





PART 1

WHAT'S WRONG?

Everyone's Doing It. So What's Wrong?

You're at your kid's soccer match at school, and you're taking pictures. Being the photo buff that you are, you get everything: kids scoring goals, parents screaming from the sidelines, the popcorn vendor, and fans in the stands. Later, you show the pictures to some of the people and find that some want to buy a print for themselves. This becomes a popular trend and, over time, your reputation grows. The local newspaper gets wind of your talent and wants to license a few photos so it can put some in the paper for an article on the school's sports curriculum. Perhaps the local gift shop wants to sell enlargements of the shot you took of the winning goal at the state championships.

All's going well — until someone tells you that you can't do any of these things unless the people in the photos sign a "release" allowing you to use pictures of them.

Are they right? After all, you're not the only person there with a camera. Everyone takes pictures. And, as evidenced from looking at just about any Web site on the Internet, photos are everywhere. Yet, whenever people take pictures in public (especially around schools and parks where children congregate), there's always someone in the crowd ready to voice objections, threats, or warnings. So, what's wrong with what you're doing? And if something is wrong, what can happen to you as a result?



In a world of heightened awareness and concern over privacy — partially exacerbated by the instantaneous, ubiquitous, and unpatrolled nature of the Internet —

people have become more acutely aware of photography's role in society and commerce. Understandably, this has raised interest for people on both sides of the lens

THE ESSENTIALS

Many people think they understand the subject of model releases for photos better than they actually do, and when you combine that misinformation with fear or greed, people tend to swing to either overly conservative or overly liberal interpretations of legal matters. The best way to learn this material is to follow these basic guidelines:

✓ *The laws regarding model releases are not codified as they are with traffic laws.* There are no hard-and-fast rules you can apply mindlessly. The greatest mistake you can make is assuming that the law is written so clearly and unambiguously that you can just look up questions in a book and get answers.

✓ *Do not look for quick answers to specific scenarios you happen to be in.* I cannot possibly list all of the different types publications, art displays, or other ways that photos can be used that will even come close to satisfying specific questions. And even if I could, that would miss the point. You need to learn the underlying principles and extrapolate what you learn in other contexts and then apply them to your own situation.

✓ *Don't just know facts, understand them.* In business negotiations, it's less important to be right as it is to close the deal. Knowing facts about model releases is useless unless you can communicate effectively with other people. Whether you're dealing with an unruly subject who is upset that you took her picture, a mall security guard who confiscated your camera, or an overly protective client who insists on having a release for every single photo (even though he doesn't need them), it's how you communicate with people that determines the outcome, not whether you're technically right about the law. In business, you want a profitable outcome, not a legal victory.

✓ *Don't look for model-release templates.* (And if you do, don't use them unless you understand them.) I subscribe to the cliché "Give a man a fish and he eats for day; teach a man to fish and he feeds himself for a lifetime." Understanding what needs to be in a release is a benefit that will do more for you in the long run than by being spoon-fed releases that you don't understand. And, frankly, what are you going to do if that canned release is thrown back at you (or modified) by a client? If you don't understand the principles involved, how are you going to negotiate them?



due to the most primitive of human emotions: fear and greed.

On the fear side, people who take pictures for a living (or to earn extra income) are concerned their actions may get them into trouble, whether it's the simple taking of pictures or the publication of those photos, either on personal Web pages or in more traditional media. On the greed side, the financial opportunity to sell photos, either as prints or to other people who'll publish them, is a powerful motivator. There are even nonfinancial motivations, such as winning photo contests or getting praise in online photo forums. Yet, people pause and worry whether they "can" do these things with their photos of other people.

Similarly, those who are in pictures feel both greed and fear, too. On the fear side, people want to be sure their privacy is protected, especially if the publication of photos would bring them undue hardship or uninvited publicity. Accordingly, circumstances may cause people to react violently, through verbal abuse or worse, tossing about assertions that "you can't take photos here!" (Just ask any

photojournalist in a metro area who covers social matters what it's like to photograph the general public, whether it's people standing in welfare lines, going to the park or the beach, attending high-brow fundraisers, or being in a compromising position with a politician.)

On the greed side, people want to exert a greater proportion of ownership of the photos they're in than they actually have: They usually believe they have ultimate control in how (or whether) a photo can ever be used. They also believe they should be paid gross sums of money to publish those pictures, whatever they may be. (Some even think they have rights of ownership to any photos they may be in. See Part 7 for more details on this.)

Almost everyone's assumptions about their rights far exceed what they actually have — and this is the case for those on both sides of the lens. These two extremes

No question about it: pictures sell. But there are also risks. Privacy and publicity concerns have put the brakes on many photos from being used for commercial purposes.





Photo subjects have fewer rights than they think for how pictures of them can be used. But photographers and publishers don't have *carte blanche*, either.

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of emotional responses have created more than just a passing interest in the subject; search trends show it as one of the fastest growing areas of public interest. This last point is no surprise — the sales of cameras and the growth of social-networking sites and photo-sharing sites are enjoying huge growth curves, so photo-related topics are capturing people's attention. And now that business interest is a major component, the subject is even more provocative.

PREEMPTING MISINFORMATION

When I say that people's assumptions of rights (as well as fears of being sued) exceed reality, this is hardly an understatement. One of the ways I monitor this kind of information is by reading online discussion forums as well as my own e-mail inbox. Since I started writing about the subject years ago, I've been getting more varied and diverse questions from everyone — consumers, publishers, advertisers, models, even lawyers — all wondering about a tiny little nuance about their particular situation regarding the rights of people or things in photos. Looking at these questions as a whole, the one overriding commonality is a perception that the law is defined like a rule book, similar to traffic laws. If the sign says, "Speed Limit 30 mph," there are no exceptions — you go no faster.

But that's *not* how it works for the publication of photos, and that simplistic misunderstanding is the primary source of why people are so misinformed. It actually skews their interpretation of information when they see or hear about it. Just



The laws on model releases are not like speed laws. You can't oversimplify what any one law says, because there are contradicting laws that point the other way, too.

because the law suggests that a release may be required to use a particular photo in a particular advertisement, it shouldn't be interpreted as a speed-limit sign with no exceptions. There could be extenuating circumstances that alter this requirement, and the list of such circumstances is potentially infinite, making the permutation of possible outcomes impossible to list as a set of rules. And even then, most cases still require the objective opinion of a judge before a firm answer can be established for that particular scenario. Ironically, the fact that interpretation is such a large factor in this has resulted in rampant misinfor-

mation from people who make their own interpretations from specific examples and then create their own "rules" that they generalize to a wide range of circumstances where they may or may not apply.

Just how uninformed are people on the subject? On my Web site, I have a very simple survey about how people use photography in their day-to-day lives. I get around 15,000 visitors a day and the portion of those who take this survey is enough to fall within the acceptable random sampling error of the general population. One of the nine questions in that survey is, "Do you know what a model

release is?” And although a consistent 80 percent of respondents say yes, my follow-up e-mails to some respondents show that not one person has been able to correctly answer four out of five very simple questions specific to the subject.

One person genuinely thought a model release was a device that helped you remove (that is, release) a toy (that is, a model) from its packaging. He actually said, “You know those awful hard plastic packaging they use these days? You can’t get anything out of it. So, I thought it was something that made it easier.” When I replied, “But what might that have to do with photography?” he said, “I dunno. I was just doing the survey.” While this

humorous anecdote may

seem irrelevant, I was very surprised to learn that photographers who actually license photos for a living incorrectly answered four out of five questions on the subject (though not as humorously). So, when writing this

book, I found that just as much attention was needed to dispelling myths as it was to explaining how the world of photos and model releases actually works.

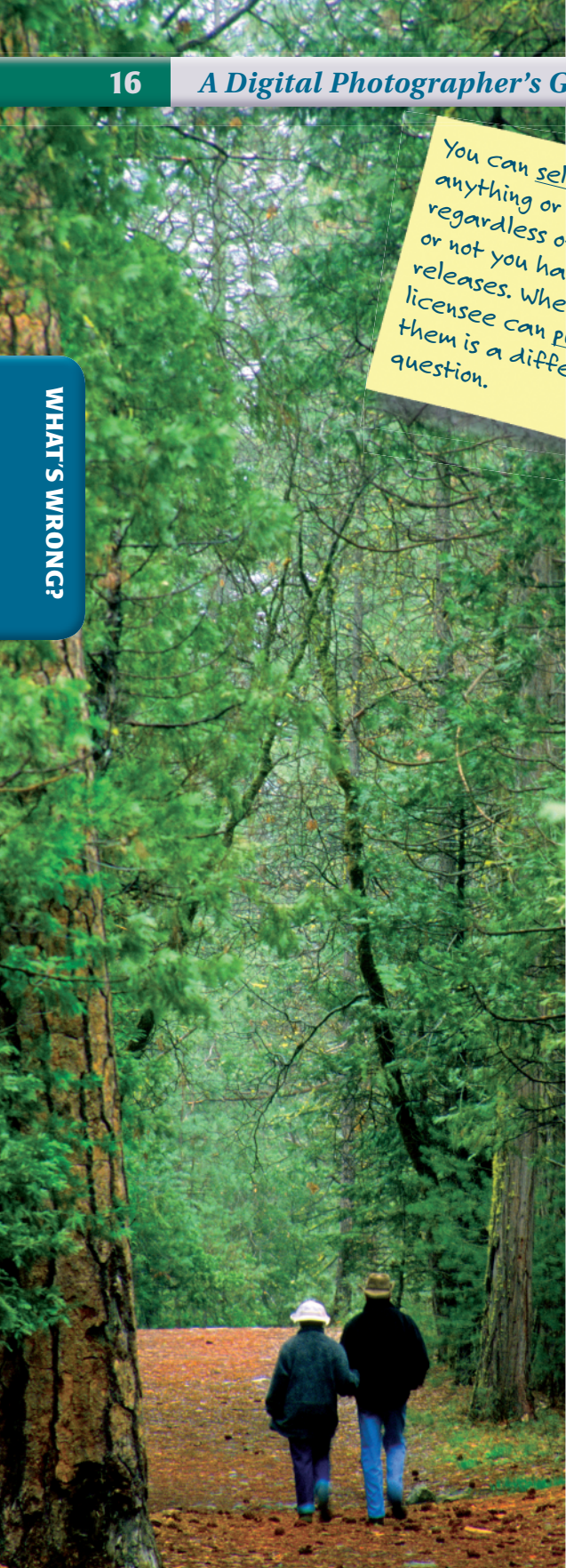
This all begs the more interesting question, though: How did people get so misinformed about this subject? And how can you avoid this same fate?

Earlier, I hinted that the core of people’s initial misapprehension about model releases starts with the erroneous assumption that they are similar to succinctly defined traffic laws. So, when people then go online and do a search on the subject, looking for quick, immediate answers to specific questions about scenarios they’re in, they start out with the wrong frame of mind for understanding what they’re reading in those results. It’s like trying to understand how the Earth’s orbit around the Sun is responsible for seasons: If you still believe the Earth is flat, the explanation will never make sense. In both cases, a paradigm shift is required before you can truly digest the new information.

When doing an online search, there are two distinct kinds of information. The first consists of very, very short legal statutes on the law books (most being little more than a paragraph or two) that contain all the information you technically need to know,

Misinformation about how model releases work and when they are required starts with the wrong frame of mind, and that comes from reading online discussion forums.



A photograph of a forest path with two people walking away, overlaid with a yellow sticky note.

You can sell photos of anything or anyone, regardless of whether or not you have model releases. Whether the licensee can publish them is a different question.

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but they're too abstract for the average person, and they present insufficient or no analysis to help you understand how the circumstances piece into the puzzle. (These statute snippets assume that you're a lawyer and already know the context.) As a result, these sources don't answer people's specific questions, causing them to move to the second kind of source: online discussion forums.

The second kind of information found during such searches consists of people's opinions, presented in blogs, discussion groups, and other forums. Here, in the nonacademic playground of society, groups of largely uninformed people try to whittle a very complex subject down to simplistic rules, all using the wrong fundamental paradigm. In fact, one of the most common subjects discussed in these forums is whether parents are allowed to photograph their kids playing at a school soccer match.

In these forums, the most common question — and topic of misinformation — is this: Someone asks, "I took a picture of kids at my son's school playing soccer. Can I sell it to the local sporting goods store to put in an ad in the newspaper?" The "correct" response to this is, "You can't *publish* that photo in that manner without a release." However, the person making the statement may often say instead, "You can't *sell* that photo in that manner without a release," which is not the same thing. This subtle one-word difference changes the entire meaning and spirit of what the

law actually restricts or permits. That is, “selling” is not the same as “publishing.”

The photographer can almost always sell the photo, regardless of the release, whereas the buyer may not necessarily be permitted to publish it.

This particular misstatement about selling versus publishing shifts people's impressions about culpability and legality away from the publisher and towards the photographer, which is exactly the opposite of how the law actually works. Once that sales paradigm is lost, it is never to be heard from again — at least in online discussion groups — and the domino effect of misinformation perpetuates long into the future, from one subject or scenario to the next. Most people won't catch these nuances.

Unless the judges make a ruling, don't assume that because a lawsuit takes place, someone did something “wrong.” Baseless claims are made all the time.



Worse, people in discussion forums often take an example out of context and try to make sweeping conclusions from it. The typical example involves someone citing a case where a photographer was sued for taking a picture at a soccer game, but the discussion will not adequately examine any of the circumstances involved in the case. Forum members too quickly draw the mass conclusion that one cannot take pictures at soccer games, or any other kind of sporting event, or perhaps at school events. Yet, all the while, no one ever took a look at the specifics of the case that was cited. While a real court case may have happened, its details are largely misunderstood or taken out of context (because no one actually reads the court documents).

Often, cases having nothing to do with photography itself happen to involve a photograph as a circumstance, giving people the impression that photography is a core



Beware of what people say in online forums. Many of the assertions are simply incorrect, based on partial or plain bad information or poor reasoning.

component of a judgment. For example, a case in New York involved

a proposed law outlawing the use of tripods in subways, and several forums blew the discussion out of proportion, claiming that photography itself was about to be outlawed on public streets.

Even when people cite cases that are actually about photography and model releases, bad information often results, largely because many of these cases are either dismissed or settled before a precedent-setting judgment is made. The details on the case's claims and even proceedings get interpreted and reinterpreted in the forum, but no one in the group follows the result to set the record straight as to what was actually decided (and why). Another example is a case involving the use of a photo with no release on a book's cover, which caused many in a discussion group to conclude the use of photos on book covers is not allowed — even though the case hadn't been decided at the time. The prevailing sentiment of these forum participants was, "it doesn't matter how it turns out — you don't want to be sued." This is not rational business thinking. (The case ended up with the judge ruling that the photo's use on that book cover was in fact allowed.)

The most worrisome part about all this is that all these topics are reported on and discussed by professional photographers, big companies, and others who appear (and should be) authoritative on the subject. In one particular case, a pro photographer spoke about a personal experience where he needed a release for a particular photo, not because of a known law, but only because the company that licensed the photo demanded one. What wasn't said is that the company itself didn't *need* the release for legal reasons — it simply wanted one to reduce the risk of a frivolous lawsuit from the photo's subject. So most forum members came away with the wrong impression that a release is needed, period.

Another caution about naively believing anecdotal claims like these is that some people have an economic interest to deliberately deceive you. This deception is sometimes done by photographers and agencies trying to create fear that slows down new competition. More often, this misinformation is spread by those who don't want photos of their properties disseminated, or who want to collect license fees for uses that would otherwise not require them. (Copyright and trademark holders are notorious for claiming infringements for otherwise legitimate uses for this reason. This is covered in Part 7.)





Ironically, there are very few actual lawsuits on model-release matters for two reasons: First, the bar to reach for an actual violation is high, and second, the penalties are so severe (compared to the ease of avoiding it in the first place) that publishers stay clear of the problem. If there were more actual cases to support the claims you see in online discussion forums, then perhaps more rumors would be justified. But this lack of cases is a double-edged sword.

The first edge is that, because there are few cases to point to, it's too hard to dispel rumors. The faulty rationale is, "If you can't prove me wrong, I must be right." The faulty business rationale is "better safe than sorry." (Hint: If you don't understand something, you don't know what "safe" is.)

The other edge of the sword is that this lack of cases means that it's hard to establish just what is right. Of the few cases that are decided by judges, most are decided on such specific circumstances that they cannot be used as a precedent for broader contexts. (Yet the discussion forums will attribute precedents anyhow,

perpetuating the misinformation further.)

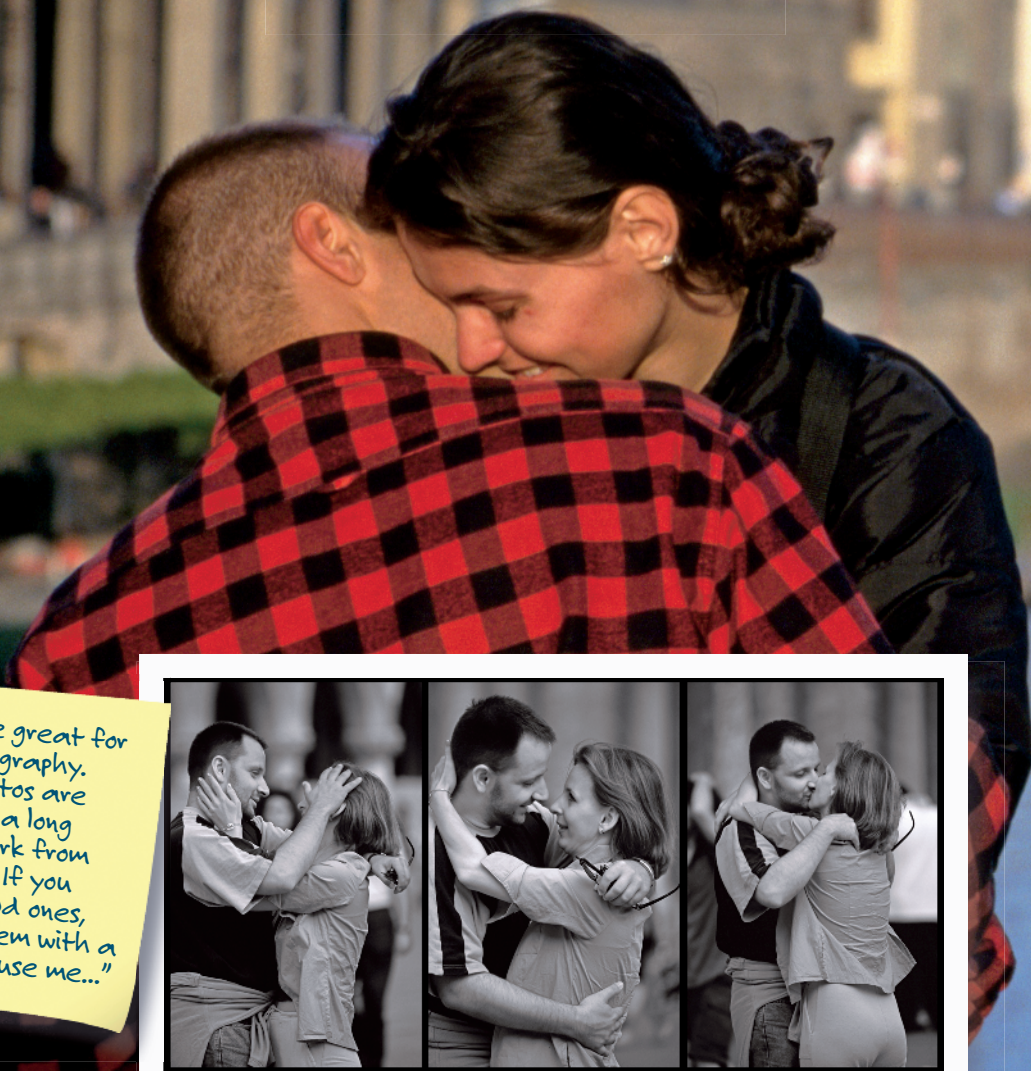
With all that as a backdrop, I want to preempt whatever preconceived notions you may have about model releases by asking you to wipe the slate clean on whatever you think you know.

While lawyers can't decide what risk is acceptable to you, always use one if you're ever involved in a legal dispute. Especially if you're instigating it.





Couples almost always sign model releases after they see great candids of themselves. If there's hesitation, be the advocate in favor of whichever of the two seems willing.



Couples are great for stock photography. Candid photos are best, so use a long lens, and lurk from a distance. If you get some good ones, approach them with a modest "Excuse me..."





Large open squares or park areas are where most couples feel and act more relaxed. They also stick around for a while, giving you plenty of time to wait for the best pictures.



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HOW TO THINK ABOUT MODEL RELEASES

As I mentioned, the first hurdle to clear in properly learning about this subject is to stop thinking about it as a collection of laws in a rule book. The second hurdle to clear is to avoid looking at specific situations as islands of facts — instead, look at them as the conceptual patterns they represent. When people ask me whether posting photos of their kid's soccer game on a personal Web site is legal, I say, "Yes, because personal Web sites are editorial," but they only look at the "yes" and fail to understand (let alone take interest in) the longer answer about personal Web sites. So, they naively ask the next question, "Okay, then what about the school play?" (I then remove this person's e-mail address from my address book.) The understanding should have been about Web sites, not about the school play.

While circumstances do play a major role in how such cases are determined, the high number of permutations makes it futile to anticipate and create rules for each possible circumstance. Besides, that's not the paradigm you want to adopt in learning this material. Instead, you have to understand the concepts — the intent of the law — and think in more abstract terms about what the law is trying to do.

Competing objectives: an individual's right to privacy and publicity, and that of the greater good provided by freedom of speech. Makes you think.





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Making good business decisions with your photos of people and places involves understanding the big picture of the photo industry. Know how the buyer thinks.



Once you grasp that basic intent, examining specific scenarios becomes easier.

In the end, you're really looking to weigh the two competing objectives: the rights of the publisher and the rights of the individual. This invariably is going to involve drawing together circumstantial variables and coming up with a sort of weighting — a likelihood on whether a release might be necessary — and then evaluating the economic ramifications of your decision.

It's not that this stuff is hard to understand, it's just that approaching it is like solving a puzzle. It just takes getting used to looking at the big picture first, and then looking at the smaller pieces to see how they fit together.

That's why I am not going to spoon-feed you a dry, meaty chunk of legal jargon that explains everything you need to know about model releases that makes you doze off. Nor do I present reference material of sample release forms that you can tear out and use on an as-needed basis — that teaches nothing. If fact, there is only one sample model release in this book, and it's used to explain the intent, spirit, and practicality of real-world uses of releases.

My goal (as if the title of the book didn't give it away) is help you make better business decisions about photos you already have, or are about to take, that you will license to other people.

Although I certainly talk about law and may use big words now and then, I am keenly aware of how quickly one can drift into Neverneverland if there are too many instances of phrases like “gross negligence,” “libel per se,” and “joinder.” We're not going to Neverneverland. Instead, we're going to the real world. And in that real world, your mindset should be focused on one thing: business. So that's what each part in this book comes down to: an analysis of the legal and economic conditions associated with the use of photos so you can make good business decisions.

You don't need a lawyer to get the basic ideas behind when and how model releases apply. Business decisions are based on weighing many factors, not just legal ones.



HEY, YOU'RE NOT A LAWYER

Some of you may be thinking, “Why look to a photographer for advice about this subject, when I should be asking a lawyer?” Glad you asked! There are many issues to consider here.

Yes, most people are fearful that they will get sued for what they do with their images. And yes, problems will arise if you do something that's illegal, like planting hidden cameras at work, committing fraud, or writing something malicious about someone that you post with their photo. But you don't need a lawyer to tell you not to do *those* sorts of things. (But you certainly will need a lawyer after you do them!) Lawyers are best at trying to make your case to a judge, or advising

you on how to avoid getting there in the first place.

But you have such an infinitesimally small chance of ever getting sued for photography-related matters that the need for a lawyer to explain this material is, well, misdirected. The reason is that most photographers (especially stock photographers — those who sell photos to other people to publish) aren't liable for how a client uses a photo. What you need to know in the legal realm is not how to protect yourself but to better understand the business landscape of your clients. Well, that, plus being informed on managing business relationships that affect legal negotiations. So, as you read this book, you're going to be getting a very different kind of characterization of legal discourse that isn't

The global business landscape is wide open when you realize your legal liabilities are next to nil. You don't need legal advice about the use of model releases, you need business advice.

typically used by lawyers, mostly because they are trained to communicate to people who have different needs than you. Your clients need lawyers; you need business advice.

And this presents two more things of note:

First, licensees (the people you sell or license photos to) must have or should have their own legal counsel, and whatever discussion they have with their legal advisers is independent of your own decisions and your business relationship with them.

Second, I guarantee that all the lawyers who advise you or your clients are going to have different assessments for every single case. I have licensed one photo to different clients for the same use, each of whom had lawyers that rendered vastly different legal assessments on the need for releases, yet none of these affected my business relationship with them. Had I been too strongly influenced by the advice of a specific lawyer at an impressionable time in my



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Licensees — those who actually use the photos — bear most of the legal risk around model releases.



career, I might not have licensed the image to any of those clients.

There's nothing unusual or surprising about this: Lawyers disagree with one another (often citing contradictory examples), just as judges disagree with one another on rulings within the same trial. It's often said that if you ask ten lawyers their opinion, you'll get twelve answers. If a lawyer were writing on this topic, you'd get a very persuasive argument on how she views or interprets the law on the matters I'll be raising. But her viewpoint is a singular one and may very well not square with the views of your clients' lawyers. Your business role is to be as agnostic as possible on legal interpretations, yet be aware of as many of them as you can. This helps keep you at arm's length from other people's lawyers.

Speaking of differences of legal opinion, many of the things in this book can (and will) easily be critiqued by lawyers using valid retorts. (Indeed, they do it to each other's books, too.) And that hones in on the point: I am not giving legal opinions or advice. I'm presenting business analysis tools, in which you are free to apply using the most conservative or liberal interpretations of the law as you (or your lawyers) desire.



The technicalities of the law are not your main objectives. Instead, understand a breadth of interpretations that you can factor into your business decisions.



Lawyers often disagree over model-release requirements. That's just a fact of life, so temper their advice with your business's context.

particular kind of use, but the business relationship between you and the client simply doesn't warrant that kind of expense, nor would a client perceive the risk to be high enough to bother.

It's sometimes better to not muddy the waters on a simple relationship involving a simple transaction just to make sure the "legal" aspects of a release are tidy.

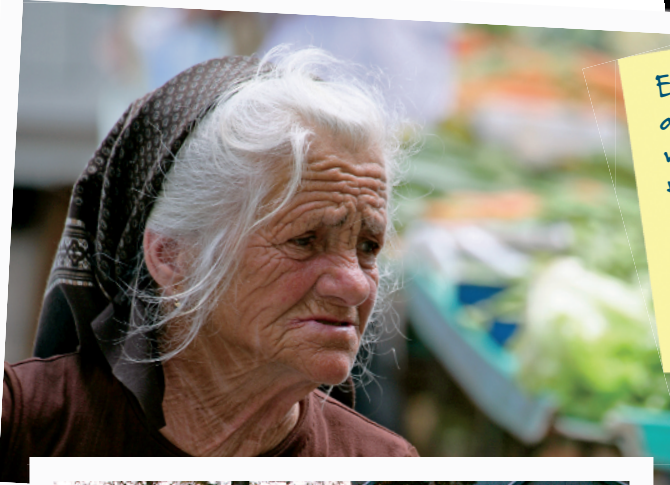
All too many times have I seen photographers get so wrapped up in the legalities and details of such matters that they actually harm the relationship or the transaction itself. Or worse, they don't even sell photos of things that don't have releases. Lawyers know risk, but they often fail to put things into perspective on what makes a good business decision. "Risk" by itself doesn't mean anything — there's risk crossing the street, but it's a risk we assume by leaving the house.

In yet another example, you may have a client whose lawyer disagrees with you or your lawyer's read of a given situation, which begins the process of everyone emptying their wallets into the communal coffer to pay the lawyers to battle it out. Is such an expense worthwhile? If the photo is for a major ad agency for which you are paid hundreds of thousands of dollars, that effort may be a good investment (because the risk is usually proportional to the exposure the photo gains). But if it's for a local monthly newsletter, the cost just isn't worth it. When this situation finally

Remember: It's Just Business

When business is the objective, legal opinions only get in the way if legality is not applicable to your end of the deal. For example, a lawyer may advise you that a particular image passes legal scrutiny for a given use, but his lack of experience in a given industry makes him oblivious to the risk associated with the litigious behaviors within that realm. You may not be happy about the outcome if your lawyer wasn't entirely on the ball.

Similarly, a lawyer may also advise you that a release would be required for a



Even if technically a model release isn't needed, it might be the right business decision to get one to get a deal signed. Do the cost/benefit calculation.



Following the crowd
can lead to nowhere.
Look and listen to
non-photography news
sources for a much
better analysis of
legal and business
trends.



happens to you (because it happens to everyone in the stock-photo industry at some point in time), your case will be somewhere in the middle.

Overly risky people rarely do well in business, whereas overly conservative people generally avoid too many opportunities and end up not making money. Your goal should be somewhere in the middle, which is the spirit of how I guide you through this book.

None of this is to suggest you shouldn't have a lawyer. And yes, if you ever get notices from a lawyer for some reason, you'd be best represented by a lawyer, not yourself. And finally, if you ever have to assert a legal position against someone for something, you should never try to do it yourself, as you will never be perceived as important, serious, or "credible" as you would

if the exact same message were to come from a lawyer. Even lawyers don't represent themselves in legal actions — they always get another lawyer to do it. As the saying goes, "A lawyer who represents himself has an idiot for a client."

But your lawyer should not drive your business decisions. Licensing involves a form of business analysis of the bigger picture that encompasses how the law and your business goals work hand in hand that most lawyers aren't really that well equipped to handle, because they don't have skills in both areas.

While lawyers can't decide what risk is acceptable to you, always use one if you're ever involved in a legal dispute. Especially if you're instigating it.



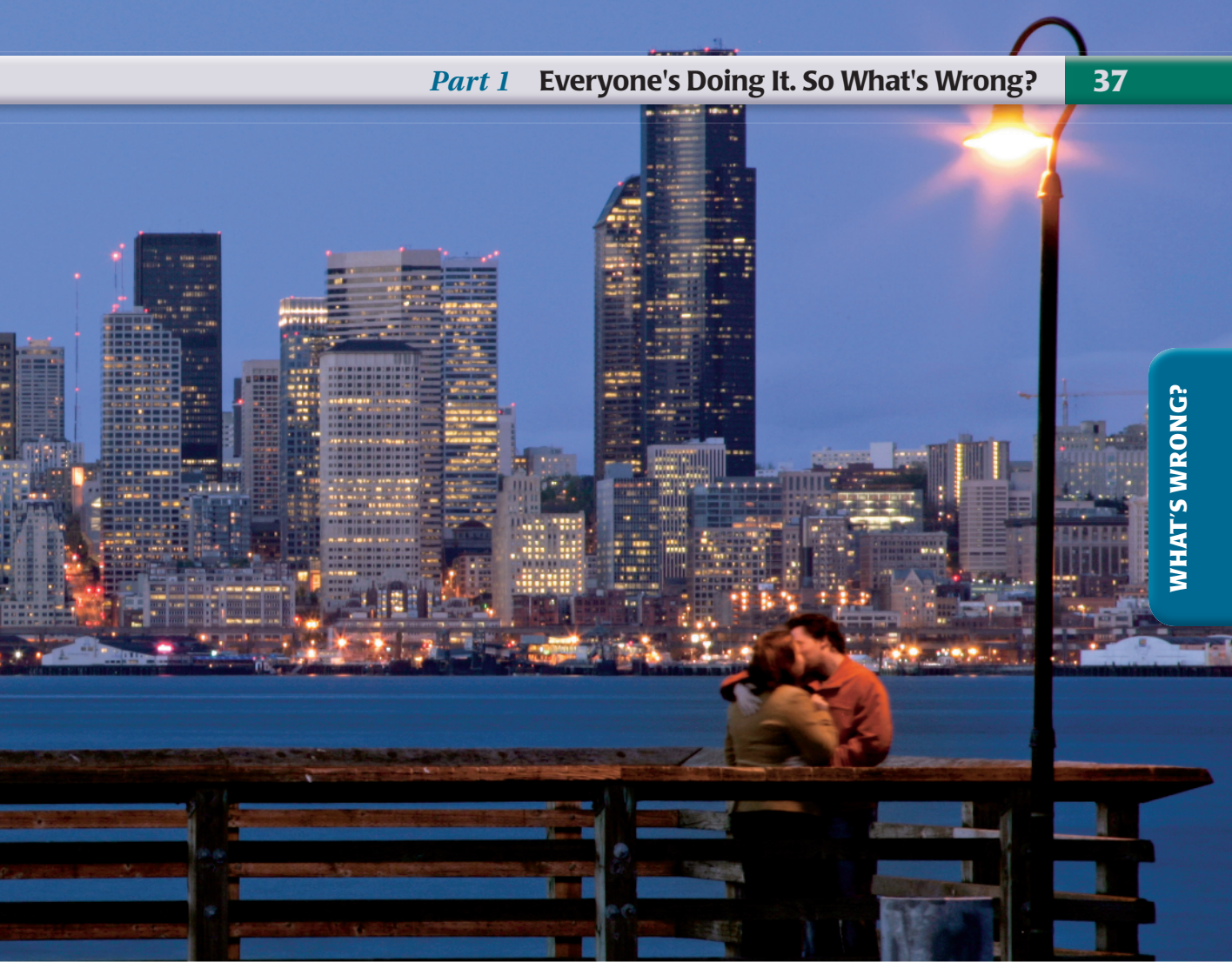
General-practice lawyers and traditional corporate attorneys are not well-versed on the laws surrounding model releases. Choose your legal partners carefully.

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Working with Your Clients' Lawyers

Whenever a photographer gets involved in licensing, he will invariably work with lawyers who often represent their clients (the licensees) in negotiations, especially if there are contractual points. In doing so, I've found that many lawyers who are experts at corporate or contract law are not as up to date on copyright or First Amendment law, which are necessary for anything related to model releases, whether for people or for copyrighted or

trademarked items. As a result, you are often put against someone who is far more experienced at law than you, but probably less informed of the specifics of these aspects of law than they need to be. First Amendment lawyers often joke that 90 percent of their business comes from clients who got into trouble because they took the advice of general-practice lawyers. Your client is likely using such a lawyer, and you'll have to deal with him. This makes it hard to negotiate a contract because you're going to be up against someone who needs



to approve your deal, but may cause it to fall through because of a misinformed (or unnecessarily conservative) legal position. So, when working with them, you need to walk a delicate line.

The best thing to do is stick to the deal and not haggle about technicalities of whether a release is or isn't necessary, unless such a provision actually affects the deal itself. In this case, you may have no choice but to do whatever you can to save the deal. Usually, the case that comes up is that a client (by advice of his lawyer)

will want a model release for a particular subject, you don't have one, and you'll be locked in the discussion on whether one is actually necessary. Unless you are quickly persuasive, do not try to win this argument. You can try to save the deal by offering to sign an indemnity clause, as explained in Part 7, but barring that, the best thing to do is let it go. You will never win an argument with a lawyer if you aren't one yourself. (Of course, you could always send them a copy of this book!) ❖



