



Manipulating Images: the Legal and Ethical Problems

[This is an edited version of a paper given to a recent conference in Melbourne by Communications Law Centre Director Helen Mills]

New digital imaging processes which allow the manipulation of still photographs raise two sets of issues.

First, truth in the representation: ethical problems arising from digitised images purporting to be photos of actual things, when they are in fact fabricated images of things that never were. How do we deal with the ease of deception, when we are used to the idea that a photo is incontrovertible proof that something existed?

Second, there is the issue of truth in the thing itself - the valuation of the actual image, as created by the artist, and the relationships between the intentionality and purpose of the artist, the object, and the viewer.

I will start with some examples of the problem.

- the image which appeared on a magazine cover (*The New Weekly*) shortly after the devastating NSW bushfires in January 1994, which appears to show how close the fires came to people's lives, by showing the tattooed man carrying a crying child facing a blazing inferno. In fact, it turned out that these are two different images from two different situations, superimposed on one another.
- an article in *The Economist* of 19 March 1994 reported a similar improvement on actuality in the recent Los Angeles bushfires.
- another recent example is an allegation by a champion swimmer that a company had photographically superimposed its corporate logo on his swim cap in a photograph of him winning a race, which was then incorporated in a newspaper ad for the company's products. He is suing for damages for the wrongful claim by the company that it sponsored him.
- just the other day a Scotsman made a deathbed confession that he had hoaxed a photo of the Loch Ness monster.
- *The Economist* article discussed two other instances: *Newsday's* publications of a front-page photograph of Tonya Harding and Nancy Kerrigan skating together, an event which had not happened (the picture was a montage, which fact was acknowledged in the caption); and the familiar image of a television news reporter apparently standing in the cold night air in front of the Capitol in Washington - the reporter had in fact been filmed, overcoat and all, in the TV studio.

All these instances cast doubt on the authenticity of the photograph, in circumstances where the image's use and context implies that authenticity matters. The Shorter

OED defines the prevailing use of authentic as 'entitled to belief, as being in accordance with, or as stating fact; reliable, trustworthy, of established credit'.

What is at stake, in these relatively benign cases - four of them at least - is that section of our Code of Journalists Ethics which requires that journalists

shall report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper emphasis.

Newspaper photographers and photographers who submit work to newspapers are covered by the Code. The compiler of the *New Weekly* bushfire cover montage, and the editor who approved it for publication, may both have breached the first principle of the code, by allowing a deliberate distortion to go out as a representation of reality, captured by someone on the spot.

As *The Economist* pointed out, one of the things that has changed newspaper culture is the impact of competition from tabloid television with 'its mesmerising, you-are-there view of lurid events', which puts pressure on the other branches of the media to exploit technology to the full.

One of my concerns about the tendency to create and manipulate images, even when they don't claim authenticity, is that from the perspective of history we are muddying the documentary record. Even where we understand there is humour and irony, future generations will not see context, only the image for what it says it is.

Legal Restraints: Copyright

How does the law deal with these cases?

In the journalism examples, so long as there is no breach of copyright involved in the reproduction of the image, the law has little to say.

In Australian law, the creator of an artistic work is the first owner of copyright. In the case of photographs, that will be the photographer, except in two important instances:

- where a photograph (on any subject) is commissioned by a client, the client is the owner of the copyright, unless there is an agreement to the contrary; and
- where the photographer is employed by a newspaper or magazine, and the photograph is taken in the course of employment, the employer has the copyright for the purposes of newspaper and magazine publication, syn-

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dication and broadcasting; the photographer retains copyright for other uses, such as books, exhibitions.

Copyright basically means the right to exploit the economic value of reproduction of the negative. Although the law requires a work to be original in order to attract copyright protection, this only means that the photographer should have created the image from their own efforts and skill, not that the photo must have remarkable qualities of originality.

In the journalism examples, particularly the bushfire montage, there could be a question about breach of copyright if the owners of the photos used in the montage had not consented to their republication. Apparently that didn't arise because the images had been sold by the newspaper into stock footage, and the original photographer has no control over reuse or sale in these circumstances.

Other Possibilities

Since copyright is of very limited value, what other legal restraints might apply to the manipulation of images?

The champion swimmer example illustrates two possibilities. One is the old tort of 'passing off' - ie making a false representation that there was a connection between a person and an activity by juxtaposing their images, in such a way as to suggest the person is recommending the thing or activity. Alternatively, he may be able to bring an action against the company under the Trade Practices Act, for making a false, misleading or deceptive representation.

In some circumstances it will be defamatory to use a person's image in a commercial context - eg where an opera singer's image was used in an advertisement which suggested she would prostitute her art and reputation for commercial gain.

But these legal restraints are more to do with the subject's reputation and sensitivities, and only secondarily to do with the question of the truthfulness of the image. The general conclusion is that the law is concerned only when image manipulation creates a situation which is dealt with by other categories of law, like false representations in commerce and advertising or damage to individual and commercial reputation by context. The general public interest in knowing the source of an image in order to make some evaluation about its truthfulness does not come into it.

To sum up: the law primarily protects private interests in the authenticity of the image. Law protecting the public interest in the authenticity of the image is mainly found in the Trade Practices Act, which again operates in the commercial context. These laws are interested in the labelling of the artwork, not its truth value, unless there is some falsehood in the representation.

The Concept of Moral Rights

Moral rights as a new legal concept is soon to be introduced into Australian law which may have an impact on the broader question of controlling the manipulation of images. Some of its proponents say that it will deal more directly with the public interest in knowing the source of an image, and thereby having information on which to judge its authenticity and its representational qualities. It will also make it more difficult for artists to appropriate and reuse the work of others, which is clearly relevant to the question of photographic digitisation.

Copyright gives the author control over the economic rights in reproducing the work. Copyright gives the author the exclusive right to publish the work; to reproduce it in a material form, including all forms of copying - recording, filming, printing, storage in a computer retrieval system; to perform it in public; to broadcast it on television and radio; to transmit it by cable to subscribers; and for literary and dramatic works, to adapt the work - though the adaptation right does not apply to artistic works.

The copyright owner is able to protect the work from unauthorised uses, and to negotiate payment for authorised uses. Copyright comes into existence when the work is created and lasts for varying periods, usually 50 years after the death of the author. Copyright can be sold (assigned) outright or for limited periods, or for certain purposes; or the author can licence others to use some of the rights inherent in the copyright - eg to publish the photo in a book. Copyright establishes a system of ownership - property - in intangible rights, and is designed to encourage innovation and creativity by ensuring that the creator gets the economic rewards from her creation, while setting up a system of circulation of copies or versions of the original creation - which ensures that society at large benefits from creativity.

French copyright law has an additional dimension, beyond the granting of rights in the economic exploitation of reproductions of original works, which is the basis of Australian copyright law. The concept of *droit moral* or moral rights involves at least two additional elements:

- the right to be acknowledged as the creator of an artistic work - the right of attribution; and
- the right to object to or restrain distortions, mutilations or other derogatory actions in relation to the work which adversely affect the honour or reputation of the artist - the right of integrity.

These rights apply even where the artist has no economic copyright - eg where the photo was commissioned, or where the copyright has been sold. They are inalienable rights - they cannot be sold with the economic copyright, and they are often termed 'non-economic copyrights'. The idea

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behind them is to protect the work as the emanation of the artist's personality.

Apart from French law, the concept of moral rights has been in use in Canadian law for many years. It recently entered UK and USA law, and the Federal Government has promised that moral rights are on the agenda for Australia.

Moral Rights in Practice

How do these rights work?

In the NSW bushfire picture example, the right of attribution could entitle the two original photographers to be credited; and the right to object to distortions could enable the photographer of the man and child to prevent the montage. In practice, even in France and other countries with such rights, the right to integrity is never extended to photographers and other authors working in journalistic situations, because it would interfere too much with ordinary commercial activities. However, the right to attribution would require identification of two photographers, which would alert the public to the montage. It could also require attribution to the montage artist, too.

It is worth noting that there is protection for something like the right to integrity in existing Australian copyright law. When a digital photo artist scans another's photo or text to reproduce it in a different form, there will be a breach of the first photographer's reproduction right, unless the digital artist has been given permission by whoever holds copyright in the scanned print - it will probably be the publisher of the magazine. But this is a protection for the economic interest in reproduction, not a right based on the original photographer's personal connection with their work. The copyright holder will have an economic incentive to approve the use, and in our present system the original photographer, who may violently object to the new use and its context, will have no redress, unless there is some passing off involved.

Going by overseas examples, here are the sorts of situations which the right to integrity would cover, in the visual arts field: the right to prevent someone painting a Calder mobile in the company colours; the right to prevent colourisation of a black and white film; the right to prevent a municipal authority from moving a site-specific sculpture to a different place.

There is a paradox in the timing of the introduction of moral rights into Australian law, at the point in history when the technologies of creation, reproduction and dissemination are calling into question the whole idea of authorship. It seems anachronistic to be using the law to strengthen the original creator's identification with created works when computer generation and digitisation means the act of creation is shared so that it becomes less relevant to identify intentionality in the act of creation, and to whom to attribute it. It seems backward-looking to be giving integrity rights to creators of products which may be intended to be interactive, and thus to be in a different

relationship to the user - to be changed by the act of consumption.

In an article in *Media Information Australia*, Cynthia Beth Rubin, a computer artist who works through appropriation, says that using a computer to discover the limits of the original work (particularly the works of other cultures) is a more respectful way of dealing with its integrity than simply copying it by reprographic or manual means because you have to engage with the actuality of the work. She talks of entering a dialogue with the source, of 'getting inside the image and pushing it around until the appropriator begins to feel the decision-making process of the original artist'.

Are we looking at a new ethics of authenticity and respect for the personality of the creator, for the digital age, or is this just an elegant rationalisation for treating all images as in the public domain? It could be argued that this sort of argument reduces the qualities of the image to its technical proportions and values - which tends to imply that the intentionality which is being respected is that of formal organisation according to or in despite of rules. And what about the intentionality of context and shape - let alone intentions to reveal or conceal psychological truths?

I am being unfair to Rubin, who goes on to say:

As we let go of technical virtuosity as the measure of artistic success, and look to the quality or the visual integrity of the work itself, it is important to understand that appropriation is only as effective as the art that results from it. [I]n the context of a specific image it may be that no transformation of an element is needed, that simply changing the context is enough to make a profoundly distinctive image, highly reflective of the appropriating artist's sensibility.

This may deal with authenticity of the new image, but where does it leave the old?

I came to thinking about photography through Roland Barthes, whose ideas about photographs and authenticity are stimulating and moving. In *Camera Lucida* Roland Barthes says that the essence of the photograph is that it 'attests to what has been'; every photograph is a certificate of presence. A photo is by nature tendentious, thus cannot attest to the true meaning of a thing, but it attests to its existence.

[T]he important thing is that the photograph possesses an evidentiary force, and that its testimony bears not on the object but on time. From a phenomenological viewpoint, in the photograph, the power of authentication exceeds the power of representation.

This is why I see ethical problems in the careless construction of non-real images in the journalistic area. But even beyond the sphere of journalism, (if Barthes is right), I wonder whether the seamless creation of non-real images will change again our relationship to time and the reality of history (death) which is what Barthes' book is about - so that history again becomes only real through personal testimony, which we do not relate to as evidence in the same way as we do to the photograph. □

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