

What to Consider when Filming People

Definition of “filming”

For the purposes of this note, filming is defined as any filming or photography that will be used for either private or commercial purposes, including theatrical distribution and broadcast.

Filming People

- Whilst there is no general “image right” or right to control one’s likeness under English law, there is a patchwork of other rights which apply to the use of a person’s image which filmmakers should consider. This is particularly the case when filming in the street as it might be relatively easy to inadvertently capture passers-by on camera. Ideally, before exploiting the film, you should obtain direct consent from anybody appearing on camera.

- Where consent has not been obtained, the filmmakers must decide if they can still include the image or whether they will need to take steps to obscure the individual’s face. The following is a brief summary of the key legal issues to consider:

- Privacy: by virtue of the European Convention on Human Rights and the Human Rights Act 1998 everybody has a right to a respect for their private and family life, their home and their correspondence. The Court has held that “wrongful disclosure of private information” and “misuse of private information” would breach an individual’s right to respect for their private life, and, in certain circumstances, publication of an image of the relevant individual would amount to the misuse of private information. Though it is unlikely that publication of an image of a person carrying out an ordinary task in a public place (i.e. going to the shops) would amount to misuse of private information, the key question is whether the person in question had a reasonable expectation of privacy in respect of the image. This needs to be considered on a case-by-case basis as the assessment will vary depending on what the person is doing and who they are. A different threshold applies to a politician or other public figure than to a person who does not work in the public eye. A much higher threshold applies to children, so that it will rarely be appropriate to publish any image of a child without the consent of the child and/or its parents.

- Data Protection: the Data Protection Act 1998 applies to any person or company “processing” anything within the definition of “personal data”. The Court has confirmed that storing, developing and printing photographs amounts to “processing” so by extension recording and exploiting video footage is also likely to be caught within the definition. “Personal data” is defined as anything relating to living individuals who can be identified from either that data itself or from that data and other information which the data processor holds or could have access to. These definitions are very wide and it is likely that even a simple image of a person would amount to “personal data” if that person was or could be identifiable, even if there was no other data included with the image. In this case the “data controller” (which is likely to be the producer or broadcaster) would then need to comply with the Data Protection Act. The simplest way to comply is to obtain the consent of the individual depicted, either specifically through a signed agreement or by displaying sufficiently prominent and clear notices warning the public that filming is taking place and they should avoid the designated area if they do not want to be filmed. There is a defence for those processing material for the purposes of publishing “journalistic, literary or artistic material” but the data controller would need to show they had a reasonable belief that publication would be in the public interest, having regard to upholding freedom of expression. Filmmakers are unlikely to want to rely on the discretion of the Court in applying this test so obtaining

consent is always preferable. If in doubt, the image should be sufficiently obscured so that the individual is not identifiable.

- **Defamation:** filmmakers must also take care not to defame any individuals depicted. This would occur if the filmmaker made a “statement” which referred to the individual concerned and lowered his/her reputation. A statement could be a direct spoken statement (i.e. someone on film saying “Mr Smith claims to be a vegetarian but eats meat every Friday”) or a statement that can be inferred from the way the person is depicted (i.e. an image of Mr Smith holding a placard stating that he is a vegetarian next to an image of him eating a beef burger). If the statement made is true then it will not be defamation, but filmmakers should ensure they have evidence to support their statements.
In the context of depicting images of individuals without consent, filmmakers should not manipulate the image of an individual so that its understandable meaning is altered. For example, footage taken of an individual entering a generic building should not be shown in a documentary about drug addiction in a way that would imply the person concerned was entering a drug addiction facility or was addicted to drugs. Filmmakers should carefully consider whether there are any defamatory meanings implicit in their footage. If there are then identifiable personal images should not be used without consent.
- Those making broadcast television programmes should also remember the provisions of the Ofcom Code which state that it is acceptable for broadcasters to film in a general manner in a public place providing the footage is brief, incidental and an individual is not engaged in a personal or private activity. Filmmakers should always comply with the Code, but that in itself is not a guarantee that you are in compliance with privacy, data protection and defamation laws.
- The information above summarises the legal considerations which apply when filmmakers include a brief, incidental image of an identifiable individual in their production. If the individual concerned is particularly famous or if they are particularly associated with a specific organisation or entity there will be additional issues to be considered (such as passing off and trade mark claims). If the individual concerned is wearing any identifiable logos or brands you should also ensure that these are obscured or are only depicted incidentally. If in doubt you should take separate advice in all of these circumstances.

Practical tips for filmmakers:

- Where possible, obtain written consent from anyone shown on camera. If an individual is the focus of a particular shot or video then consent is essential. If you have captured an individual in the background of a shot and they are clearly identifiable, you will also need their consent. Remember that even if someone's face is obscured, they could still be identifiable in other ways (i.e. through their car number plate).
- Obtaining consent does not always entail a detailed rights agreement. It can be a short, simple statement confirming the individual has granted his/her consent for their image to appear in the production. Keep these in a safe place with all the key documents for the production.
- If it is not possible to obtain specific consent, you should at the very least ensure that the area in which you are filming is clearly marked and sufficient warning notices are visible at the entry points. These should state in plain English and a legible font that filming is taken place and that by entering the area individuals are granting consent for their image to be used in a production. They should be informed that if they do not want to grant consent they should inform a member of the production team or avoid the area in question. If possible, take and keep photos of these signs in situ.

- You should not include any images of people in situations which might be regarded as private (i.e. coming out of a fertility clinic) without their specific consent, ideally in writing. You should not show any images of children without the consent of the child and/or a parent.
- You should not use images of an individual in a manner that could be defamatory and lower their reputation. Avoid all manipulation of an image that suggests a context or meaning that was not part of the original image and do not associate an individual with a negative or damaging story unless such association is accurate and truthful. Remember that what you might think of as harmless could be very damaging to a different person's reputation (i.e. the head of a bank wrongly associated with a story about credit card companies charging excessive fees).
- Where you cannot obtain consent, either specific or generic, you should carefully consider whether the individual in question is actually identifiable and whether they have an expectation of privacy. You should also contact your production's Errors and Omissions Insurance provider, as they should be able to provide experienced guidance.
- If in doubt, you should take specialist advice or take sufficient steps to disguise the individual's identity.

Note:

This note is intended to provide a general background on the way English law approaches issues around filming people. It is not intended to be taken as legal advice. The legal issues involved are complex and each situation is different, requiring an individual analysis.