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Logan A. Forsey

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TOWARDS A WORKABLE RUBRIC FOR ASSESSING PHOTOSHOP LIABILITY

By: Logan Forsey

Part I: Introduction

As technology has developed over the past decade and items such as Adobe Photoshop have made photo editing as simple as the click of a button, images in news publications, beauty magazines, and even on social networks are being altered in both subtle and dramatic ways. In today's media, images have been altered more often than not.¹ More recently, these images have been altered using "retouching software that can make celebrities and models look thinner, taller, unblemished, with brighter eyes and whiter teeth."² No longer are photographers simply playing tricks with the lighting or exposure in order to create a different effect than what is shown through the pose.³ Now, digital photography has made it easy to manipulate photographs.⁴ Unfortunately, however, these digital innovations can have untoward effects. On the one hand, they can make a model appear "seemingly perfect."⁵ On the other hand, they can manipulate the photographs so that the "cover models often resemble weirdly synthesized creatures or . . . 'objects from Mars.'"⁶ As such, the alterations can be subtle ones that make the model appear five or ten pounds thinner, or they can be drastic distortions that are meant as a satire of the subject in the photograph.

A significant effect of these digital alterations is that young, impressionable girls are fooled into believing that the retouched model or celebrity on the cover of the latest fashion magazine truly is as thin and blemish-free as she appears. As a result, these young girls become

¹ Eric Wilson, *Smile and Say 'No Photoshop'*, N.Y. TIMES, May 27, 2009, http://www.nytimes.com/2009/05/28/fashion/28RETOUCH.html?pagewanted=all&_r=0.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

accustomed to seeing these photographs broadcast throughout media outlets and come to believe that the images portray “real” beauty, a beauty they wish to attain themselves.⁷ Unfortunately, these young consumers do not realize that the beauty they are striving for is not natural or the product of a healthy diet, but rather it is the result of digital enhancement and is “not achievable by a real girl.”⁸ In essence, photoshopping images of female models “creates unattainable images for most American women.”⁹ Furthermore, evidence has confirmed that women, on average, “have lower self-concept immediately after viewing an image of a thin model over other kinds of images.”¹⁰ “Consumers, particularly young female adults viewing fashion advertisements, do not know that the images are computer altered, and therefore, try to replicate figures that are nearly impossible to attain.”¹¹ When these young women strive to replicate the manipulated bodies of fashion magazine models, they tend to “develop unsafe eating habits.”¹² Studies show that only a year’s subscription to a fashion magazine can lead to “increased body dissatisfaction, dieting, and bulimic symptoms amongst adolescent girls.”¹³ Photoshopping in these fashion magazines presents “concerns similar to those surrounding tobacco and fast-food advertisements.”¹⁴ It is peculiar, then, that the government has sought to regulate advertisements for tobacco and fast-food companies, but has remained virtually silent regarding photoshopped images.¹⁵

Along with the harm that photoshopped images can cause to young women, these images can also be injurious to their subjects. Often these subjects are celebrities who find a digitally

⁷ Nicole Hunter, *Beauty Is in the Eye of the Retoucher: Why Photoshopped Magazine Images Require Regulation*, 33 WOMEN’S RTS. L. REP. 82, 93 (2011).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 95.

¹¹ *Id.* at 100. “These young consumers are more likely to submit to peer pressure and incorporate the values and images they view into their developing self-identifies. Advertising has been said to be one of the most potent messengers in a culture that can be toxic for a girls’ self-esteem.” *Id.* at 102.

¹² *Id.*

¹³ Hunter, *supra* note 7, at 95.

¹⁴ *Id.*

¹⁵ *Id.* at 97.

altered photograph of themselves to be offensive or unflattering. Over the past few years, “several popular fashion publications have found themselves caught in a whirlwind of negative publicity based on photoshopping allegations.”¹⁶ For example, Kate Winslet took action against *GQ* magazine for “digitally altering her body in its photographs—making her unrealistically thin.”¹⁷ Well-known celebrities such as Demi Moore and Brad Pitt have also voiced their concerns over photoshopping and directed their attention to the popular fashion magazine *W*. Prior to his photo shoot for the *W* magazine cover, Brad Pitt requested that there be no retouching and even selected his own photographer, one who he knew would “expose skin flaws.”¹⁸

Regardless of which publication contains the image, it is a harsh reality that there is no standard precisely on point that can be used to determine the liability that should be attributed to the creator of such photoshopped images that offend or misrepresent their subject.¹⁹ Two potential explanations for why a standard has not yet been established are: (1) photoshopped images may be protected in some contexts as a form of commercial speech; and (2) the marketplace of ideas theory. The first possible explanation will not be explored in any great depth in this Note, but it is important to briefly mention it nonetheless. Scholars have argued this commercial speech theory in the context of photoshopped advertisements and determined that

¹⁶ *Id.* at 85. It is important to note that fashion magazines are not the only publications that receive negative publicity for the use of Photoshop. *Newsweek*, an American news magazine, has “manipulated images appearing in its magazine, even though it claims to have a policy against the practice. In March 2005, Martha Stewart appeared on *Newsweek*’s cover accompanied by the headline ‘After Prison She’s Thinner, Wealthier & Ready for Primetime.’ Stewart did appear thinner on the cover, but not because she lost weight; rather her head was removed and placed on a model’s body in the published image.” *Id.* at 104-105.

¹⁷ Vivian Diller, Ph.D., *Is Photoshop Destroying America’s Body Image?*, HUFFINGTON POST, July 7, 2011, http://www.huffingtonpost.com/vivian-diller-phd/photoshop-body-image_b_891095.html.

¹⁸ *Id.*

¹⁹ “Currently there are no laws regulating the manipulation of images in magazines. The danger and concern is that ‘in the digital era, images can be manipulated any way its creator desires. Slimmer. Taller. Change skin colour. Swap body parts. Nothing is impossible and nothing is illegal.’” Hunter, *supra* note 7, at 83.

such images can either be regulated as “deceptive or misleading advertising”²⁰ or under the *Central Hudson* analysis.²¹ Photoshopped advertisements have the potential to be misleading when “consumers are unable to distinguish a real image from a manipulated one and . . . consumers are considering these computer-altered models as a factor when making purchase decisions.”²² Once deemed misleading, these images would no longer receive First Amendment protection and a government agency could impose a “reasonable regulation to prevent consumer harm.”²³ On the other hand, if the images are not deemed misleading, any regulation passed to police them would need to meet the *Central Hudson* test, which requires that the regulation be “narrowly tailored enough to balance the First Amendment concerns with the need for intervention.”²⁴

This Note explores not only photoshopped images in advertisements or fashion magazines but also photoshopped images with varying degrees of manipulation. For these images, the lack of liability can likely be explained not with commercial speech principles, but rather with another significant First Amendment principle: the “marketplace of ideas” theory. The marketplace of ideas theory was first advocated by John Stuart Mill and can be defined as “a forum in which expressions of opinion can freely compete for acceptance without governmental restraint.”²⁵ Although courts and scholars generally acknowledge that there can be a real societal harm when bad information is released to the public, their belief “in an efficient marketplace of ideas [leads] them to conclude that high-quality information [will] eventually beat out low-

²⁰ Hunter, *supra* note 7, at 89.

²¹ *Id.* at 96-97. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court “articulated a four-part test that commercial speech regulation must pass in order to be deemed constitutional.” *Id.* at 88.

²² *Id.* at 111.

²³ *Id.*

²⁴ *Id.* at 103.

²⁵ BLACK’S LAW DICTIONARY (9th ed. 2009).

quality information.”²⁶ It is likely that the lack of photoshop liability can be attributed to many scholars believing in the ability of positive imagery to outweigh the negative effects of significantly manipulated images.

Unfortunately, the marketplace of ideas has not been successful in balancing unedited, natural photographs of celebrities and models with the highly manipulated and often offensive photoshopped images of these same subjects. This is because the marketplace of ideas theory is “based on assumptions that have been proven untenable,” as consumers are no longer searching for the truth, but rather “for information that confirms their own pre-existing biases.”²⁷ Even when confronted with the truth, unbiased information consumers still have a tendency to believe the lie.²⁸ This problem is increased by the ready availability of dissemination in an internet era, which has “dramatically increased the quantity of low quality information,” and the “relative permanence of amateur digital media, which can increase the lifespan of low-quality information.”²⁹ Both of these problems contribute to the “problem of information pollution, the high proportion of low-quality to high-quality information increasingly forcing information consumers to expend extra resources to sift through the rubbish, a growing harm that the United States Supreme Court has yet to recognize in its First Amendment jurisprudence.”³⁰

This Note will argue that photoshopped images have distorted the marketplace of ideas to such a point that government and the courts must come up with a workable standard to determine photoshop liability. Without the marketplace of ideas to fetter out the low-quality information from the high-quality information, the subjects of these photoshopped images are being harmed and currently have no legal redress against the creators of such images. Part II of this Note will

²⁶ Jamie Lund, *Correcting Digital Speech*, 19 UCLA ENT. L. REV. 170, 171 (2012).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

examine three potential analogies that could help to create a standard for photoshop liability: (1) cartoon parodies; (2) the tort of false light; and (2) the invasion of privacy when the subject is a public figure. Furthermore, Part II will assess the propriety of state legislative efforts at reform. Part III will describe alternative grounds for liability and propose a workable rubric for photoshop liability. Finally, Part IV will conclude that the solution proposed in this Note must be implemented so that First Amendment jurisprudence can keep up with the changing world of digital technology.

Part II Analogous Templates for Imposition of Liability

The Supreme Court has yet to establish a standard that judges can use to assess the liability of authors³¹ who use photoshopped images in their publications. When faced with the task of creating a standard of liability for an undeveloped area of the law, often liability can be assessed by making an analogy between the undeveloped area and an area where a standard has already been articulated. Therefore, one must look to appropriate analogies across a variety of different First Amendment areas in order to find a workable standard for photoshop liability.

A. Analogy to Cartoon Parodies: *Hustler Magazine v. Falwell*

The first, and arguably closest, analogy to photoshopping is the use of a parody, generally in the form of a cartoon, of a subject. This cartoon parody first became known to the legal community after the Supreme Court handed down its decision in *Hustler Magazine v. Falwell*³² in 1988.

a. Hustler's Holding

In *Hustler v. Falwell*, Jerry Falwell, a nationally known minister and commentator on public affairs, “sued publishers of advertisement parody for libel, invasion of privacy, and

³¹ This Note will use “creator” and “author” interchangeably to describe an individual who digitally alters a photoshop through digital enhancement software such as Adobe PhotoShop.

³² 485 U.S. 46 (1988).

intentional infliction of emotional distress.”³³ The suit arose after Hustler Magazine, Inc., a magazine of nationwide circulation, published its November 1983 issue.³⁴ The inside front cover of this issue “feature[d] a ‘parody’ of an advertisement for Campari Liqueur that contained the name and picture of [Mr. Falwell] and was entitled ‘Jerry Falwell talks about his first time.’”³⁵ This parody was actually modeled after real ads for Campari Liqueur that included “interviews with various celebrities about their ‘first times.’”³⁶ “Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of ‘first times.’”³⁷

Hustler’s editors copied the form and layout of the Campari “first time” ads.³⁸ They chose Mr. Falwell as the “featured celebrity and drafted an alleged ‘interview’ with him in which he states that his ‘first time’ was during a drunken incestuous rendezvous with his mother in an outhouse.”³⁹ The Hustler parody portrayed Mr. Falwell and his mother as “drunk and immoral” and suggested that Mr. Falwell was a “hypocrite who preaches only when he is drunk.”⁴⁰ In fine print at the bottom of the page, the ad contained the following disclaimer: “ad parody—not to be taken seriously.”⁴¹ Soon after this particular issue of Hustler magazine became available to the public, Mr. Falwell brought a complaint against Hustler Magazine, Inc., alleging that “publication of the ad parody in Hustler entitled him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress.”⁴² The jury found against Mr. Falwell on the libel claim, “specifically finding that the parody could not ‘reasonably be understood as

³³ *Id.* at 46.

³⁴ *Id.* at 47-48.

³⁵ *Id.* at 48.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Hustler Magazine v. Falwell*, 485 U.S. 46, 48 (1988).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 47-48.

describing actual facts . . . or events,’ but ruled in his favor on the emotional distress claim, stating that he should be awarded compensatory and punitive damages.”⁴³ The Court of Appeals affirmed this ruling.⁴⁴

In 1987, the Supreme Court granted certiorari in an effort to resolve the important constitutional issues discussed in the *Falwell* case.⁴⁵ The issue in the case before the Supreme Court was whether a “public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most.”⁴⁶ “Rejecting as irrelevant the contention that, because the jury found that the parody did not describe actual facts, the ad was an opinion protected by the First Amendment to the Federal Constitution, the [C]ourt ruled that the issue was whether the ad's publication was sufficiently outrageous to constitute intentional infliction of emotional distress.”⁴⁷

In an effort to “protect the free flow of ideas and opinions on matters of public interest and concern,”⁴⁸ the Court first held that public figures and public officials “may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one . . . at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice.’”⁴⁹ This “actual malice” standard comes from the Court’s landmark 1964 case, *New York Times v. Sullivan*.⁵⁰ In *New York Times*, the Court held that “in a libel suit brought by a public official, the [F]irst [A]mendment requires the plaintiff to demonstrate with clear and convincing evidence that the defendant published the statement with ‘actual malice,’ that is, ‘with knowledge that it was false or with reckless disregard of whether it

⁴³ *Id.* at 49.

⁴⁴ *Hustler Magazine v. Falwell*, 485 U.S. 46, 49 (1988).

⁴⁵ *Id.* at 50.

⁴⁶ *Id.*

⁴⁷ *Id.* at 46.

⁴⁸ *Id.*

⁴⁹ *Id.* at 56.

⁵⁰ 376 U.S. 254 (1964).

was false or not.”⁵¹ For purposes of the actual malice standard and First Amendment law in general, the *Hustler* Court found that Mr. Falwell was a “public figure” and therefore subject to this actual malice standard.⁵²

Furthermore, the Court found that the State’s interest “in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved.”⁵³ The Court looked to and accepted the lower court’s determination that the cartoon parody could not “reasonably be understood as describing actual facts about [Mr. Falwell] or actual events in which [he] participated.”⁵⁴ Furthermore, the Supreme Court accepted the determination of the Court of Appeals that the cartoon parody was not “reasonably believable.”⁵⁵ Thus, the Supreme Court reaffirmed that “protection of statements of ‘opinion’ may be compelled by the First Amendment.”⁵⁶ More specifically, the Court “extended First Amendment protection to speech that ‘could not reasonably have been interpreted as stating actual facts about the public figure involved,’ even if that speech were ‘patently offensive and . . . intended to inflict emotional injury.’”⁵⁷

After concluding that the cartoon parody could not reasonably have been interpreted as stating actual facts about Mr. Falwell, the Court was left to consider whether “outrageousness”

⁵¹ Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 426-427 (1988) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964)). The *Hustler* Court felt that this actual malice standard reflected its “considered judgment that such a standard is necessary to give adequate “breathing space” to the freedoms protected by the First Amendment. *Hustler*, 485 U.S. at 56.

⁵² *Hustler*, 485 U.S. at 57.

⁵³ *Id.* at 46.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to be Understood as Fact*, 2008 UTAH L. REV. 875, 890 (2008).

⁵⁷ *Id.*

should be the standard used when evaluating cartoon parodies.⁵⁸ Mr. Falwell unsuccessfully argued that the cartoon parody was so “outrageous” as to “distinguish it from more traditional political cartoons” and thus remove it from First Amendment protection.⁵⁹ The Court rejected this “outrageousness” argument, finding that such a standard would be too subjective and would give the jury discretion to impose liability on the basis of his or her tastes or views, “or perhaps on the basis of [his or her] dislike of a particular expression.”⁶⁰ According to the justices, an “outrageousness” standard would run afoul of the Court’s “longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.”⁶¹

In delivering the opinion for the *Hustler* Court, Chief Justice William Rehnquist stated that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether it was true.”⁶² Chief Justice Rehnquist further concluded that the jury in the lower court had “explicitly found that the statement as not factual” and in the absence of a misstatement of fact, Mr. Falwell “could not . . . recover for the mere intentional infliction of emotional distress.”⁶³ Following the majority opinion, Justice Byron White filed a “brief, two-sentence, separate concurring opinion.”⁶⁴ In his concurrence, Justice White opined: “The decision in *New York Times v. Sullivan* . . . has little to do with this case, for here the jury found that the ad

⁵⁸ *Hustler*, 485 U.S. at 57.

⁵⁹ *Id.* at 55.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Smolla, *supra* note 51, at 437.

⁶³ *Id.*

⁶⁴ *Id.*

contained no assertion of fact. But I agree with the Court that the judgment below, which penalized publication of the parody, cannot be squared with the First Amendment.”⁶⁵

In addition to applying the *New York Times* standard to cartoon parodies, the majority acknowledged both the “fundamental importance of the free flow of ideas and opinions” and the marketplace of ideas.⁶⁶ The justices stated that the “freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”⁶⁷ Furthermore, the Court discussed the theory of the marketplace ideas in terms of false statements of fact. The justices concluded that “false statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”⁶⁸ Although these falsehoods have little value in and of themselves, however, they are “nevertheless inevitable in free debate.”⁶⁹

The *Hustler* Court is recognizing that falsehoods such as those inherent in cartoon parodies can have an interference with the marketplace of ideas and thus distort it. Similarly, images that are severely manipulated through photoshopping could potentially be classified as “false statements of fact” that interfere with the truth-seeking function of the marketplace of ideas. Like the effect of cartoon parodies, photoshopped images that greatly alter the original portrayal of a subject can be damaging to that subject’s reputation. This damaging effect cannot easily be challenged through counterspeech, as the original photograph rarely makes headlines or

⁶⁵ *Hustler*, 485 U.S. at 57.

⁶⁶ *Id.* at 50-52.

⁶⁷ *Id.* at 50-51 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-504 (1984)).

⁶⁸ *Id.* at 52.

⁶⁹ *Id.*

even surfaces in the media. Without counterspeech as a remedy, it appears that photoshopped images, like cartoon parodies, distort the marketplace of ideas.

b. Political Cartoons

By concluding that Mr. Falwell could not recover under intentional infliction of emotional distress, the *Hustler* Court made a “glowing endorsement of free speech” and “made clear its interest in preserving the ‘free trade of ideas,’ even when the speech is patently offensive and is intended to inflict emotional distress.”⁷⁰ The Court expressed its concern “over the chilling effect on political cartoons if plaintiffs who could not recover for libel were allowed to recover for emotional distress.”⁷¹ The justices felt that if they ruled differently on this issue, “political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject.”⁷² By the end of the Court’s reasoning in *Hustler*, it became clear that the justices viewed political cartoons, parodies, and caricatures as part of the same category and therefore deserving of the same level of protection. The Court presented the definition of a caricature as “the deliberately distorted picturing or imitating of a person . . . by exaggerating features or mannerisms for satirical effect,”⁷³ while a parody is a “composition in which an author’s ‘characteristic turns of thought and phrase . . . are imitated in such a way as to make them appear ridiculous, especially by applying them to ludicrously inappropriate subjects.”⁷⁴ Political cartoons can take the form of caricatures, parodies, or both, as such cartoons often imitate a person through exaggerated features that make them appear ridiculous for a satirical effect.

⁷⁰ Sandra Davidson Scott, *From Satirical to Satirical: When Is a Joke Actionable?*, 13 HASTINGS COMM. & ENT. L.J. 141, 147 (1991).

⁷¹ *Id.*

⁷² *Hustler*, 485 U.S. at 53.

⁷³ *Id.* at 53-54 (quoting WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979)).

⁷⁴ Scott, *supra* note 70, at 177 (quoting OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

The Court described political cartoons as a type of “weapon of attack, of scorn and ridicule and satire” and expressed the opinion that such cartoons are least effective when they “try to pat some politician on the back.”⁷⁵ Further, “the appeal of the political cartoon or caricature is often based on exploration of unfortunate physical traits or politically embarrassing events—an exploration often calculated to injure the feelings of the subject of the portrayal.”⁷⁶ According to the Court, “graphic depictions and satirical cartoons have played a prominent role in public and political debate” despite their “sometimes caustic nature.”⁷⁷ Chief Justice Rehnquist gave several descriptions of political cartoons throughout the ages, including ones containing “Lincoln’s tall, gangling posture, Teddy Roosevelt’s glasses and teeth, and Franklin D. Roosevelt’s jutting jaw and cigarette holder.”⁷⁸ The Chief Justice reinforced the efforts of political cartoonists by explaining that the effect of these political cartoons “could not have been obtained by the photographer or the portrait artist.”⁷⁹ He concluded his support of such cartoons by positing that “from the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.”⁸⁰

c. Adequacy of Cartoon Parody as Analogy to Photoshopped Images

At first glance it appears that photoshopped images could be analogous to cartoon parodies or political cartoons. A closer look, however, makes it evident that attempting to pigeonhole photoshopped images into this category would be quite unsuccessful. Photoshopped images can come in many different shapes and sizes. For example, a photo of President Barack

⁷⁵ *Hustler*, 485 U.S. at 54.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 55.

⁷⁹ *Id.*

⁸⁰ *Id.*

Obama skeet shooting at Camp David has been repeatedly photoshopped.⁸¹ White House personnel initially took to the White House Flickr page to warn the public not to alter the photograph, stating that it was being made available “only for publication by news organizations and/or for personal use printing by the subject(s) of the photograph” and that it may not “be manipulated in any way and may not be used in commercial or political materials, advertisements, emails, products, promotions that in any way suggests approval or endorsement of the President, the First Family, or the White House.”⁸² Despite this warning, several versions of the photograph immediately began circulating the internet via social media. One of the most popular photoshopped versions of this image posed President Obama as if he were shooting both the American flag and the Constitution.⁸³ In another version, the President was featured shooting the gun while wearing a tutu, a crown, and pink fingernails.⁸⁴

By taking a quick, simple glance at these photos, the American public can easily discern that the original photograph of President Obama skeet shooting was digitally altered to make him look ridiculous, feminine, and anti-American. It is highly unlikely that someone who stumbles upon this image on social media would truly believe that President Obama was shooting the Constitution or wearing a crown and a tutu while he shot a gun. These digitally altered images constitute one end of the photoshopping spectrum, as they contain obvious and discernible distortions.

At the other end of the spectrum are photoshopped images that contain more subtle distortions. For example, photoshopping in the magazine industry has become more widespread

⁸¹ Mike Opelka, *White House Dared People to Photoshop Obama's Gun Picture...And Did They Ever*, THE BLAZE, Feb. 3, 2013, <http://www.theblaze.com/stories/2013/02/03/white-house-dared-people-to-photoshop-obamas-gun-picture-and-did-they-ever/>.

⁸² <http://www.flickr.com/photos/whitehouse/8436110735/>.

⁸³ *Id.*

⁸⁴ *Id.*

than ever, as “new technological advances that allow images to be manipulated easily, and with magazines in authoritative positions employing more digital retouchers, image manipulation has been taken to new heights.”⁸⁵ Prior to the transformation of digital technology, photo enhancement was simply used to smooth the complexions of models or move strands of hair that had fallen out of place.⁸⁶ Now, however, new digital technology can be used to “[widen] eyes, [adjust] teeth to create the perfect white smile and, in some cases, . . . [replace] feet, hands and even legs to create a new image.”⁸⁷ Such visual distortions create the impression that the model or celebrity has been blessed with perfect teeth, thin legs, or a flawless complexion. These distortions, although sometimes dramatic, are as not as obvious to the public. They are not obvious changes such as inserting a tutu onto the President’s torso, but rather are minor adjustments that appear as real as the original photograph. Consumers, particularly young female adults, are tricked into believing that the photoshopped images are real depictions of their favorite celebrities or fashion icons.⁸⁸

Looking at these two ends of the spectrum, the political cartoons and parodies explained in the *Hustler* case fit easily into the end of the spectrum where the viewer can quickly determine that the visual is not actually what the subject looks like. When an observer sees a cartoon of a politician, that observer does not automatically think that the politician looks like a cartoon character such that he or she has exaggerated characteristics like a big head and a small body. Instead, the observer quickly understands that the cartoon is the author’s personal depiction of the subject. The *Hustler* standard, therefore, could theoretically help to establish liability for photoshopped images that have obviously been drastically manipulated, such as the image of

⁸⁵ Hunter, *supra* note 7, at 85.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 100.

Obama wearing a crown and a tutu. Unfortunately, many photoshopped images contain only minor enhancements to the subject's body and can often fool the unsuspecting observer. If an author digitally enhances a model's body so that her legs look only slightly thinner, it is harder for the consumer to notice such a minor difference. These types of minor enhancements are the ones that appear most often in the media realm and can have the most negative impact on their subjects, as the public cannot easily determine that the photo is digitally enhanced and is therefore tricked into believing that the photograph is a real depiction of the subject.

If one accepts the premise that photoshopped images with minor enhancements are not equivalent to the drastic distortions of political cartoons and parodies, then one must also conclude that the *Hustler* standard is insufficient in the context of minor digital enhancements. The *Hustler* standard plainly does not cover minor and subtle changes to the subject of a photograph and therefore is an inadequate analogy for purposes of determining the author's liability.

B. Analogy to False Light Cases

The second analogy that may be helpful in establishing a rubric for assessing photoshop liability is the tort of "false light." According to the Restatement (Second) of Torts:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.⁸⁹

The tort of false light can be most easily analogized to photoshop liability in cases involving photographs in publications such as supermarket tabloids⁹⁰ and *Playgirl*.⁹¹

⁸⁹ RESTATEMENT (SECOND) OF TORTS § 652 (e) (1977).

⁹⁰ Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Pub., Inc., 978 F.2d 1065 (8th Cir. 1992).

⁹¹ Solano v. Playgirl, Inc., 292 F.3d 1078 (9th Cir. 2002).

a. *Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Pub., Inc.*

In 1992, the Eighth Circuit decided a case involving the potential liability of Globe International, Inc. (hereinafter “Globe”) for reusing a photograph of Nellie Mitchell that had been printed in the *National Examiner* and placing it next to a headline “about a ‘granny forced to quit work because of pregnancy’ in the supermarket tabloid *The Sun*.”⁹² Globe was the publisher of several tabloids, including the *National Examiner* and *The Sun*.⁹³ Initially, Globe’s November 25, 1980 issue of the *National Examiner* contained an accurate photograph of Ms. Mitchell with an accompanying story.⁹⁴ On October 2, 1990, however, *The Sun* printed the same photograph of Ms. Mitchell.⁹⁵ This time, her photograph appeared next to a headline that read “Pregnancy forces granny to quit work at age 101.”⁹⁶ The tabloid circulated throughout supermarkets in the county where Ms. Mitchell lived and worked.⁹⁷ Customers who stood in the checkout lines at these supermarkets could easily see Ms. Mitchell on the front cover next to this “pregnant granny” headline.⁹⁸ If a customer later picked up or purchased the tabloid, they could turn to the story on page eleven and see a “second photograph of [Ms.] Mitchell next to a fictitious story about a woman named ‘Audrey Wiles,’ living in Australia, who quit her paper route at the age of 101 because an extramarital affair with a millionaire client on her route had left her pregnant.”⁹⁹ The October 1990 issue of *The Sun* was a “sell-out” where Ms. Mitchell lived and news spread that “Nellie Mitchell, ‘the paper lady,’ was featured in the offending edition of [*The*] *Sun*.”¹⁰⁰

⁹² *Peoples Bank*, 978 F.2d at 1067.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Pub., Inc.*, 978 F.2d 1065, 1067 (8th Cir. 1992).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Ms. Mitchell filed suit against Globe, initially only suing for libel.¹⁰¹ After the case was removed to federal court, Peoples Bank and Trust Company of Mountain Home, as conservator of Ms. Mitchell's estate, was substituted as plaintiff and amended the complaint to include claims of "defamation, false light invasion of privacy, and outrage (intentional infliction of emotional distress)."¹⁰² During the jury trial, the District Court gave the following instruction regarding false light invasion of privacy: "to prevail on this claim, the plaintiff has the burden of proving by clear and convincing evidence the following: one, that the false light in which she was placed by the publicity would be highly offensive to a reasonable person; and two, that the defendant acted with actual malice in publishing the statements at issue in this case."¹⁰³ The District Court further instructed that actual malice means that Globe "intended, or recklessly failed to anticipate, that readers would construe the publicized matter as conveying actual facts or events concerning Mrs. Mitchell" and therefore a finding of actual malice "requires a showing of more than mere negligence."¹⁰⁴

The jury trial in the District Court returned a unanimous verdict for Ms. Mitchell and awarded her both compensatory and punitive damages for invasion of privacy and outrage.¹⁰⁵ Globe appealed the verdict, arguing that Ms. Mitchell could not "prevail as a matter of law" and that the evidence did not "support an invasion of privacy claim or the tort of outrage."¹⁰⁶ The thrust of Globe's argument was that the assertion of pregnancy could not "reasonably be believed, and therefore must render the whole story an obvious, non-actionable 'fiction.'"¹⁰⁷ The Eighth Circuit reasoned that every other aspect of the story, such as the "implication of sexual

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1068.

¹⁰⁴ Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Pub., Inc., 978 F.2d 1065, 1068 (8th Cir. 1992).

¹⁰⁵ *Id.* at 1067.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1069.

impropriety and that [Ms.] Mitchell was quitting her life-long profession” were subject to reasonable belief.¹⁰⁸ Even the story about her pregnancy, which is a physical condition and not an opinion or metaphor, “could be proved either true or false.”¹⁰⁹ Based on the foregoing, the court concluded that it could not say as “as a matter of law that readers could not reasonably have believed that the charged story portrayed actual facts or events concerning [Ms.] Mitchell.”¹¹⁰ Furthermore, in affirming the holding of the District Court, the Eighth Circuit held that its own analysis of the tabloid at issue led it to conclude that Globe did not “intend [*The Sun*] to be an obvious work of fiction at all, but rather [held] out the publication as factual and true.”¹¹¹ The court ruled that Ms. Mitchell adequately met her burden on the claim of false light because she had proven that the false light she was portrayed in by the photograph would be highly offensive to a reasonable person and that Globe had acted with actual malice.

b. *Solano v. Playgirl, Inc.*

A Ninth Circuit case in 2002 analyzed the tort of false light against *Playgirl* magazine.¹¹² A tort committed by this type of publication could arguably cause more damage to a subject’s reputation than a supermarket tabloid, as this magazine often “features sexually suggestive nude pictures of men.”¹¹³ In the January 1999 issue of *Playgirl* magazine, the cover photograph featured actor Jose Solano, Jr., best known for his role on the television program “Baywatch.”¹¹⁴ The cover photo showed Solano “shirtless and wearing his red lifeguard trunks, the uniform of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Pub., Inc.*, 978 F.2d 1065, 1069 (8th Cir. 1992).

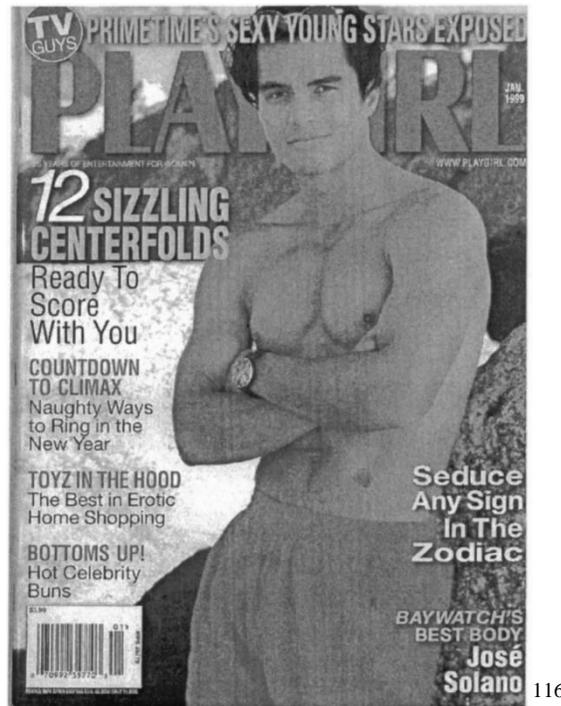
¹¹¹ *Id.*

¹¹² *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002).

¹¹³ *Id.* at 1082.

¹¹⁴ *Id.* at 1080.

his ‘Baywatch’ character, under a heading reading: ‘TV Guys. PRIMETIME’S SEXY YOUNG STARS EXPOSED.’”¹¹⁵ Below is a copy of the January 1999 cover photo:



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Despite the photograph and headlines on the front cover, Solano did not pose for this magazine and had never given an interview.¹¹⁷ His sole appearance inside the magazine was on page 21, where he appeared fully-clothed along with a short profile of his acting career; however, the *Playgirl* issues were displayed on newsstands “packaged in plastic wrap to prevent potential customers from flipping through the pages to view the magazine’s contents.”¹¹⁸ This effectively prevented consumers who did not wish to purchase the entire publication from seeing anything other than the suggestive front cover. *Playgirl* has a reputation for appealing to its female readers by featuring nude photographs of men “in various poses emphasizing their genitalia, including some showing them engaged in simulated sex acts,” although the magazine does also contain

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1090.

¹¹⁷ *Id.* at 1080-1081.

¹¹⁸ *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1081 (9th Cir. 2002).

some minimum writing in the form of editorials.¹¹⁹ Inevitably, Solano's photograph on the cover of this magazine caused him humiliation and embarrassment in his workplace, as consumers who had only viewed the front cover assumed he posed naked for the issue.¹²⁰ In his suit in District Court, he sued *Playgirl* under the tort of false light, alleging that it had "deliberately created the false impression that he [posed nude], making it appear he was willing to degrade himself and endorse such a magazine."¹²¹

Initially, the District Court granted *Playgirl* summary judgment, finding that Solano had failed "to establish that *Playgirl* created a false impression about what readers would actually see of Solano inside the magazine or in any event that it had acted knowingly or recklessly in doing so."¹²² Solano appealed this decision to the Ninth Circuit.¹²³ In evaluating whether *Playgirl* should prevail on summary judgment, the court first determined that in order to prevail on his false light claim under California law or common law, Solano must show that: "(1) *Playgirl* disclosed to one or more persons information about or concerning Solano that was presented as factual but that was actually false or created a false impression about him; (2) the information was understood by one or more persons to whom it was disclosed as stating or implying something highly offensive that would have a tendency to injure Solano's reputation; (3) by clear and convincing evidence, *Playgirl* acted with constitutional malice; and (4) Solano was damaged by the disclosure."¹²⁴

The Ninth Circuit reviewed the grant of summary judgment de novo in order to "determine, viewing the evidence in the light most favorable to the nonmoving party, whether

¹¹⁹ *Id.* at 1090.

¹²⁰ *Id.* at 1081.

¹²¹ *Id.* at 1080-1081.

¹²² *Id.* at 1081.

¹²³ *Id.*

¹²⁴ *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082 (9th Cir. 2002).

any genuine issues of material fact [existed].”¹²⁵ The court first analyzed whether Solano met his burden of establishing a genuine issue as to whether the cover photo created a false impression of him.¹²⁶ The court indicated that it is “well-established that ‘[a] defendant is liable for what is insinuated as well as for what is stated explicitly.’”¹²⁷ By placing Solano on the cover of a magazine known for posing men in sexually provocative ways, one could reasonably believe that *Playgirl* was making an insinuation about what readers would see inside the magazine.¹²⁸ In support of this contention, the court looked to another case involving *Hustler*, where an actress “asserted a false light claim based on *Hustler* magazine’s insinuation that she was the kind of person to pose nude for *Hustler*: ‘To be depicted as *voluntarily* associated with such a sheet . . . is unquestionably degrading to a normal person. . . .”¹²⁹ Therefore, Solano met his burden of establishing that the cover photo created a false impression of him.

Along with establishing that a false impression was created, Solano, as a public figure, also had to meet his burden with regard to “actual malice” in order to withstand summary judgment. To prevail on a claim of false light as a public figure, Solano must establish by clear and convincing evidence that *Playgirl* acted with actual malice: that is, the magazine knowingly or recklessly created the false impression.¹³⁰ Generally, a plaintiff’s failure “to set forth specific facts showing such malice is a proper ground for summary judgment.”¹³¹ In analyzing the facts in the light most favorable to Solano, however, the court found that Solano raised a genuine issue as to “whether *Playgirl*’s editorial staff produced the January 1999 cover knowing, or with reckless disregard for whether, Solano’s bare-chested photograph and various suggestive

¹²⁵ *Id.*

¹²⁶ *Id.* at 1082-1084.

¹²⁷ *Id.* at 1083 (quoting *O’Connor v. McGraw-Hill*, 159 Cal.App.3d 478 (1984)).

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting *Douglas v. Hustler Magazine*, 769 F.2d 1128, 1136 (7th Cir. 1985)).

¹³⁰ *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1087 (9th Cir. 2002). This is the third element necessary to establish a claim for false light, and is most often called the constitutional requirement of actual malice. *Id.*

¹³¹ *Id.* at 1084.

headlines would falsely imply that he voluntarily posed for and appeared nude inside the magazine.”¹³² The court reversed the District Court’s holding and remanded for trial, as it felt Solano had “provided sufficient evidence to create triable issues of fact for the jury on the elements of each of his causes of action.”¹³³

c. False Light as Analogy to Photoshopped Images

The branch of privacy law that Ms. Mitchell and actor Jose Solano, Jr. sued under involves the right of an individual to be free from publicity which places him or her in a false light in the public eye.¹³⁴ As stated previously, the Restatement (Second) of Torts provides that the two main common law elements of false light are that the false light would be highly offensive to a reasonable person and the author had knowledge of or acted in reckless disregard as to the falsity of the publicized matter.¹³⁵

In order to make an analogy between false light publications and photoshopped images, we must again look at the spectrum of photoshop. On one end of the spectrum, the one with digitally altered photographs of President Obama wearing a tutu, this obvious distortion of the President’s features would be an extreme example of portraying a subject in a false light. The false light portrayed in such photographs could potentially be offensive to the reasonable person, and the authors generally acted with knowledge of or reckless disregard as to the photograph’s falsity.

On the other end of the spectrum, a photoshopped image could be one like the NatureLux Mousse mascara ad that CoverGirl ran featuring pop singer Taylor Swift.¹³⁶ In the ad, digital

¹³² *Id.* at 1087.

¹³³ *Id.* at 1081.

¹³⁴ *Braun v. Flynt*, 726 F.2d 245, 252 (5th Cir. 1984).

¹³⁵ RESTATEMENT (SECOND) OF TORTS § 652 (e) (1977).

¹³⁶ Maura Judkis, *Photoshop catastrophes: The year in review*, WASHINGTON POST, Dec. 27, 2011, http://www.washingtonpost.com/blogs/arts-post/post/photoshop-catastrophes-the-year-in-review/2011/12/27/gIQAb7XqKP_blog.html.

enhancements to the photograph made Swift's eyelashes look longer than they actually are.¹³⁷ Following a complaint from the National Advertising Division ("NAD") of the Council of Better Business Bureaus, CoverGirl was forced to pull the ad.¹³⁸ According to a watchdog group, "Swift's eyelashes were enhanced in post-production so much that the ad became misleading."¹³⁹ Furthermore, NAD questioned whether the ad "implied that the fullness of Swift's lashes, which were enhanced digitally, could really be achieved with the product."¹⁴⁰ Following the removal of this ad, CoverGirl also "discontinued its claim that the product made users' lashes two times fuller than bare lashes and was 20 percent lighter than other mascara." At this end of the spectrum, with enhancements that add fullness to a model's eyelashes, it is difficult to make the case that a subject such as Taylor Swift could challenge the enhancements under the tort of false light. Although it may be possible to achieve the actual malice standard if the publisher knew they were making such blatant changes, it would nevertheless be difficult for the subject to prove the second element of the tort: that the false light would be highly offensive to a reasonable person. Furthermore, it might be difficult for Taylor Swift to measure the damage to her reputation for being portrayed with unnaturally long eyelashes. CoverGirl's use of Photoshop is not easily analogized with the magazine covers in *Peoples Bank* and *Solano*.

Based on the foregoing, it appears that the tort of false light invasion of privacy is still an inadequate analogy when one is attempting to develop a standard for liability based on Photoshop enhancement. False light is best used when a photograph is used to make a celebrity appear as if he is posing nude inside of a magazine or an older woman has quit her job due to

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Sarah Anne Hughes, *CoverGirl ad featuring Taylor Swift nixed over 'enhanced' eyelashes*, THE WASHINGTON POST, Dec. 22, 2011, http://www.washingtonpost.com/blogs/celebrityology/post/covergirl-ad-featuring-taylor-swift-nixed-over-enhanced-eyelashes/2011/12/22/gIQAElgBP_blog.html.

pregnancy. These are manipulations to photographs which could potentially offend and humiliate the reasonable person. The tort of false light does not, however, get to the type of invasion of privacy where the photograph is not actually a “false light,” but is rather a minimal alteration that could still cause harm to the subject. Because false light does not cover the most common way we see photoshopped images being used, it is not a sufficient enough analogy when establishing a rubric for photoshop liability.

C. Invasion of Privacy: Public v. Private Figures

A third analogy that could potentially help government and the courts develop a workable standard for photoshop liability comes from the landmark U.S. Supreme Court decision *New York Times Co. v. Sullivan*.¹⁴¹ This case involved a full page advertisement in the *New York Times* newspaper, which alleged that “Martin Luther King Jr.’s arrest for perjury was part of a campaign to hinder King’s efforts to ‘integrate public facilities and encourage blacks to vote.’”¹⁴² The city commissioner of Montgomery, Alabama, L.B. Sullivan, filed a lawsuit and initially won a judgment under Alabama law.¹⁴³ When the case went to the Supreme Court, however, the justices held that the Alabama law failed to provide adequate safeguards for the First Amendment right to freedom of speech and press.¹⁴⁴ This meant that Commissioner Sullivan was prohibited from recovering as a public official “unless the public official proved the statement was made with actual malice.”¹⁴⁵

By setting the *New York Times v. Sullivan* standard, the Court was attempting to establish a threshold which plaintiffs, as public officials, must meet in order to successfully sue “news

¹⁴¹ 376 U.S. 254 (1964).

¹⁴² *Id.* at 256.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 280.

reporting establishments” for defamation.¹⁴⁶ The Court was not intending to give special rights to the news media, but instead wanted to set a high standard for recovery when the plaintiff is already in the public spotlight. Later, in *Gertz v. Robert Welch, Inc.*, the court extended the *New York Times* standard to include public figures and defined a “public figure” as an individual who achieves general fame or notoriety in the community.¹⁴⁷ In *Gertz*, an article was published about an attorney who had defended a child’s family in a civil action after a police officer killed the child.¹⁴⁸ The article labeled the attorney as a “Leninist” and a “Communist-fronter.”¹⁴⁹ After the attorney filed a libel suit against the reporter, the Court held that the attorney was not a public figure, as he plainly did not “thrust himself into the vortex of this public issue,” and he therefore did not have to prove that the article was written with actual malice in order to establish the reporter’s liability.¹⁵⁰ The *Gertz* decision placed the same high burden for recovery on public figures as *New York Times v. Sullivan* had placed on public officials.¹⁵¹

New York Times v. Sullivan and *Gertz v. Robert Welch, Inc.* both involved libel cases in the printed media¹⁵², but their common ideal of applying a heightened standard when media outlets are sued by a public figure can be seen in the area of photoshop as well. For example, actor Jake Gyllenhaal claimed in May 2011 that a photograph that had swept across the internet was a violation of his privacy rights.¹⁵³ The image attempted to show the actor stretching in his

¹⁴⁶ Cameron Danly, *Paparazzi and the Search for Federal Legislation*, 38 W. ST. U. L. REV. 161, 169 (2011).

¹⁴⁷ 418 U.S. 323 (1974).

¹⁴⁸ *Id.* at 325-326.

¹⁴⁹ *Id.* at 326.

¹⁵⁰ *Id.* at 352.

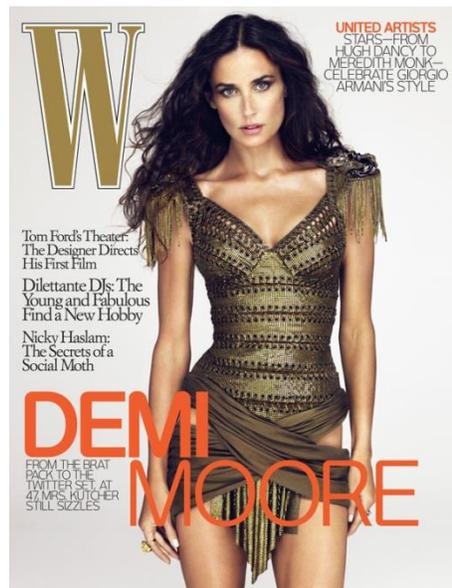
¹⁵¹ Danly, *supra* note 146, at 169.

¹⁵² This Note goes back and forth between the terms “libel” and “defamation.” This is because libel is a written form of defamation. The definition of libel is to “defame (someone) in a permanent medium, esp. in writing.” BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁵³ Eriq Gardner, *Actor’s lawyer demands websites take down “fake” image*, HOLLYWOOD REPORTER, May 19, 2011, <http://www.hollywoodreporter.com/thr-esq/jake-gyllenhaal-claims-defamation-by-190274>.

“tighty-whitey underwear,” but was actually only Gyllenhaal’s face on another man’s body.¹⁵⁴ In the photo, Gyllenhaal was posed in an attempt to resemble “an album cover pose of singer Grace Jones.”¹⁵⁵ Gyllenhaal’s lawyers at the Los Angeles firm Bloom Hergott claimed that ““as anyone could tell from a cursory examination, this is a fake picture, in which our client’s head has been pasted on the body of another person.””¹⁵⁶ They alleged, however, that the photo “violate[d] the actor’s legal rights by ‘portraying him in a false light [and] violating his right of publicity.’”¹⁵⁷ Gyllenhaal has so far been unsuccessful in litigating this claim, as some viewers do not even believe the image is fake.¹⁵⁸ In addition, it would be hard for him to make a defamation claim and prove that the image truly damages his reputation.

Demi Moore found herself in the exact opposite situation in 2010 when she landed on the cover of the December Issue of *W* magazine, seen below:



¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* “At least one photo expert believes the image is a fake, so perhaps Gyllenhaal isn’t stretching. No, maybe just his lawyers.” *Id.*

¹⁵⁹ *Demi Moore’s Hip Photoshopped For W Cover? She Says NO!*, HUFFINGTON POST, March 18, 2010, http://www.huffingtonpost.com/2009/11/19/demi-moores-hip-photoshop_n_364469.html.

In this photograph, it appears that Moore is “impossibly thin,” as there seems to be a “chunk missing from her left hip where you’d expect a more contiguous line would connect hip to thigh beneath that pelvic drapery.”¹⁶⁰ A spokesperson with the magazine claimed that the publishers “did not do anything unusual or out of the ordinary on Demi Moore for the photo on the cover of [W]. Demi is an extraordinary, beautiful woman and we feel our cover reflects that.”¹⁶¹ Furthermore, Moore also denied that she fell “victim to a botched Photoshop job.”¹⁶² She took to Twitter with an “original image” that matches the cover page photo and stated: “Here is the original image people my hips were not touched don’t let these people bullshit you!”¹⁶³ Later, she told reporters that what bothered her about the controversy “wasn’t that people were saying it was retouched, it was that they were saying [her] hip was so badly botched because a hunk of it was taken out.”¹⁶⁴ She admitted to calling the photographers, who reassured her that they did not photoshop anything on her hip, thigh, or waist.¹⁶⁵ Although she knew that the image had not been photoshopped, Moore “tasked attorney Marty Singer to tame a blogger who had the nerve to suggest that a little Photoshopping on December’s W cover made her look like ‘she had some sort of weird car accident that left a wedge of meat missing.’”¹⁶⁶

By reviewing the struggles that these two celebrities have had with their likeness being photoshopped (or images that appear to be photoshopped even if they have not been), it is clear that a workable standard must be established to determine photoshop liability. Unfortunately, however, celebrities do not appear to be having much success bringing libel claims against the

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Demi Moore in Harper’s Bazaar: Talks Photoshop Dispute, Insta-Love with Ashton*, HUFFINGTON POST, May 17, 2010, http://www.huffingtonpost.com/2010/03/17/demi-moore-in-harpers-baz_n_502510.html.

¹⁶⁵ *Id.*

¹⁶⁶ Eriq Gardner, *Marty Singer demands blogger stop being mean to Demi Moore*, HOLLYWOOD REPORTER, Dec. 21, 2009, <http://www.hollywoodreporter.com/blogs/thr-esq/marty-singer-demands-blogger-stop-63560>.

authors of such photoshopped images, as they know they would have a difficult time meeting the *New York Times* actual malice standard. At the time that the Supreme Court introduced this heightened standard in the 1960s, it was meant for defamation that appeared in words in newspapers. Technology has drastically changed over the past fifty years and content that could potentially be defamatory now appears in photographs rather than in printed words. In addition, the public is now given much more access to news coverage and therefore there is a greater potential that these photoshopped images are reaching a wider audience and causing more damage to the subject's reputation. Due to these immense changes, the Supreme Court needs to revisit the heightened *New York Times* actual malice standard to determine whether it should be applied not only to defamation through the printed word, but also defamation through photoshopped images.

D. Georgia's Legislative Response

The final analogy that can be used to establish a rubric for photoshop liability is not based on caselaw or torts, but rather is based on a legislative response to the changing world of digital enhancements. Initially, a bill by Georgia state legislators that would criminalize lewd image alterations was introduced "in response to a teenage girl falling victim to obscene photo-shopping."¹⁶⁷ The legislation is House Bill 39 and was originally proposed one year ago by Representative Earnest Smith.¹⁶⁸ The bill died without advancing, but once Representative Smith and co-sponsor Pam Dickerson were "targeted by online pranksters," they decided to re-file the bill.¹⁶⁹ If this current bill is passed, the state "could fine creators of offensive images \$1,000

¹⁶⁷ Tiffany Madison, *Photoshop under fire: Legislator moves to outlaw lewd Photoshop images*, WASHINGTON TIMES COMMUNITIES, Feb. 21, 2013, <http://communities.washingtontimes.com/neighborhood/citizen-warrior/2013/feb/21/photoshop-under-fire-legislator-moves-outlaw-lewd-/>.

¹⁶⁸ Barnini Chakraborty, *Georgia pol wants to make lewd photoshopping a crime after being mocked in porn star pic*, FOXNEWS.COM, <http://www.foxnews.com/politics/2013/02/13/georgia-lawmaker-wants-to-make-photoshopping-picture-crime/>.

¹⁶⁹ Madison, *supra* note 167.

and/or impose a 12-month jail sentence for ‘defamation when he or she causes an unknowing person wrongfully to be identified as the person in an obscene depiction.’”¹⁷⁰

The lewd image of Representative Smith that prompted his renewed efforts to get HB 39 passed featured his head “digitally imposed on a nude man’s body.”¹⁷¹ This photoshopped image was created by a blogger “who used the image to mock Smith.”¹⁷² The blogger, Andre Walker, publicly responded to Smith’s legislative move by stating: “I would simply remind Representative Smith that he’s a public figure, and just like someone had the protected right to depict former President George W. Bush as a monkey, I have the protected right to Photoshop the head of any elected official onto the body of anything I chose.”¹⁷³ He went on to dispute the bill on First Amendment grounds, arguing:

‘The First Amendment . . . protects all forms of speech, not just [the] spoken word. That’s why House Bill 39 is so asinine. It attempts to regulate speech and I doubt it would stand up in a court of law. Rep. Smith needs to grow some thick skin if he’s going to be an elected official. Trust me when I say the altered photograph shown above was not the worst I could have done.’¹⁷⁴

In addition, internet bloggers, First Amendment advocates, and even Representative Smith’s hometown have all chastised his move against satire.¹⁷⁵ For example, Tom Knighton of the Libertarian Party of Georgia explained that what Representative Smith is seeking to do “is criminalize speech that does nothing more than criticize those in power.” Furthermore, an editor for the *Augusta Chronicle* published the statement: “It’s mind-boggling to think that people who help write our laws are that out to lunch. Americans have a fundamental right to mock others. It’s an integral part of free speech;

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Chakraborty, *supra* note 168.

¹⁷³ Madison, *supra* note 167.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

ridicule and satire simply cannot be boiled out and separated from free speech. It's impossible."¹⁷⁶

In response to the overwhelming criticism of his bill, Representative Smith has retorted: "Everyone has a right to privacy. You have a right to speak, but no one has a right to disparage another person. It's not a First Amendment right. It's clear that we need to do something. It can be done by anyone at any time."¹⁷⁷ When asked to provide specifics about the legislation, however, Representative Smith could not provide any. Instead, he said, "At this juncture, I am not at liberty to share anything with you. I don't have to. If and when this bill passes we can revisit the issue and if I choose to give you details at that time I will, but until then I don't have to tell you anything."¹⁷⁸

Despite the predictable criticism that the bill has received from internet bloggers and First Amendment advocates, this bill could provide a workable response to the issue of how Photoshop liability should be evaluated. Representative Smith advocates the bill as a way to protect teens from "becoming victims of cyber cruelty."¹⁷⁹ Although critics believe the bill attacks free speech rights, Representative Smith says it is not about adults, but is instead about the "sanctity and privacy of our kids."¹⁸⁰ The teenager who was the inspiration for the original bill did not just have her photograph altered- she had sexual predators calling her and emailing her as a result of the image being spread on the internet.¹⁸¹ With no laws on the books to help protect children from this type of

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Chakraborty, *supra* note 168.

¹⁷⁹ *Lawmaker behind Photoshop bill targeted in obscene photo*, WSBTV.COM, Feb. 19, 2013, <http://www.wsbtv.com/news/news/local/lawmaker-behind-photoshop-bill-targeted-obscene-ph/nWSkT/>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

cyberbullying,¹⁸² the legislators are attempting to ensure that victims of obscene photoshopped images have a potential cause of action against the creators of such images.

As stated previously, Georgia's legislation would make it a misdemeanor offense (a crime punishable by up to a \$1,000 fine) to alter a photograph "that causes an unknowing person wrongfully to be identified as the person in an obscene depiction."¹⁸³ Although the specifics of the legislation have not been released, one could imagine that the standard is fairly easy to implement. For example, the state could use the obscenity standard from *Miller v. California*¹⁸⁴ to determine whether the photoshopped image was obscene. *Miller* is the Supreme Court's test to determine whether speech or an expression is obscene and therefore not protected by the First Amendment. In order to be labeled "obscene," the work must meet all three prongs of the *Miller* test: (1) the work must appeal to the "prurient interest in sex;" (2) the work must "portray sexual conduct in a patently offensive way;" and (3) the work must, taken as a whole, have no "serious literary, artistic, or scientific value."¹⁸⁵ Using this standard, a person could be found liable for creating an obscene image through the use of Photoshop that causes an unknowing person wrongfully to be identified as the person in such a photograph.

On the other hand, a standard similar to Georgia's legislative response would only address photoshopped images that are obscene and would not address when an image is slightly altered and still considered offensive to the subject. For example, the digital alterations of Jake Gyllenhaal or Demi Moore would not fit under the court's definition of obscene and therefore the creators of such photographs would not be subject to the \$1,000 for their creation. This standard would only be applicable when the photograph is offensive and lacks no particular

¹⁸² *Id.*

¹⁸³ Chakraborty, *supra* note 168.

¹⁸⁴ 413 U.S. 15 (1973).

¹⁸⁵ *Id.* at 24.

value in the scientific or literary world. It would not, however, be applicable to the subtle alterations that we often see in magazines.

Part III: Toward a Workable Response

Each of the four analogies explained above has the potential to be a significant contributor towards a workable rubric for establishing photoshop liability. On their own, however, these four templates cannot be used in their precise form. Instead, parts of their standards and the reasoning behind their implementation must be used in order to create a workable Photoshop standard. First, liability under *Hustler v. Falwell* could potentially be used when there is such a drastic distortion to a photograph that no reasonable viewer could believe in its truth. Second, under the tort of “false light,” the subject of a photoshopped image could try to argue that an altered photograph is highly offensive to the reasonable person and the author knew that the altered image was false. Third, the “actual malice” standard that is applicable to public figures under *New York Times v. Sullivan* could be modified to keep pace with changing technology. Finally, we could turn from the courts to the government and attempt to create a bill which would make the creator of an obscene photoshopped image subject to a \$1,000 fine.

Unfortunately, however, each of these suggestions has its own flaws and each cannot establish liability across the entire spectrum of photoshopped images. The bill proposed by the Georgia state legislators, for example, only applies to obscene photographs and would not cover photographs that are not obscene but that the subject still finds offensive. Furthermore, the *Hustler* standard does not accommodate distortions that are more subtle.

A. False Advertising, Disclaimers, and Photoshop Liability in Other Countries

Along with the four main analogies discussed above, there are also other alternatives that can make a small contribution to the quest for a workable rubric for photoshop liability. These

alternatives include classifying photoshopped images as misleading or false advertising, adding disclaimers beneath photoshopped images, and mirroring the liability standards that England and France have established.

First, as detailed in the beginning of this Note, photoshopped images in advertisements could be regulated as “deceptive or misleading advertising.”¹⁸⁶ Such images are misleading when “consumers are unable to distinguish a real image from a manipulated one and . . . consumers are considering these computer-altered models as a factor when making purchase decisions.”¹⁸⁷ In *FTC v. Colgate-Palmolive Co.*, the Supreme Court sent a “strong message to advertisers that deceiving the public would not be tolerated” and found that Colgate’s advertising practices were a deceptive misrepresentation of its products.¹⁸⁸ The Court’s reasoning in *Colgate* provides strong support for regulating photoshopped images when they contain misleading qualities.¹⁸⁹ The reasonable consumer is generally “unable to determine the difference between a manipulated image and its original;” therefore, photoshopped images in advertisements can create the same consumer confusion as misleading advertisements that do not contain photoshopped images.¹⁹⁰ Viewed in this light, the courts could establish liability for photoshopped advertisements by analogizing them to other misleading advertisements that the Supreme Court has previously allowed agencies to regulate. Unfortunately, this standard would be limited to photoshopping in advertisements and would not create liability for other photoshopped images.

A second alternative to help establish photoshop liability is for the government to enact legislation that would require a disclaimer under every photoshopped image. Removing all

¹⁸⁶ Hunter, *supra* note 7, at 89.

¹⁸⁷ *Id.* at 111.

¹⁸⁸ *Id.* at 91 (citing *FTC v. Colgate-Palmolive, Co.*, 380 U.S. 374 (1965)). In *FTC v. Colgate-Palmolive, Co.*, Colgate was “utilizing a plexiglass model covered with sandpaper to demonstrate the moisturizing power of its shaving cream.” *Id.*

¹⁸⁹ *Id.* at 92.

¹⁹⁰ *Id.*

photoshopped imagery would very likely be “viewed as a violation of the First Amendment,” but designing a warning system similar to the labels on tobacco advertisements “could provide the ideal compromise for acceptable regulation.”¹⁹¹ In 2006, the University of Alabama conducted a study in order to determine the best way to place a disclaimer on photoshopped images.¹⁹² The study found that “even though consumers may know about the widely used practice of photoshopping, without the additional alert immediately prior to or at the same time of viewing an image, consumers will not process the image as photoshopped and will rather process it as a real untouched image.”¹⁹³ The study also found that the disclaimer’s wording needs to be powerful, the appearance needs to be obvious, and the positioning needs to be “central to the advertisement.”¹⁹⁴ Even with these requirements, this type of disclaimer would not infringe on a company’s right to advertise and would likely be narrowly tailored enough “to balance the First Amendment concerns with the need for intervention.”¹⁹⁵

Democrats in England have launched a campaign, entitled the “Real Women” campaign, which seeks to implement this type of disclaimer in the advertising realm.¹⁹⁶ Supporters of this campaign call it a “labeling system” and explain that it would contain an icon “signaling that the image had been retouched and a rating to accompany the icon that would denote the extent of the manipulation done to that image.”¹⁹⁷ Supporters hope that this rating system will prevent consumers “from being misled and harmed by images that they may have otherwise perceived as real” and move companies toward more honest advertising practices.¹⁹⁸ In France, a proposed disclaimer system would impact both advertisements and editorial images and require that these

¹⁹¹ *Id.* at 102.

¹⁹² Hunter, *supra* note 7, at 103.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 107.

¹⁹⁷ *Id.* at 107.

¹⁹⁸ Hunter, *supra* note 7, at 107-108.

photoshopped images carry a warning label.¹⁹⁹ This version would cover not only advertisements, but also “art photography, press releases and political posters, as well as [images] in magazines.”²⁰⁰ Unlike England’s version, France’s disclaimer would not have further information rating the extent of the alteration, but violators would be subject to fines.²⁰¹

Governments in countries such as England and France have looked toward disclaimers in order to establish a rubric for photoshop liability, but disclaimers would likely not be adequate to combat the harm that photoshopped images are causing to American society. When viewing models or celebrities in magazines, young females are often too mesmerized by the fancy clothes or expensive makeup in the photograph to notice the fine print at the bottom of the page. The disclaimers would likely go unnoticed by the majority of the population and would therefore do little to decrease the harms of photoshopped imagery.

B. Combining the Four Analogies with the Two Alternatives for a Workable Legislative Response

Flaws can be found with each of the four main analogies as well as the two possible alternative grounds for establishing photoshop liability. Therefore, it is necessary for the government or the courts to use the reasoning from each of these analogies in order to form a workable rubric for photoshop liability.

This Note proposes that the best rubric for photoshop liability is a bill that would impose liability on the creator of a photoshopped image whenever that image could be seen as: (1) offensive to the reasonable person; or (2) willfully misleading to the reasonable person. Furthermore, if a public figure or public official wishes to bring a claim under the first prong of this photoshop liability legislation, he or she must meet the heightened “actual malice” standard

¹⁹⁹ *Id.* at 108.

²⁰⁰ *Id.*

²⁰¹ *Id.*

that was established in *New York Times v. Sullivan*.²⁰² This bill would combine the reasonable person standards from the cartoon parody and false light scenarios while still maintaining the heightened standard for public figures and public officials. In addition, the bill would look at the level of “offensiveness” rather than obscenity as the Georgia legislation did. This is important because finding liability for photoshopped images that offend the reasonable person is a broader and more inclusive standard than simply finding liability for photoshopped images that are obscene. Furthermore, this bill would include any misleading or deceptive photoshopped images, whether they are found in advertisements or on social media, but would only impose liability if the creator’s deception was willful.

If the government were to pass such a bill to regulate photoshop liability, it is highly probable that the courts would look upon it favorably. It is the court’s job to balance the government’s need to regulate this area against each individual’s First Amendment guarantees. This bill appears to perfectly balance these two interests, as it allows the government to regulate an area that can be harmful to society while still not infringing on a photoshop creator’s ability to manipulate images as a form of expression. In addition, the bill is broad enough to include more than just the obscene, but it is also narrowed through its reasonable person and actual malice standards. The court would likely find that this type of regulation is sufficiently narrowly tailored to the government’s interest in controlling cyberbullying and decreasing the harmful effects of manipulated photographs, such as eating disorders and depression. Although it may not be able to assess liability for the minor enhancements that magazines make to models when such adjustments are not willfully deceiving, it would still provide a strong legal tool that will likely cause magazine publishers to think twice about some of the images they portray as real.

²⁰² 376 U.S. 254 (1964).

Whether photoshop liability is established with this rubric or with one of the several others that scholars have proposed, it needs to be established quickly. The problem of photoshop liability has been acknowledged outside of the legal field by the American Medical Association (AMA), which adopted a “new policy against the altering of photographs ‘in a manner that could promote unrealistic expectations of appropriate body image.’”²⁰³ In a press release, the AMA described how “the altering of models’ bodies in advertisements . . . leads to unrealistic ideas about body image, particularly for ‘impressionable’ children and teenagers.”²⁰⁴ The AMA has made recommendations to advertising associations that they work with “children’s health organizations on guidelines that discourage the use of Photoshop and similar photo editing software.”²⁰⁵ Even though the AMA’s policy against photoshopping does not have the force of law, it appears to be “a step in the right direction.”²⁰⁶

Part IV: Conclusion

First Amendment principles have been lagging behind advancements in digital technology over the past decade and we can no longer wait for the marketplace of ideas to rid society of the harms that photoshopping causes. Digital enhancements through the use of Adobe Photoshop have allowed publishers to alter images without the consent, and often knowledge, of the subjects of these images. When the digital alteration is drastic or offensive, these images can have a very negative impact on their subjects. When the alteration is subtle, these images can harm the young consumers who cannot tell the difference between a real photograph and an enhanced one.

²⁰³ Ellie Krupnick, *Photoshop Discouraged By American Medical Association*, HUFFINGTON POST, June 23, 2011, http://www.huffingtonpost.com/2011/06/23/photoshop-american-medical-association_n_882958.html.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Thanks in large part to the lag between digital advancements and First Amendment jurisprudence, the victims of photoshopped images have been left without a clear remedy when such an image is offensive to them and is published in a widely circulated magazine or spread throughout the internet. Furthermore, young and impressionable girls who are constantly exposed to photoshopped images of models who appear unrealistically thin have a higher tendency to develop self-identify issues and eating disorders. Within the past few years, “consumer attitude has shifted toward opposing this deceptive practice, and therefore, the environment is ripe to implement regulations to put an end to consumer harm.”²⁰⁷

In order to combat the harms that photoshopping can cause, the government and the courts must look to reasonable analogies and alternatives in order to form a workable rubric for photoshop liability. By looking at these analogies and alternatives, the government should create a rubric which would impose liability whenever a photoshopped image would be offensive to the reasonable person (with an actual malice standard for public figures and public officials) or willfully deceiving to the reasonable person. It has become clear throughout the past several years that photoshopped images are prevalent and harmful, so our government and our courts should not leave these images without regulation any longer.

²⁰⁷ Hunter, *supra* note 7, at 110-111.