

CCTV and The Law

Digital Still Images: Virtually admissible?

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Q. Is a picture taken using a digital still camera admissible in a Canadian court?

A. Yes, provided that the picture is authenticated (i.e., verified on oath by a capable witness)! Although there are no reported Canadian cases on this point to this writer's knowledge, in this writer's opinion, a "digital picture" should not be excluded from evidence merely because it was recorded and stored digitally.

The requirement that a picture be authenticated applies regardless of the technology used to produce it. In most cases, the authenticating witness is an eye-witness to the event recorded (e.g., the camera operator or a bystander). He or she testifies in court that the picture shown in the courtroom is a true and accurate reproduction of what he or she saw when the event was recorded. Also, the authenticating witness establishes that the picture is fair (i.e., not misleading). Obviously, the content of the picture must be a relevant issue before the court or it will not be admitted. In addition, a trial judge has a judicial discretion to exclude a picture from evidence if its prejudicial effect outweighs its probative value (e.g., if the picture is gruesome, horrific or otherwise likely to arouse the anger, sympathy or other passions of the jury).

A digital still camera records an image as a digital file on a magnetic medium such as computer floppy disk. The digital file consists of a series of "zeros and ones" in any one of a number of different formats (e.g., Bitmap, JPEG, TIFF, etc.). The image recorded in the form of a digital file is instantly available. It can be downloaded or transferred from the camera

and stored in a computer. The computer can transmit the digital file via modem over the Internet to another computer, or fax it, or email it or print it on "paper" or transparency film.

The digital file can be easily manipulated (that is, "changed") using "picture editing" software. For example, the image can be altered by adding or removing items, changing colour hue and saturation, and increasing or decreasing picture contrast and intensity (brightness/darkness). This is not necessarily a bad thing. There are times when it is necessary to "enhance" an image to improve picture highlights and quality, bring out shadow detail and remove defocus or blur. However, whenever an image is altered, the fact that it has been altered must be disclosed to the court along with the original ("source") computer file and the enhanced ("altered") computer file.

There is no harm in copying a computer file, making changes to it, producing a picture from the copy, and tendering it in evidence, *provided that* you also tender a picture made from the original, unaltered, computer file. By tendering two pictures (the proverbial "before" and "after" pictures), you allow the trier of law (the judge) to compare the two images and determine their admissibility.

This approach is based on age-old case law that when special techniques are used to enhance the appearance of objects in a scene being photographed, the court's attention should be drawn to the fact, otherwise the court may be misled.

Obviously, the court will want to hear evidence regarding the changes that were made to the original image to produce the "new" image. The person performing the alteration should keep careful records of the procedures and techniques used, as the party tendering the images will, no doubt, call him or her as a witness.

The fact that the image was recorded digitally, as opposed to photographically, should not influence its admissibility, in this writer's opinion. What will, and indeed should, influence admissibility is the nature, kind and degree of manipulation of the recorded image however recorded.

It is possible to "capture" or "seize" an image from a videotape, "enhance" it, and tender it as evidence. That is the topic for a forthcoming column. Stay tuned!

Elliott Goldstein is the author of Visual Evidence: A Practitioner's Manual; published by Carswell/Thomson Professional Publishing, 1-800-387-5164.

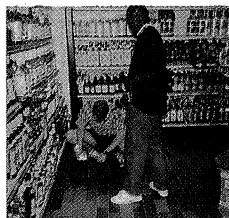
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COVER: These two people posing as liquor store thieves are really undercover security operatives from Reilly's Security Services.

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