premises uninhibited. Even if the photographer has been photographing and is now trespassing, the best advice is that if he chooses to leave, he should be permitted to do so.

### **Photography on Public Property**

Most anecdotes found on the Web describe confrontations between private security professionals and photographers occurring outside the property in question, in public space. Needless to say, usually the photographer is narrating the incident, and security professionals are often held up to ridicule.

This general rule applies everywhere in the United States: a person standing on public property has the unrestricted right to photograph virtually anything and anyone in view. As to people, the key is that a person in public has no expectation of privacy. Therefore, that person may be photographed. As to things other than people, if the thing may be seen from a public space, it may be photographed. (The owner of the thing may restrict use of those photographs; that is another matter, however.)

The confrontations usually occur when a zealous security professional exits property to which he is assigned and tells the photographer not to photograph. At that point he has overstepped his authority. Moreover, his order is illegal. Furthermore, he may even speak or act in a manner that opens himself or his principal to civil or criminal liability.

Some of the variations to be found in photographers’ complaints about security professionals’ actions (in these examples, “S” is the security professional and “P” the photographer):

1. (In all these examples, S exits private- or government-owned property and confronts P in a public place like a sidewalk, street, or park. Anecdotes in the boxes are taken from accounts posted to Flickr<sup>†</sup>.)

S says to P, “You cannot photograph here” (or “You cannot photograph that building,” etc.). Since this assertion is not true, photographers who know their rights consider this intimidation and are inclined to use online media to report the incidents (sometimes including photographs of S).

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<sup>†</sup> - [http://www.flickr.com/groups/photography\\_is\\_not\\_a\\_crime/](http://www.flickr.com/groups/photography_is_not_a_crime/)

A person photographed the World Trade Center Towers in Denver. The photos were taken from a public sidewalk. The photographer was approached by a security guard who informed him that he couldn't take photos. The photographer just took more, and then took some photographs of the guard, and told him to watch for himself on the Internet.

Some photographers will ignore S. Others will state something like, “You are wrong,” or even stronger language. In any case, even if P is unaware of his rights, S has used a falsehood to intimidate P.

A person photographed two of the towers at the Peachtree Center in Downtown Atlanta. A security guard told him that photography is not permitted. The photographer informed the guard that since he was on a public sidewalk, he had every right to photograph the buildings. The guard was kind and did not pursue the matter.

A man photographed the Midwest Generation Power Plant in Waukegan, Illinois. Just a few minutes before he did so a security guard told him he could not take pictures of the power plant. The photographer was on a public street outside the plant. The guard also said the photographer could not take pictures of him. He said if the photographer put the pictures on the internet he would sue. The photographer posted a photo of both the plant and the guard on Flickr.

2. S says to P, “After 9/11, it is illegal to photograph this building [or oil refinery, or dam, etc.]” Again, untrue. First, no laws prohibiting photography of any subject or facility were enacted following 9/11. (To do so would likely violate the First Amendment.) Second, a common justification used to intimidate photographers, to quote a Federal “Special Security Bulletin,” is to claim that “a widely known reconnaissance activity of criminal and terrorist organizations has been to gather photographic information about prospective targets.” That assertion is totally unfounded. The terrorists who perpetrated 9/11, the London transit bombings, or the Madrid subway bombings did no photo reconnaissance of their targets. Timothy McVeigh did not photograph the Oklahoma City Federal Building before destroying it.

Again, therefore, photographers consider this intimidation.

We are all concerned about terrorism. Security professionals are understandably concerned about the very remote possibility that a terrorist might target their facilities. This is no excuse for trying to stop a photographer from doing something he has every right to do. And consider this: Who is the more likely terrorist, someone who walks by a building and casually snaps a pic using his cellphone or a photographer spending ten minutes composing a series of artistic shots?

(Photographers find this subject particularly humorous given that Google Maps’ “Street View” will permit a terrorist anywhere in the world to obtain a very good view of a

building, its environment, approach routes, and other pertinent information without ever having to visit the location.)

A man photographed the façade of PPG Place, the headquarters of the Pittsburgh Plate Glass Company. The photograph shows the 12-story building on a sunny afternoon with a cloudless sky, as viewed from the sidewalk in front. While taking his photograph, the man was approached by a PPG guard who claimed that photographs were not allowed because of potential terrorism. The man told the guard politely that if he thought a law was being broken he could call the police. He called 911. (The photographer told the guard that five thousand guys were hiding in Market Square with their cameras, and that they had all agreed to demolish the building by bludgeoning it with their cameras.) The police showed up a few minutes later, and, in the photographer's words, "made the guy wish he had not called them." He finished taking his pictures, unmolested.

A photographer was walking in Mountain View, CA, taking photos near Caltrain as the train pulled up to the station. A Caltrain security guard approached and informed him, "You can't take photos of Caltrain since the attack." The photographer observed that this was a public space, but the security guard would not listen. As the Photographer put it, "As someone who works in security, it bothers me that the people in charge of our physical infrastructure are being so dumb. Stopping photographers (a) won't stop terrorists, and (b) is a waste of money and time."

3. S says to P, "You can't photograph that building because it is copyrighted," or, "You can't photograph that sign because it is trademarked." Here S is acting on the basis of imperfect information. While it is true that the design of a building may be copyrighted, if such building may be viewed from a public place it may be photographed for non-commercial purposes. An example of a "commercial purpose" might be photographing a building and selling postcards of that photograph. Use of the photograph may be challenged under limited circumstances; merely taking it may not.

As to trademark, again while a trade name or logo may be protected by trademark, the purpose is to protect the trademark's owner from improper use of the trademark or confusion by competing products. Mere photography of the trademark from a public space may not be prohibited, unless the photograph is used commercially.

4. S says to P, "What is your name? Show me your ID." Nothing prevents S from asking for these, but he has no right to expect either. If P refuses to provide name or ID, S has no recourse. S has even fewer powers in this instance than the police, and in many jurisdictions even the police cannot require a person in public and breaking no law to identify themselves.

A man standing on public property photographed the abandoned Bennett Rice Mill located on Union Pier Terminal in Charleston, SC, at night. A few minutes later a security guard approached him and asked questions like "Who do you work for?," "Why are you taking photographs at night?," and "Where do you

live?”

5. S says to P, “If you continue to photograph, I will call the police.” If P is savvy, he will say, “Be my guest.” In some instances, photographers have offered to dial 911 for the security professional. Again, however, this kind of statement is improper intimidation. And it comes very close to being criminal (see discussion of “coercion” below).
6. S continuously harasses P and obstructs P’s photography. While this may not be criminal, if P is a professional and makes money selling artistic prints, P may have an action against S (and his principals) for tortious interference. It is certainly impolite. In any case, P might document the harassment and publish photos of S on the Internet. (If the police arrive, S may be arrested for disturbing the peace.)

A photographer and friends were in downtown Los Angeles. As they passed the building at Ninth and Broadway the photographer noticed the entryway details and took a picture of it. As he did, a security guard approached and told him that he couldn't take pictures of the building. The photographer corrected the guard, saying that he was standing on a public sidewalk and was in no way, shape or form on their property. To quote the photographer, “[The guard] kept coming at us saying that we couldn't take pictures so I told him to call the police and have me arrested - which of course he declined to do - and yes I did mock him and say he wouldn't call because he is WRONG. Anyhow not only did I continue to take pictures of it, but I went across the street and took more.”

A more serious possibility, however, is if ...

7. S physically touches P or his equipment, tries to take P’s equipment, or puts himself in P’s “personal space.” Examples of this: placing his hand over P’s lens, pushing P’s camera aside, or going “face-to-face” inside an arm’s length of P. This becomes a much more serious matter. In most jurisdictions, and depending upon the nature of the touch or the proximity, S may have assaulted P and may be subject to civil or criminal prosecution.
8. S demands that P show him the photographs taken. S may certainly ask – it might even be taken by the photographer to be a compliment. S has no right to see them, however, and P is not obliged to show them to him, or even to police.
9. S demands that P delete photos taken of the building or facility. S’s demand is entirely improper and possibly illegal. Under no circumstances does S (or anyone, including the police) have the right or power to require that P delete his photos. P may absolutely refuse to do so, with impunity. This requires some explanation.

Once P has taken a photograph, he has created property – intellectual property in this case. He owns a copyright in the image at the time of creation, and his property rights are essentially the same as with other property (*i.e.*, P can sell it, rent it, give it away, etc.). To delete it is to destroy property. If S compels P to delete an image against his will, he may have committed the crime of coercion. (If S takes P’s camera by force to delete the

photos, or takes or attempts to take the memory card, he has committed a number of significant crimes.)

“Coercion” has been mentioned a few times. The elements of the crime of coercion or attempted coercion differ among the jurisdictions. In summary, here’s some of what is involved in Minnesota (2008 Minnesota Statutes §§609.27 and 609.275), using our S and P scenario to illustrate:

P is photographing from a public place. S approaches P and (a) tells P to stop photographing, (b) tells P to leave, (c) tells P to delete his photos, or (d) demands that P identify himself. In order to convince or compel P to do so, S threatens to (1) harm P or restrain P from leaving; (2) damage P’s camera or delete P’s images; (3) harm P’s business; (4) defame P; or (5) have P arrested.

If P, against his will, does any of (a) through (d) in response to S’s threats, S has committed the crime of coercion. Even if P does not comply with S’s demands, S may have committed the lesser crime of attempted coercion.

Penalties can increase if P suffers monetary loss, but even if there is no pecuniary damage S may be imprisoned if guilty.

A man was photographing “sculptural items” in the plaza of the Dr. A.H. McCoy Federal Building (Jackson, MS). He was approached by a security guard who kindly explained that photos were not allowed on the property. Later, another security guard tried to persuade the photographer to delete the photos, threatening that otherwise they would call Homeland Security, who would interview and possibly charge the photographer. The photographer asked to see the rules prohibiting photography, which they assured him existed, but they showed him none.

### **“Best Practices” When Dealing With Photographers**

Understandably, some security professionals, or some security supervisory personnel, either acting alone or at the direction of their principals, choose to take an aggressive stance when it comes to photography within, but especially photography of, sites they are assigned to protect. Leaving aside the fact that such photography is usually benign in nature, and in any case a legitimate exercise of the photographer’s right to free expression, if such is the manner in which photographers are treated, understandably there will be reaction. Such reaction has already included:

- Derision of and disrespect for security professionals;
- Publicizing such personnel on the Internet, including names and photos;
- Damage to the reputation of corporate or government principals;
- Photography of structures and facilities published on the Internet that achieves a notoriety far beyond what would happen without the harassment; and

- Infrequent but nevertheless serious lawsuits or arrests for assault, damage to property, harassment, tortious interference or coercion.

None of this is necessary.

Based on the applicable laws, and believing that some security, corporate and government principals may desire a civil approach to photographers, the following is recommended:

If the photographer is on private property, you (the security professional) hold the stronger hand. Before approaching such photographer, however, you should already know whether your principal has a “strict no photography” or a “flexible no photography” policy. In a strict policy, no photography is permitted whatsoever ( *e.g.*, for the interior of a research institution, a design studio, etc.) With a flexible policy, at best the principal has delineated what photography is permitted ( *e.g.*, photography of and between friends and family, for example at an amusement park), or what photography is prohibited ( *e.g.*, in a mall photography of storefronts, architecture, decorations, etc.). In a suboptimal situation, the principal has told you to use your own judgment.

You should also know whether the photography policy has been effectively communicated – *e.g.*, via a sign posted at all public entrances, at the top of a sign-in sheet, etc.

In any case, once you understand the facility’s policy, you may approach the photographer, politely explain the policy, and request that the photographer cease taking pictures. If the photographer stops, that should be the end of the matter. If the photographer has been acting contrary to the facility’s policy and the policy was effectively communicated to him upon his entry, then you may decide whether to ask the photographer to leave.

If the photographer ignores you, continues to photograph, or refuses to leave (if requested), you may wish to consult your supervisor. In any case, in order to eject the photographer from the premises (because he is now trespassing), the best course will be to call in the police. Although under limited circumstances you may use force to eject or restrain the photographer, given the potential for lawsuits you would best let the police handle it.

If the photographer is in a public space ( *e.g.*, on a public sidewalk, in the street, or in a park), you have virtually no power to compel him to cease photographing. Nevertheless, your principal may have directed you to discourage photography of your facility. (If you undertake to challenge such photography on your own initiative, you may embarrass your principal, not to mention endanger your own job.) If your principal has directed you to discourage photography, you must be very careful about how you approach the task.

You may certainly approach anyone in public and request that he (or she) not photograph something (building, power plant, dock, statue, etc.). If the request is couched in polite language, with luck the photographer will respond courteously. Some photographers may honor the request; others may not. In any case, once you have made the request, you have exhausted your options.

Regardless whether the photographer is on private property or in a public space, you should not:

- Single out “large camera” users;



- Demand that the photographer identify himself (you may ask, certainly – anyone may ask for another’s name or any other information – but to demand implies the photographer is obliged to provide the information, which he isn’t);
- Demand that the photographer delete his images (again, you may ask, but if the request is couched in a manner the photographer might interpret as a threat, you may be in criminal trouble);
- Demand to see the photographer’s images (again, if you ask politely, the photographer may show them to you, but he is not obliged to).
- Couch your requests in terms of “terrorism” or “9/11” – knowledgeable photographers will immediately lose respect for you, and since you may already be operating from a position of strength, you don’t want to weaken your case by making absurd references to photography and terrorism; or
- Become insistent, antagonistic, threatening, or otherwise lose your cool – you are not called a security “professional” for nothing – if you act in a manner respecting the photographer, we may hope he will respect you as a professional.

As demonstrated by reports on such websites as Flickr, “War on Photography,” and “Photography is Not a Crime – It’s a First Amendment Right,” relationships between security professionals and photographers have already been damaged in every arena imaginable – government buildings, infrastructure, corporate headquarters, industrial facilities, and even minor locations like construction sites. Since in most cases reported the damage has been caused by security personnel acting unprofessionally or over-zealously, the possibility for improvement falls to security professionals. This article has sought to point out both appropriate actions by which security professionals may improve the situation, and inappropriate actions to avoid.