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## APPLYING TORT LAW TO FABRICATED DIGITAL CONTENT

Michael Scott Henderson\*

### INTRODUCTION

Imagine viewing a video of yourself doing and saying things you have never done or said. This “You” could be in a room you have never been in; it could appear younger or older than you currently are and still seem completely realistic. Such a video might sound as if it should exist solely through the use of advanced CGI or animatronics. However, new technologies are being developed that would allow individuals to fabricate digital media using only a recording and a computer. This technology raises the prospect of “fabricated digital content”<sup>1</sup> becoming an easily created and disseminated form of media with the potential of impacting an individual’s image and reputation.

On November 2, 2016, software company Adobe demonstrated eleven “experimental technologies” at its “Max 2016” event in San Diego, California.<sup>2</sup> One of the technologies demonstrated, titled “Photoshopping Voiceovers,” or “#VoCo,” is designed to provide audio recorders the ability to alter the dialogue of a recording without the need of the original voiceover artist.<sup>3</sup> The technology was demonstrated by manipulating an audio recording of actor and comedian Keegan-Michael Key.<sup>4</sup> The demonstrator, Adobe developer Zeyu Jin, manipulated the recording,<sup>5</sup> using only a keyboard, by switching the order in which words were said,<sup>6</sup> as well as adding

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<sup>1</sup> The phrase “fabricated digital content” relates to digital media, such as a video or audio recording, edited to have different content, but to appear as if it is original, or non-edited.

<sup>2</sup> Adobe Communications Team, *Let’s Get Experimental: Behind the Adobe Max Sneaks*, ADOBE BLOG (Nov. 4, 2016), <https://blogs.adobe.com/conversations/2016/11/lets-get-experimental-behind-the-adobe-max-sneaks.html> [<https://perma.cc/95T6-DWXD>].

<sup>3</sup> For example, if a new word or phrase was added into a script, a voiceover artist would have to be recorded saying the new word or phrase. *Id.*

<sup>4</sup> Adobe Creative Cloud, *#VoCO. Adobe MAX 2016 (Sneak Peeks)*, YOUTUBE (Nov. 4, 2016), <https://www.youtube.com/watch?v=I314XLZ59iw&feature=youtu.be&list=PLD8AMy73ZVxVLnQh5m-qK0efH3rKIYGx2> [<https://perma.cc/S5CY-D7SU>].

<sup>5</sup> In the original recording Keegan-Michael Key says, “I jumped out the bed, and I kissed my dogs and my wife, in that order.” *Id.*

<sup>6</sup> The first manipulation changed the recording to say, “. . . and I kissed my wife and my wife.” *Id.*

new words and phrases into the recording.<sup>7</sup> The new recording, though manipulated, sounded mostly organic, even though the added phrases were not part of the original recording.

Researchers at the University of Erlangen-Nuremberg and Stanford University are developing technology, similar to Photoshopping Voiceovers, that allow users to manipulate video recordings.<sup>8</sup> The technology, called Face2Face, allows actors “to animate the facial expressions” of individuals in a video and then “re-render the manipulated output video in a photo-realistic fashion.”<sup>9</sup> Thus, individuals could take a video recording and manipulate the facial expressions, including the movement of the mouth, and produce a new, visually realistic, recording. Computer scientists at the University of Washington are also developing technologies to alter the composition of videos featuring public figures using artificial intelligence.<sup>10</sup> This developing technology would allow users to make it appear that video recordings occurred in a different place and manipulate the age of the speaker.<sup>11</sup>

Near the end of the Photoshopping Voiceovers demonstration, Jordan Peele, who was present for the demonstration, stated, “if this technology gets into the wrong hands . . . .”<sup>12</sup> Though Peele’s concerns were dissuaded by Jin’s assurances that any audio manipulations could be easily identified,<sup>13</sup> technologies like Photoshopping Voiceovers represent genuine cause for concern. For example, an individual utilizing technology such as Photoshopping Voiceovers and Face2Face in combination could fabricate a recording of an individual, whether they be a public or private figure, making false, defamatory, or controversial statements. Given the increased use of social media platforms such as Facebook and Twitter,<sup>14</sup> along with

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<sup>7</sup> The second manipulation changed the recording—meant for comedic affect since Jordan Peele was present for the demonstration—to say, “. . . and I kissed Jordan three times.” *Id.* The technology only requires twenty minutes of recorded speech to replicate a person’s voice. *Id.*

<sup>8</sup> Justus Thies et al., *Face2Face: Real-time Face Capture and Reenactment of RGB Videos*, VISUAL COMPUTING GROUP, <http://www.niessnerlab.org/projects/thies2016face.html> [<https://perma.cc/4WCJ-6P2X>] (last visited Oct. 9, 2017).

<sup>9</sup> *Id.*

<sup>10</sup> See Aarti Shahani, *Computer Scientists Demonstrate the Potential for Faking Video*, NPR (July 14, 2017, 4:57 AM), <http://www.npr.org/sections/alltechconsidered/2017/07/14/537154304/computer-scientists-demonstrate-the-potential-for-faking-video> [<https://perma.cc/67UC-CK3X>] (discussing how “[a] team of computer scientists have figured out how to make words come out of the mouth of former President Barack Obama — on video — by using artificial intelligence”).

<sup>11</sup> *See id.*

<sup>12</sup> Adobe Creative Cloud, *supra* note 4.

<sup>13</sup> Zeyu Jin assured Jordan Peele, and the audience, that Adobe had developed means to prevent misuse via a watermark system which would distinguish original recordings from those with manipulations. *Id.*

<sup>14</sup> Combined monthly users among social media platforms is in the billions. Josh Constine, *Facebook now has 2 billion monthly users . . . and responsibility*, TECHCRUNCH

increased concerns over cyberbullying<sup>15</sup> and “fake news,”<sup>16</sup> the potential for misuse of these technologies, and the harm they can render, is very real.

This Note will seek to examine the potential legal implications of the misuses of digital fabrication technologies and the ways in which the existing legal framework should be altered to allow victims harmed by the misuse of these technologies to recover damages under a “reasonable publisher” standard. Part I will analyze the development of technologies that allow individuals to manipulate photographs, as well as video and audio recordings. Part II will discuss how misuse of media editing technologies have been and are currently being litigated. And Part III will analyze how courts and litigants can apply developed tort law to the misuse of new digital fabrication technologies.

## I. DEVELOPMENT OF PHOTO, VIDEO, AND AUDIO EDITING TECHNOLOGIES

### A. *The Development of Photo Editing*

Photo editing developed as a practice long before the advent of the computer and the development of photo editing software.<sup>17</sup> Increased access to computers in the 1980s led to the development of photo editing software such as Display<sup>18</sup> and

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(June 27, 2017), <https://techcrunch.com/2017/06/27/facebook-2-billion-users/> [<https://perma.cc/E2AB-PAA7>].

<sup>15</sup> “Cyberbullying is when someone repeatedly harasses, mistreats, or makes fun of another person online or while using cell phones or other electronic devices.” Approximately 34% of the students in our sample report experiencing cyberbullying in their lifetimes.” Justin W. Patchin, *2015 Cyberbullying Data*, CYBERBULLYING RES. CTR. (May 1, 2015), <https://cyberbullying.org/2015-data> [<https://perma.cc/7EFN-ANHV>].

<sup>16</sup> “Fake news is made-up stuff, masterfully manipulated to look like credible journalistic reports that are easily spread online to large audiences willing to believe the fictions and spread the word.” Angie Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016, 5:30 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news/> [<https://perma.cc/4VV9-ZTVR>]. Fake news has become increasingly prevalent since the start of the 2016 presidential election. *See id.*

<sup>17</sup> *See What Did We Do Before Photoshop?*, PBS NEWSHOUR, (Nov. 29, 2012, 10:11 AM), <http://www.pbs.org/newshour/art/slide-show-what-did-we-do-before-photoshop/> [<https://perma.cc/97MP-HG7N>] (“When photography was first introduced in 1839, people wondered how a medium that could render forms and textures with such exquisite detail could fail to register the ever-present element of color. Eager to please potential customers, photographers immediately resorted to manual intervention, enlivening their pictures with powdered pigment, watercolor and oil paint.”). Leaders throughout history have had photos of themselves, or others, edited to enhance their own image, or defame others. *See Photo Tampering Throughout History*, FOURANDSIX TECH. INC., [http://pth.izitru.com/2008\\_09\\_00.html](http://pth.izitru.com/2008_09_00.html) [<https://perma.cc/9EVH-SG8P>] (last visited July 27, 2018).

<sup>18</sup> Display can be considered the “unofficial father of . . . Photoshop.” Webdesigner Editorial Team, *The Interesting History of Adobe Photoshop*, WEBDESIGNER (Jan. 17, 2016), <https://1stwebdesigner.com/history-of-adobe-photoshop/> [<https://perma.cc/3GLR-X87G>]

Photoshop.<sup>19</sup> These developments have made photo editing easier for professionals, as well as amateurs.<sup>20</sup> The increased prevalence and use of smartphones<sup>21</sup> has led to the development of mobile applications which allow people to capture and edit photos from their mobile devices without the need for a computer.<sup>22</sup>

The increased use of photo editing software has led to instances of misuse and controversy. For example, the fashion industry has been accused of using photo editing software to distort the appearance of models and entertainers.<sup>23</sup> News outlets have also been criticized for editing photos to distort images of public figures.<sup>24</sup> The rise of social media platforms has also led to the distribution of altered photos of public figures by private individuals.<sup>25</sup> Courts have had the opportunity to review

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(cited in Ashley Brown, *Picture [Im]Perfect: Photoshop Redefining Beauty in Cosmetic Advertisements, Giving False Advertising a Run for the Money*, 16 TEX. REV. ENT. & SPORTS L. 87, 90 n.32 (2015)).

<sup>19</sup> See Stephanie Crosson, *Photoshop Flawless: Is Excessive Digital Alteration of Commercial Photography Fraud and Deceptive Advertising?*, 20 NEXUS 67, 69 (2014–2015). Photoshop is just one of a host of software products that allow individuals to manipulate digital photos with ease. See, e.g., Michael Muchmore, *The Best Photo Editing Software of 2017*, PC MAG., <https://www.pcmag.com/article2/0,2817,2369237,00.asp> [<https://perma.cc/ATM2-EJLR>] (providing a list of photo editing software and comparing their features) (last visited Jan. 15, 2018).

<sup>20</sup> See Crosson, *supra* note 19, at 69; see also Brown, *supra* note 18, at 88 (“[W]ith Photoshop it has become possible, with relatively minimal time and effort, to completely alter a person's appearance and size to create a life-like Barbie.”).

<sup>21</sup> At the beginning of 2017, “[r]oughly three-quarters of Americans (77%) . . . own[ed] a smartphone . . .” Aaron Smith, *Record Shares of Americans now own Smartphones, Have Home Broadband*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/> [<https://perma.cc/TN4J-9KBM>].

<sup>22</sup> Applications like “Google Snapseed” allow individuals to “modify depth of field, perspective . . . curves and brightness” as well as “to subtly change the direction [individuals are] facing.” Cat Ellis & Gary Marshall, *The Best Photo Editing Apps for Android and iOS*, TECHRADAR (Feb. 7, 2018), <http://www.techradar.com/news/the-best-photo-editing-apps-for-android-and-ios> [<https://perma.cc/KST8-2LDG>]. Other popular social media applications, such as Instagram and SnapChat, allow individuals to apply visual filters, like adding a “Gold Crown” to a photo prior to capturing it. See Josh Constine, *Instagram Launches Selfie Filters, Copying the Last Big Snapchat Feature*, TECHCRUNCH (May 16, 2017), <https://techcrunch.com/2017/05/16/instagram-face-filters/> [<https://perma.cc/HJR5-FJR5>].

<sup>23</sup> See Crosson, *supra* note 19, at 69–70.

<sup>24</sup> For example, *Time* magazine was accused of manipulating a photo of OJ Simpson “to make [him] appear ‘darker’ and ‘menacing.’” *Photo Tampering Throughout History*, *supra* note 17. Similarly, USA Today was criticized for publishing an altered photo of former Secretary of State Condoleezza Rice. See *id.*

<sup>25</sup> See *id.* (“A photo of Governor Sarah Palin was widely distributed across the Internet shortly after Palin was announced as the vice-presidential nominee for the Republican ticket, depicting her in a patriotic bikini holding a rifle. Shortly after its release the photo was revealed to be a composite of Palin’s head, and somebody else’s body.”).

cases involving photo manipulation in the criminal context in situations involving the possession of edited pornographic pictures of children<sup>26</sup> and defendant's using photo editing software to forge documents.<sup>27</sup>

### B. Video Editing

Like photo editing, film editing emerged shortly after the creation of the medium itself.<sup>28</sup> Initially, film editing was done manually by literally cutting scenes with scissors.<sup>29</sup> Over the course of the twentieth century, new technologies shaped how films and videos were created. In 1924, Iwan Surrurier created "the world's first successful editing machine," the Moviola.<sup>30</sup> In 1956, the first video tape recorders were released "allowing television to be recorded and edited using magnetic tape . . ."<sup>31</sup> The advent of computers led to nonlinear editing, which allows users to edit any clip within a recording without making permanent changes.<sup>32</sup> As

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<sup>26</sup> See, e.g., *People v. Gerber*, 126 Cal. Rptr. 3d 688, 694 (Cal. Ct. App. 2011) (reversing defendant's convictions for using Microsoft paint to "alter pornographic pictures of women he had collected from the Internet by replacing a woman's head with [his 13-year-old daughter's] head."); see also *State v. Klett*, 352 Wis. 2d 247, ¶¶ 5, 9 (Wis. Ct. App. 2013) (upholding conviction of defendant in possession of child pornography where defendant argued that "the evidence was insufficient to establish that the photograph . . . records a child actually engaging in sexually explicit activity rather than merely appearing to do so as a result of photo editing."); *United States v. Schales*, 546 F.3d 965, 969 (9th Cir. 2008) ("[Defendant] used [photo editing] software to manipulate images of himself, including some sexually explicit images, and obscene and sexually explicit images of minors that he had obtained from the internet. [Defendant] produced morphed images of female minors engaged in sexually explicit conduct through this process.").

<sup>27</sup> See *United States v. Trejo*, No. 13-29 2014 WL 4930810, at \*5, \*7 (D. N. J. Sept. 29, 2014) (Defendant convicted for "procur[ing] false bank account statements . . . using photo editing software" among other illegal activities).

<sup>28</sup> See Bill Roberts, *The Evolution of Film Editing*, ADOBE NEWS (Feb. 20, 2015), <https://blogs.adobe.com/conversations/2015/02/the-evolution-of-film-editing.html> [<https://perma.cc/UMU8-FSGU>] (detailing the advent of the Kinetograph in 1890 and the beginning of film editing in 1900).

<sup>29</sup> *Id.* ("The first movies with multiple scenes debut[ed] [in 1900], cut with scissors and tape on editing tables.").

<sup>30</sup> See *id.*; see also *About Moviola*, MOVIOLA, <https://moviola.com/about-us/> [<https://perma.cc/P2ZE-HK94>] (last visited Oct. 9, 2017) (describing how the Moviola was "the very first film editing machine.").

<sup>31</sup> Roberts, *supra* note 28. The invention of the video tape recorder led to the development of numerous new editing technologies such as the EECO 900 which used "Time code" to identify frames and give users "much greater control and flexibility over the editing process." *On Time . . .*, MUSEUM OF EARLY VIDEO EDITING EQUIP. TECH., <http://www.vtoldboys.com/editingmuseum/> [<https://perma.cc/HNU4-MGSN>] (last visited Oct. 9, 2017).

<sup>32</sup> See *Understanding Linear vs Non-linear Editing*, MOTIONELEMENTS (Dec. 16, 2013), <https://www.motionelements.com/blog/articles/understanding-linear-vs-non-linear-editing> [<https://perma.cc/R55L-SCPU>].

with photo editing, the increasing prevalence of home computers and mobile devices has led to the development of easy-to-use video editing software and mobile applications.<sup>33</sup>

Increased access to video editing technologies, like photo editing, has led to controversy and misuse. Katie Couric, an American journalist and author, has recently come under scrutiny for editing a scene in the documentary *Under the Gun*, which made it appear as if members of a gun rights advocacy group were unable to easily answer a question posed during an interview.<sup>34</sup> Antiabortion activists have also been discovered using altered videos to defame and discredit organizations such as Planned Parenthood.<sup>35</sup> Altered and fake videos have become more prominent with the expansion of the internet and the development of social media websites.<sup>36</sup> These recordings can appear authentic enough to fool White House staff members.<sup>37</sup> Altered videos have also come before the courts during evidentiary challenges.<sup>38</sup>

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<sup>33</sup> See, e.g., Michael Muchmore, *The Best Video Editing Software of 2017*, PC MAG. (Jan. 15, 2018, 2:10 PM), <https://www.pcmag.com/article2/0,2817,2397215,00.asp> [<https://perma.cc/ATM2-EJLR>] (comparing the cost and features of different video editing software, readily available for purchase and download onto a personal computer); see also Cat Ellis, *The best free video editor for Android 2017*, TECHRADAR (Sep. 8, 2017), <http://www.techradar.com/news/the-best-free-video-editing-app-for-android> [<https://perma.cc/9R4Z-5MK2>] (providing a list of free mobile applications which allow users to edit video recordings captured on a mobile device).

<sup>34</sup> See David Folkenflik, *Manipulative Editing Reflects Poorly on Katie Couric, Gun Documentary*, NPR: OPINION (MAY 26, 2016, 8:11 PM), <http://www.npr.org/2016/05/26/479655743/manipulative-editing-reflects-poorly-on-couric-and-her-gun-documentary> [<https://perma.cc/9R4Z-5MK2>].

<sup>35</sup> Matt Hamilton, *Two antiabortion activists behind undercover Planned Parenthood videos charged with 15 felonies*, LA TIMES (Mar. 28, 2017, 10:00 PM), <http://www.latimes.com/local/lanow/la-me-ln-planned-parenthood-charges-activists-2017-0328-story.html> [<https://perma.cc/89XW-8MUK>] “[E]dited videos were published online, prompting outrage among abortion foes and triggering a wave of threats to abortion providers and those who were secretly recorded.”)

<sup>36</sup> See *Here’s why it’s so hard to spot deepfakes*, CNN, <https://www.cnn.com/videos/cnnmoney/2018/08/08/deepfakes-tech-social-media-gfycat-albany-carnegie-mellon-cnnmoney-orig.cnnmoney> [<https://perma.cc/RFB3-8JDA>] (last visited Oct. 21, 2018).

<sup>37</sup> See Abby Ohlheiser, *A running list of viral hoaxes about Irma — including one shared by the White House*, WASH. POST (Sept. 11, 2017), [https://www.washingtonpost.com/news/the-intersect/wp/2017/09/06/irma-is-not-a-category-6-hurricane-a-running-list-of-viral-hoaxes-about-the-storm/?utm\\_term=.99fa4022da40](https://www.washingtonpost.com/news/the-intersect/wp/2017/09/06/irma-is-not-a-category-6-hurricane-a-running-list-of-viral-hoaxes-about-the-storm/?utm_term=.99fa4022da40) [<https://perma.cc/UTX9-6XHQ>]. This video was only one of several which were circulated around social media sites such as Twitter. See *id.*

<sup>38</sup> See, e.g., *Green-Pinto v. OR & L Facility Servs., LLC*, No. NNHCV126027983, 2012 WL 6924424, 1 (Conn. Super. Ct. Dec. 24, 2012) (finding in favor of Plaintiff in spoliation of evidence claim where Defendant altered a surveillance video with evidence of a tort claim); *Boothe v. Sherman*, 66 F.Supp.3d 1069, 1076 (N.D. Ill. 2014) (finding in favor of Defendant on claims of video tampering during arrest).

### C. Audio Editing

The ability to edit early audio recordings, unlike film and photography, was not immediately available.<sup>39</sup> It was not until 1948, when audio recordings were switched to magnetic tape, that editing became possible.<sup>40</sup> This new technology allowed recording artists to “invent their own reality in the studio.”<sup>41</sup> In the 1970s, digital audio recording technologies were developed which allowed for “visual editing of musical waveforms . . . .”<sup>42</sup> Advances in digital audio technology have led to its pervasiveness among sound editors who work predominantly with “digital audio workstation software on computers.”<sup>43</sup> This software has become readily available with tutorials to teach novices how to easily manipulate digital audio recordings.<sup>44</sup>

The development of audio editing tools has led to concerns among some about the authenticity of recorded music.<sup>45</sup> Commentators have also made arguments against the inclusion of digital audio recordings as evidence in criminal and civil cases.<sup>46</sup> The ability to easily distribute doctored audio recordings via social media

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<sup>39</sup> The very first audio recording devices, such as the phonautograph and the phonograph, were invented in the late 19th century. Recordings on these devices were not editable. See *Timeline, National Recording Preservation Plan*, LIBRARY CONG., <https://www.loc.gov/programs/national-recording-preservation-plan/tools-and-resources/history/timeline/> [<https://perma.cc/93G3-KMEG>] (last visited Oct. 10, 2017).

<sup>40</sup> See *id.*

<sup>41</sup> Alex Ross, *The Record Effect: How Technology Has Transformed the Sound of Music*, NEW YORKER (June 6, 2005), <https://www.newyorker.com/magazine/2005/06/06/the-record-effect> [<https://perma.cc/NQF4-TLYJ>]. (Using this technology, bands like the Beatles were able to “construct[] intricate studio soundscapes that they never could have replicated onstage . . . .”).

<sup>42</sup> Thomas Fine, *The Dawn of Commercial Digital Recording*, 39 ARSC J. 1, 4 (2008).

<sup>43</sup> Sam Inglis, *Audio Editing In DAWs*, SOS (Feb. 2011), <https://www.soundonsound.com/techniques/audio-editing-daws> [<https://perma.cc/3NZ2-RVRV>].

<sup>44</sup> See Billy Bommer, *The Best Audio Editing Software of 2017*, TOPTENREVIEWS (May 25, 2017), <http://www.toptenreviews.com/software/multimedia/best-audio-editing-software/> [<https://perma.cc/75SM-8K2W>] (providing a list of audio recording software to edit and record audio); see also Alan Dixon, *How Has the Recording Studio Affected the Ways in Which Music Is Created?*, CLASSIC ALBUM SUNDAYS (Dec. 31, 2016), <http://classicalbumsundays.com/how-has-the-recording-studio-affected-the-ways-in-which-music-is-created/> [<https://perma.cc/4TYR-58V7>] (“As technology has developed the home studio has been reduced to a laptop. With technology now so powerful, everything you once had in a studio, is now found in software readily available on the internet for free.”).

<sup>45</sup> See Ross, *supra* note 41 (“[F]ans are apt to claim that live shows are dead experiences, messy reenactments of pristine studio creations.”); Dixon, *supra* note 44 (“Due to the limitations of many of today’s [sic] producers, technology has changed in order to mask people’s inabilities.”).

<sup>46</sup> *The Case Against Digitally Recorded Evidence*, FINDLAW, <http://technology.findlaw.com/modern-law-practice/the-case-against-digitally-recorded-evidence.html> [<https://perma.cc/75SM-8K2W>].

has also led to concerns regarding “fake news,” as previously discussed. For example, during the 2016 presidential election, a number of altered recordings of Democratic presidential candidate, Hillary Clinton, surfaced which were meant to harm her credibility.<sup>47</sup>

## II. A LIMITED HISTORY OF LITIGATION

Considering the potential for misuse and the harm inherent to the distribution of digitally edited material, there is surprisingly little in the way of civil litigation involving the dissemination of edited digital media. One potential reason for the limited amount of litigation in this area is the Supreme Court’s stance on civil suits involving speech. Landmark cases such as *New York Times Co. v. Sullivan*,<sup>48</sup> *Curtis Pub. Co. v. Butts*,<sup>49</sup> and *Hustler Magazine, Inc. v. Falwell*<sup>50</sup> have set high standards to meet in a civil action against another’s speech. These cases help explain why there is little litigation of photoshopped magazine covers<sup>51</sup> as well as permissible use of

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cc/MC25-96FN] (last visited Oct. 10, 2017) (arguing that audio recordings should only be admitted into evidence if they are made via analog audio cassette because “digital edits are highly difficult and frequently impossible to discern.”).

<sup>47</sup> One such recording involved a rape suspect whom Ms. Clinton defended. See Louis Jacobson, *7 Hillary Clinton quotes on the Internet that are complete fakes*, POLITIFACT (Mar. 23, 2016, 4:29 PM), <http://www.politifact.com/truth-o-meter/article/2016/mar/23/hillary-clinton-quotes-Internet-complete/> [https://perma.cc/MTC3-6FUX].

<sup>48</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that the Constitution requires a “federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

<sup>49</sup> *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967) (“[A] ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”).

<sup>50</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (“[P]ublic 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 or not it was true.”).

<sup>51</sup> See Isabel Calkins, *13 Times Celebrities Called Out Magazines over Retouching*, COSMOPOLITAN (Apr. 11, 2016), <http://www.cosmopolitan.com/entertainment/news/a56561/celebrities-respond-retouching-magazine-covers-criticism/> [https://perma.cc/5YXE-QEPF] (providing a list of instances in which celebrities publicly chastised magazine editors for editing cover photos); see also *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183, 1189 (9th Cir. 2001) (holding that plaintiff, Dustin Hoffman, was unable to recover for appropriation or defamation when his image was impermissibly used in a Los Angeles Magazine issue).

defamatory “memes” of public figures that are commonly circulated among social media websites.<sup>52</sup> The rules established in *Sullivan* and *Falwell* are particular to public figures whereas the Court has established a more lenient rule for “private individuals” in holdings such as *Gertz v. Robert Welch, Inc.*,<sup>53</sup> and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>54</sup> Under *Gertz* and *Dun*, suits by private individuals against other private individuals, corporations, or public figures, which do not involve matters of public concern, have greater viability. Though there is limited litigation on the subject of media manipulation, what does exist will be discussed as those cases are useful in illuminating potential avenues of recovery for potential plaintiffs.

#### A. Virginia Citizens Defense League v. Couric

One case regarding media manipulation arose out of the previously discussed controversy regarding Katie Couric and the documentary *Under the Gun*.<sup>55</sup> Interviewed members of the Virginia Citizens Defense League (“VCDL”) sued Couric for defamation after the film was distributed with an edit during an interview.<sup>56</sup> Couric asked the plaintiffs, “If there are no background checks for gun purchasers, how do you prevent felons or terrorists from purchasing a gun?”<sup>57</sup> In the film, the question was followed by eight seconds of silence from the members of the VCDL.<sup>58</sup> During the actual interview, the VCDL members did in fact respond to the question, though they did not answer it directly.<sup>59</sup>

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<sup>52</sup> “The phenomenon of Internet memes—pictures with juxtaposed text that are replicated by derivative authors . . . has become a pervasive component of mass Internet culture.” Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 235 (2013).

<sup>53</sup> “We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (emphasis added) (footnote omitted).

<sup>54</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (“We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”).

<sup>55</sup> See Folkenflik, *supra* note 34.

<sup>56</sup> See Virginia Citizens Def. League v. Couric, No. 3:16–CV–00757(JAG), 2017 WL 2364198, at \*2 (E.D. Va. May 31, 2017).

<sup>57</sup> *Id.* The film was also edited to exclude additional parts of the question posed by Ms. Couric. See *id.* at \*2 n.3.

<sup>58</sup> The eight seconds of silence was recorded as part of a “calibration” where Ms. Couric asked the group to remain silent. *Id.* at \*2.

<sup>59</sup> *Id.* at \*1. In response to Ms. Couric’s question, the VCDL members “articulated their opposition to any gun control, but never said how to keep guns out of the hands of felons and terrorists. One VCDL member said that felons should have the right to own a gun after

In their suit, the VCDL members alleged that the edit was impliedly defamatory<sup>60</sup> in four ways: (1) it implied that they “ha[d] no basis for their opposition to background checks; (2) [were] uninformed notwithstanding their expertise in the areas of gun regulations and rights; (3) were stumped by Couric's question; and (4) are ignorant or unfit in their trades.”<sup>61</sup> The first two claims were dismissed by the Court for not “aris[ing] from the film.”<sup>62</sup> The fourth claim was also dismissed because “the film [did not] imply that the plaintiffs are unfit in their trades.”<sup>63</sup> The Court did find that the film “impl[ie]d that the individual plaintiffs were stumped by Couric's question.”<sup>64</sup> Implying that the plaintiffs were stumped by the question did not, however, “lower the[] plaintiffs in the estimation of the community to the extent and with the sting required” and was therefore not defamatory.<sup>65</sup> Though the VCDL's case was ultimately dismissed, this case demonstrates the potential for litigation arising from digital editing. Moreover, had more substantial editing taken place to make the VCDL members appear as if they were saying things not actually said in the interview, the court's analysis might have been different.<sup>66</sup>

### B. Binion v. O'Neal

Another suit arose in 2014 when Shaquille O'Neal posted an edited picture of Jahmel Binion on his social media accounts.<sup>67</sup> The photo was altered by O'Neal “by adding a side-by-side shot of O'Neal himself” with contorted facial features, matching that of Binion.<sup>68</sup> Though the dispute has not gone in front of a jury, O'Neal filed a motion to dismiss which was analyzed by a District Court Judge.<sup>69</sup> In his complaint, Binion alleged five claims against O'Neal: 1) invasion of privacy;<sup>70</sup> 2)

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serving their time. [Another] responded by discussing existing laws related to firearms. [While another] responded by saying why she opposed background checks.” *Id.*

<sup>60</sup> The plaintiffs claimed direct defamation, however Judge Gibney analyzed the claims as defamation by implication because the plaintiffs were unable to “point to a directly defamatory statement pertaining to them.” *Id.* at \*4.

<sup>61</sup> *Id.* at \*4.

<sup>62</sup> “The film does not suggest that [the VCDL members] do not have a basis to oppose background checks or are ignorant about gun regulations and rights.” *Id.*

<sup>63</sup> *Id.* at \*5.

<sup>64</sup> *Id.* at \*4.

<sup>65</sup> *Id.*

<sup>66</sup> For example, had the film made it appear that the members were ignorant or stupid, that may have had the “sting” necessary to demonstrate defamation. *See id.* at \*3.

<sup>67</sup> *See Binion v. O'Neal No. 15-60869-CIV-COHN/SELTZER*, 2016 WL 111344, at \*2 (S.D. Fla. Jan. 11, 2016).

<sup>68</sup> *Id.* Binion suffers from “ectodermal dysplasia” which has left him with disfigured facial features. *Id.*

<sup>69</sup> *Id.* at \*1.

<sup>70</sup> “Binion's Invasion of Privacy counts proceed[ed] under four different theories that the Court . . . analyze[d] separately: (1) Appropriation; (2) False Light; (3) Intrusion Upon Seclusion; (4) and Public Disclosure of Private Facts.” *Id.* at \*3.

infliction of emotional distress; 3) defamation; 4) negligence; and, 5) unjust enrichment.<sup>71</sup> In reviewing the claims, the District Court found Binion’s claims for “Intentional Infliction of Emotional Distress, Invasion of Privacy under the Appropriation theory, and Unjust Enrichment” to be viable.<sup>72</sup> This case, therefore, demonstrates that these torts may be avenues of recovery in instances of digital media fabrication.

### III. APPLYING MODERN TORT LAW

New technologies in the realm of media manipulation, such as Photoshopping Voiceovers<sup>73</sup> and Face2Face,<sup>74</sup> raise the potential for a host of new litigation in the area of media manipulation. For example, imagine if Couric had digitally altered the statements made by the VCDL plaintiffs in *Virginia Citizens Defense League v. Couric* rather than simply leaving eight seconds of silence after posing her question.<sup>75</sup> Using technologies such as Photoshopping Voiceovers, Couric or her producers could have made it appear that the VCDL members made statements that they did not make. Visual editing technologies such as Face2Face would allow editors to change the facial reactions of interviewees to make it appear as if they are forming new sentences, therefore enhancing the realism and credibility of the altered interview.<sup>76</sup>

This new technology allows editors to go a step beyond merely editing digital content to fabricating new content. Had Couric used this technology in her documentary, the analysis and composition of the VCDL’s complaint would most certainly have been different because the editing might have represented malicious intent and might have been more damaging to the VCDL member’s reputations.

Given the potential harms that these new technologies can cause, it is foreseeable that harmed litigants will come forward with claims against those that create, as well as those that publish, fabricated media. There are several torts regarding speech—including defamation, invasion of privacy, and intentional infliction of emotional distress—that may be applicable against the creator of

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*4. The other claims against Mr. O’Neal, as well as those against another party, “Mine O’ Mine” were dismissed. *Id.*

<sup>73</sup> See Adobe Conversations Team, *supra* note 2.

<sup>74</sup> See Thies et al., *supra* note 8.

<sup>75</sup> See *Virginia Citizens Def. League v. Couric*, No. 3:16–CV–00757(JAG), 2017 WL 2364198, at \*2 (E.D. Va. May 31, 2017).

<sup>76</sup> See Thies et al., *supra* note 8; see also Supasorn Suwajanakorn et al., *Synthesizing Obama: Learning Lip Sync from Audio*, 36 ACM TRANS. GRAPHICS 95:1, 1 (2017) (discussing how to create a video of Barack Obama “from his voice and stock footage”). Similar technology has been used to “transmit the complex motion of [a] performer’s body (and face) to an animated character” to enhance realism. Steve Dent, *What You Need to Know About 3D Motion Capture*, ENGADGET (July 14, 2014), <https://www.engadget.com/2014/07/14/motion-capture-explainer/> [<https://perma.cc/F9TD-J23M>].

fabricated media. Publishers or distributors of fabricated media, such as news organizations, that distribute fabricated media will likely be capable of causing more harm to plaintiffs than the initial creator.<sup>77</sup> For a private person, the torts discussed above will likely still be admissible.<sup>78</sup> The “actual malice” standard, discussed in detail below, presents a more daunting challenge for public individuals seeking remedy against publishers. Due to the potential harms that fabricated media can cause a public person, a new standard should be utilized when analyzing disputes between these types of plaintiffs and publishers.

### A. Generally Applicable Torts Against Content Creators

Creators of fabricated content will be the most vulnerable to lawsuits, regardless of the plaintiff, because the knowing publication of false content implies actual malice.<sup>79</sup> This section will consider four torts which will likely be applicable

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<sup>77</sup> Cable news networks such as Fox, CNN, and MSNBC have combined viewership in the millions, and therefore have substantial influence over the what content is seen by online users. See Joe Otterson, *Cable News Ratings: MSNBC, CNN, Fox News Post Double-Digit Growth in Q2*, VARIETY (June 27, 2017, 10:24 AM), <http://variety.com/2017/tv/news/cable-news-ratings-cnn-fox-news-msnbc-q2-1202479416/> [<https://perma.cc/M4T5-VTQT>]. These news outlets also have substantial numbers of subscribers on social media platforms like Facebook and Twitter. See Jonathan Berr, *These TV brand names top the social media rankings*, CBS NEWS (June 8, 2016, 11:31 AM), <https://www.cbsnews.com/news/these-tv-brand-names-top-the-social-media-rankings/> [<https://perma.cc/92BP-LWX4>] (“Most channels tended to rank higher on one or the other social network, but 21st Century Fox’s (FOX) Fox News, the most popular cable news channel, was an exception. It ranked third on Facebook and second on Twitter.”).

<sup>78</sup> The Supreme Court has historically treated these classes of people differently when analyzing torts involving free speech. Compare *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that state law is not sufficient “to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct”), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that a public person cannot maintain an action of intentional infliction of emotional distress without showing actual malice), with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that “States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (“We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”).

<sup>79</sup> See RESTATEMENT (SECOND) OF TORTS § 580A (AM. LAW INST. 1977) (“One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.”).

in a suit between a content creator and their victim—defamation, appropriation, invasion of privacy, and intentional infliction of emotional distress.

### 1. Defamation—Libel & Slander

The common law has long recognized the value of an individual's reputation.<sup>80</sup> Simultaneously, the United States gives great weight to individual's constitutional rights to free speech.<sup>81</sup> This has been demonstrated by the Supreme Court's defense of highly obscene published material, such as in *Hustler Magazine, Inc. v. Falwell*.<sup>82</sup> The Court has, however, stated, "there is no constitutional value in false statements of fact."<sup>83</sup> The law of defamation exists to protect individuals from these false statements by ensuring that one can recover against the publication of defamatory content:

To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>84</sup>

Additionally, expressions of opinion "are not actionable as defamation because such statements cannot be shown to be false."<sup>85</sup>

Publications of fabricated material, produced with the intent to appear factual, will likely meet all of the elements for a defamation claim, unless the plaintiff has consented to the creation of the defamatory media, which would act as a bar against recover.<sup>86</sup> The fabrication of digital media is per se false, therefore publications of

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<sup>80</sup> "[In] the ecclesiastical courts of the middle ages, . . . damning someone's reputation in the village square was worthy of pecuniary damage." Leslie Yolaf Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 18 (2011) (citing RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (AM. LAW INST. 1977)).

<sup>81</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>82</sup> For example, in 1983, *Hustler Magazine* published a parody of Jerry Falwell, a well-known minister. *Falwell*, 485 U.S. at 48–49. The parody alleged that Mr. Falwell was a drunk that he had an incestuous affair with his mother. *Id.* The Supreme Court held that Mr. Falwell could not recover for infliction of emotional distress because parody is protected by the First Amendment. *Id.* at 55–56.

<sup>83</sup> *Gertz*, 418 U.S. at 340.

<sup>84</sup> RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

<sup>85</sup> *Dragulescu v. Virginia Union Univ.*, 223 F. Supp.3d 499, 507 (E.D. Va. 2016) (quoting *Gov't Micro Res., Inc. v. Jackson*, 624 S.E.2d 63, 69 (Va. 2006)).

<sup>86</sup> "[T]o one who is willing, no wrong is done . . . the plaintiff's consent to the publication of defamatory matter about him is a complete defense to his action for

“material tending so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him”<sup>87</sup> will establish the first element for defamation. Moreover, absolute privilege will likely not be applicable to fabrication cases considering it generally arises out of “speech concerning certain defined governmental proceedings.”<sup>88</sup> Additionally, claims of conditional privilege will be defeated because the creation and publication of fabricated media amounts to “actual malice,”<sup>89</sup> or “ill-will malice.”<sup>90</sup> Harms caused by the publication of fabricated media will range from “reputational harm, shame, mortification, and injury to . . . emotional and mental equanimity” with damages being established by jurisdiction.<sup>91</sup>

## 2. *Invasion of Privacy*

The “right to privacy” evolved out of an 1890 law review article, “The Right to Privacy.”<sup>92</sup> Fifty years later, William Prosser articulated four privacy torts: “(1) intrusion on solitude, 2) publication of private facts, 3) false light, and 4) misappropriation.”<sup>93</sup> When analyzing media fabrication, the two privacy torts most likely to come into controversy are false light and misappropriation.<sup>94</sup>

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defamation.” *Absolute privilege of consent*, in 2 LAW OF DEFAMATION § 8:4 (2d ed.) (citations omitted).

<sup>87</sup> *Gertz*, 418 U.S. at 371.

<sup>88</sup> *Division between absolute and conditional privileges*, in 2 LAW OF DEFAMATION § 8:2 (2d ed.).

<sup>89</sup> Actual malice is “knowing or reckless disregard of the truth . . .” *Id.*

<sup>90</sup> “[A] conditional privilege is forfeited if the publication is made with ‘malice’ in the traditional common-law sense of actual spite or ill will.” *Abuse of privilege – Publication with common-law (ill-will) malice*, in 2 LAW OF DEFAMATION § 8:63 (2d ed.) (citations omitted).

<sup>91</sup> *Actual damages*, in 2 LAW OF DEFAMATION § 9:30 (2d ed. 2018) (citations omitted).

<sup>92</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (cited in Scott Jon Shangin, *The Prosser Privacy Torts in a Digital Age*, 251 N.J. LAW. 9, 9 (2008)).

<sup>93</sup> Scott Jon Shangin, *The Prosser Privacy Torts in a Digital Age*, 251 N.J. LAW. 9, 9 (2008) (citations omitted).

<sup>94</sup> Intrusion is unlikely to be actionable because the technology at issue allows individuals to publish material without the need to intrude “into a private place, conversation or matter . . .” *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 490 (Cal. 1998). Publication of private facts is similarly unlikely to enter into controversy when analyzing fabricated media because the anticipated harm of fabrication is the creation of false information. One with access to truthful information regarding someone they wish to harm would not likely need to create false content to publish that information.

(a) *Misappropriation and the Right-of-Publicity*

“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”<sup>95</sup> The tort of misappropriation, or the right-of-publicity, is “designed to protect the dignitary interest of a person in being left alone.”<sup>96</sup> The tort is commonly used to protect an individual’s commercial interest in their name or likeness, but that use is not exclusive.<sup>97</sup> The tort “exists whenever ‘the defendant makes use of the plaintiff’s name or likeness for his own purposes and benefit.’”<sup>98</sup> Because fabricated media will impermissibly use another’s image, misappropriation will be a potential avenue of recovery for those harmed by its misuse.

(i) Commercial Use

The tort of misappropriation is often used in the commercial context to protect the misuse of an individual’s identity.<sup>99</sup> Litigation involving video games and appropriation represent issues which may also be brought forth in a fabrication case. Former NCAA players filed a class action suit against Electronic Arts (“EA”) for the use of their image in video games.<sup>100</sup> EA produces the NCAA Football series of games which “allow users to control avatars representing college football players as those avatars participate in simulated games.”<sup>101</sup> These avatars are highly realistic representations of real players.<sup>102</sup> In reviewing these cases, the Ninth and Third

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<sup>95</sup> RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

<sup>96</sup> Shangin, *supra* note 93, at 12.

<sup>97</sup> See RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. LAW INST. 1977) (“The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff’s name or likeness to advertise the defendant’s business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation.”).

<sup>98</sup> See *Binion v. O’Neal* No. 15-60869-CIV-COHN/SELTZER, 2016 WL 111344, at \*8 (S.D. Fla. Jan. 11, 2016) (quoting *Battaglieri v. Mackinac Ctr. for Pub. Policy*, 261 Mich. App. 296, 300 (2004)). Applying Michigan law, “[t]o prevail on an Appropriation claim, a plaintiff need not allege that a defendant intruded upon any private matters or that defendant made a false statement. ‘Instead, any unauthorized use of a plaintiff’s name or likeness, however inoffensive in itself, is actionable if that use results in a benefit to another.’” *Id.* (quoting *Battaglieri*, 261 Mich. App. at 300).

<sup>99</sup> See, e.g., *Henley v. Dillard Dept. Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999).

<sup>100</sup> See *In re NCAA Student-Athlete Name & Likeness Licensing Litig. v. Elec. Arts, Inc.*, 724 F.3d 1268, 1271–72 (9th Cir. 2013); see also *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 147 (3rd Cir. 2013).

<sup>101</sup> *NCAA*, 724 F.3d at 1271.

<sup>102</sup> “Every real football player on each team included in the game has a corresponding avatar in the game with the player’s actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state. EA attempts to match any unique, highly

Circuit Courts have found the NCAA players' claims of misappropriation valid.<sup>103</sup> Using fabrication technologies, one could similarly edit video or audio clips of celebrities to make it appear as if they are endorsing a product by appearing in a film or commercial. This use, like the creation of digital avatars representing real individuals, would likely meet the elements of misappropriation and allow for recovery of damages if the use financially benefitted the defendant.

(ii) Political Speech

Misappropriation in the fabrication context may also be appropriate in political speech cases. Over the last several decades, politicians have increasingly focused on discrediting their opponents during political campaigns.<sup>104</sup> For example, during the 2016 presidential election, an authentic recording surfaced of republican candidate Donald Trump in which Trump made derogatory comments about women.<sup>105</sup> The recording served as potent material for Trump's opponent, democratic candidate Hillary Clinton to use against him.<sup>106</sup>

With the development of media fabrication technology, tapes such as the one featuring Donald Trump can be created at will to harm political opponents. In the event of such abuse, political candidates should be able to recover under a

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identifiable playing behaviors by sending detailed questionnaires to team equipment managers. Additionally, EA creates realistic virtual versions of actual stadiums; populates them with the virtual athletes, coaches, cheerleaders, and fans realistically rendered by EA's graphic artists; and incorporates realistic sounds such as the crunch of the players' pads and the roar of the crowd." *Id.*

<sup>103</sup> See *id.* at 1284; see also *Hart*, 717 F.3d at 170.

<sup>104</sup> In 2012, over 50 percent of campaign advertising in the Republican primaries was used to attack political opponents. See T.W. Farnam, *Study: Negative Campaign Ads Much More Frequent, Vicious than in Primaries Past*, WASH. POST (Feb. 20, 2012), [https://www.washingtonpost.com/politics/study-negative-campaign-ads-much-more-frequent-vicious-than-in-primaries-past/2012/02/14/gIQR7ifPR\\_story.html?utm\\_term=.5d838e0710f5](https://www.washingtonpost.com/politics/study-negative-campaign-ads-much-more-frequent-vicious-than-in-primaries-past/2012/02/14/gIQR7ifPR_story.html?utm_term=.5d838e0710f5) [<https://perma.cc/GB8B-L67Y>].

<sup>105</sup> See David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.5bfd44140adb](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.5bfd44140adb) [<https://perma.cc/3ASM-KRYD>]. In part of the recording Mr. Trump said, "Grab them by the p---y," *id.*, which has become particularly notorious. See, e.g., Jill Filipovic, *Donald Trump's 'P---y' Comment Is the Root of Sexual Violence*, TIME (Oct. 8, 2016), <http://time.com/4523972/donald-trumps-comment-root-sexual-violence/> [<https://perma.cc/6KM5-A55F>].

<sup>106</sup> Hillary Clinton and her running mate, Tim Kane, released statements against Donald Trump shortly after the audio tape was leaked. See Maxwell Tani, *'This is horrific': Hillary Clinton campaign responds to Trump's lewd 2005 comments about women*, BUS. INSIDER (Oct. 7, 2016, 5:34 PM), <http://www.businessinsider.com/hillary-clinton-reaction-donald-trump-lewd-2016-10> [<https://perma.cc/5G99-UG25>].

misappropriation claim when their likeness is appropriated via media fabrication technologies to benefit a political opponent. Allowing this type of recovery will act as a disincentive for individuals willing to create false digital content. It will also incentivize politicians to authenticate political propaganda prior to releasing content.

(iii) Social Media Presence as a Benefit?

Plaintiffs may have an opportunity to file claims against individuals for appropriation via fabricated media outside of the commercial or political context also. Given the rise of the internet and social media, one's online presence has become increasingly important.<sup>107</sup> If, for example, an individual fabricated a video or audio clip of another person, perhaps a celebrity, to increase their own image, this may meet the criteria for an appropriation claim because courts have begun to recognize social media presence as a commercial asset to public personalities.

In 2009, a video featuring Ms. Lastonia Leviston engaging in consensual sexual activity was released over the internet.<sup>108</sup> The video had been edited and advertised by Curtis Jackson III, popularly known as "50 Cent," prior to its distribution.<sup>109</sup> After the video was released, Leviston sued Jackson for appropriation, among other claims.<sup>110</sup> In analyzing Leviston's appropriation claim, the court considered "whether the Videotape was promoted and made available in order to attract people to Jackson and/or helped Jackson to make a profit" rather than just whether the video was used for advertising purposes.<sup>111</sup>

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<sup>107</sup> See *Actual Damages*, *supra* note 91, § 9:34.50 ("[T]he proliferation of defamation arising on the Internet and social media sites such as Facebook has transformed much of modern defamation law, including the principles governing defamation damages. The reputation of individuals, corporations, and organizations largely 'resides' on the Internet, and for many organizations and individuals, 'Internet reputation' is virtually all that matters. Moreover, the Internet has proven a powerful engine of reputational destruction.").

<sup>108</sup> *Leviston v. Jackson*, 980 N.Y.S.2d 716, 717 (N.Y. Sup. Ct. 2013).

<sup>109</sup> The edited video was meant to be an attack on Rick Ross, a performer that Mr. Jackson was in a "rap war" with, and who was also the father of one of Leviston's daughters. *Id.*

<sup>110</sup> Leviston also sued for intentional infliction of emotional distress and defamation, though the defamation claim was withdrawn. *Id.*

<sup>111</sup> *Id.* at 721.

Similarly, in Binion’s complaint against O’Neal, discussed above, one of the claims alleged was appropriation.<sup>112</sup> Binion argued that O’Neal’s social media presence is “a[] critical element[] in the brand promotion of Shaq.”<sup>113</sup> Therefore, the use of Binion’s image to promote that brand amounted to appropriation.<sup>114</sup> The Court agreed with Binion that the use of social media is analogous to a “commercial purpose” and allowed the allegation to proceed.<sup>115</sup>

(b) *False Light*

The tort of false light is meant to protect an individual’s “peace of mind.”<sup>116</sup> Therefore, the tort is actionable in situations where:

One . . . gives publicity to a matter concerning another that places the other before the public in a false light [and]: (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.<sup>117</sup>

The publication of fabricated content is highly susceptible to a false light claim. As an example, imagine that the audio clip of Donald Trump previously discussed had been fabricated.<sup>118</sup> An audio clip of an individual making sexist remarks would most certainly be “highly offensive to a reasonable person . . . .”<sup>119</sup> Additionally, a false light claim does not require that the published material be defamatory.<sup>120</sup> If, hypothetically, the audio recording of Mr. Trump had fabricated language of him offering full support to his political opponent, Hillary Clinton, that too could be actionable under a false light claim.<sup>121</sup> Additionally, an action against the creator of

<sup>112</sup> See Binion v. O’Neal No. 15-60869-CIV-COHN/SELTZER, 2016 WL 111344, at \*8 (S.D. Fla. Jan. 11, 2016).

<sup>113</sup> *Id.* at \*10.

<sup>114</sup> *Id.*

<sup>115</sup> “[T]he mere act of misappropriating the plaintiff’s identity may be sufficient evidence of commercial value to survive even a motion for summary judgment.” *Id.*

<sup>116</sup> Individuals have an interest in “not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is.” Romaine v. Kallinger, 537 A.2d 284, 294 (N.J. 1988) (quoting RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b (AM. LAW INST. 1977)).

<sup>117</sup> RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

<sup>118</sup> See *supra* notes 95–96 and accompanying text.

<sup>119</sup> RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

<sup>120</sup> *Id.* § 652E cmt. b.

<sup>121</sup> See, e.g., *id.* § 652E cmt. b illus. 4 (“A is a Democrat. B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A’s name. B is subject to liability to A for invasion of privacy.”).

fabricated media would meet the second element of a false light claim because the act of creating the media would be indicative of “knowledge . . . as to the falsity of the publicized matter . . . .”<sup>122</sup>

### 3. *Intentional Infliction of Emotional Distress*

The tort of intentional infliction of emotional distress (“IIED”) is meant to protect plaintiffs against “extreme and outrageous conduct” which “intentionally or recklessly causes severe emotional distress to another . . . .”<sup>123</sup> For conduct to be deemed “extreme and outrageous,” it must “go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>124</sup>

Whether the creation of fabricated media amounts to “outrageous conduct” will likely rely more on the publisher and the content rather than on the act of publication itself. A fabricated video of a celebrity endorsing a political candidate they otherwise wouldn’t support may not be actionable under an IIED claim, whereas a fabricated video in which a celebrity is depicted performing sexual acts might be. Additionally, a publisher’s status may bear on whether publication amounts to outrageous conduct. An individual’s relationship and status may also be impactful in determining whether the fabrication amounts to outrageous conduct. The impact of a family member or friend distributing a defamatory fabrication may cause more harm than if a stranger distributed the material. Furthermore, if an individual with a large media presence publishes material that will be viewed by millions of individuals, that act would certainly be more harmful than if an individual with a limited media presence published the same material.<sup>125</sup>

#### *B. Replacing the Actual Malice Standard*

The Supreme Court has articulated a threshold rule for public individuals to recover against the publication of false or defamatory material by demonstrating “actual malice.”<sup>126</sup> Determining the authenticity of potentially fabricated content will likely require verification beyond what is currently required under the actual malice standard, thus creating a high barrier to recovery against publishers, for any tort. Therefore, in the area of fabricated digital content, the “responsible publishers”

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<sup>122</sup> *Id.* § 652E.

<sup>123</sup> *Id.* § 46.

<sup>124</sup> *Id.* § 46 cmt. d.

<sup>125</sup> *See, e.g.,* Binion v. O’Neal No. 15-60869-CIV-COHN/SELTZER, 2016 WL 111344, at 78 (S.D. Fla. Jan. 11, 2016) (noting that it could not conclude that O’Neal’s celebrity status and “his decision to mock Binion’s appearance before an audience of millions” was “insufficient to trigger liability for Intentional Infliction of Emotional Distress . . . .”).

<sup>126</sup> *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

standard, articulated by Justice Harlan in *Curtis Publishing Co. v. Butts*,<sup>127</sup> should apply in order to limit the dissemination of fabricated content and provide an avenue of recovery for individuals who have been defamed.

### 1. *The Actual Malice Standard*

The actual malice standard was first articulated in *New York Times v. Sullivan*.<sup>128</sup> In 1960, B. Sullivan was Commissioner of Public Affairs, which included supervising the police and fire departments for the City of Montgomery, Alabama.<sup>129</sup> Sullivan sued the *New York Times*, along with four African American clergymen, for libel after the *Times* published an ad regarding police behavior in response to civil rights activism occurring in Montgomery.<sup>130</sup> After a verdict in favor of Sullivan was awarded by the trial court and affirmed by the Supreme Court of Alabama,<sup>131</sup> the case came before the Supreme Court. Writing for the Court, Justice Brennan pronounced a new standard for defamation cases by stating:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>132</sup>

The Court has since articulated that “the actual malice standard is not satisfied merely through a showing of ill will or ‘malice’ in the ordinary sense of the term.”<sup>133</sup> Additionally, neither the publication of “defamatory material in order to increase . . . profits[,]”<sup>134</sup> nor a “failure to investigate . . . alone [will] support a finding of actual malice . . . .”<sup>135</sup> In *Curtis Pub. Co. v. Butts*<sup>136</sup> and its companion

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<sup>127</sup> 388 U.S. 130, 155 (1967).

<sup>128</sup> *Sullivan*, 376 U.S. at 279–80.

<sup>129</sup> *Id.* at 256.

<sup>130</sup> The relevant portions of the ad claimed that “truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus” and that police had been abusing Dr. Martin Luther King Jr. for his role in the civil rights movement. *Id.* at 257.

<sup>131</sup> *Id.* at 263. “The trial judge submitted the case to the jury under instructions that the statements in the advertisement were ‘libelous per se’ and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made ‘of and concerning’ respondent.” *Id.* at 262.

<sup>132</sup> *Id.* at 279–80.

<sup>133</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989).

<sup>134</sup> *Id.* at 667.

<sup>135</sup> *Id.* at 692.

<sup>136</sup> 388 U.S. 130, 155 (1967).

case, *Associated Press v. Walker*,<sup>137</sup> the Supreme Court also extended the actual malice standard to public figures and celebrities.<sup>138</sup>

## 2. “Actual Malice” and Other Torts

Since deciding *New York Times Co. v. Sullivan* in 1964, the Supreme Court has applied the actual malice standard to cases involving intentional infliction of emotional distress and false light, which will be discussed below.<sup>139</sup>

### (a) *Time, Inc. v. Hill*—False Light

In 1952, James Hill and his family were held hostage in their home by escaped convicts.<sup>140</sup> The family was released unharmed, but their experience was publicized and became the basis of a novel<sup>141</sup> and a play.<sup>142</sup> In 1955, *Life Magazine* published an article discussing the play and books about the Hill family, and also included photographs of actors reenacting the Hill’s hostage situation.<sup>143</sup> Hill sued *Life Magazine* under a New York statute<sup>144</sup> alleging that the article “[gave] the

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<sup>137</sup> *Associated Press v. Walker*, 388 U.S. 130, 162 (1967). Writing for a plurality, Justice Harlan articulated a new standard for public figures, divergent from the standard created in *Sullivan*. Justice Harlan’s standard would allow public figures to recover against defamatory statements “on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967). However, “a majority of the Court agreed with Mr. Chief Justice Warren’s conclusion that the *New York Times* test should apply to criticism of ‘public figures’ as well as ‘public officials.’” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 (1974).

<sup>138</sup> “Public figures are those who have ‘assumed roles of especial [sic] prominence in the affairs of society.’” Eric Walker, *Defamation Law: Public Figures—Who Are They?*, 45 *BAYLOR L. REV.* 955, 956 (1993) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

<sup>139</sup> In *Zacchini v. Scripps-Howard Broad. Co.*, the Supreme Court declined to apply the actual malice standard to a case involving misappropriation. 433 U.S. 562, 574 (1977). This leaves misappropriation as a means of recovery in fabrication cases where a plaintiff has a “commercial stake” in the use of their image. *See id.* at 578–79.

<sup>140</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 377 (1967).

<sup>141</sup> The novel, written by Joseph Hayes, depicted a family held hostage by convicts in their home. *Id.* at 378. However, “unlike Hill’s experience, the family of the story suffer violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult.” *Id.*

<sup>142</sup> The play, “entitled *The Desperate Hours*[,]” was based on the book written by Joseph Hayes. *Id.*

<sup>143</sup> “The article appeared in *Life* in February 1955. It was entitled ‘True Crime Inspires Tense Play,’ with the subtitle, ‘The ordeal of a family trapped by convicts gives Broadway a new thriller, ‘*The Desperate Hours*.’” *Id.* at 377–78.

<sup>144</sup> The statute Hill sued under was N.Y. Civ. Rights Law § 51. *Id.* at 376.

impression that the play mirrored the Hill family's experience, which, to the knowledge of defendant was false and untrue."<sup>145</sup> Hill won his case at the trial and appellate levels before it was ultimately decided by the Supreme Court.<sup>146</sup> The Court "preclude[d] the application of [the] New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."<sup>147</sup> The Court, however, never established this as a blanket rule.<sup>148</sup> And in *Cantrell v. Forest City Pub. Co.*, the Court expressly refused to address "whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases."<sup>149</sup> Thus, whether an individual would need to meet the actual malice standard in a false-light claim is an answered question, and therefore, it has not been ruled out as an option for recovery when individuals are harmed by fabricated media.

(b) *Hustler Magazine Inc. v. Falwell—Intentional Infliction of Emotional Distress*

In November 1983, *Hustler Magazine* published a parody of Jerry Falwell, "the host of a nationally syndicated television show and . . . the founder and president of a political organization formerly known as the Moral Majority."<sup>150</sup> The parody was "an alleged 'interview' with [Falwell] in which he states that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse."<sup>151</sup> The parody also portrayed Falwell as "a hypocrite who preaches only when he is drunk."<sup>152</sup> Following the publication, Falwell filed suit against *Hustler*, alleging intentional infliction of emotional distress among other claims.<sup>153</sup> When the issue came before the Supreme Court, it held "that public figures and public officials may

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<sup>145</sup> *Id.* at 378.

<sup>146</sup> *Id.* at 379–80.

<sup>147</sup> *Id.* at 387–88 (emphasis added).

<sup>148</sup> *Id.* at 390 ("We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals.").

<sup>149</sup> 419 U.S. 245, 250 (1974).

<sup>150</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 n.5 (1988).

<sup>151</sup> *Id.* at 48.

<sup>152</sup> *Id.*

<sup>153</sup> "[T]he District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'" *Id.* at 49 (citation omitted).

not recover for . . . intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice’ . . . .”<sup>154</sup> Falwell was unable to meet this standard, and therefore lost his case.<sup>155</sup>

### 3. *How Does Actual Malice Apply to Digital Fabrications?*

With the potential of new digital fabrication technologies, the continued validity of the actual malice standard comes to question. If an individual created a fabricated video of a public person making defamatory statements, the actual malice standard would be defeated at the outset because that person would have firsthand knowledge of its falsity. If, however, a fabricated video is published, circulated, or commented on by a newspaper or magazine—which would likely cause more harm than material circulated by the creator alone—the question becomes more complicated. New and developing technologies have the potential to make fabricated media appear completely authentic. Media conglomerates could therefore argue that the authenticity of the fabricated media gave them no notice of its falsity. Thus, the actual malice standard would limit a public person’s ability to recover damages for the circulation of defamatory materials unless they could prove that the publisher had a “‘high degree of awareness of . . . probable falsity,’ or . . . ‘entertained serious doubts as to the truth of [the] publication’ . . . .”<sup>156</sup>

### 4. *Applying the “Responsible Publishers” Standard*

As the technology to fabricate digital media becomes more readily available,<sup>157</sup> it is likely that these materials will be easily disseminated and published over the internet. News outlets which choose to publish or disseminate fabricated material should not be able to use the actual malice standard to circumvent the authentication of these materials. In the context of fabricated media, the actual malice standard is too high a bar to transcend for public figures.

In *Curtis Pub. Co. v. Butts*,<sup>158</sup> Justice Harlan articulated a better standard to apply in these cases. The standard suggested by Justice Harlan would allow public figures to assert a claim “on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”<sup>159</sup> Under the responsible publishers standard,

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<sup>154</sup> *Id.* at 56.

<sup>155</sup> *Id.*

<sup>156</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 667, 666 (1989) (citations omitted).

<sup>157</sup> This is likely considering the dissemination of other media editing tools. *See supra* Part I.

<sup>158</sup> 388 U.S. 130, 155 (1967). This standard should only be applied in media fabrication cases, not to all free speech cases involving public persons.

<sup>159</sup> *Id.*

a plaintiff should be able to recover against a publisher for disseminating fabricated media, which is defamatory or places the plaintiff in a false light, by providing “clear and convincing evidence”<sup>160</sup> that the publisher failed to authenticate the material prior to publication. Though this standard will allow plaintiffs to recover for harm caused by the publication and dissemination of fabricated media, it will also benefit the public and publishers by encouraging only the dissemination of digital media that is not falsified.

#### CONCLUSION

Advances in computer technologies have led to the development of new tools to edit and disseminate digital media. Some of these new tools allow users to fabricate digital media by editing video and audio recordings of individuals to make it appear as if they are saying or doing things they have not actually said or done. The rise of these new technologies will lead to litigation by individuals who are harmed by the misuse of fabricated digital media. These individuals will be able to rely on several common law torts—such as defamation, misappropriation, false light, and intentional infliction of emotional distress—to recover against the creators of fabricated media. However, the actual malice standard, applicable to public persons, will make it difficult for some plaintiffs to recover against non-creator publishers of such fabricated media. To limit the dissemination of fabricated digital media content, by publishers, courts should adopt the “responsible publisher” standard when analyzing cases by public persons against publishers.

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<sup>160</sup> The Supreme Court applied a clear and convincing evidence standard in other free speech cases that will be appropriate in this area as well. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 331–32 (1974) (“[T]hose who hold governmental office may recover for injury to reputation only on clear and convincing proof . . .”).