R
epresenting today’s
trend in photography,
digital cameras con-
tinue to rapidly replace tradi-
tional film-based models. As
prices keep dropping, consumer
ownership will become even
more prevalent. Similarly, law
enforcement agencies have be-
gun to favor digital cameras—
just the latest in a long line of
technological innovations used
by departments to collect and
document evidence. Digital
photography offers law enforce-
ment numerous benefits, includ-
ing instant access to images,
rapid transportability of pictures
within a department or to out-
side agencies, and decreased
cost and time as these cameras
require no film development.

Of course, photographs—
which generally hold substantial
weight—serve as one of the
most effective forms of evi-
dence in court. However, many
individuals in the legal commu-
nity fear the potential abuse and
manipulation of digital images.
Therefore, they consider these
pictures inadmissible under
current evidentiary rules.

To this end, an examination
of the admissibility of film-
based photographs and an
analysis of cases, legislation,
and legal commentary per-
taining to digital pictures can
provide valuable insight. Fur-
ther, agencies can follow rec-
ommendations as to how they
can help ensure the admissibil-
ity of their digital photographs
under the law as it develops in
the United States.

FILM-BASED
PHOTOGRAPHS

People can manipulate film-
based pictures. Throughout the
photographic process, an indi-
vidual skilled in photography
can alter the image.¹ For
instance, while taking a picture, a person can use a narrow f-stop and a fast shutter speed to make a photograph taken during the day appear as if someone took it at night.

Individuals also can alter a photograph during the development stage. “Through the judicious selection of exposure times for the paper emulsions and filters to screen selective color wavelengths, a skilled photographer can produce a different image from the one...viewed through the camera’s eyepiece. This image could appear to the untrained eye to be...perfectly legitimate...yet in subtle ways could be misleading in the jurisprudential context.” Also, during development, a technique known as crop and splice can change the picture. Using this method, a person combines two negatives by cropping out a portion of one and splicing in its place part of another.

Modifications of film-based photographs have presented problems for years. “The forensic ramifications...are obvious. A skilled photographer could artfully assemble through either pre- or postphotographic processing a photograph that could either be highly incriminating or exculpatory. Litigants could then offer that photograph as evidence in support of their cause. Under the Rules of Evidence, to authenticate a photograph, a witness need only to say that the photograph accurately depicts the scene, object, or person. In this scenario, if a witness were willing to deceive the court with a manipulated photograph, discovery of such perjurious intent would be problematic.” However, someone suspecting manipulation of a picture always can ask for the negative to trace its origin.

“...many individuals in the legal community fear the potential abuse and manipulation of digital images.”

Any party seeking to introduce a film-based photograph into evidence must demonstrate its relevancy (i.e., add to the likelihood that an event did or did not occur) and authenticity (i.e., a knowledgeable person must verify the image’s accuracy). For example, a detective photographs a drug deal. The picture depicts two individuals exchanging a package. The prosecutor wants to enter the photo into evidence at the criminal trial of the individual who received the drugs. The picture is relevant because it shows the person present at the scene where the deal occurred and in receipt of the package.

To authenticate the photograph, the prosecutor can place on the stand the detective who took the picture or any officer who witnessed the transaction and elicit that the image actually represents the person, package, place, and time. After establishing the photograph’s relevancy and authenticity, the prosecutor can move to admit it into evidence.

One additional rule exists that pertains to the admissibility of all photographs. Under the Best Evidence Rule, to prove the content of a picture, courts generally require the original—defined as the negative or any print therefrom. Therein lies a major perceived problem with digital images: the absence of a traceable origin to rely upon (i.e., no negative).

DIGITAL PHOTOGRAPHS

Digital photographs include pictures processed by computer. They consist of picture elements, or pixels—computer codes consisting of bits of information representing specific colors, intensities, and locations. More pixels result in a sharper and clearer image.

A digital camera works similarly to a film-based model. However, instead of using light-sensitive film, it employs a light-sensitive chip—a charged
coupled device (CCD). The CCD records the picture electronically as its light sensors capture, convert, and store the image as blue, green, and red pixels, which then become saved in the camera as a computer-readable data file. Using specialized software, a computer can reconstruct the image and display it on a monitor and route it to a printer.

Concerning admissibility, people mainly fear that digital photographs can become altered more easily than film-based images “to fabricate evidence for improper purposes.” Some in the legal community feel that such dangers in digital photography overall necessitate different treatment under the Rules of Evidence.

Certainly, software used to create digital photographs allows alteration of the picture. “At worst, objects...not in the original image can be added and those that were there can be removed.” However, detection of a manipulated digital picture does not prove difficult. “Factors such as the density of the image (based on light exposure), the shadows in the picture, existence or nonexistence of splice lines, and continuity of the image” can be scrutinized.

Compressing represents a secondary concern pertaining to digital photographs. While the amount of film limits the quantity of pictures taken with a traditional model, “digital cameras allow users to choose the number of images they want to capture and store.” The compression of data files allows digital camera users to save more pictures, resulting in lower-quality photos because when “the user wants to view the image, the decompression process ‘guesses’ what information was discarded to produce a complete image.”

The Georgia Supreme Court case of Almond v. State dealt directly with the admissibility of digital photographs. In that case, a jury found Mastro Almond guilty of malice murder and the sale of cocaine. On appeal, Almond raised the issue of digital images as evidence at his trial. The court stated that because the record showed “that the pictures were introduced only after the prosecution properly authenticated them as fair and truthful representations of what they purported to depict,” they were properly admissible. The Georgia Supreme Court did not provide any other guidelines for determining the admissibility of digital photographs. In fact, the court went on to say that “[w]e are aware of no authority, and appellant cites none, for the proposition that the procedure for admitting pictures should be any different when they were taken by a digital camera.”

Although no other court has dealt directly with the admissibility of digital photographs, opinions exist that can offer insight as to where many will stand on the issue. For example, in People v. Rodriguez, the New York Supreme Court, Appellate Division, stated that the trial court properly exercised its discretion in admitting bank surveillance videotapes, and photographs made from those tapes, without expert testimony.

ADMISSIBILITY OF DIGITAL IMAGES

Cases

Few cases directly address the admissibility of digital photographs in courts of law. In fact, the author found only one court in the U.S. federal and state systems that tackled the issue head-on. The many courts that have yet to address the subject largely must extrapolate from opinions pertaining to other issues concerning digital imaging.
about the digitizing process used at the FBI laboratory to slow the tapes down and make still photos from them, since a bank employee responsible for making the original tapes at the bank testified that he compared the original and slowed-down tapes and that what was represented therein was identical except for speed." The People v. Rodriguez holding indicates that the court seeks to ensure that an individual with firsthand knowledge of the photographed scene attests to the picture’s accuracy. Again, this demonstrates that for admissibility, photographs must be relevant and authenticated.

The Washington Court of Appeals case of State v. Hayden represents an additional example that provides insight into how another state may rule on the admissibility of digital photographs. The case mainly focused on the admissibility of digital imaging used to enhance latent fingerprints and palm prints. The court held that “[b]ecause there does not appear to be a significant dispute among qualified experts as to the validity of enhanced digital imaging performed by qualified experts using appropriate software, we conclude that the process is generally accepted in the relevant scientific community.”

Although State v. Hayden dealt with the admissibility of digital enhancement technology under the Frye Test—used to determine the admissibility of novel scientific evidence—the court made four important points that support the admissibility of digital photographs in general: 1) digital photography is not a novel process; 2) the high cost may have contributed to the delay of digital image enhancement in forensic science; 3) the court opined that digital photographs have an advantage over analog film

The modifications of film-based photographs have presented problems for years. photographs because they “can capture approximately 16 million different colors and can differentiate between 256 shades of gray”; and 4) like film photographs, digital images work with light sensitivity, except that the “computer uses a chip and a hard drive in place of the camera’s film.” Based upon the dicta provided, Washington courts seemingly would rule on the side of admissibility concerning digital photographs.

Recently, the Court of Appeals in California addressed the use of digital imaging to enhance a shoe print in a criminal case. In People v. Perez, the court of appeals accepted the trial court’s statement that a particular brand of software “is not a scientific technique” but represents “just an easier way of developing film, developing a picture. And it does it by means of digital imaging of pixels. Digital imaging...is accepted scientifically and has been for decades.” After reading People v. Perez and in light of the previous cases mentioned, courts in California seemingly would consider digital photographs admissible.

Legislation

Alternatively, a legislator sponsored Wisconsin Assembly Bill 584, which “prohibits the introduction of a photograph... of a person, place, document... or event to prove the content... if that photograph...is created or stored by data in the form of numerical digits.” The legislator apparently “became upset when high school students manipulated a digital photograph by putting heads on bodies of the opposite sex.” If this bill becomes law, digital photographs will not be admissible in Wisconsin courts.

Legislators in Hawaii also have concern about the admissibility of digital photographs. However, rather than taking the extreme position of seeking a
ban in courts, the legislature directed the Hawaii Supreme Court to establish written procedures governing police use of digital photography in traffic accident reconstructions. The directions to the Hawaii Supreme Court are contained in Hawaii House Bill 1309, which states, “[a]lthough current rules do not preclude the admission of digital photographs as evidentiary material, such admissibility is contingent upon the basic data and collection technique meeting a threshold requirement of reliability that has not yet been established by the Hawaii Supreme Court’s Standing Committee on the Rules of Evidence.”

Legal Commentary

Many individuals in the legal community remain largely unreceptive to allowing the admission of digital photographs under the current rules of evidence. One author stated that “[a]lthough photographs may be manipulated, the potential for making subtle but significant alterations to digital images gives cause for concern that digital images may be unfit for use as evidence in a court of law” and proposed amending the current evidentiary system specifically to deal with digital imaging.

In another article voicing concern over the admissibility of digital photographs under current evidentiary systems, the authors stated, “As noted, current principles of authentication have developed partly in response to certain assumptions about the inherent limitations of traditional media technologies. The degree to which these assumptions are appropriate in the context of today’s highly sophisticated multimedia tools is an open question posing challenges for advocates, judges, experts, and legislative bodies alike.” And, another author noted that “[w]hile advances in technology are generally viewed as positive within society as a whole, the potential for incredible abuse associated with electronic photography is, or should be, troubling to the legal profession in particular.”

As evidenced by these statements, not everyone in the legal community agrees with any court decision admitting digital photographs under the current Rules of Evidence. At its October 18, 2002, meeting in Seattle, Washington, the Advisory Committee on the Federal Rules of Evidence considered the concerns of commentators who argue that digital photographs should not be admitted under current evidentiary rules. The committee held a preliminary discussion on whether to amend Rule 901, the authentication requirement, or if a new rule proved necessary to deal with digital photographs. Ultimately, the committee members were skeptical of the necessity of a new rule and felt that Rule 901 “was flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered.” However, the committee did direct its reporter to “prepare a background memorandum on the use of digital photographs as evidence” so that it could
consider changes to the rules in the future due to its “interest in assuring that the rules are updated when necessary to accommodate technological changes.”

As for the requirements of the Best Evidence Rule, a logical reading indicates that digital photographs are admissible under that rule. Generally, it requires the original to prove the content of a writing, recording, or photograph. Under the Best Evidence Rule, “[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’” Therefore, a digital image downloaded to a computer and subsequently printed would seem to qualify.

RECOMMENDATIONS

At a minimum, agencies should establish standard operating procedures that focus on two goals that will ensure the admissibility of their digital photographs in court: 1) preserve the original and 2) follow a reliable process demonstrating the integrity of the image. Ideally, departments will concentrate on “chain of custody, image security, image enhancement, and release and availability of digital images.”

When attempting to preserve the original, unmanipulated image, agencies should store it on a compact disc that can be written to only once and then is only readable (i.e., a CD-R, rather than a CD-RW). This ensures that no one can remove or alter the data without copying the original. After capturing an image, agencies should immediately transfer it to a CD-R and label the disc with the date, time, and place the picture was taken; the individual who captured the image; and other important information associated with the photo.

When establishing reliable procedures that demonstrate the integrity of images from creation to admission into evidence, agencies must limit access to the files. As one commentator stated, “[i]mage handling procedures should be standardized and access to digital images should be strictly controlled.” The process used “should be able to demonstrate: who took the picture and when, where and how the image was stored, who had access to the image from the time it was taken through the time it is introduced in court, and any details on whether or not the image has been altered and how.”

In this regard, reliable procedures will help prevent challenges to admissibility by defense counsel. Also, they will allow agencies to track who had access to the photographs and what, if anything, was done with them. Of course, any reliable procedures must begin with preserving the original.

Additionally, agencies should preserve the digital image in its original file format rather than compressing it for storage. This allows the camera to capture and store the most information possible. When departments must enhance a picture, they should create a new image file, saving it separately and not writing over the original.

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Also worthy of note, some law enforcement agencies use commercial photo labs for developing and processing film. Following such a procedure opens up possible challenges when departments seek to admit these pictures in court. In this regard, digital images prove superior to film-based photographs because no one outside the department handles them.
CONCLUSION

Digital photographs serve as powerful, efficient tools for law enforcement. The ability to take a picture and instantly view and distribute it helps officials in their efforts to serve and protect their communities. Agencies should not become hindered by those in the legal system reluctant to stay in step with advances in technology. As one commentator stated, “Fear about manipulation of digital images is exaggerated, perhaps because of the perceived novelty of the technology. We often fear what is or seems new. Certainly, this fear has made many forget a secret of analogue photography [traditional film-based photographs], namely that conventional photographs may be manipulated to alter reality and at worst to fabricate false evidence.”

The trend in case law points to the admissibility of digital photographs as evidence, although many in the legal community rightfully suggest that digital photographs are subject to abuses. To alleviate those fears, law enforcement agencies should attempt to establish standard operating procedures that, at least, include the preservation of and accountability for the original image from creation to admission into evidence. Like so much in law enforcement, the admissibility of digital photographs will depend on the veracity and integrity of the authenticating official.

Ultimately, to help prevent the abuse of digital photographs, judges and attorneys on both sides of the courtroom must become aware of the potential abuses and familiar with the associated technology. As a result, the underlying fears will dissipate, and, in those rare cases where a dishonest person may falsely alter an image, the judicial system will recognize and effectively address the problem.

Endnotes

2 Id. at 303, 308.
3 Id.
5 Supra note 1 at 303, 309.
6 See, e.g., Federal Rules of Evidence Rule 401, Rule 402, and Rule 901; see also M. L. Cross, Annotation, Authentication or Verification of Photograph as Basis for Introduction in Evidence, 9 A.L.R. 2d 899.
7 See, e.g., Federal Rules of Evidence Rule 1001 and Rule 1002.
8 Supra note 1 at 303, 311-312 (“However, modern technology has tossed another monkey wrench into the evidentiary gearbox. Traditional emulsive photography always had a traceable origin to rely upon. The courts or opposing counsel could always demand, ‘Show me the negative.’ However, it is now possible to create a photograph digitally without a negative and no traceable parentage.”).
10 Id.
13 Supra note 12 (Witkowski).
16 Id. (citing Ray v. State, 266 Ga. 896, 897(1), 471 S.E. 2d 887 (1996) (videotapes admissible with the same limitations and on same grounds as photographs)).
21 Id.
are superior to regular film photographs because digital photographs can pick up and differentiate between many more colors and shades of gray than film photographs. Unfortunately this is not true, forensic quality film offers at least as many colors and more shades of gray than digital images.


25 Id. at 4.

26 2003 WI A.B. 584; and supra note 9.

27 Supra note 9.

28 Hawaii House Bill 1309; and supra note 9.

29 Supra note 12 (Witkowski) at 267, 273.


34 Id.

35 See, e.g., Federal Rules of Evidence Rule 1002.

36 See, e.g., Federal Rules of Evidence Rule 1001(3).

37 Supra note 12 (Camp) (“Arguably, a photograph taken by a digital camera of a particular event...is an ‘original’ photograph as defined by Federal Rules of Evidence 1001(3)...”); but see Roderick T. McCarvel, “You Won’t Believe Your Eyes: Digital Photography as Legal Evidence,” retrieved from http://www.seanet.com/~rod/digiphoto.html (“Worse yet is any incarnation of the best evidence rule, which follows the Federal Rules of Evidence in defining a printout as an ‘original’ for purposes of the rule.”).


39 Id.

40 Supra note 11.

41 Supra note 11.


43 Supra note 9.

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