



3-1-1989

One Technological Step forward and Two Legal Steps Back: Digitalization and Television Newspictures as Evidence and as Libel

Don E. Tomlinson

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

Recommended Citation

Don E. Tomlinson, *One Technological Step forward and Two Legal Steps Back: Digitalization and Television Newspictures as Evidence and as Libel*, 9 Loy. L.A. Ent. L. Rev. 237 (1989).

Available at: <https://digitalcommons.lmu.edu/elr/vol9/iss2/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

ONE TECHNOLOGICAL STEP FORWARD AND TWO LEGAL STEPS BACK: DIGITALIZATION AND TELEVISION NEWSPICTURES AS EVIDENCE AND AS LIBEL*

*Don E. Tomlinson***

I.	Introduction	237
II.	History of Television Newspictures as Admissible Evidence	241
III.	The Relationship of Television Newspictures to Libel	244
IV.	From Analog to Digital: A Revolution in Television Technology	249
V.	Concerns About and Uses of Digitexed Television Newspictures	252
VI.	Possible New Life for False Light Privacy Invasion	255
VII.	Analysis and Conclusions	256

I. INTRODUCTION

Digitalization, the technological revolution now taking place in television,¹ will have a profound impact on the admissibility of television newspictures as evidence,² and on the status of television newspictures as

* Parts of this article appeared in two earlier articles by the author. See Tomlinson, *The Digital Amendment of Reality: The Future of Television Newspictures as Evidence and as Libel*, BULLETIN OF LAW, SCIENCE, AND TECHNOLOGY, May 1988, at 2-4, reprinted in Los Angeles Daily Journal, Oct. 6, 1988, at 4; Tomlinson, *Coalesce or Collide? Ethics, Technology and Television 1991*, 2 JOURNAL OF MASS MEDIA ETHICS, Spring/Summer 1987 at 21-31. The author gratefully acknowledges the editorial and research assistance of television engineer and program producer Tim Paul of Northern Telecom Corporation in Nashville, Tennessee, relating to the video and audio engineering aspects of the article.

** Arkansas State University (B.S.); University of North Texas (M.J.); University of Arkansas at Little Rock (J.D.). The author is a member of the Arkansas Bar and is an Assistant Professor of Journalism at Texas A&M University.

1. See Sadashige, *Video Recording Formats in Transition*, SMPTE JOURNAL, Jan. 1989 at 25; *The Digital Timetable: Too Much, Too Soon?*, BME: FOR TECHNICAL AND ENGINEERING MANAGEMENT, Sept. 1988, at 51.

2. Digitalization is likely to have quite an effect on the admissibility of video tape in general—just as video tape is gaining acceptance in the courtroom in a number of different ways. See, e.g., Joseph, *Videotape Evidence In The Courts—1985*, 26 S. TEX. L.J. 453 (1985).

an element of falsity in libel.

Video tape revolutionized television in the mid-1950s.³ Previously, local television news was coming of age but relied on sixteen millimeter film as its moving picture medium.⁴ Except in highly extraordinary circumstances, local television station news departments did not use the first video tape machines for on-location moving picture newsgathering because they were bulky, clumsy and expensive.⁵ Video tape machines were used to record studio productions, including local programming, commercials and promotions, and for general playback purposes.⁶

In the relatively short time since, video tape processes and machines have evolved from the original two-inch tape format to an array of small, portable and less expensive formats, including the current one-inch broadcast standard.⁷ Manufacturers, wanting to expand the video tape machine market, engaged in research and development during the 1960s and focused on the needs of television news departments, in addition to the rest of television.⁸ In the early to mid-1970s, local television station news departments disposed of their 16mm film cameras in favor of new and highly portable three-quarter-inch format video tape recorders and the electronic mini-cams that accompanied them.⁹

For television journalists, the most significant advantage of video tape over film was the immediate playback offered by video tape. Film had to be processed before it could be edited and broadcast. Video tape, on the other hand, only needed to be rewound.¹⁰

For the last fifteen years, television news has taken advantage of its conversion to video tape technology.¹¹ But the most radical change may not be the change from film to video tape, but the change from analog¹²

See also Stephens, *Kentucky Courts Go Video*, 9 AM. J. TRIAL ADVOC. 359 (1986). This article, however, deals only with television newscasters and not with video tape derived from any other source.

3. *See* D. DARY, TV NEWS HANDBOOK 31 (1971).

4. *Id.* at 119.

5. *See generally* Robertson, *Roll Tape: The Early Days of Hollywood's Independent Videotape Facilities*, MILLIMETER, Aug. 1988, at 59-68.

6. *Id.*

7. *See* H. ZETTL, TELEVISION PRODUCTION HANDBOOK 274 (4th ed. 1984).

8. *See* R. YOAKAM & C. CREMER, ENG: TELEVISION NEWS AND THE NEW TECHNOLOGY 1-2 (1985).

9. *Id.*

10. *Id.* at 10.

11. *Id.* at 1-2.

12. Pertaining to representations by means of continuously variable physical elements. For example, an analog signal fluctuates exactly like (analogous to) the original stimulus (physical quantity). The important aspect is that it is continuously variable and does not proceed in discrete steps (as in digital). You could think of a ramp as an analog representation and a staircase as a digital one.

video tape editing to digital¹³ video tape editing.¹⁴

The breakthroughs of digital video tape editing are complete image flexibility and no generational signal degradation.¹⁵ These technological breakthroughs will cause the legal problems which are the subject of this article. Digital technology, soon to be commonplace in local television stations, will allow easy and fundamental amendments to video tape images which are scientifically undetectable. These breakthroughs will impact litigants who subpoena¹⁶ television newscasters for use as evidence¹⁷ and libel and false light privacy invasion¹⁸ litigation because television newscasters alone now can constitute the element of falsity.¹⁹

Given the highly competitive nature of television news,²⁰ there is great potential for misuse of digital video tape editing. Media ethicist John Hulteng wrote:

With such capabilities, TV news producers will be able to fabri-

H. ZETTL, *supra* note 7, at 342. See also F. WILLIAMS, *THE NEW COMMUNICATIONS* 128-29 (2d ed. 1989).

13. Pertaining to data in the form of digits. The original stimulus is translated into many *discrete* steps, represented by the binary digits 0 and 1. . . . While the analog system may be represented by a ramp (continuous change), the digital system is more like a staircase (each step having a discrete value).

H. ZETTL, *supra* note 7, at 342. See also F. WILLIAMS, *supra* note 12.

14. See generally Ochiva, *The Dimension Extension*, MILLIMETER, Sept. 1988, at 81-90. See also G. ANDERSON, *VIDEO EDITING AND POST-PRODUCTION: A PROFESSIONAL GUIDE* ix (1984). The digitalization of television is by no means limited to the video tape recording and editing of television newscasters. On the contrary, the digital technology will replace the analog technology right down to the most basic of television's processes. This article, however, deals only with some of the possible legal ramifications of digitalization as it relates to television newscasters.

15. H. ZETTL, *supra* note 7, at 298.

16. This article assumes that the subpoenaing party has overcome any first amendment or common law privileges or shield laws, satisfied all evidentiary tests, including relevance to a significant legal issue, nonavailability from alternative sources, and need which is compelling enough to justify potential harm to the newsgathering process and ultimately been successful in acquiring the subpoenaed newscasters. See Bainbridge, *Subpoenaing the Press*, A.B.A. J. 68-74 (Nov. 1, 1988).

17. See, e.g., *Storer Communications v. Giovan*, 810 F.2d 580 (6th Cir. 1987) (newscasters requested by grand jury); *WBAL-TV v. Maryland*, 300 Md. 233, 477 A.2d 776 (Ct. App. 1984) (newscasters requested by prosecution); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) (newscasters requested by criminal defendant); *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (Pa. Sup. Ct. 1987) (newscasters requested by plaintiffs in two libel cases); *Anderson v. Fisher Broadcasting*, 300 Or. 452, 712 P.2d 803 (1986) (newscasters requested by plaintiff in tort action other than libel/false light); *Lynch v. Riddell*, 35 Fed. R. Serv.2d 185 (Callaghan) (D.C. Mass. 1982) (newscasters requested by defendant in tort action other than libel/false light).

18. *William v. ABC*, 96 F.R.D. 658 (W.D. Ark. 1983) (newscasters requested by plaintiff in libel/false light action).

19. *United States v. Nixon*, 418 U.S. 683 (1974).

20. H. E. GOODWIN, *GROPING FOR ETHICS IN JOURNALISM* 287 (1983).

cate simulations of news situations that for one reason or another had not been covered on tape or film as they were occurring. And when those simulations are fed into the nightly news, viewers will be unable to distinguish them from footage obtained from crews on the spot. . . .

The temptation then will be great, particularly where network competition is intense. Will the news producers be able to withstand it? Or will they rationalize that a simulated scene is "equal to" reality, particularly since it gives such immediacy and drama to the news report? What, then, of the viewer trying to sort out the facts?²¹

Journalistic bias provides another possible motivation for the digitizing²² of television newspictures. In this regard, Hulteng wrote:

[W]hen reporters, cameramen, or desk editors abuse the journalistic ethic by retouching the picture of reality a bit, it . . . [usually] results from the journalist's conscious or unconscious attempt to interpret the news so as to bring out the best points of a figure who is currently a media hero, or to reveal the black nature of a current media villain, or to advance a cause seen to be "right," or to unmask a movement perceived to be "wrong."²³

Should digitizing become routine, the use of television newspictures as evidence will be impaired because of the impossibility of certifying their integrity. Further, except for coming close in selective editing-type cases,²⁴ television newspictures have never, in and of themselves, constituted the element of falsity in the torts of libel and false light invasion of privacy; the words accompanying the pictures give rise to a cause of action.²⁵ While the words alone can give rise to a cause of action,²⁶ the newspictures alone normally cannot give rise to a cause of action since they, by themselves, lack an element of falsity.²⁷

21. J. HULTENG, *THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA* 168 (2d ed. 1985).

22. The term "digitex," coined by the author, is a combination of the terms digital, editing, and special effects, and signifies the concept of manipulating video and/or audio actuality through the use of the digital technology. Not all digitizing would give rise to legal or even ethical problems. Current uses, e.g., include squeezing the entire picture to fit over an anchorperson's shoulder. No harm done.

23. J. HULTENG, *supra* note 21, at 181.

24. *See, e.g.*, Uhl v. CBS, 476 F. Supp. 1134 (W.D. Pa. 1979).

25. *See, e.g.*, Clark v. ABC, 684 F.2d 1208 (6th Cir. 1982).

26. *Silvester v. ABC*, 650 F. Supp. 766 (S.D. Fla. 1986); *Lasky v. ABC*, 631 F. Supp. 962 (S.D.N.Y. 1986).

27. *Harrison v. Washington Post*, 391 A.2d 781, 783 (D.C. App. 1978).

The advent of digital editing of television newscapes makes it possible that newscapes alone could be false. Further, the problem is compounded in libel and false light privacy invasion cases because of the inability to prove whether the newscapes were altered, concealing the original libel.

II. HISTORY OF TELEVISION NEWSCAPES AS ADMISSIBLE EVIDENCE

Commentators have discussed the admissibility of motion pictures as evidence since 1923, when Dean Wigmore foresaw lawyers' desire to admit motion pictures and the concerns of opposing counsel and the bench regarding the pictures' accuracy and integrity.²⁸ An extensive treatment of the subject was undertaken just prior to World War II.²⁹ Although courts were hesitant to admit motion pictures as evidence,³⁰ the rule is now well-settled that motion pictures are admissible upon the laying of the proper foundation.³¹ The Federal Rules of Evidence have allowed courts to consider motion pictures, including film and video tape, for admission as evidence under the rules for admissibility of still photographs.³² No special rules apply to the admission of television newscapes as opposed to other kinds of photographic evidence.

The main criteria for the admission of any photographic evidence is accuracy.³³ Photographic duplicates must be authentic. Duplicates found to be authentic by competent evidence are admissible as originals.³⁴ Many cases involve the admissibility of photographic evidence, but these precedents are of little value in most instances because the issue depends on the circumstances of each case.³⁵ Courts tend to admit photographic evidence.³⁶

*Appelby v. State*³⁷ was perhaps the first case relating to the admissibility of newscapes. In *Appelby*, at defendants' trial for resisting and obstructing peace officers by the use of dangerous and deadly weapons, Indiana sought to admit a newsreel film of the alleged crimes.³⁸ The

28. J. WIGMORE, WIGMORE ON EVIDENCE § 798, at 107-09 (1923).

29. Gray, *Motion Pictures In Evidence*, 15 IND. L.J. 408 (1939-1940).

30. *Id.* at 411-13.

31. Joseph, *supra* note 2, at 454.

32. FED. R. EVID. 1001(2).

33. Joseph, *supra* note 2, at 453.

34. *See generally* FED. R. EVID. 1003.

35. Joseph, *supra* note 2, at 457.

36. *Id.*

37. 221 Ind. 545, 48 N.E.2d 646 (Ind. Sup. Ct. 1943).

38. *Id.* at 550, 48 N.E.2d at 648.

defendants argued that the sequence and chronology of the film had been altered by cutting and rearrangement.³⁹ On appeal after the defendants' conviction, the Indiana Supreme Court stated: "The fact that the continuity of the film in controversy had been disturbed was enough to warrant its exclusion."⁴⁰ However, the appellate court ruled that the lower court properly admitted still photographs made from frames of the newsreel.⁴¹

Today, editing of video tape applies to the *weight* accorded to the evidence by the trier of fact, not to its admissibility.⁴² Courts judge the authenticity of the video tape through the testimony of the persons responsible for the production (not necessarily technical production) of the video tape.⁴³ Other persons can authenticate newspaper pictures, however. *State v. Lewis*⁴⁴ involved television newspaper pictures taken at a family cemetery desecrated by grave robbers.⁴⁵ The defendant, convicted of being an accessory before and after-the-fact of the grave robbing, argued on appeal that the lower court erred by admitting improperly authenticated television newspaper pictures of the scene.⁴⁶ The appellate court ruled that the investigating sheriff properly authenticated the newspaper pictures with his testimony that the newspaper pictures accurately portrayed what he found at the cemetery.⁴⁷

Courts follow the chain of custody to insure accuracy when the video tape was produced by some entity outside the court's superintendence, such as video tapes produced by police departments including confessions and line-ups.⁴⁸ Generally, the testimony of the photographer will overcome chain of custody and entirety of product arguments regarding television newspaper picture admissibility.

*Bremer v. State*⁴⁹ involved the prosecution of Arthur Bremer for the attempted assassination of Alabama governor George Wallace in 1972.⁵⁰ CBS news photographer Laurence Pierce shot the historic newspaper pictures of the assassination attempt.⁵¹ The trial court admitted the film into evi-

39. *Id.*

40. *Id.*

41. *Id.*

42. Joseph, *supra* note 2, at 457.

43. *Id.*

44. 58 N.C. App. 348, 293 S.E.2d 638 (N.C. Ct. App. 1982).

45. *Id.* at 349, 293 S.E.2d at 639.

46. *Id.* at 351, 293 S.E.2d at 640.

47. *Id.*, 293 S.E.2d at 641.

48. Joseph, *supra* note 2, at 466.

49. 18 Md. App. 291, 307 A.2d 503 (1973).

50. *Id.* at 297-98, 307 A.2d at 510.

51. *Id.* at 345, 307 A.2d at 535.

dence⁵² over the objections of Bremer's attorneys, who argued that the film's chain of custody was not established and that Pierce's refusal to state unequivocally that the entire film was present meant the newspictures were not authenticated.⁵³ Pierce testified that he shot the film and delivered it to CBS in Washington, D.C. for processing.⁵⁴ Pierce viewed the film in open court and then stated that it fairly and accurately represented the scene at the time Governor Wallace was shot.⁵⁵ Pierce said that to the best of his knowledge the film shown was the entire roll.⁵⁶ The appellate court ruled that the newspictures were properly admitted at trial.⁵⁷

*State v. Molasky*⁵⁸ did not involve television newspictures but discussed the possibility of video tape alteration and the potential effect on its admissibility.⁵⁹ Molasky was convicted of rape, sodomy and child abuse.⁶⁰ The evidence used to convict Molasky included a home video tape depicting him, his future wife and his minor son engaging in various sex acts.⁶¹ On appeal, Molasky argued that the video tape should not have been admitted because it was testimonial in nature, it constituted a privileged communication, it contained statements by a co-defendant who was not present and it deprived him of his sixth and fourteenth amendment rights of confrontation.⁶² The court stated:

The tape was verified by a video tape expert who said it was an original video tape produced on a common home video cassette recorder. The expert said that the tape was not edited in any way and that it *could not be undetectably altered by any known editing method.*⁶³

With the advent of digital editing, experts will be unable to determine whether a video tape has been altered. The availability of digital editing equipment will also create peculiar chain of custody problems relating to the admission of television newspictures; even if the chain of title is clear, the video tape may still be subject to undetectable amendment.

52. *Id.*

53. *Id.*

54. *Bemer*, 18 Md. at 345, 307 A.2d at 535.

55. *Id.* at 346, 307 A.2d at 535.

56. *Id.*

57. *Id.*

58. 655 S.W.2d 663 (Mo. Ct. App. 1983), *cert. denied*, 464 U.S. 1049 (1984).

59. *Id.* at 667-68.

60. *Id.* at 665.

61. *Id.* at 666.

62. *Id.* at 667.

63. *Molasky*, 655 S.W.2d at 668 (emphasis added).

Generally, video tape evidence is marked and admitted as an exhibit, which makes it subject to appellate review.⁶⁴ With respect to the video taping of depositions, Gregory Joseph, Chairman of the Videotape Evidence Subcommittee A.B.A. Section of Litigation Trial Evidence Committee wrote:

Because video tape is susceptible to editing, and frequently must be edited prior to trial, it is important to provide a method of ensuring [the] integrity of the tape. Among the procedures suggested by the Uniform [Audio-Visual Deposition] Act are identification on camera of all video tape operators, parties, counsel and persons present, an on-camera announcement at the beginning and end of each video-tape unit to allow the viewer to determine that the tapes are being run in proper sequence, and use of a time [-code] generator or other indexing device which allows immediate detection of any matters edited from the tape.⁶⁵

With respect to the digitizing of television newscast, time-code generators provide little detection value because newscasts are not recorded with a visible time-code "window" and if located anywhere else, i.e., on an audio channel or in the vertical blanking interval, the time-code numbers could easily be erased and replaced to cover any digitizing.

III. THE RELATIONSHIP OF TELEVISION NEWSPICURES TO LIBEL

The majority of libel cases against television stations, much like libel cases against newspapers and magazines, are based on statements made by reporters or sources; the plaintiff's complaint is based on words and not on newscasts. Television newscasts become the subject of libel suits when the story and newscasts alone are not libelous, but taken together the television broadcast as a whole allegedly constitutes libel.⁶⁶ Plaintiffs rarely prevail in libel cases.⁶⁷ Usually, defendants win at the summary judgment stage.⁶⁸ Plaintiffs who survive summary judgment often win jury verdicts which are often reversed or reduced on appeal.⁶⁹

Television plaintiffs face the same obstacles as plaintiffs in tradi-

64. Joseph, *supra* note 2, at 467.

65. *Id.*

66. Harrison v. Washington Post, 391 A.2d 781, 783 (D.C. App. 1978).

67. See generally R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987).

68. *Id.* at 127-44.

69. *Id.* at 170-83.

tional libel suits. Additionally, the news media also suffers the high cost of litigating these libel claims.⁷⁰ Despite the great potential for losing outcomes, more television libel suits are filed today than before.⁷¹

Until the 1980s, very few television libel cases were filed where the newspictures were the only point of contention.⁷² Not until the 1970s did courts begin to scrutinize the word/newspicture juxtaposition requirement.⁷³ If this requirement is abandoned, thereby allowing the picture to be the sole basis for liability, the amount of libel litigation will dramatically increase.

One of the first reported word/television newspaper juxtaposition cases, *Harrison v. Washington Post*,⁷⁴ involved television newspaper pictures of a daytime bank robbery in Washington, D.C.⁷⁵ WTOP-TV's camera crew shot footage of two unidentified men in handcuffs being escorted into the bank by police.⁷⁶ The evening newscast included the bank robbery footage and a narrative that named a suspect arrested in connection with the robbery.⁷⁷ When the footage of the two handcuffed individuals was shown, the reporter narrated: "In the flurry of post-robbery excitement . . . police seized a couple of men who fit the hold-up man's description. . . . Both men were later released."⁷⁸ Darryl Harrison, one of the handcuffed individuals, sued for libel and false light privacy invasion, claiming the broadcast created the impression that he was the named criminal arrested for the bank robbery.⁷⁹ The court of appeal affirmed the trial court's grant of defendant's summary judgment.⁸⁰

In *Uhl v. Columbia Broadcasting System, Inc.*,⁸¹ C. Randall Uhl and several fellow hunters were goose hunting in Pennsylvania when a CBS camera crew asked if it could film them for a CBS hunting documentary.⁸² Uhl and his companions consented.⁸³ They later regretted their cooperation because when the documentary aired, Uhl learned that it focused on unsportsmanlike hunting activities. Uhl and his companions

70. *Id.* at 69-72.

71. *Id.* at 148-51.

72. R. BEZANON, *supra* note 67, at 96-104.

73. *Id.*

74. 391 A.2d 781 (D.C. App. 1978).

75. *Id.* at 782-83.

76. *Id.*

77. *Id.*

78. *Id.* at 783 n.2.

79. *Harrison*, 391 A.2d at 782.

80. *Id.*

81. 476 F. Supp. 1134 (W.D. Pa. 1979).

82. *Id.* at 1135-36.

83. *Id.*

considered themselves sportsmanlike but were shown engaging in un-sportsmanlike conduct in the documentary.⁸⁴ In the edited sequence, scene one depicted geese walking in a clearing, scene two depicted Uhl and his companions shooting in a generally horizontal direction, and scene three showed Uhl and companions picking up dead geese.⁸⁵ In his suit for false light, Uhl argued that the film was selectively edited to make he and his friends appear to be shooting geese on the ground.⁸⁶ The jury agreed with Uhl but awarded him nominal damages of one dollar.⁸⁷ On a motion for judgment notwithstanding the verdict, the district court affirmed.⁸⁸

*Bravo Realty v. Columbia Broadcasting System, Inc.*⁸⁹ concerned a WBBM-TV Chicago (owned by CBS) story on "blockbusting," where unscrupulous real estate agents exploit racial prejudices to induce white homeowners in particular neighborhoods into selling their homes to blacks at reduced prices.⁹⁰ Bravo Realty maintained two outdoor billboards in the community which advertised its ability to sell homes and displayed the firm's address and telephone number. Neither billboard had any racial overtones.⁹¹ During the airing of one of the stories, one of Bravo's billboards was shown while the reporter narrated: "[R]ealtors moved in to prey on the fears of the homeowners left behind . . . telling them: everyone else is selling—and if you don't, you'll lose everything."⁹² Later in the story, the second Bravo billboard was shown while the reporter narrated: "Proving which realtors are panic peddling is nearly impossible because those who do it are usually shrewd . . . and the State Department which regulates realtors is badly understaffed."⁹³ Bravo Realty argued that the words and newscaptions taken together were defamatory and that it suffered injury to its business and reputation.⁹⁴ CBS filed a motion for summary judgment.⁹⁵ The trial court granted summary judgment, applying Illinois' innocent construction rule.⁹⁶ The decision was affirmed on appeal.⁹⁷

84. *Id.*

85. *Id.*

86. *Uhl*, 476 F. Supp. at 1135-36.

87. *Id.* at 1134.

88. *Id.* at 1138.

89. 84 Ill. App. 3d 862, 406 N.E.2d 61 (Ill. Ct. App. 1980).

90. *Id.* at 863, 406 N.E.2d at 63.

91. *Id.*

92. *Id.* at 864, 406 N.E.2d at 63.

93. *Id.*, 406 N.E.2d at 64.

94. *Bravo Realty*, 84 Ill. App. 3d at 864, 406 N.E.2d at 64.

95. *Id.*

96. *Id.*

*Clark v. ABC*⁹⁸ involved a documentary about the spread of prostitution to middle-class urban neighborhoods.⁹⁹ After the narrator stated that almost all prostitutes in the Detroit neighborhood were black, the visual showed Ruby Clark walking down one of the neighborhood streets.¹⁰⁰ She was in her early to mid-twenties, attractive, well-dressed and black.¹⁰¹ She was unaware that she was being photographed.¹⁰² Just after Clark's appearance, a black neighborhood resident appeared on camera and said: "Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute."¹⁰³ In fact, Clark was married, had a child, had never been a prostitute and did not even live in the neighborhood.¹⁰⁴ On a motion for summary judgment after viewing the program, the court ruled that the broadcast was capable of a defamatory meaning and denied the motion.¹⁰⁵ The case was later settled.

In *Duncan v. WJLA-TV*,¹⁰⁶ WJLA-TV received a wire service story about a research breakthrough of a cure for genital herpes.¹⁰⁷ The station wanted to broadcast the story but had no accompanying newspaper pictures, so it sent a camera crew into the streets of Washington, D.C. to video tape people.¹⁰⁸ The camera crew's footage included close-ups of Linda Duncan, a private figure.¹⁰⁹ The pictures of Duncan were shown on the newscast as the anchorperson narrated: "For the twenty million Americans who have herpes, it's not a cure."¹¹⁰ The court denied WJLA's motion for summary judgment in Duncan's suit for false light invasion of privacy.¹¹¹

*Wilhoit v. WCSC, Inc.*¹¹² concerned a reporter's insistence that Juanita Wilhoit, who testified as a character witness at the sentencing stage of an embezzlement trial, was herself guilty of the crime.¹¹³ Wil-

97. *Id.* at 865, 406 N.E.2d at 66.

98. 684 F.2d 1208 (6th Cir. 1982).

99. *Id.* at 1210-11.

100. *Id.*

101. *Id.* at 1211.

102. *Id.*

103. *Clark*, 684 F.2d at 1211.

104. *Id.*

105. *Id.* at 1214.

106. 10 Med. L. Rep. 1395 (D.D.C. 1984).

107. *Id.* at 1396.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Duncan*, 10 Med. L. Rep. at 1398.

112. 293 S.C. 34, 358 S.E.2d 397 (S.C. Ct. App. 1987).

113. *Id.* at 36, 358 S.E.2d at 398.

hoit, who was leaving the Charleston courthouse when the reporter and camera crew confronted her, told the reporter she was not the defendant.¹¹⁴ When the reporter persisted to ask her questions and video tape her, she covered her face with her hands.¹¹⁵ The television station aired the Wilhoit sequence, which consisted of newscaptures juxtaposed to narration regarding the sentencing of the embezzlement defendant, five times.¹¹⁶ The jury awarded Wilhoit one dollar in compensatory damages and \$45,000 in punitive damages.¹¹⁷ The appellate court affirmed the verdict.¹¹⁸

Dairy Barn Stores v. ABC,¹¹⁹ like *Bravo Realty*, involved a corporate plaintiff, but unlike *Bravo Realty*, in which the plaintiff sued because allegedly accused of unethical conduct, Dairy Barn sued because it was allegedly accused of criminal conduct.¹²⁰ WABC-TV (owned by ABC) aired a story about wholesale milk dealers in New York who were indicted for price fixing.¹²¹ WABC shot background footage of competing milk products displayed together in a grocery store, which briefly showed Dairy Barn's products.¹²² Dairy Barn had neither been indicted nor implicated in the price fixing scandal.¹²³ On ABC's motion for summary judgment, the New York Supreme Court stated that a jury must determine whether the average viewer might believe that Dairy Barn had been implicated.¹²⁴ However, the court granted the motion because Dairy Barn did not show ABC was grossly irresponsible as required by New York law.¹²⁵

*MIGI, Inc. v. Gannett Massachusetts Broadcasters, Inc.*¹²⁶ involved a situation similar to *Dairy Barn*, except that no crime was imputed. During the Christmas shopping season, the Massachusetts Department of Public Health issued a press release which stated that it was "in the process of ordering off sale all stuffed toys that do not have labels, or those which have strong petroleum-like odors."¹²⁷ A Boston television station

114. *Id.*

115. *Id.*

116. *Id.*

117. *Wilhoit*, 293 S.C. at 36, 358 S.E.2d at 398.

118. *Id.* at 43, 358 S.E.2d at 402.

119. 15 Med. L. Rep. 1239 (N.Y. Sup. Ct. 1988).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Dairy Barn*, 15 Med. L. Rep. at 1239.

125. *Id.*

126. 25 Mass. App. 394, 519 N.E.2d 283 (1988).

127. *MIGI*, 519 N.E.2d at 284.

showed MIGI's doll, the "Smudget," during a story based on the press release, as the reporter stated:

They may be cute and cuddly but if they don't carry a manufacturer's label or they smell like kerosene, you probably won't be buying them for your kids this Christmas. After testing several imitation and look-alike Cabbage Patch dolls, state officials are now ordering Massachusetts retailers to pull them off the shelves.¹²⁸

In fact, the Smudget was ordered to be removed because of the labeling violation.¹²⁹ The doll was not found to be malodorous.¹³⁰ The appellate court affirmed the trial court's grant of the defendant's summary judgment motion, ruling that since the doll was pulled for the labeling violation, it was not libelous to picture it while stating that dolls were removed for labeling violations or odor problems.¹³¹

IV. FROM ANALOG TO DIGITAL: A REVOLUTION IN TELEVISION TECHNOLOGY

The shift from analog television technology to digital television technology may create a new basis for litigation. The analog principle involves an electronic signal made up of waveforms.¹³² When these waveforms are recorded onto video tape and transferred or copied to another piece of video tape, they lose some of their original strength; in other words, the signal-to-noise ratio¹³³ is lower.¹³⁴ With each generational loss of waveform strength, the resulting quality is diminished, until the video image becomes unusable.¹³⁵ These waveforms are not easily amended to add something or subtract something from the original picture.¹³⁶ To the extent that the original waveforms contained in analog television pictures can be amended, the tampering is detectable.¹³⁷

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See generally Sadashige, *Transition to Digital Recording: An Emerging Trend Influencing All Analog Signal Recording Applications*, SMPTE JOURNAL, Nov. 1987, at 1074-75.

133. "The relation of the strength of the desired signal to the accompanying electronic interference, the noise. A high signal-to-noise ratio is desirable (strong video or audio signal and weak noise)." H. ZETTL, *supra* note 7, at 37.

134. See generally Baldwin, *Digital Television Recording—History and Background*, SMPTE JOURNAL, Dec. 1986, at 1206; Lehtinen and Bentz, *The D-1 and D-2 Formats*, BROADCAST ENGINEERING, Aug. 1988, at 76.

135. R. YOAKAM & C. CREMER, *supra* note 8, at 342.

136. Sadashige, *supra* note 132, at 1075.

137. *Id.* See also *Molasky*, 655 S.W.2d at 668.

Digital technology fundamentally changes television (video technology) with regard to generational signal degradation and the ability to amend the original recording.¹³⁸ In digital video tape editing, the quality does not diminish from generation to generation because the original signal is not transferred to the subsequent tape.¹³⁹ The digital technology transfers computer information from the first tape to the subsequent video tape; the subsequent tape is a re-creation of the information on the first tape, rather than a copy.¹⁴⁰ Since the digital video tape is a re-creation, it can be amended fundamentally, easily, and undetectably during the editing process.¹⁴¹

"Pixel" stands for picture element.¹⁴² Digital television signals are made up of picture elements—the greater the number of pixels the higher the quality.¹⁴³ Pixels are binary codes, i.e., a combination of "0s" and "1s" make each particular pixel.¹⁴⁴ A digital television picture results when all the pixels are shown in relation to each other.¹⁴⁵

Digital technology applies to audio as well as to video.¹⁴⁶ Digital technology has replaced analog in many music recording studios.¹⁴⁷ Any discussion of digital audio necessarily begins with its application to music because the synthesis of music has been the driving force behind advances in digital audio.¹⁴⁸ Digital audio synthesis started out as the artificial electronic creation of music and other sounds.¹⁴⁹ The synthesized human voice does not sound real, like "Hal" of "2001/2010" fame.¹⁵⁰

Another idea that revolutionized digital audio synthesis is digital

138. G. ANDERSON, *supra* note 14, at 137-38.

139. See Chan, *Designing Facilities for Digital Video*, BROADCAST ENGINEERING, Sept. 1988, at 124.

140. See Oudin, *The World's First All Digital Television Production*, SMPTE JOURNAL, Jan. 1987, at 11-15. See also Chan and Takeo, *Product Implementation of the 4:2:2 Component Digital Format*, SMPTE JOURNAL, Oct. 1987, at 958.

141. See generally Chan, *supra* note 139, at 124. See also H. ZETTL, *supra* note 7, at 378-85. With respect to computational speed, see Kemp, *Personal FX*, DISCOVER, Nov. 1988, at 74-78. See also Waters, *Living Inside Your PC*, DISCOVER, Nov. 1988, at 64-67.

142. See *Hot New CCDs*, BROADCAST ENGINEERING, Aug. 1988, at 30.

143. *Id.*

144. A system that uses only two digits, 0 and 1. The binary digit, called *bit*, is the smallest amount of information a computer can hold and process. A charge is either present, represented by a 1, or absent, represented by a 0. The thousands of electronic circuits in a computer can handle such on-off switching with incredible speed.

H. ZETTL, *supra* note 7, at 342 (emphasis in original).

145. See *Hot New CCDs*, *supra* note 142.

146. H. ZETTL, *supra* note 7, at 259-60.

147. *Mechanical, Analog, Digital—Sequencer History In a Nutshell*, MIDI SEQUENCING, May/June 1988, at 11 [hereinafter *Mechanical*].

148. See Vogel, *Duet For Man and Machine*, DISCOVER, Nov. 1988, at 72-73.

149. See *Mechanical*, *supra* note 147, at 11.

150. Vogel, *supra* note 148, at 73.

sound sampling,¹⁵¹ which involves not the electronic creation of a sound, but the recording of actual sound coupled with its digitization and manipulation.¹⁵² Digital sound sampling was developed to enhance working with music; its application to the human voice is in its infancy.¹⁵³

Motion picture dialogue editors are beginning to discover the possibilities of digital sound sampling. "Sound editors will find that the inflection of a segment of dialogue can be easily changed, with a procedure similar to sound-effects alteration. For instance, the pitch-bend wheel can add inflection, turning a flat statement into a question [or vice-versa]."¹⁵⁴

Soon digital audio technology will allow the voice of the President of the United States, for example, to be recorded, sampled, digitized, and made to sound as if he had said something he had not said. Once a representative sample of the President's voice's binary codes are fed into a computer, these codes can be rearranged to create new words.

Digital editing and rearrangement can also be applied to still pictures.¹⁵⁵ Once newspaper or magazine photojournalists have chemically processed their film, they can use laser technology to convert a photographic print into digital data.¹⁵⁶ The "photograph" is displayed on a monitor with a grid screen.¹⁵⁷ As with digital television newscasters, the pixels within the grids can be manipulated to alter the image.¹⁵⁸ Although retouching methods are common to still photography, most notably airbrushing, these differ from digital retouching because they are susceptible to detection. Traditional methods alter the photograph rather than re-create it as does the digital technology.¹⁵⁹

151. See Tingley, *Here Comes the Tapeless Studio*, MILLIMETER, Nov. 1986 at 104-11. See also Wolvington, *Digital Audio Post-Production: Sound Editing Transformed*, SMPTE JOURNAL, Jan. 1987, at 34-36.

152. *Id.*

153. *Id.*

154. Tingley, *supra* note 151, at 111.

155. See Brand, Kelly and Kinney, *Digital Retouching: The End of Photography as Evidence of Anything*, WHOLE EARTH REVIEW, July 1985, at 42-50; Brandt, *Technology Changes, Ethics Don't*, PRESSTIME, Dec. 1987, at 32; *Picture-Perfect Photos*, NEWSWEEK, Dec. 28, 1987, at 64.

156. Reaves, *Digital Retouching: Is There a Place for It in Newspaper Photography?*, JOURNAL OF MASS MEDIA ETHICS, Spring/Summer 1987, at 42.

157. *Id.*

158. *Id.*

159. *Id.* at 43.

V. CONCERNS ABOUT AND USES OF DIGITEXED TELEVISION NEWSPICTURES

Aural or visual recording technology, such as still and moving film and analog audio and video tape, can be transferred from the original mode of recordation to digital recordation for amendment and back to the original mode, if desired.¹⁶⁰ Digital amending capabilities are presently available to television network news divisions.¹⁶¹ Soon, many local

160. See Heitmann, *Development of Component Digital VTRs and the Potential of the D-1 Format*, SMPTE JOURNAL, Feb. 1988, at 126-29. See also Stanton, *Bibliography: Video Production Technologies*, SMPTE JOURNAL, Aug. 1987, at 762. Video cameras are being redesigned to output a digital signal rather than an analog signal (see, e.g., Lehtinen, *Directions in Camera Design*, BROADCAST ENGINEERING, Aug. 1988, at 26). Video tape, which presently records analog signals, is being redesigned to receive digital signals (see Lehtinen, *Formulating Tape for Digital Applications*, BROADCAST ENGINEERING, Oct. 1988, at 96). Audio tape has already been redesigned and is beginning to appear on the market (see Castro, *Hello DAT A New Audiotape is on the Way*, TIME, Jan. 25, 1988, at 52). On the horizon, though, tape will become obsolete. The silicon chip will take the place of audio and video tape (see H. ZETTL, *supra* note 7, at 299) and film (see Keppler, *What's Really Going on in Electronic Still Photography?*, MODERN PHOTOGRAPHY, Feb. 1986, at 42) and become the sole entity onto which digital images are recorded, played back, and edited. The transition, however, will take years and involve many innovations not now known, at least to the public. These occurrences will make the issues raised by this article even more complicated because there no longer will have to be any non-digital original recordation in any medium of newpicture communication, i.e., when digital original recordation becomes commonplace there will be no chance of tracing the amendment of newpictures by referring to the original.

161. They exist in Hollywood, too. And the motion picture industry is worried about the effects of these new capabilities, albeit for different reasons. Writing in *The Hollywood Reporter*, in an article titled "Industry Stands at Crossroads as New Technologies Take Hold," Jolson-Colburn said: "Imminent technological changes could have a profound impact on both the Hollywood labor market and the future revenue stream of the entertainment industry."

In the article, Jolson-Colburn paraphrased and quoted a number of motion picture industry executives who had spoken at "ShowBiz '88" in Los Angeles on a panel titled "Surviving New Technologies with Creative Rights and Financial Security Intact." Mel Shavelson, president of the Writer's Guild Foundation, was paraphrased as saying that the economics of the business would have to change completely and the computer chip would replace jobs by the scores. Motion picture executive Lorin Brennan said: "The computer will eat alive every medi[um] that has come before it."

Director Alexander Singer said: "Cameramen should be worried as hell, as they'll be the first ones to go. The prop men, too. Also, any job where people 'make things' is at risk." Singer was paraphrased as saying that the future shock included new generations of computer-animated graphics that could create actors and sets so realistic that they could effortlessly interface with or replace live action. Kit Galloway of Mobile Image was paraphrased as predicting that the casting directors would be able to create actors based on composites of great actors from the past and present. In other words, a director could cast Humphrey Bogart mixed with John Wayne by telling a computer to blend their attributes and create the character.

Jim Kristoff, president of the computer graphics house Metrolight, was paraphrased as saying that although creating actors may be down the road, computer sets will be created relatively soon. He said: "It will be like matte, only the actors will be able to move around and through the 3-D animations." *The Hollywood Reporter*, June 13, 1988, at 1.

television stations will have the same technology.¹⁶²

To what extent are digital amending technologies already available in television journalism? ABC News "20/20" video tape editor Dean Irwin, wrote in *Videography*:

Over the years all of us involved in post-production at 20/20 have tried to create clean and concise effects. There are always special challenges from week to week. . . . Two famous singers are performing as a duo for the first time; no footage exists of both of them singing together, so each must be superimposed over the same concert footage, slightly slowed down to achieve lip sync with the song.¹⁶³

C. Raymond Fielding, Director of the School of Communication at the University of Houston, wrote in the "Historical Journal of Film, Radio, and Television:"

[Digital retouching] techniques are now being used by the news departments of television networks in order to manipulate news footage. It is now a common practice at ABC-TV News, for example, to remove, digitally, any microphones which obstruct the clear view of an individual who addresses the news cameras.

I am not speaking of *cropping* the scene; I am speaking of electronically *removing* objects from the scene. During the Reagan/Mondale election coverage, some alterations were made in the appearance of the candidates on the evening news. States Ben Blank, Art Director of ABC-TV News: "If the head and shoulders are hunched up, we work on cleaning up the suit. Take Mr. Reagan: if he's hunched over, we can clean that up—straighten out a shoulder. We do things like that. It's cosmetic. And we do it equally. What we did for Mr. Reagan, we also did for Mr. Mondale."¹⁶⁴

Tom Pettit, the executive vice president of NBC News, on the subject of this new technology's effect on reality, wrote: "Today, technology permits producers to speed up or slow down actual events, actual voices. This is alteration of reality akin to forging a check. . . . [W]ith [the]

162. Local television news operations are becoming externally and internally electronically sophisticated. See, e.g., Lehtinen, *Newsroom Automation*, BROADCAST ENGINEERING, Aug. 1988, at 44.

163. Irwin, *20/20's Vision of Post-Production*, VIDEOGRAPHY, Apr. 1985, at 121.

164. Fielding, *Newsfilm as a Scholarly Resource*, HISTORICAL JOURNAL OF FILM, RADIO AND TELEVISION, 1987, at 53; Armbrust, *Computer Manipulation of the News*, COMPUTER PICTURES, Jan./Feb. 1985, at 8.

highly sophisticated editing of video tape, we can reshape reality with great ease."¹⁶⁵ Tom Wolzien, NBC-TV News' vice president of editorial and production services said: "Once this technology gets out there, we're going to have a helluva time telling what's real and what's unreal."¹⁶⁶

Credibility will be the issue in the courts and in journalism itself. Within the profession, credibility is more of an issue in the print medium than in television because the technology was first available to the print media, which deals with still pictures, while television has thirty moving frames per second.

Digital retouching in the print medium has already raised several issues.¹⁶⁷ *National Geographic*, like most magazines, is vertical rather than horizontal in shape and a photograph normally appears on its cover. Obviously, the photograph must be vertically oriented. The magazine instigated a controversy in the industry when it electronically moved a pyramid in a photograph to fit the vertical format.¹⁶⁸ On another occasion *National Geographic* combined two shots of the same scene to improve the visual appearance of a man's hat.¹⁶⁹

Edward Klein, editor of *The New York Times Magazine* warned: "This new technology has the potential of undermining our faith in photography as a reflection of reality."¹⁷⁰ John D. Goodell, a computer graphics consultant for motion pictures and education, stated that computerized retouching is "[o]ne of the few areas in which one can do true counterfeiting and not have it be observed."¹⁷¹ Many photojournalists prefer to view digital retouching on a case-by-case basis. For example, they say that news photographs should never be retouched while feature

165. R. YOAKAM & C. CREMER, *supra* note 8, at XI.

166. *Local TV News: Nipping at the Heels of the Networks*, BROADCASTING, May 5, 1986, at 76.

167. Some photo editors are concerned from other legal points of view as well. Will courts construe the standard language of model releases to include, e.g., the digital lifting of the model out of the actual setting in which the photograph was taken and the placing of her or him in a new setting which is offensive to the model, such as from a beach to a racetrack with horses running in the background? And if a contract action wouldn't lie, then how about the torts of misappropriation, false light privacy invasion, and libel? What about contracts with freelance photographers? Copyright ramifications (*see Mathias, New Technology, New Law, COMMUNICATIONS AND THE LAW*, Oct. 1987, at 3-7)? Contracts with agencies relating to stock photographs (Reaves, *supra* note 156, at 47)?

168. Reaves, *supra* note 156, at 46.

169. *Id.*

170. *Retouching Poses Ethical Questions*, FOLIO: THE MAGAZINE FOR MAGAZINE MANAGEMENT, Mar. 1985, at 19 [*hereinafter* FOLIO].

171. Ritchin, *Photography's New Bag of Tricks*, THE NEW YORK TIMES MAGAZINE, Nov. 4, 1984, at 54.

photographs can be altered.¹⁷² Robert E. Gilka, former director of photography at *National Geographic*, stated: "It's like limited nuclear warfare. There ain't none."¹⁷³

Scientifically and technologically-based evidence, such as audio and video tape, are coming under increased scrutiny as admissible evidence as attorneys become aware of the potential for error and fraud.¹⁷⁴ Perhaps equally complex and puzzling is the admissibility of computer-simulated information.¹⁷⁵

VI. POSSIBLE NEW LIFE FOR FALSE LIGHT PRIVACY INVASION

The legal theory in *Spahn v. Julian Messner, Inc.*¹⁷⁶ could become the basis for recovery under false light privacy invasion in cases where television newscasters are digitized—regardless of the good intentions or motivations of television journalists. The greatest distinction between libel and false light privacy claims is that defamation is not an element of false light. The harm in false light is to an individual's sensibilities, not to reputation as in libel.¹⁷⁷

Warren Spahn is a former major league baseball pitcher and a member of the baseball hall of fame.¹⁷⁸ In 1963, Milton J. Shapiro wrote and Julian Messner, Inc., published an unauthorized biography of Spahn.¹⁷⁹ In Spahn's view, Shapiro's book depicted him as a number of things he was not, such as a World War II hero.¹⁸⁰ Spahn did serve in World War II, but he was not heroic. He viewed Shapiro's distortions and inaccuracies of his wartime experiences as humiliating.¹⁸¹ Spahn sued to enjoin further distribution of the book and for money damages.¹⁸² The court

172. FOLIO, *supra* note 170, at 20.

173. Ritchin, *supra* note 171, at 50.

174. See, e.g., Note, *The Admissibility of Electrophoretic Methods of Genetic Marker Blood-stain Typing Under the Frye Standard*, 11 OKLA. CITY U.L. REV. 773 (1986); Note, *The Horizontal Gaze Nystagmus Test and the Admissibility of Scientific Evidence*, 27 NEW HAMP. B.J. 179 (1986); Nelson, *Garbage In, Garbage Out: The Need for New Approaches to Computer Evidence*, 9 AM. J. TRIAL ADVOC. 411 (1986).

175. See Note, *Computer Simulations: How They Can Be Used at Trial, and the Arguments for Admissibility*, 19 IND. L. REV. 735 (1986).

176. 43 Misc.2d 219, 250 N.Y.S.2d 529 (1964), *aff'd*, 260 N.Y.S.2d 451, 23 A.2d 216 (1965).

177. Tomlinson, *'Eyewash' and False Light Privacy Invasion: A New Legal Thicket May Loom as Local Television Journalism Becomes More Issues-Oriented*, 3 SW MASS COMM. J., at 3-6 (1987).

178. *Spahn*, 250 N.Y.S.2d at 531.

179. *Id.*

180. *Id.* at 538-39.

181. *Id.* at 543.

182. *Id.* at 544.

granted the injunction against the continued distribution of the book and Spahn was awarded \$10,000 in compensatory damages, based on the approximately 16,000 copies of the book actually distributed and sold.¹⁸³

False light is not a respected tort. Some states do not recognize the tort, viewing it as indistinguishable from libel. Other states recognize the tort, but do not allow damages recovery if libel is a cause of action in the same suit.¹⁸⁴ Commentators disagree about the role of false light invasion of privacy claims in the scheme of libel and privacy torts. Some believe the tort should stand alone. Others believe it should not exist. Some believe it is linked to libel. Others believe it is linked to the privacy tort of embarrassing private facts.¹⁸⁵ False light cases are often based on vague legal philosophy, as if the courts acknowledge that the cases involve a legally protected interest, but are unsure what the interest is.¹⁸⁶

Despite the status of the false light tort, when false material, such as digitexed newspaper pictures, is added to a television news or feature story resulting in a distorted portrayal of the subject,¹⁸⁷ a false light privacy action may result. In their zeal to make images "look better," television station news departments may face plaintiffs like Warren Spahn, who do not want inaccurate public exposure.

VII. ANALYSIS AND CONCLUSIONS

As digital replaces analog technology, courts must rethink the admission of video tape, audio tape, and still and motion-picture film evidence and recognize a new dimension of falsity as an element of libel and false light privacy invasion. The question is not "Is it live or is it Memo-rex?"¹⁸⁸ Rather, the question will be "Is it real or is it digitex?" Based on the foregoing discussion, television newspaper pictures may not be admissible as evidence of anything but libel, although television newspaper pictures may be admissible as *the* element of falsity in libel.

Television newspaper pictures which allegedly constitute libel or false light by themselves will suffer the same admissibility problems as any other newspaper pictures. Digitexed television newspaper pictures could be the subject of the litigation *and* the cause of the inadmissibility of the subject of the litigation at the same time.

183. *Spahn*, 21 N.Y.2d at 124, 233 N.E.2d 841.

184. See generally Walden and Netzhammer, *False Light Invasion of Privacy: Untangling the Web of Uncertainty*, 9 HAST. J. COMM. ENT. L., at 353-59 (1987).

185. *Id.*

186. *Id.* at 381.

187. R. HOLSINGER, *MEDIA LAW* 193 (1987).

188. Trademark of the Tandy Corporation.

Digital technology will effect the admissibility of television newscaptures as evidence because courts will be unable to determine the integrity of the evidence. Even if the evidence is crucial to either party's case, judges are likely to exclude television newscaptures from evidence if the slightest hint of tampering exists. Perhaps an allegation of tampering or even the threshold argument that the evidence should be inadmissible because the court cannot detect tampering. The question may become: Is the admission of television newscaptures as evidence reversible error because tampering is not scientifically detectible?

The affect of digitexed television newscaptures on libel is such that because digitexing, where allegedly resulting in falsity and defamation, could create a new basis for litigating. For example, if digital editing can straighten a person's hunched shoulder, it can also bend a shoulder. Will individuals seek libel damages from television stations for making them look like stoop-shouldered weaklings? Will cases arise in which the defendant television station argues: "We were only trying to make you look better."

The implications of digital technology are great, taken even to shallow extensions. Despite television's realistic appearance, it is nothing more than electronic images displayed on a screen. Television is not very real, and the advent of digitexing demonstrates it is becoming less real.

