


UNDER THE ROSE OR OVER THE LINE?



*The Reasonable Expectation of Privacy in the
Context of Unmanned Recording Devices*

Privacy is “the condition or state of being free from public attention to intrusion into or interference with one’s acts or decisions.”¹ Most individuals sense that there are limits as to what constitutes a private or public forum. For an individual employed in the field of investigations or intelligence gathering, such intuitions are molded into concrete understanding when securing a private investigator’s license. However, no course of study can prepare an investigator for every potential scenario regarding a subject’s right to privacy. Similarly, no legal statute can fully encapsulate where the right to privacy begins or ends.

The issue of privacy becomes more complicated when a human is not physically present to gather and analyze all relevant factors in a given situation. Such issues have arisen with the proliferation of “un-manned recording devices.” These devices, remotely operated or installed and then left unattended, are often deployed to augment an investigator’s capabilities and present a unique set of legal challenges. When using such technology, the investigator operating or installing the recording device must be hyper-vigilant as to local legal statutes as well as what constitutes a “reasonable expectation of privacy.” By combining the knowledge of what is and is not permitted in manned surveillance with an understanding of how courts have traditionally defined the reasonable expectation of privacy, best practices for the installation and use of unmanned recording devices becomes possible. This document seeks to outline the relevant legal issues surrounding the use of unmanned recording devices, and set out best practices for their utilization.

¹ Black’s Law, 9th Ed, 2009: Law Encyclopedia

THE REASONABLE EXPECTATION OF PRIVACY STANDARD

The Fourth Amendment of the Constitution protects against warrantless searches of places or seizures of persons or objects in which they have a subjective expectation of privacy deemed reasonable in public norms.² The current concept of a “reasonable expectation of privacy” was introduced by the Supreme Court in 1967 in *Katz v. United States*.³ Until recently, most Americans simply assumed that they could expect privacy within their home and in other places where they made the effort to be out of view of others. This assumption was based primarily on the technological capabilities of the time. “The greatest protections of privacy were neither constitutional nor statutory, but practical.”⁴ With advances in technology, particularly in the field of telecommunications, that reality changed. As was said by Justice Murphy:

*The search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment.*⁵

In the dissent of *Katz*, Justice Harlan created the test to determine what constitutes a reasonable expectation of privacy.⁶ The two-part test determines whether an action by the government has violated an individual's reasonable expectation of privacy.⁷ The test asks the following two questions: (1) Has an individual exhibited an actual (subjective) expectation of privacy; and (2) is the expectation one that society is prepared to recognize as reasonable? If both of these requirements have been met, and the government has taken an action which violates this “expectation,” then the government's action has violated the individual's Fourth Amendment rights.⁸

The Supreme Court in *Rakas v. Illinois* (1978), stated that the “expectation of privacy must have a source outside of the Fourth Amendment either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”⁹ For example, private homes are at the core of Fourth Amendment protection, as they are closely associated with the ownership interest in property law.¹⁰

². U.S. Const. amend. IV.

³. *Katz v. United States*, 389 U.S. 347 (1967)

⁴. *United States v. Jones*, 132 S. Ct. 945, 963 (2012).

⁵. *Goldman v. United States*, 316 U.S. 129, 139 (1942)

⁶. *Katz v. United States*, 389 U.S. 347 (1967)

⁷. *Id.*

⁸. *Id.*

⁹. *Rakas v. Illinois*, 439 U.S. 128 (1978)

¹⁰. *Id.*

PRIVACY IN THE CONTEXT OF PRIVATE INVESTIGATIONS

In the context of private investigations, any evidence obtained in violation of an individual's privacy will not be admissible in a court of law. Therefore, surveillance in a public place is not private and there is no reasonable expectation of privacy, making such evidence admissible. In contrast, surveillance in areas such as bathrooms, locker rooms, changing/dressing rooms, bedrooms and other areas where a person should expect a high level of personal privacy is off limits. The so-called "gray area" lies between these two seemingly obvious ends of the privacy spectrum. Determining whether the law protects your privacy is often a question of what society deems is reasonable.

While the test outlined above will be a useful guidepost for private investigators, it is clear it was created to protect citizens from an oppressive government. In fact, case law regarding what is considered private vs. public in the specific context of non-governmental surveillance are few and far between, likely adjudicated in specific workers compensation, family, or small claims courts. However, an investigator, when questioning the legality of his actions, would be prudent to apply the Katz test to a given situation as a starting point. As it pertains to unmanned recording devices, below are a list of 10 best practices for an investigator's consideration.

BEST PRACTICES

1. The device must be placed on/in an object owned by the investigative firm, on public land, or on private land with the express permission of the owner of said land.
2. Even with express permission, if placement of the device on private property allows for a vantage point that violates the subject's reasonable expectation of privacy, such a location is disqualified.
3. The device may not be placed in a location which would allow a vantage point a manned investigator would not enjoy. (ie: placed on the top of a telephone pole allowing a view over a privacy fence)
4. The device may never be attached to any piece of property owned by the subject, such as a vehicle.
5. As with any situation, if questioned by law enforcement, do not lie.
6. Ensure the device has no markings which would allow a passerby or the subject to connect it with the investigative firm.
7. When installing the camera, an investigator may not trespass or "cut-through" private property to access an advantageous vantage point.
8. It is important to be aware of the state's wiretapping laws, but best practice to ensure no audio is captured by the device.
9. If controlled remotely, the same rules which apply to manned surveillance apply. For example, an investigator may not zoom in to peer through a window, or into a garage even if the door is open.
10. The device may never be placed in a location which may cause harm, directly or indirectly, to anyone.