Altered Realities: The Effect of Digital Imaging Technology on Libel and Right of Privacy

Lisa Byrne Anastasio Potter

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol17/iss2/5

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Altered Realities: The Effect of Digital Imaging Technology on Libel and Right of Privacy

by

LISA BYRNE ANASTASIO POTTER*

“What is truth? said jesting Pilate, and would not stay for an answer.”1

Table of Contents

I. Digital Imaging Technology .................................. 498
   A. The Digitalization Process .......................... 498
   B. Advancements into the Consumer Market ....... 499
II. Uses of Digitalized Imagery in the News Media:
    Print and Television .................................... 500
III. Areas of Law Affected by Digitalized Imagery ........ 502
IV. Libel ............................................................ 505
    A. Defamation: Slander and Libel .................... 505
    B. The Defense of Truth ............................... 506
V. Right of Privacy ........................................... 507
    A. Appropriation ...................................... 508
    B. False Light .......................................... 510
    C. Public Disclosure of Private Facts ............. 510
VI. Analysis ..................................................... 513
    A. Truth of Gist: In Content or Form? .............. 513
    B. The “Implication” Created by the Existence
       of a Photograph ..................................... 515
    C. Effect on Standard of Care ......................... 517
       1. Actual Malice ...................................... 517
       2. Negligence ........................................ 519
    D. Reasonably Believable: Who’s to Say? ........... 521
    E. Notice: A Solution? .................................. 523
VII. Conclusion .................................................. 526

  Director of Business Affairs at Tapestry International, a Film Distribution Company in
  New York City. The following Note won the Los Angeles County Bar Association’s Sev-
  enth Annual Entertainment Law Writing Competition.

1. Francis Bacon, Of Truth, in FRANCIS BACON’S ESSAYS 5 (John B. Alden ed., 1887)
   (1625) (quoting John 18:38).
Introduction

If Pilate had stayed, he would have been in for a treat: shifting pyramids, holstered guns disappearing from shoulders, heads and bodies interchanging at whim. Digital imaging technology has thrust photography into the realm of subjectivity. Although the manipulation of photography has been possible for decades by means of "staging" or traditional techniques, photography, especially photojournalism, has been offered up to the public and received as objective documentation of reality. Society did not question whether a photograph depicted reality, whether it was truthful. There was an arguably mistaken belief that the camera was an objective and truthful witness. Photographs simply did not lie.

There are many areas of the law in which truth makes a difference, but in defamation and privacy law, it is a critical part of the test of liability. Essentially, truth is a defense in both libel and invasion of right of privacy claims; therefore, when the judge and jury must decide whether the plaintiff's rights were infringed, they must ask and answer the question: what is truth? In a world where photographs did not lie, truth in images was relatively simple. Society, of which judges and juries are members, is now confronted with photographs that are as easy to manipulate as the written word; society, however, has not yet realized that the old verities of photography and photojournalism have fundamentally changed.

The concept of "truth" is timeless and perhaps subjective. It is timeless in that great thinkers have sought truth since the beginning of civilization. It is subjective because we believe that something is true only after it has been filtered through our own minds and perhaps many other minds as well. If we hear a story, we may or may not

---

2. Just to name a few photojournalism uses of digital imaging technology. Fred Ritchin, In Our Own Image: The Coming Revolution in Photography 17-20 (1990). In 1982, National Geographic retroactively repositioned its photographer by digitally moving the Egyptian Giza Pyramids closer together to accommodate the magazine's vertical format cover. National Geographic, Feb. 1982; see discussion infra part II. In 1985, Rolling Stone, opting for a kinder, gentler cover photograph, digitally removed the gun and holster from the shoulder of Don Johnson, star of the then-popular television cop show Miami Vice. Rolling Stone, Mar. 28, 1985. The cover photograph on the May 20, 1991 issue of Time showed Vice-President Dan Quayle standing behind President George Bush. The photograph was digitally altered six times to show six different potential running-mates standing behind the President in lieu of Mr. Quayle. The heads of five of the six politicians were cloned and grafted onto Quayle's body, except in the case of Nancy Kassebaum, where only Quayle's hands were used. Time, May 20, 1991; see discussion infra part VI.D.

3. Ritchin, supra note 2, at 38.

believe the tale, or we may believe some parts and not others. Assume, for example, that I tell you “Phyllis cheated on her Civil Procedure exam.” Your belief in the story depends on a number of factors. First, who is telling the story: Do you know me well? Do I have a reputation for honesty? Do you like me? Second, who is the story about: Is Phyllis the type of person who would cheat? Do you think she might need to cheat? Do you like Phyllis? Third, does the story comport with your notion of reality: Is it remotely possible to cheat on Civil Procedure exams? Is it something you can imagine happening? or is it physically impossible or nonsensical (Phyllis has never taken a Civil Procedure exam? Civil Procedure does not exist as a course anywhere in the world but is a fictional subject created by Scott Turow to add drama to his latest novel)? And fourth, your personal nature: Are you generally credulous? skeptical? or somewhere in between?

In our everyday life, the question of truth does not trouble us in a profound manner; instead, we absorb information by personal experience, or truth is fed to us by the media: television; newspapers; and radio. When people want to be entertained, they turn on Star Trek or read a John Irving novel. When people want to know what happened today, they turn on CNN or read a Boston Globe. People do not expect that the images they see on the television news or in Newsweek may be as fictional as those in Star Trek. The reason? Digital imaging technology.

“Photographs don’t lie” is a common maxim; people believe that photographs are “true” depictions of reality. Historically, unlike paintings or drawings, photography objectively captured the actual event, and except for difficult and time-consuming alteration techniques, photography could not be manipulated without the change being noticeable.

The advent of digital imaging technology, with its ability to create and grossly manipulate photographic images with ease and without detection, will likely create claims of libel and invasion of privacy based solely on the publication of a digitalized image. Such litigation has yet to reach the courts, although the technology is in common commercial use. It is only a matter of time before we find out, perhaps with little preparation by the courts, what the potential effects are of photograph digitalization technology on libel and right of privacy law.

---

Part I of this Note discusses the process of digital creation and manipulation of images as well as advancements into the consumer marketplace. Part II provides an overview of the uses of digitalized imagery in the news media, both print and television. As consumers begin using digital imaging technology in the personal sphere to manipulate home movies and holiday photos to remove ex-husbands or clean-up an unattractive pose, for example, society will be informed of photography's vulnerability to manipulation. This awareness could lead to either stricter standards for photographs, via judge and jury decisions, or a more relaxed attitude towards what we expect from photography and photojournalism. Part III discusses areas of the law, other than libel and right of privacy, that are affected by digitalized imagery. Parts IV and V explain the basics of the laws of libel and right of privacy. Part VI poses hypothetical situations to draw out the issues raised by digital imaging technology on libel and right of privacy laws and suggests a solution: notice.

I

Digital Imaging Technology

A. The Digitalization Process

Digital technology makes possible the creation and manipulation of photographs. Digital processing, for both still and moving imagery, begins with scanning. The operator of the digital processing technology scans a “printed photograph, photographic negative, a videotape frame, a television transmission, or a piece of paper” and captures the image in her computer. The scanning device breaks down the image into thousands of tiny geographic picture elements, known as pixels, assigning a number to each pixel. The pixels represent various attributes of the image, such as color, and the digital scanning device operator can manipulate the pixels in a variety of ways: colors can be changed, brightness or shadow added, elements of the picture removed entirely, or elements from other images added. The image can be stored in the computer for future use, transmitted to another computer, or fixed on paper or a video screen. The changes in the image

6. John Gastineau, Bent Fish: Issues of Ownership and Infringement in Digitally Processed Images, 67 Ind. L.J. 95, 97 (1991). Gastineau provides a detailed background regarding copyright law and the current uses of digital imaging technology in the commercial photography industry. He concludes that, although the photography industry is destined to change, photographers’ skills are changing too, increasingly embracing digital technology as a method to improve their work. Id.
are "virtually undetectable" and the technology is barely out of its infancy.\footnote{Ritchin, supra note 2, at 13.}

Although traditional photography techniques, such as airbrushing and cropping, allow for manipulation, there are three major differences between traditional photography alteration techniques and the alteration techniques now available through digitalization processing. These are: (1) the extent of manipulation possible; (2) the ease and speed at which images can be altered; and (3) the virtually imperceptible nature of the alterations by digital scanning.\footnote{See generally id.} The clever operator of a digital scanning device can create an image of Frank Sinatra in a string bikini on the moon which would be impossible to tell was a "fake" were it not for the fact that such a situation is ludicrous and currently physically impossible (at least the moon part).

True, digitally created photographs can be used to entertain and even educate, but there is a sinister side to the power of imagery manipulation. The potential for misuse in the news media industry is great, and the possible results range from a "benignly" misinformed public, to the destruction of an individual's reputation and personal life, or even the intentional deception of the public for political or monetary gain.\footnote{See discussion infra part VI.} The possible Orwellian results of misuse of digital imaging technology is frightening; however, such fears must be weighed against the equally disturbing solution of restricting our constitutionally protected freedom of speech.

\section*{B. Advancements into the Consumer Market}

The use of digital imaging technology in the personal sphere will change our attitude toward photography, thus affecting our expectations and standards regarding photographic imagery in the courtroom. Digital imaging technology is no longer just for professional photographers or special effects artists. Although the American consumer market has not yet fully embraced digital imaging technology, the time is rapidly approaching. Traditionally, digital technology was far too expensive and difficult to be of interest to the average amateur photographer; however, as the technology has developed, the costs have plummeted and extensive specialized skills are no longer needed to create your own desktop darkroom.\footnote{John Durniak, Electronic Imaging Takes a Step Forward, N.Y. TIMES, Aug. 2, 1992, § 9, at 15; Dan Fost, Honey, Make Sure We Bring the CD-ROM Snapshots to Grandma's, GANNETT NEWS SERVICE, Mar. 25, 1992, available in LEXIS, Nexis Library, Arcnews File; Joshua Quittner, What's Wrong With This Picture?, NEWSDAY, Sept. 17, 1991, at 57.} Although even the industry
is uncertain how soon consumers will embrace the power of the computer to alter family pictures,\(^{11}\) industry leaders such as Kodak are beginning to mass-market items such as Photo CD, a compact disc player that not only plays music but also photographic CDs and allows the operator to edit the images on-screen.\(^{12}\) Kodak has also recently introduced a new digital still-imaging camera which costs from $8,500 to $10,000.\(^{13}\) Although the price is still prohibitive in the consumer market, these new cameras cost less than half the price of the previous industry models, which indicates a general trend of downgrading costs and increasing ease and accuracy.\(^{14}\)

II

Uses of Digitalized Imagery in the News Media: Print and Television

The current uses of digital imaging technology by the print and television news media has spurred industry debates over the ethics of using digital technology to manipulate news photographs. The uses of digitalization in print and television photojournalism share many similarities, but there are salient differences between the attitudes of the print industry and those of the television industry about manipulation of news images.

In print journalism, the ability to manipulate images is pervasive at both the national and local levels and "[d]igital imaging already has quietly revolutionized . . . photojournalism."\(^{15}\) Many wire-photo services, such as The Associated Press and the Canadian Press now employ digital technology, and the cost of digitalized photography scanners, frequently employed by newspapers and magazines to "read" still photographs taken by conventional photography, or even the new digital photography, start at only a few hundred dollars.\(^{16}\)

Similarly, the technology to manipulate moving images via computer is sophisticated and available to television news journalists.

11. See generally Fost, supra note 10.
12. John Holusha, American Snapshot, The Next Generation, N.Y. TIMES, June 7, 1992, § 3, at 1. Photographs taken by a traditional film camera can be transferred to the CD later for manipulation. Id. According to computer industry experts, the future of technology will be the home media market. Wall Street Week (Vermont ETV television broadcast, Jan. 22, 1993).
16. Id.
“Digital amending capabilities are presently available to television network news divisions ... [and soon], many local television stations will have the same technology.”  

The print and television journalism industries greatly differ, however, with respect to their attitudes towards manipulation of news imagery. Print journalism has taken the high road, almost universally declaring that manipulation of news images is unethical because it alters what is purported to be the “truth.” However, there are three exceptions to the rule. There is little industry concern regarding the manipulation of news pictures for the purposes of (1) cleaning up the technical appearance of an image, such as removing dust particles, scratches, and the like, (2) creating “photo illustrations,” or (3) enhancing a photograph to depict “more accurately” what the photographer saw. Photo illustrations are “pictures that are clearly the product of photo manipulation.” Although there is disagreement, on a case-by-case basis, whether a digitally manipulated photograph qualifies as a photo illustration and thus passes muster, the industry attitude is to err on the side of caution.

In contrast, the general attitude of television news journalism is blasé at best. During an Annenberg Washington Program seminar on the application of digitalized manipulation to photojournalism, not one of the “ten very prominent network and local television news people” invited to attend the seminar responded on the issue of unethical imagery manipulation in the television news media. In print journalism, manipulation of news photographs, such as National Geo-

18. See Michael Karol, Elvis Lives: Image Manipulating Abuses, Graphic Arts Monthly, Aug. 1991, at 68 (discussing the guidelines promulgated by the American Society of Newspaper Editors); New Picture Technologies, supra note 4, at A42 (discussing the policy of the St. Louis Post-Dispatch not to manipulate news images and the similar in-house guidelines at the New York Times, the Asbury Park Press, etc.); Quittner, supra note 10, at 57 (discussing the promulgation of strict rules regarding industry manipulation by many newspapers).
19. Quittner, supra note 10, at 57.
20. Id. For example, the cover photographs on the May 20, 1991 issue of Time magazine showed a photograph of Vice President Dan Quayle standing behind President George Bush. The photograph was digitally altered six times to show six different potential running-mates standing behind the President in lieu of Mr. Quayle. Although this is a fairly blatant example of digitalized image “illustration,” some readers believed that the pictures were “real.” Quittner, supra note 10, at 57; see discussion infra part VI.D.
23. Id.
graphic's historic Giza pyramids "move," created a storm of controversy. 24 Television journalists treat such imagery manipulation as part of the job. During the Reagan/Mondale presidential campaign, it was common practice at ABC-TV News to alter the appearances of both candidates, straightening a shoulder or fixing a candidate's posture for the viewing audience. 25

Nevertheless, despite the attitudinal differences between print and television news journalism, both media employ digital imaging technology to alter news images, and the benefits and problems raised by the digital manipulation of news imagery are the same for both. One of the ethical and legal issues raised by the advent of digital imaging technology in the news media is the effect on libel and right of privacy laws. In other words, what is going to happen as the news media substantively manipulates images of people?

III
Areas of Law Affected by Digitalized Imagery

Digital imaging technology affects legal issues other than libel and right of privacy through its myriad of entertainment and edu-

24. NATIONAL GEOGRAPHIC, Feb. 1982; Tomlinson, supra note 17, at 254. NATIONAL GEOGRAPHIC moved the Giza pyramids closer together so that both pyramids would fit on their vertical format cover. Then-editor Wilbur Garrett referred to the alteration as merely the retroactive repositioning of the photographer. RITCHIN, supra note 2, at 17. However, others in the industry disagreed; a similar controversy surrounded the publication of a photograph by the St. Louis Post-Dispatch. NEW PICTURE TECHNOLOGIES, supra note 4, at A42. The Post-Dispatch removed a Diet Coke can from a front-page photograph of amateur photographer Ron Olshwanger, taken by a Post-Dispatch photographer the night Olshwanger won the Pulitzer Prize for spot news journalism. Olshwanger had been drinking Diet Coke, while others attending the ceremony were sipping champagne, and the Post-Dispatch photographer (who was not consulted regarding the alteration) had purposefully left the Diet Coke can in the image as a statement about Olshwanger's character. After its share of criticism, the Post-Dispatch issued a policy disallowing the digital manipulation of any news images and requiring the approval of the managing editor for manipulation of illustrative photographs. Jane Hundertmark, When Enhancement is Deception, PUBLISH, Oct. 1991, at 51-52; NEW PICTURE TECHNOLOGIES, supra note 4, at A42.

25. Tomlinson, supra note 17, at 253. The advent of newscast "re-creation" or "simulation" raises similar issues. For example, in 1989 ABC-TV News reported on the ongoing governmental investigation of alleged spy Felix Block. During the broadcast of WORLD NEWS TONIGHT, ABC aired a simulated scene of Block exchanging a briefcase with a Soviet diplomat; ABC employees played the roles of Block and others, and the segment was shot through crosshairs, implying that it had been filmed by a hidden camera. Although ABC posted a notice on the screen that the footage was a "simulation," the notice was accidentally delayed. NBC and CBS commented that they planned on using similar "simulation" techniques in the future, and Joanna Bistany, Vice President of ABC News insisted that "[t]he content of the simulation was correct." BILL CARTER, ABC News Divided on Simulated Events, N.Y. TIMES, July 27, 1989, at C20. What if ABC had merged actual footage of Block with footage of a real Soviet diplomat?
tional uses. Sports video games which simulate the actual plays of a particular athlete are already on the market. The melting pot of faces in Michael Jackson's "morphing" video, and the amazing and amusing Diet Coke commercials featuring Humphry Bogart, Cary Grant, Groucho Marx, and others from eras past interacting with present-day celebrities, are courtesy of digital imaging technology. Although somewhat controversial, Virtual Reality is already available in "experience boutiques," allowing people to explore and interact with computer-created realities, as well as in the consumer home video game market.

Although fun and harmless uses for digital imaging technology abound, the ability to manipulate still and moving images without detection also creates a host of legal and ethical issues. The law has recognized and responded to the impact of digital imaging technology in a number of areas not covered by this Note, including copyright and evidence law. The ease of copyright infringement, the difficulty in proving infringement, especially when the original work has been altered beyond recognition, and the devaluing of the photography profession in general are current legal and industry concerns.

Acceptance of photographs as evidence will be, or at least should be, greatly curtailed as digital imaging technology becomes more and

26. In the Air with Michael Jordan, USA TODAY, July 2, 1992, at 7D.
27. Bruce N. Wright, Charged Up-Art: Designers Explore New Dimensions with Electronic Images, STAR TRIB., Sept. 19, 1992, at 1E. Michael Jackson's video shows the head of one person "melt" into the head of another person, then another person, and so on. Id.
28. Lambert, supra note 22, at 55. The Diet Coke commercials use clips from old films and merge them with today's footage of entertainers Paula Abdul, or Elton John, so it appears that the old film stars are interacting with Abdul, John, and various models. For example, Paula Abdul and Groucho Marx perform a dance together. Id.
29. Are New Realities More or Less Real?, U.S. NEWS & WORLD REP., Jan. 28, 1991, at 59. Virtual Reality, now available as an arcade game, is an interactive technology using audio and visual stimulants to create the illusion of being in an artificial world. Philip Elmer-Dewitt, Cyberpunk!, TIME, Feb. 8, 1993, at 60. The user is connected to and interacts with the artificial world through a computerized glove and headset. Id.
31. A detailed discussion of the effect of digital imaging on copyright law and the commercial photography industry can be found in Gastineau, supra note 6. Digital sound technology is to sound recordings what digital imaging technology is to still and moving images—the power to capture, create, and alter the original work with flawless ease. The most controversial use of digital sound technology has been digital sound sampling, the "borrowing" of a line of music from one song to incorporate into another. Digital sound sampling has spawned a number of copyright infringement cases and countless charges of plagiarism in the music industry. An informative discussion regarding digital sound sampling can be found in Note, A New Spin on Music Sampling: A Case for Fair Play, 105 HARV. L. REV. 726 (1992).
more common. Courts freely admit photographs into evidence, as long as the proponent of the evidence lays the proper foundation, usually a competent witness testifying to the photograph's accuracy.\(^3\) Because digital imaging technology allows for quick, easy manipulation that is virtually undetectable, even by an expert,\(^3\) the chance of tampering is much greater. Also, the extent to which an image can be altered is problematic; in traditional photography, cropping, airbrushing, and use of light and angle all can skew the "reality" portrayed in a photograph. Evidence law does not demand a 100% guarantee of no tampering, thus it suffices for a witness to confirm that, yes, the photograph is a fair and accurate reflection of the scene on the day in question.\(^3\)

In traditional photography, any major alteration requires great skill and time to create and would probably be detectable. Digital imaging technology, however, can extensively change an image quickly and nearly perfectly on a machine that is increasingly common for businesses and consumers to own.\(^3\) In a battery case, a seamless photograph of the defendant flogging the plaintiff would greatly favor the plaintiff. Following current evidence rules, an entirely fabricated image could be admitted by a witness' (perjured) testimony or as a "silent witness."\(^3\) In response to this increased risk of tampering, courts may require a stricter foundation before admitting a photograph into evidence. The ultimate result may be that authentic and valuable photographic evidence will be disallowed, while pure fabrications slip through.\(^3\)

Although the law has already confronted some problems resulting from digital imaging technology, many issues have yet to be raised. This Note examines the potential impact of digital imaging technology on libel and right of privacy law. While such issues have yet to surface


\(^{33}\). Researchers are creating systems to store scientific or otherwise confidential data, as well as digitalized images, in a tamperproof form by "coding" the material; however, as the technology to protect data advances, so does the technology to break these codes. John Markoff, \textit{Technology: Experimenting with an Unbreachable Electronic Cipher, N.Y. TIMES}, Jan. 12, 1992, at F9.

\(^{34}\). \textit{FED. R. EVID.} 1002 advisory committee's note.

\(^{35}\). \textit{See} discussion \textit{supra} part I.B.

\(^{36}\). A photograph may be entered into evidence as demonstrative evidence of to what a witness is testifying or as substantive evidence, whereby the photograph is entered into evidence without the testimony of a witness, and the photograph "speaks for itself." \textit{CARLSON ET AL., supra} note 32, at 269 (quoting Bergner v. State, 397 N.E.2d 1012 (Ind. Ct. App. 1979)).

\(^{37}\). A discussion about the effect of digital imaging technology on evidence law can be found in \textit{Tomlinson, supra} note 17.
in the courts, the media and computer industries are already grappling with them.

IV
Libel
A. Defamation: Slander and Libel

Truth is a key element to any defamation claim. Courts, therefore, have dealt with the issue of truth regarding the written word and photographs. Defamation consists of two different torts: slander, which usually involves spoken and unfixed defamatory statements, and libel, which involves written or somehow fixed defamatory statements. Originally, an action in libel applied only to the poison pen; however, libel was later extended to include “pictures, signs, statutes, motion pictures, and even conduct.”

Photographs and film/video footage, as fixed statements, are generally considered libel; therefore, this Note will not discuss slander.

In order to prevail in a libel action, a plaintiff must prove that the offensive material was false, defamatory, and published. A defamatory statement is one “which tends to blacken a person’s reputation or expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession.” To be considered published, the statement must have been communicated to and understood by a third person. Although there may be a cause of action for infliction of mental distress if the defamatory material is made known only to the plaintiff, there is no cause of action for libel without publication, in any of its various forms: newsprint; broadcast; display; performance; mailing, etc.

Originally, harm was presumed upon publication of a defamatory statement. If the statement was false, pejorative, and published, the plaintiff prevailed. However, as trickier cases arose, such strict liability seemed unfair and the Supreme Court limited liability based on First Amendment principles. In the seminal case, 

New York Times Co. v. Sullivan,

the United States Supreme Court decided that a public figure claiming libel in the context of his official capacity must prove that the defamatory material was made “with actual malice—this is, with the knowledge that it was false or with reckless disregard

---

39. Id. For a detailed discussion on slander, see id. § 112.
41. KEETON ET AL., supra note 38, at 798.
42. Id.
of whether it was false or not." The holding in *Sullivan* amounts to a reckless disregard standard for professional journalists. As one commentator stated, "a news organization or other media entity will not be held liable if it has acted at least somewhat responsibly in its fact-gathering, even if in the end it is wrong about what it comes up with and publishes to the world."

**B. The Defense of Truth**

Under the old common law, truth was an affirmative defense, and the defendant had the burden of proof. However, in *Philadelphia Newspapers, Inc. v. Hepps* the United States Supreme Court held that it is the plaintiff's burden to prove falsity, regardless of whether the plaintiff is a public or private figure. In a case where the truth cannot be objectively determined, the *Hepps* decision requires that the press always wins a "tie."

Whichever party bears the burden, truth remains a complete defense to libel. However, the offensive material need not be truthful in every detail, but the general "gist" must reflect the truth. In fact, there is an action in libel if all the details are truthful but the gist is

---

44. *Id.* at 280.
45. Oliver R. Goodenough, *The Price of Fame: The Development of the Right of Publicity in the United States, Part II*, 3 EUR. INTELL. PROP. REV. 90, 94 (1992). Courts have generally divided plaintiffs into two categories: public and private. RALPH L. HOLSINGER, MEDIA LAW 85 (1987). Public individuals, because of their voluntary exposure to the public eye, are always required to prove actual malice in a libel action; however, in 1974 the Court condoned the common state practice of allowing private plaintiffs to prevail on a negligence standard, a lower level of proof than actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Gertz, an attorney, represented the family of a young man named Nelson in a civil action against Robert Nuccio, a police officer convicted of murdering Nelson. Robert Welch, Inc. published *American Opinion*, a vent for John Birch Society ideology. Plaintiff Gertz sued Robert Welch, Inc. over an article published in *American Opinion* which stated that Gertz was a member of the Communist Party, that he had a criminal record, and that the Nuccio murder trial was part of a Communist plot he was involved in to discredit the local police. A jury found in favor of Gertz, but the trial court granted judgment notwithstanding the verdict in favor of the defendant on the grounds that the actual malice standard of *Sullivan* was not met; the appellate court affirmed. The Supreme Court reversed on the ground that the actual malice standard need not be applied to private plaintiffs. The Court stated that the states may set their own standards of liability for media defendants in libel actions by private plaintiffs because private plaintiffs have not voluntarily exposed themselves to the public and are less able to rebut defamatory publications than are public plaintiffs. The Court, however, held that presumed or punitive damages cannot be recovered by any plaintiff, private or public, unless the actual malice standard is satisfied. *Id.* at 350.
47. *Id.* at 776.
48. *Id.*
49. KEETON ET AL., *supra* note 38, at 840.
50. *Id.* at 842.
false. Photographs are not usually the sole cause of action in a libel case because historically photographs themselves were perceived as objective. It is usually a combination of an image with particular commentary or captioning which result in the libelous "statement." This Note will explore the possibility of digitally created or altered photographs serving as the bases for libel actions.

V
Right of Privacy

Truth also plays an important role in right of privacy claims. The concept of the right of privacy was born from the landmark 1890 law review article by Boston lawyer Louis Brandeis (who became a United States Supreme Court Justice) and his law partner Samuel Warren. Warren and Brandeis asserted that because "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency," individuals must be afforded legal protection from unwanted and personally offensive intrusion into their private affairs.

Most states have confronted the right of privacy issue through the courts and eventually fashioned either common law or statutory remedies. In many states, following the lead of Dean Prosser, the right of privacy developed into a four-pronged tort protecting an individual from appropriation, false light invasion of privacy, public disclosure of private facts, and unreasonable intrusion. However, Prosser's attempt at packaging the right of privacy into distinct parcels of "rights" was neither intended as a definitive statement of the law, nor did it apply to digital images.

51. Church of Scientology v. Flynn, 744 F.2d 694 (9th Cir. 1984). Defendant Flynn was an attorney who frequently represented former Church of Scientology of California (CSC) members in suits against CSC. During a speech, Flynn described the travails of his "war" against CSC, specifically detailing his refusal to accept a settlement offer from CSC and the ensuing verbal altercation. Flynn also described a harrowing experience on his private plane, which occurred shortly after the altercation with CSC, when he had to make an emergency landing of the plane because the fuel tank was mysteriously filled with gallons of water. The lower court dismissed the claim, but the appellate court reversed on the grounds that "it is well settled that the 'arrangement and phrasing of apparently nonlibelous statements' cannot hide the existence of a defamatory meaning." Id. at 696 (quoting Kapellas v. Kofman, 459 P.2d 912, 919-20 (Cal. 1969)).


54. Id. at 196.


56. KEETON ET AL., supra note 38, at 851.
succeed in becoming so.\textsuperscript{57} Essentially, Prosser informally surveyed
the types of claims brought under the right of privacy and grouped
them into these four general categories. However, privacy claims
rarely fit neatly into only one parcel, and they may not fit perfectly
into any of Prosser's categories.\textsuperscript{58} Because it is helpful to understand
the distinctions drawn by Prosser, this Note will adopt his four-prong
analogy solely for the purpose of explaining areas of privacy law rele-
vant to the issues raised by digital photography technology in news
journalism.

Unreasonable intrusion is trespass into a person's private physical
or mental sphere.\textsuperscript{59} This Note focuses on the legal and societal effects
digital imaging technology, specifically the possible claims in libel
and right of privacy resulting from publication of digitally-altered
images. Since publication is not an element necessary to prove unrea-
sonable intrusion, this prong will not be addressed.\textsuperscript{60}

A. Appropriation

Appropriation is the use of a person's name or likeness by the
defendant to her advantage and without the plaintiff's permission.\textsuperscript{61}
The right of privacy essentially protects a person's thoughts, feelings,
and sentiments affected by the unauthorized use of the person's like-

\begin{itemize}
\item[57.] William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960).
\item[58.] See generally Ken Gormley, One Hundred Years of Privacy, 1992 Wis. L. REV. 1335.
\item[59.] Holsinger, supra note 45, at 171; for example, in Galella v. Onassis, defendant Ron Galella was a freelance photographer who made a career of photographing plaintiff Jacqueline Kennedy Onassis. 353 F. Supp. 196 (S.D.N.Y. 1982). Galella followed Onassis and her children everywhere, capturing every conceivable moment on film. He was relentless in his quest, lying, bribing, or sneaking his way into her life, hounding her children and taunting Onassis and her companions. Although the court admitted that Galella had the right to photograph Onassis in public because she was a public figure, the court ordered Galella to maintain a certain distance from her because "[t]here is no general constitutional right to assault, harass, or unceasingly shadow or distress public figures." Id. at 223.
\item[60.] The tort of unreasonable intrusion is raised by other technological advances, such as caller-i.d. An informative discussion of the legal ramifications is found in M. Ethan Katsh, The First Amendment and Technological Change: The New Media Have a Message, 57 GEO. WASH. L. REV. 1459 (1989).
\item[61.] Prosser, supra note 57, at 401-02.
\item[63.] Id. In 1903, the New York State legislature passed the first statute codifying the right of privacy, 1903 N.Y. LAWS, ch. 132, §§ 1-2 (codified as amended at N.Y. CIV. RIGHTS
Appropriation incorporates a subcategory of the right of privacy: the right of publicity, which protects the commercial value of a person's identity. In *Haelan Laboratories v. Topps Chewing Gum* the Second Circuit held that the plaintiff, holding exclusive licenses for the names and images of various professional baseball players, had the right to enjoin others from using the name or likeness of the baseball players on other baseball cards. The right of publicity is most often referred to in connection with celebrities, allowing them to "control commercial value and exploitation of [their] name[s] or picture[s]."

The crux of appropriation is the proprietary right to control the use of one's own likeness within a commercial context. Courts have addressed appropriation claims involving the use of altered images for advertising purposes, with the salient question being: Is the altered photograph the same photograph the plaintiff gave the defendant permission to use? In most cases, the plaintiff was a model or actor who signed a contract or release in conjunction with the original (unaltered) photograph. Whether or not the defendant is liable for a breach of contract depends on whether the contract or release contemplated uses of an altered photograph. Yet even where a plaintiff consented in writing to the use of her portrait for advertising purposes... and agreed that she would forgo inspection and approval of the completed material when ready for publication, it does not follow that the consent signed by the plaintiff goes beyond its wording so as to exculpate, as a matter of law, the dissemination of all types of altered pictures or of libelous material.

Courts have essentially determined that a photograph, if altered enough, was no longer the same photograph for which the plaintiff granted unrestricted use.

---

LAW §§ 50, 51 (McKinney 1990)). The legislature was responding to the holding in Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902). In Roberson, the plaintiff, an attractive young woman, sued the company for using a picture of her, without her permission, on posters advertising flour; although New York state's highest court was sympathetic, the court held that a right of privacy was not currently in existence and it was for the legislature, not the judiciary, to craft such a right. Id. at 447.


68. *Russell*, 183 N.Y.S.2d at 27-28. The plaintiff granted the photographer unrestricted use of the photograph and expressly "[waived] the right to inspect or approve such contemplated portraits, pictures, or advertising matter used in connection therewith." Id.

69. Id. at 27-29.
B. False Light

A cause of action for the second right of privacy prong, false light invasion, generally requires that the plaintiff prove that (1) the material is false, (2) that it was published or made known to others, and (3) that it is highly offensive to a person of ordinary sensibilities. On its face, false light appears to satisfy the requirements for a defamation action, and in some states, false light is not a separate claim, but rather already covered by a claim of defamation.

Photographs have frequently been the basis for false light claims when the photograph at issue was used as an illustration for a news story unrelated to the plaintiff and implied something unfavorable and false about the plaintiff. As in defamation cases, truth is an absolute defense to a claim of false light, and the question put to judges and juries is: What is truth?

C. Public Disclosure of Private Facts

The third prong, public disclosure of private facts, is the only right of privacy infringement claim where truth does not work as an absolute defense. As such, it is often the loser in a First Amendment showdown. A claim of public disclosure of private facts requires that (1) the publication concern “the private, as distinguished from the public, life of the individual,” (2) the publication is not “news-

70. Donaldson, supra note 55, § 2a.
72. However, in states that do recognize false light claims, false light differs from defamation in two ways. Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976); Gill v. Curtis Pub. Co., 239 P.2d 630 (Cal. 1952). The first difference is the subjective standard; unlike defamation, false light does not require that the false statement be objectively defamatory, only that a reasonable person in the plaintiff’s situation would find it offensive. Donaldson, supra note 55, at 40-41. The second difference is the scope of “publication.” Id. In a defamation action, any publication or dissemination of the defamatory material to a third person constitutes publication; however, because of the subjective nature of false light, courts have often required that the invasion of privacy be substantial and that the general public, or at least a portion thereof, be exposed. Id. at 41, 43.
73. Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948) (denial of motion to dismiss invasion of right of privacy claim by plaintiff taxi driver against the Saturday Evening Post over the publication of plaintiff’s photograph to illustrate an unflattering article about taxi drivers); Gill, 239 P.2d 630 (reversal of dismissal of husband and wife plaintiffs’ claim of invasion of privacy against Ladies’ Home Journal over publication of photograph of couple nuzzling in private used to illustrate story on love); Keeton et al., supra note 38, at 864.
74. RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977). See also Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983).
75. HOLINGER, supra note 45, at 181.
worthy," (3) the publication is "highly offensive to a reasonable person," and (4) the information is not found in a public record.79

A frequent complaint of public disclosure of private facts regarding the plaintiff's likeness occurs when a picture of the plaintiff was used to illustrate a general topic.80 Courts have generally found that a claim will not stand if the implication of the picture and article taken together is appropriate, and the publication is newsworthy.81 Whether or not certain information is "newsworthy" is a subjective jury question. A court may instruct the jury to "consider (1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety."82

In Diaz v. Oakland Tribune, Inc. plaintiff Diaz was the female student body president at the College of Alameda.83 She sued the Oakland Tribune for public disclosure of private facts after the Tribune published an article about her sex-change operation.84 Although it was true that Toni Ann Diaz had once been Antonio Diaz, Ms. Diaz had made every effort to conceal her past as a man and to begin a new life as a woman.85 The jury agreed with Diaz that the defendant paper and columnist had infringed on her right of privacy by public disclosure of private facts.86 The jury also decided that the defendants should pay punitive damages arising from the mean-spirited tone of the article and awarded Diaz a total of $775,000.87 The appellate court reversed and remanded the case on the ground that the trial judge improperly instructed the jury regarding the second element, whether or not Diaz's sex-change operation was "newsworthy."88 The appellate court followed the First Amendment standard articulated in New York Times, Co. v. Sullivan,89 shifting the burden of proof from the defendant to the plaintiff. Ms. Diaz would have to prove that her

79. Howard, 283 N.W.2d at 298-300.
80. KEETON ET AL., supra note 38, at 862.
81. Id.
84. Id. at 122.
85. Id. at 123.
86. Id. at 125.
87. Id. at 122.
88. Id. at 130.
operation was not newsworthy, instead of the defendant having to prove that the information was newsworthy.\textsuperscript{90}

In \textit{Time, Inc. v. Hill}\textsuperscript{91} the Hill family sued \textit{Life} magazine for infringement of their right of privacy. In 1952 the Hill family was held hostage in their suburban home by escaped convicts.\textsuperscript{92} After the family was released unharmed, members of the family stressed that their captors had been polite and non-violent.\textsuperscript{93} Three years later, after the Hills had moved to another state and gladly returned to private life, a play was produced loosely based on their hostage experiences.\textsuperscript{94} The play, which portrayed the hostage incident as violent and dangerous, did not purport to be an accurate account of the Hill family experience and did not use the Hill name. However, when \textit{Life} magazine decided to write an article about the play, the editors decided to tie in the Hill family's real life incident.\textsuperscript{95} \textit{Life} set up a photo shoot for the actors who were portraying the family members in the play at the Hill's original home where the incident occurred.\textsuperscript{96} The photographs, which accurately depicted the play storyline but did not accurately depict the Hill family experience, showed the family defending itself against the vicious aggressions of the convicts.\textsuperscript{97} The \textit{Life} article portrayed the play and photographs as a reenactment of the Hill family experience.\textsuperscript{98} The Supreme Court, in reversing the decision of New York's highest court, held that whether \textit{Life} knowingly or recklessly published untrue facts or whether \textit{Life} was merely negligent was a jury question.\textsuperscript{99} It was not clear to the Court how true the reenactment was and how culpable the defendants were.\textsuperscript{100}

Although truth is not a traditional defense to public disclosure of private facts claims, a claim could arise where a defendant has created or altered a photograph so as to disclose a private but true fact. Assuming that the content of the photograph is accepted as "true," libel and false light claims would not stand. However, courts and juries may or may not accept a re-created image as an expression of truth. Moreover, what would be the criteria for truth if the courts and juries

\begin{itemize}
\item 90. \textit{Diaz}, 139 Cal. App. 3d at 130.
\item 91. 385 U.S. 374 (1967).
\item 92. \textit{Id.} at 378.
\item 93. \textit{Id.} at 380.
\item 94. \textit{Id.} at 377-80.
\item 95. \textit{Id.} at 379.
\item 96. \textit{Id.} at 377-78.
\item 97. \textit{Id.} at 380.
\item 98. \textit{Id.} at 377-79.
\item 99. \textit{Id.} at 391, 397.
\item 100. \textit{Id.}
\end{itemize}
did accept a re-created image as an appropriate expression of a private fact?

VI
Analysis

At first glance, it seems easy for a plaintiff in a libel case involving a purposefully created digitalized image to prove that the image is "false." The picture is not "real." It is not an actual photograph of a particular event. However, such a conclusion would rely on a physical, unyielding, and perhaps unconstitutional approach to assessing the authenticity of the photograph. As one court noted in 1935, a "true" picture is one that has not been tampered with, that simply shows exactly what the camera captured.101 Much has happened in the technological and legal worlds since 1935. The question now presented to the courts is: What is truth?

A. Truth of Gist: In Content or Form?

Truth is an absolute defense to libel. Furthermore, "absolute" truth is not required for a defendant to prevail in a libel action.102 There are at least two ways courts could address libel claims over digitally altered images. First, courts could require strict "physical truth" by mandating that the photograph is an actual photograph of an actual event, without manipulation. Second, courts could employ the standards used to assess the "truth" of a written statement by regarding a true "gist" as true enough to avoid the charge of libel. If courts require "absolute" truth for photographs, thereby automatically finding "actual malice" if the offensive aspect of an image is the product of intentional digitalization, the First Amendment rights of publishers may be restricted. The First Amendment "does not demand literal truth"103 for a successful defense to libel. Therefore, per se liability

101. Sinclair v. Postal Tel. & Cable Co., 72 N.Y.S.2d 841, 842 (1935). Plaintiff Sinclair, a movie actor, sued the defendant for invasion of privacy over the use of a photograph of him for advertising purposes. The photograph was altered to show him telegraphing friends and admirers that his new movie would be playing at a certain theater. Sinclair was embarrassed by the implication of the alteration, comparing it to a lawyer requesting friends witness his performance at court. Sinclair had contractually agreed that the producers of his new movie Escape Me Never could use the original photograph of Sinclair for publicity purposes in conjunction with the movie. The defendants contended that the producers, armed with a release signed by Sinclair, had authorized this use. However, the court found that Sinclair had authorized only use of the "true" picture, not a composite picture "brought about by double printing or new matter added to a true photograph." Id.

102. KEETON ET AL., supra note 38, at 840.

for libel or right of privacy claims resulting from publication of digitalized images should not be the general standard.

The "gist" test, applied by courts to determine the "truth" of a written article, may be an ill-suited test for photographs. Assume, for example, that a digitalized image of Gennifer Flowers sitting on President Bill Clinton's lap was used to illustrate a news story about Mr. Clinton's alleged affair with Ms. Flowers. Assume that the digitalized image is based on reliable eyewitness reports of seeing Ms. Flowers sitting on Mr. Clinton's lap. Further assume that Ms. Flowers admitted that she had an affair with Mr. Clinton and that she sat on his lap at times.

Although the digitalized image is not a "real" photograph and therefore not true in the particular, it is "true" in the sense that it depicts a situation which is generally true (in this example, we know that Clinton and Flowers had some sort of relationship, confirmed by eyewitness accounts and Flowers' admission). The image also exemplifies factual events (witnesses saw Flowers sitting on Clinton's lap and Flowers admits to it). In this example, the "gist" of the digitalized image is true, even if the "specifics" are not true.

The First Amendment guarantees freedom of speech and the press, with special protection for information about issues of public interest. Information regarding the private behavior and morality of a presidential candidate is of great importance to the public. If Bill Clinton's exploits, including the reliable eyewitness accounts of Ms. Flowers sitting on his lap, were faithfully described in writing, Mr. Clinton would not have a cause of action in libel because the gist would be considered true. In this example, an expression of verifiable facts informing the public about a public person, be it by writing or illustration, is probably constitutionally protected speech.

However, is the "gist" of a photograph comparable with the "gist" of a written article? Not necessarily. In this case, the two distinct differences between photography and the written word affect the libel analysis. First, photographs are more damaging than words be-

---

104. Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) (asserting that the First Amendment protects speech about public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large"); New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' . . . The rule dampens the vigor and limits the variety of public debate.").

105. See Sullivan, 376 U.S. at 271.
cause of their seemingly objective nature. Words can distort facts, and imply falsehoods; Gennifer Flowers spoke freely with the press about her alleged twelve year affair with Bill Clinton, but he still won the presidency. If someone published a digitalized image of Flowers on Clinton’s lap, perhaps he would not be president.

"The test is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate."\(^{107}\) A photograph of Ms. Flowers on Mr. Clinton’s lap does more than illustrate his alleged extra-marital relationship. It suggests his indiscretion and lack of judgment. During the Clinton/Flowers media debacle, Clinton was criticized not only for possibly engaging in activity contrary to "family values" but also for his lack of judgment.\(^ {108}\) A photograph implies that the subject voluntarily "posed," belying a gross indiscretion which, in this example, many would say does not befit our nation’s leader.\(^ {109}\) The photograph might also imply the subject’s profound lack of respect for the cuckolded spouse and her innocent children. An article about an affair is damaging to one’s reputation because of its content. A photograph, on the other hand, is damaging, not only because of its content, but also because of its existence.

B. The “Implication” Created by the Existence of a Photograph

Although Mr. Clinton may not, in this example, have a cause of action for libel because of the “gist” test defense, his interests may still be protected. Mr. Clinton could argue that the existence of the photograph asserts that he “posed” or was otherwise imprudent enough to allow the picture to be taken.\(^ {110}\) Because the photograph implies more than its facial content, Mr. Clinton could argue that the photograph portrays him as something he is not—indiscreet and shameless. He might not be able to sustain the burden of proving that the content

110. See McCabe v. The Village Voice, Inc., 550 F. Supp. 525, 528 (E.D. Pa. 1982) (finding that, by virtue of the publication of a nude photograph of the plaintiff, “some readers might conclude that the plaintiff was supportive of avant garde photography, [however,] this communication cannot support a defamation claim”).
of the photograph is false, but if the publisher admittedly “created” the image, Mr. Clinton could argue that its existence is embarrassing on different grounds.

Courts have addressed the “implication” of the existence of an altered photograph as a basis for a cause of action in libel and invasion of right of privacy. Although the claims have consistently arisen regarding advertising, and not news media, uses, the legal reasoning is still applicable.

Whether the implication, and not only the actual content, can be defamatory depends on the subjective beliefs of the court. In *Dahl v. Columbia Pictures Corp.* the plaintiff, movie actress Arlene Dahl, sued Columbia Pictures for libel over an illustration of Dahl used to advertise her new movie. The illustration, according to the plaintiff, erroneously portrayed her movie character “Kathy” as sexually promiscuous and lewd. Dahl was not concerned that people would impute to her the qualities of her movie character as indicated in the illustrated advertisements. Rather, Dahl was concerned that the illustration proclaimed she had the “‘bad taste’ or ‘poor judgment’ to permit herself to be photographed performing, in the motion picture, acts suggestive of immorality, lust and sexual promiscuity.” The court held that Dahl did not have a cause of action in libel because “[t]he acceptance of such a role does not reflect upon [an actress’] character, judgment or taste.” However, the court noted that it is conceivable that an actress who had militantly avoided any sexually suggestive roles might have a cause of action in libel because the existence of such an illustration of her would imply a falsehood regarding her character.

In *Russell v. Harboro Books* the plaintiff, a top fashion model, sued the defendant bookstore, advertising agency, and bedsheet manufacturer for breach of contract and infringement of her right to pri-

---

111. The salient difference between the two uses is that news media uses, unlike commercial advertising, are constitutionally protected as free speech. See *supra* part V.A. (discussing appropriation claims involving the use of altered images for advertising purposes). Use of a person’s likeness without his or her permission for advertising use is a direct violation of the appropriation prong of the right of privacy, thus the cases in which an altered image is used often turn on whether the contract or model release signed in conjunction with the original photograph contemplated such a use. *Id.*

113. *Id.* at 711.
114. *Id.*
115. *Id.* at 712.
116. *Id.*
vacy over the use of her image in an advertisement for bedsheets.\textsuperscript{118} The original photograph of the plaintiff showed her in bed reading an intellectual book. In the adjoining twin bed was a male model, portrayed as her husband, also reading an intellectual book.\textsuperscript{119} The original photograph was used in newspaper advertisements and store posters to advertise the quality reading material available at the bookstore.\textsuperscript{120} The defendant bookstore subsequently sold the negative to Springs Mills, the defendant bedsheet manufacturer, for use in magazine advertisements for bedsheets.\textsuperscript{121} The photograph used in the advertisements was altered, showing the plaintiff as a prostitute, awaiting the advances of her elderly customer, who was reading a vulgar book.\textsuperscript{122} The plaintiff's concern was not that people would consider the content of the photograph (that she is a prostitute) true but was the implication the existence of the photograph created: that she would voluntarily pose for a lewd portrait.\textsuperscript{123} The court agreed that the plaintiff had a cause of action for invasion of privacy. The court relied, in part, on the fact that the plaintiff had meticulously cultivated her reputation for portraying wholesome, upstanding, moral women and had entirely avoided any suggestive or provocative portraits.\textsuperscript{124}

In both \textit{Dahl} and \textit{Russell} the content of the photographs were per se “fake;” Russell was a model and Dahl an actress, and the photographs purported to show them in “roles.” However, in both cases, the plaintiffs claimed that the photographs, by their existence, imputed a false and offensive statement about their real-life characters. Whether a judge or jury will agree that the implication itself, absent a false content, is enough to prevail in a libel or right of privacy action has yet to be seen. However, the decision is as subjective as the court’s decision in \textit{Dahl} that the public’s opinion of an actress' taste and judgment is not affected by the roles she chooses to play.

C. Effect on Standard of Care

1. Actual Malice

In order for actual malice to be proved, the plaintiff must prove that the media defendant “entertained serious doubts as to the truth of his publication.”\textsuperscript{125} Whether the media defendant entertained seri-
ous doubts or not depends upon the subjective belief of the defendant, which may be determined as follows: (1) "where a story is fabricated by the defendant, is the product of his imagination,"126 (2) where a story "is based wholly on an unverified anonymous telephone call[.],"127 (3) where a story is "so inherently improbable[,]"128 or (4) "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."129

Determining when a digitalized image is libelous and when it is protected speech presents a new challenge of line-drawing on a case-by-case basis. In Cantrell v. Forest City Publishing Co.130 the plaintiff prevailed on her claim of false light invasion of privacy under the same standard of care used in libel cases—"actual malice." Mrs. Cantrell became a widow when a bridge collapse killed her husband, Melvin. Shortly thereafter, defendant newspaper reporter Joseph Eszterhas wrote a news article about the disaster for defendant Plain Dealer magazine, focusing on the effect of Melvin's death on the Cantrell family. Five months later, Eszterhas went to the Cantrell home to cull information for a follow-up story. Mrs. Cantrell was not home, but Eszterhas spoke with her oldest son. The Court held that the defamatory article was published with actual malice because although Mrs. Cantrell was not present at any time during the reporter's visit to her home, Eszterhas wrote, "Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it."131

The Court did not apply the actual malice standard to the specific facts stated. Moreover, there was no discussion of whether Mrs. Cantrell did indeed wear "the same mask of non-expression she wore at the funeral,"132 nor whether Mrs. Cantrell actually refused offers of money from the people in town.133 The Court held that the implica-

---

126. Id. at 732.
127. Id.
128. Id.
129. Id.
131. Id. at 248 (quoting Joseph Eszterhas, Legacy of the Silver Bridge, Plain Dealer Sunday Mag., Aug. 4, 1968, at 32).
132. Id.
133. Although the Court noted that the defendants "conceded that the story contained a number of inaccuracies and false statements" regarding the article's content, the Court's primary concern was reporter Eszterhas' descriptions of Mrs. Cantrell, deceptively implying that he saw and spoke with her. Id. at 248-54.
tion that Mrs. Cantrell was present during the interview was a "calculated falsehood," rising to the level of actual malice.

What troubled the Court in Cantrell is similar to what is particularly troubling about determining the "truth" of a digitalized image. The factual content itself is one issue, and the presentation of those "facts" is another. Although a media defendant can avoid liability if the "gist" of a statement is true, liability might attach if there is intentional deception which misleads the reader.

2. Negligence

The effect of digitalized imaging on the standard of care required of a media defendant in a libel action is problematic in the case of a private plaintiff. After Gertz v. Robert Welch, Inc., courts in the majority of states have ruled that a private plaintiff claiming libel by a media defendant need only prove that the defendant was at fault—generally, a negligence or gross negligence standard. In some states, fault is measured by whether a "reasonable person" in the same position as the defendant would have published the statement. Other states measure fault based on the industry standard—whether a reasonable publisher in the same position would have published the statement. As future courts confront libel actions over digitalized images and inquire into the editorial practices of a publisher and her decisions regarding the publication, the industry standards will be brought to bear on the question of whether or not the publisher published the photograph with "knowledge that it is false or with reckless disregard of whether it was false or not."

The first standard requires the judge or jurors to determine if the reasonable person, like themselves, would have published the photograph. People who are unfamiliar with digitalization in their private lives may be shocked to learn that the "trick" photography used in

134. Id. at 253.
135. Id.
136. Although Mrs. Cantrell was a private plaintiff, the Court analyzed the case under the actual malice standard. Id. at 249. New York Times Co. v. Sullivan requires the actual malice standard for actions regarding public plaintiffs; Gertz v. Robert Welch, Inc. allows, but does not mandate, that private plaintiffs can prevail on a lower standard of care. See discussion infra part IV.B.
138. Id.; Holsinger, supra note 45, at 109.
139. Holsinger, supra note 45, at 109.
140. Id.
their favorite movies and humor publications is also widely used in news journalism. Disillusionment with photojournalism might result in a determination that a “reasonable person” would not have published the image. This conclusion sends the message that such news media manipulation is unacceptable.

However, as digital imaging technology becomes available to consumers and increasingly part of their personal lives, their standards for truth in photojournalism may not be so exacting. Instead of disillusionment, people familiar with digital imaging will be less exacting of “truth” for two reasons. First, they will be familiar with photography manipulation in the personal sphere and are unlikely to condemn behavior that they share. Second, because of their personal familiarity with digitalizing images, they will look at all images, including news images, with a healthy dose of skepticism and thus will not be shocked that the media engages in such practices. The reasonable person will be familiar with, and accepting of, digitalization of news images.

The “reasonable photojournalist” standard will be easier for a media defendant to satisfy. The media already use digital imaging technology in magazines, newspapers, and broadcast news, and continued use will solidify it as part of responsible journalism. For example, in the future, perhaps expert witnesses from well-known and respected entities like the New York Times or MacNeil/Lehrer NewsHour will testify that digital imaging technology is employed for almost all news pictures published or broadcast, whether to correct technical problems, to enhance a photograph’s impact, or to create illustrations for lead stories. A court may some day contend with an industry standard allowing for liberal use of digital imaging technology. In that context, the judge or jurors must decide if the media defendant before them was negligent—outside the standards of professional journalism—or whether she was following the rules of her profession, practices condoned and encouraged by respected peers.

142. See, e.g., COOL WORLD (Paramount 1992); DEATH BECOMES HER (MCA/Universal 1992); TERMINATOR 2 (Carolco 1991); WHO FRAMED ROGER RABBIT? (Disney 1988).

143. See, e.g., MAD (E.C. Publications, N.Y.); SPY (SPY Corp., N.Y.).

144. Lambert, supra note 22, at 55; Quittner, supra note 10, at 57. See generally Tomlinson, supra note 17; see discussion supra part II.

145. See discussion supra part II.B.

146. Id.

147. See discussion supra part III.
D. Reasonably Believable: Who's to Say?

Both print and broadcast journalism avow that “illustration” is an acceptable use of digitalized imagery. For example, the cover photographs on the May 20, 1991 issue of *Time* magazine showed a photograph of Vice President Dan Quayle standing behind President George Bush. The photograph was digitally altered six times to show six different potential running-mates standing behind the president in lieu of Mr. Quayle. Although this is a fairly blatant example of digitalized image “illustration,” some readers believed that the pictures were “real.” Only realistic, factual assertions about a person can be defamatory. The question for courts will be whether a digitalized photograph “illustration” is reasonably believable?

If the court determines that an offensive statement is not “reasonably believable,” then a claim for libel will not stand because libel requires a false representation of fact. In *Pring v. Penthouse,* plaintiff Kimberli Jayne Pring, the former Miss Wyoming at the Miss America Pageant, sued defendant *Penthouse* for libel. *Penthouse* published an article about a Miss Wyoming at the Miss America Pageant named “Charlene.” The article described Charlene’s thoughts as she was about to perform her baton twirling talent at the contest: She thought about an incident back home in Wyoming when she performed an act of fellatio on a football player from her school, causing

---

148. Quittner, *supra* note 10, at 57 (discussing the promulgation of strict rules regarding imagery manipulation by many newspapers but allowing for technical or illustrative uses).

149. *Time*, May 20, 1991; Quittner, *supra* note 10, at 57. The heads of five of the six politicians were cloned onto Quayle’s body, except in the case of Nancy Kassebaum, whereby only Quayle’s hands were used. *Time* wrote a clarification a few weeks later in response to readers puzzled by the recurrence of the same body in the same dark suit, or why Kassebaum had such masculine hands. *Id.; see discussion supra part II.*

150. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (affirming the appellate court interpretation of the “jury’s finding to be that the ad parody [depicting a mock Campari ad with the Reverend Jerry Falwell admitting that his ‘first time’ was during a drunken, incestuous encounter with his mother in an outhouse] ‘was not reasonably believable.’”); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (“[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas”); Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (finding that the statement, naming the plaintiff as a “traitor,” could not be taken literally in context and, therefore, was not a statement of fact); Greenbelt Coop. Publishing Ass’n v. Bresler, 398 U.S. 6 (1970); Pring v. Penthouse Int’l Ltd., 695 F.2d 438, 442 (10th Cir. 1982) (reversing the lower court finding of libel because “it is impossible to believe that a reader . . . would not have understood [the charged portions were pure fantasy and nothing else]”).


152. 695 F.2d 438 (10th Cir. 1982).

153. *Id.*
him to levitate.\textsuperscript{154} Charlene then goes on stage at the contest to perform her talent, the finale being a fellatio-like act on her baton, which stops the orchestra.\textsuperscript{155} Although Charlene did not win the Miss America title, the article describes that the television cameras focused on Charlene, not the crowned Miss America, while Charlene performed an act of fellatio on her coach "Corky," causing him to levitate.\textsuperscript{156} The court found that the article depicted pure fantasy, not fact, and therefore was not libelous.\textsuperscript{157}

Pring limited her complaint to the specific acts described in the article. She claimed that the article defamed her solely and specifically in that it gave the impression to the public that she had performed an act of fellatio on Monty Applewhite in Wyoming, on her baton, and also on her coach Corky Corcoran at the Miss America Pageant on national television.\textsuperscript{158} The court noted that the limited complaint prevented the plaintiff from asserting that the article imputed general immorality to her character.\textsuperscript{159} The court implied that Pring might have prevailed on a more general complaint; however, because the plaintiff alleged that only those specific acts were imputed to her character, she could not possibly prevail.\textsuperscript{160}

Although the satirical \textit{Penthouse} article described events that are physically impossible, satire is not always relegated to the land of "pure fantasy." The cover photograph of the November 1992 issue of \textit{SPY} magazine was a digitalized photograph showing Woody Allen in bed with England’s naughty Duchess of York, Fergie.\textsuperscript{161} Under the standard articulated in \textit{Pring}, the photograph of Woody and Fergie together in bed—a spoof on their contemporaneous, yet unrelated, sexual misadventures—is probably not libel, even though it is not physically impossible (strictly speaking).

Courts and juries must decide when humorous or illustrative digitalized images are not reasonably believable and when they are libelous because they depict what one could reasonably believe as "facts." The task becomes more difficult if a picture, like the Clinton/
Flowers example, is fact-based. Instead of a spoof showing Fergie and Woody in bed, what if the SPY cover were of a digitalized image of Woody in bed with Soon-Yi Previn, or Fergie in bed with her financial advisor/paramour John Bryan? Might a “reasonable person” believe that such photographs are real? Woody admits to a relationship with Soon-Yi, and there have been repeated charges (as well as blurry photos) of Fergie’s relationship with Bryan. The digitalized images depict a true “gist,” corroborated by admissions and other information. Even if the images were published in the context of a humor publication, might people reasonably believe that the photographs are true in the particular, as well as the general?

E. Notice: A Solution?

Digital imaging technology raises concerns about believability: Will people believe what they see? For courts, the “believability” of a story or statement is the heart of libel and right of privacy actions. The plaintiff is defamed, her reputation or feelings damaged because people believed what they read or heard was the literal truth. Whether an article or image is “believable” affects libel and right of privacy analysis in two ways. First, if the material is not “believable,” then it cannot purport to be fact. A second related issue is that if material is inherently unbelievable, then the reader/viewer has internal notice that the material is not true and, therefore, this internalized disclaimer saves the publisher from libel or right of privacy claims. Courts consider (1) whether it is reasonable for people to believe the statement, and (2) whether the statement is offered to the public as true facts. Clear-cut cases—our example of a picture of Frank Sinatra in a string bikini on the moon—would not be actionable because the “setting [is] impossible” and therefore no one could reasonably “believe” the photograph.

Courts have confronted a version of this “believability” dilemma when dealing with fictional stories about real people and have con-
sistently protected fictionalized accounts about real people as long as there was some sort of “disclaimer.” In *Hicks v. Casablanca Records* the disclaimer was the word “novel.” In *Davis v. Costa-Gavras* the prologue of the film informed the viewer: “This film is based on a true story. The incidents and facts are documented. Some of the names have been changed to protect the innocent and also to protect the film.” The introductory message shifts the focus of the digitalized image dilemma. Instead of the focus centering on the circumstances in which a digitalized image is protected speech, the focus is on the circumstances in which a disclaimer will protect the publisher of the digitalized image from libel and privacy claims. If a disclaimer will protect the publisher, what are the minimum standards for a disclaimer? Is it enough that the credit at the back of the magazine indicates that the image was the product of “paintbox” (as in the case of the *SPY* cover image of Woody and Fergie), or must a disclaimer appear on or near the image itself?

In *Byrd v. Hustler Magazine* plaintiff Julian Byrd sued defendant *Hustler* for libel and invasion of privacy. Byrd was a professional male model who had posed in an ad for Viceroy cigarettes. Byrd was attired in casual outdoor wear, making the “V” sign for victory with his hand. Hustler subsequently published the photograph but air-brushed out one of his fingers, giving the impression that Byrd was protected as “fiction” and defendant’s use of the word “novel” worked as a disclaimer; Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974), aff’d, 560 F.2d 1061 (2d Cir. 1977) (summary judgment for defendant in libel claim over fictionalized events and conversations in book about Ethel and Julius Rosenberg).


168. *Id.* Plaintiff Hicks, heir of the late mystery writer Agatha Christie, sued the defendant for libel regarding a fictionalized book and movie version of an incident in Christie’s life. *Id.* at 431. The court considered the book’s characterization as a “novel” to be a sufficient disclaimer for readers. *Id.*


170. *Id.* at 657. Plaintiff Ray Davis sued filmmaker Costa-Gavras for libel. *Id.* at 654. Costa-Gavras produced the docu-drama *Missing* which recounted the experiences of Ed and Beth Horman, as portrayed in the book *Missing* by Thomas Hauser. *Id.* at 655. American journalist Charles Horman, who lived in Chile, disappeared at the time of the 1973 coup in Chile. *Id.* Beth, his wife, and Ed, his father, went to Chile to find him. *Id.* In their pursuit, they contacted Ray Davis, who was the Commander of the United States Military Group in Chile at the time. *Id.* They discovered that Charles had been executed by the Chilean military. *Id.* The book and movie imply that Ray Tower, a United States government representative, was involved in the murder of Charles. Plaintiff Davis alleged that the movie implied that he was Ray Tower, had been involved in the murder, and had behaved offensively towards the Horman on a number of occasions. *Id.* at 655-57.

171. 433 So.2d 593 (Fla. 1983).

172. *Id.* at 594.

173. *Id.*
demonstrating an obscene gesture. Under the photograph was the caption:

Up Your Ad When you saw this ad in magazines or on billboards, you might remember having seen this gentleman with two fingers—rather than one—raised in front of his face. But the reader who sent us this couldn’t resist the temptation to change the picture. We can’t blame him—this is probably what the cigarette companies are saying to Americans.

The court found that the caption worked as a disclaimer and therefore no reader would believe that Byrd had actually posed for the photograph as depicted. The disclaimer, said the court, explicitly stated that the photograph had been retouched, and viewed as a whole did “not convey a false impression.”

The Institute for Journalism in Norway has proposed that the public be informed when an image has been altered by requiring all altered images to bear a mark of “montage,” an “m” in a circle. Although this would put the public on notice that the image has been manipulated, there are two problems. First, the montage mark does not inform the public how the image has been altered. Was a piece of dust removed, or has Oprah Winfrey’s face been superimposed on Ann-Margaret’s body? Second, because digitalized imaging is increasingly common for print and broadcast journalism, virtually all images will eventually bear the montage mark, thus negating its “warning” effect.

In libel and right of privacy cases, the extent of the “notice” that courts will require of the media will be decided on a case-by-case basis. In a case such as the SPY magazine cover of Woody in bed with Fergie, the montage mark might suffice as an indication that the photograph is not an assertion of fact. The mark itself would inform readers that the image has been created or altered; the content of the photograph, in the context of the media circus regarding the separate affairs of Woody and Fergie, would indicate that their union is improbable. And the context of a humor publication would further exculpate the publisher, since the publication does not purport to be a “serious” news journal, but rather a form of entertainment.

174. Id.
175. Id.
176. Id. at 595.
177. Id.
178. Id., supra note 10, at 57.
179. As the story goes, TV Guide digitally placed Oprah Winfrey’s head on Ann-Margaret’s sequin-clad body as a cover illustration showing the new, thin Oprah. Barbara Robertson, Photo Re-Touching Technology: Friend or Foe; Changes in Technology, COMPUTER GRAPHICS WORLD, Nov. 1990, at 92.
A photograph of Woody engaged in fisticuffs with Mia Farrow might require greater “notice.” The photograph would illustrate the well-publicized and ongoing legal and media war between Woody and Mia. Although such a picture would be quite effective as an illustration of their emotionally violent relationship, Woody, Mia, or both might take great exception to being depicted as crossing the line to physical assault. Even in the context of a humor publication, it is not inconceivable that either would sue for libel or invasion of right of privacy. In this example, the montage mark alone may not suffice. A judge or jury might decide that, under the circumstances, the photograph could be considered a false assertion of fact and the publisher would be liable because she published the photograph with actual malice, knowing the photograph to be untrue, or with reckless disregard of the truth or falsity of the statement. There is a general trend in the print news media industry that digital illustrations and digital alterations of news images should be clearly captioned to indicate that the image was digitally created or enhanced. Nevertheless, the trend in television news media does not seem to be swaying from its course disregarding the ethical dilemma posed by digitally creating or altering news images.

VII
Conclusion

Digital imaging technology is revolutionizing professional photography and is advancing into our personal lives; the law will, as always, eventually respond. The right of privacy itself was partly born of the industrial and technological advances allowing better collection and dissemination of information to an increasingly literate population. As the general population becomes more aware of digital imaging technology, using the technology at home, the expectations and standards of judges and juries will change to accommodate these changes in the news media industry. Digital imaging technology is a boon for fun and education, and its creative use should not be diminished. However, if the news media continues altering images without notifying viewers and readers, there are two likely legal and societal

180. See On-Line Conference on Photo Montages and Composite Images: Questions of Ethics, Jan. 28, 1992, available in COMPUSERVE, Desktop Publishing Forum (conference co-sponsored by Journalism Forum, discussion by editors on ethics and legalities of altering images for news stories); discussion supra part II.

181. See discussion supra part II.

results. In the short term, the victims will be individuals whose private lives are “illustrated” with digitalized images. Since the public continues to perceive photography as objective, a successful libel or right of privacy action will perhaps provide some vindication (and maybe even some cash to assuage the hurt), but the damage will still have been done. In the long term, however, the victim will be photojournalism. With the advent of digital imaging technology in the consumer market, people are catching on. When enough cases are publicized, the public will approach photojournalism with a skeptical eye. As a purist, I believe that the news media should not be in the business of re-creating images of “reality” or straightening the shoulders of our presidential candidates. However, the technology is here, and it is being used for just those purposes. If an editor has chosen the glitzy path of illustrating her story with a digital creation, the most logical, legal, and ethical way to avoid potential libel and invasion of privacy claims is notice.

183. A recent example of industry and consumer dismay over journalism ethics is the NBC News scandal involving “safety tests” of General Motors (GM) trucks. William A. Henry III, Where NBC Went Wrong, TIME, Feb. 22, 1993, at 59. On December 7, 1992, Dateline NBC, a well-respected news show hosted by Jane Pauley and Stone Phillips, featured a story on the safety hazards of the gas tank placement on certain GM truck models. Dateline (NBC television broadcast, Dec. 7, 1992). The NBC broadcast footage showed a GM truck exploding upon impact. NBC claimed the footage was from tests they conducted, but NBC failed to inform the viewers that the truck footage was staged. Incendiary devices had been placed near the errant gas tank to ensure fire upon impact. When GM sued NBC for defamation, a quick settlement followed. NBC apologized, via their Dateline hosts Pauley and Phillips, during the February 9, 1993 broadcast of Dateline. NBC admitted that staging the tank explosion without informing the viewers was inappropriate and assured the viewing public of the new NBC policy: no unscientific demonstrations in news stories. Dateline (NBC television broadcast, Feb. 9, 1993). Reaction by the media has been quick. According to Charles Eisendrath, Director of the University of Michigan Journalism Fellows Program, this incident is a “wake-up call” to the news media; people are desperate to trust journalists and this is a big setback for all. Good Morning America (ABC television broadcast, Feb. 11, 1993).