

**NINTH CIRCUIT HOLDS THAT THE FIRST AMENDMENT
PROTECTS A MAGAZINE'S USE OF A DIGITALLY ALTERED PHOTOGRAPH
OF A CELEBRITY IN AN EDITORIAL CONTEXT**

DUSTIN HOFFMAN V. CAPITAL CITIES/ABC, INC., AND L.A. MAGAZINE, INC., 2001 U.S.APP. LEXIS 15085 (9TH CIR. 2001)

On July 6, 2001, the United States Court of Appeals for the Ninth Circuit overturned the decision of the United States District Court for the Central District of California in Hoffman v. Capital Cities/ABC, Inc. et al., 33 F.Supp. 2d 867 (C.D. Cal. 1999). In doing so, the Ninth Circuit held that a media organization such as L.A. Magazine, Inc. and its parent company Capital Cities/ABC, Inc. may digitally alter the image of a celebrity and present that image in an editorial context with full protection of the First Amendment.

The case arose in 1997, when Los Angeles Magazine published a "Fabulous Hollywood Issue" with images of celebrities digitally altered so that it appeared as though those celebrities were wearing Spring 1997 fashions. One of the images was that of Dustin Hoffman in the wig and make-up he wore as "Dorothy Michaels" in the advertisement for the 1982 film "Tootsie," with the famous red sequined dress replaced by a gown by designer Richard Tyler. Hoffman sued Los Angeles Magazine and its parent company, Capital Cities/ABC, Inc., under California right of publicity laws and the federal Lanham Act. The California right of publicity laws prohibit any person or organization from using a celebrity's name and likeness for commercial purposes, and Hoffman argued that his name and likeness were being used to sell the gown and the accompanying shoes, even if the photo was in an article and not an advertisement. The District Court for the Central District of California agreed, calling the use of the photo "exploitive commercial use" not entitled to protection under the First Amendment.

The Ninth Circuit overturned the District Court's decision, finding that the altered photo was not "commercial speech" because Los Angeles Magazine "did not use Hoffman's image in an advertisement printed merely for the purpose of selling a particular product. . . LAM did not receive any consideration from the designers for featuring their clothing in the fashion article containing the altered movie stills. Nor did the article simply advance a commercial message." Because the use of the photo was "non-commercial," the court explained, as a public figure Hoffman could only recover damages if he could show that Los Angeles Magazine acted with "actual malice" ("reckless disregard for the truth" or a "high degree of awareness of probable falsity.") Otherwise, the First Amendment would protect the Defendants. The Ninth Circuit then found that there were numerous references in the magazine to the fact that the photos were altered to show the celebrities wearing clothes they were not actually wearing when the photos were taken. Therefore, there was no "actual malice" and the Defendants had their First Amendment protection.