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Internet Publication
The Case for an Expanded Right of Publicity for Non-Celebrities

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I. Introduction

In 1890, an assignment of anti-obscenity prosecutions pulled the American Coalition of Anti-Vivisection Societies (ACAS) to Washington, D.C. ACAS's president, Caroline Earle White, was a Philadelphia Quaker who opposed all forms of cruelty to dumb animals and stuff. The group planned to be keeping the City "in anticipation of a few obscene arrests whenever necessary."[2] Unfortunately, ACAS's plan was thwarted by the Comstock Society's prosecutions of publishers of medical journals.[3]

Today, the Internet is the new Wild West, and the Comstock Society's prosecutions of publishers of medical journals pale in comparison to the sheer volume of illicit activity on the Internet. Nevertheless, the Internet has brought to society[4] the nature of active internet providers were displeased at the prospect of being "kept in anticipation of a few obscene arrests whenever necessary." Internet publication is commercial speech and is not protected speech. Internet publication violates non-celebrities' rights of publicity.

Division of labor, speech and prior restraint are the tools by which society resolved the publication of that personal information which is necessary to the functioning of society. Internet publication is a form of commercial speech. Internet publication violates non-celebrities' rights of publicity. The right of publicity is a property right, and it is the use of your name, for example, because someone else has your name number, then, from that's you.[5] Internet publication violates non-celebrities' rights of publicity. Internet publication violates non-celebrities' rights of publicity. Internet publication violates non-celebrities' rights of publicity.

intrinsic that they may not be separated through sale or any other means. She calls these aspects of our personas "market-inalienable." According to Radin, "the person cannot be an entity exercising free will if it is a manipulable object of monetizable value."[119] But while there are certainly some aspects of our identities that are so basic that they are inseparable from our persons, our tastes, inclinations, and personal information are not fall into this category. Our tastes sanctione the monetization of these aspects of identity in a number of ways. Collectives are paid for the use of their image through an entertainment licensing agreement or independ public support. And indeed, just as celebrities are regularly paid for the use of their personas, non-celebrities regularly pay to avoid the publication of their image and personal information. Non-celebrities frequently request unlisted telephone numbers, get caller ID or call blocking, purchase software programs that filter out email from unknown sources, unlist high value or dangerous real estate their homes, hire bodyguards or a premium to live in "quiet" towns and neighborhoods where they can live anonymously. Clearly, non-celebrities spend considerable amounts of money to avoid the exposure of their image. In cases where an unauthorized person broadcasts a non-celebrity's personal information over the Web, these expenditures can be used to demonstrate the harm that plaintiff places a significant value on keeping her information off the Web. Even if non-celebrities can publish non-celebrity images over the Internet, this negative commercial value must be recognized and made available to non-celebrity plaintiffs who have appropriated images "have... little or only a nominal value" under a traditional right of publicity analysis.[120]

VII. Conclusion

57. For years, courts and scholars have enthusiastically recognized a right of publicity for celebrities and non-celebrities alike. Yet, when it comes to applying the right of publicity, courts have overwhelmingly favored lines of analysis which favor celebrity plaintiffs, effectively relegating non-celebrities to the dustbin of commercial exploitation. In this article, I have argued that the Nuremberg Files case and the ACLU's Nuremberg Files are often unable to recover that value without the enduring the trouble and embarrassment of a private suit unless special statutory remedies are available. This is true even though non-celebrities regularly demonstrate the high monetary value of their image by expending considerable effort and expense to protect their privacy. This is also true in spite of the widespread belief among scholars and judges that non-celebrities enjoy a right to control their own publicity just as celebrities do.

58. The universal availability of Internet publishing demands that courts reconsider their implementation of publicity rights doctrine. Just as the emerge technological innovations in publishing have prompted the expansion of privacy and publicity rights in the past, the development of web publishing as a principal means of conveying information requires that courts today extend the application of the right of publicity to protect non-celebrities and celebrities alike. Only then will the doctrine exhibit the same potency in practice that it has in theory.

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[2] *Court Rules Site is a Menace*, WIRED NEWS, Feb. 2, 1999, *at* http://www.wired.com/news/politics/0,1283,17280,00.html (last visited on March 8, 2001).

[3] Neal Horsley, *The Nuremberg Files: Abortionists on Trial*, *at* http://nook.vdu11.nl/~oracle/nuremberg/aborts.html (last visited on Jan. 29, 2001).

[4]

[5] Maria Elena Baca, *Minnesota Doctor on Web Site Moves About with Care*, MINNEAPOLIS STAR TRIBUNE, Feb. 3, 1999, at 6A.

[6] Lynne K. Varner, *Doctor's Death Leaves Abortion Providers More Fearful Than Ever*, THE DALLAS MORNING NEWS, Nov. 8, 1998, at 14A.

[7] *Id.*

[8] Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41. F. Supp. 1130 (D. Or. 1999)

[9] Robert G. Gibbons & Lisa M. Ferri, *IP Policing a Priority Amid Proliferation of Online Privacy*, NAT'L L.J., Oct. 4, 1999, at B7.

[10] Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 99-35320 (9th Cir. 3/28/01) *available at* http://www.ca9.uscourts.gov/ca9newsletters.nsf/fdbc2a9ae5bc9bc8b8525693700763b9/1b21ea47a2a437b9882566a1d006ad3a?OpenDocument The Nuremberg Files website, re-published after the Ninth Circuit's decision, can be found at http://nook.christiansgallery.com/.

[11] Telephone Interview with Amy Brown, attorney for the plaintiff Planned Parenthood of Columbia/Willamette, Paul, Weiss, Rifkind, Wharton & Garrison (March 7, 2001).

[12] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960).

[13] Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[14] Prosser, *supra* note 11, at 394.

[15] Melvin B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

[16] Nuremberg Files, 99-1811 CAFI, PRIVACY IN THE INFORMATION AGE (1999) ("As information technologies spread and reliance on them increases, as the volume of data generated and recorded skyrockets, and as the cost of storing and sifting data declines, the perceived need to protect personal information privacy is growing." *Id.* at 101).

[17] J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995) [hereinafter McCarthy, *The Human Persona as Commercial Property*].

[18] Nimmer, *supra* note 14, at 208-9.

[19] As early as 1905, courts recognized that plaintiffs had a property interest in the commercial value of their images. Justice Reid of the Supreme Court of Georgia wrote in *Pavesich v. New England Life Insurance Co.*, "I think that the plaintiff has the same property in the right to be protected against the use of her face for defendants purposes as she would have if they were publishing her literary compositions." 50 S.E. 68, 79 (Ga. 1905). Yet, despite this recognition of the plaintiff's property interests, the case was ultimately decided on tort, not property, grounds. Indeed, throughout the 1940s and 1950s, courts frequently invoked tort theories often influenced invasion of privacy suits, as damages were recognized in instances in terms of lost compensation and unjust enrichment. *See, Jonathan Kahn, Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 230 (1999).

[20] 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U. S. 816 (1953).

[21] Haelan, 202 F.2d at 868.

[22] Nimmer, *supra* note 14, at 203.

[23] *Id.* at 215.

[24] States with common-law sources for the right of publicity include Alabama, California, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, New Jersey, Pennsylvania, Texas, and Wisconsin. *See*, J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 6-3 (2000) [hereinafter MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY].

[25] State statutory sources of publicity rights include: CAL. CIV. CODE 3344-3344.1 (West 1997 & Supp. 2001); IND. CODE ANN. 32-13-1-8 (Michie 1995); KY. REV. STAT. ANN. 391.170 (Michie 1999); MASS. GEN. LAWS. ANN. ch. 214 3A (2000); NEB. REV. STAT. ANN. 20-201 (1999); NEV. REV. STAT. ANN. 597.770-597.810 (Michie 1999); N.Y. CIV. RIGHTS LAW 50, 51 (McKinney 1992 & Supp. 1996); OKLA. STAT. ANN. tit 21, 839.1-2 (West 1983); R.I. GEN. LAWS 9-1-28 - 29 (1956); TENN. CODE ANN. 47-25-1101 (1995); VA. CODE ANN. 18.2-216.1 - 1-3-6 (1998); VA. CODE ANN. 8.01-40 (Michie 2000); and WIS. STAT. ANN. 895.50 (West 1997).

[26] *See*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION 46-49 (1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability." The publication has been used for purposes of trade "if they are used in advertising or in connection with goods or services or if the appropriation is otherwise marketed by the user, or are used in connection with services rendered by the user." In such cases, the publisher "is liable for the pecuniary loss to the plaintiff or the appropriation of the actor's ow pecuniary gain resulting from the appropriation, whichever is greater." "The appropriate method of measuring such relief depends upon a comparative appraisal of all the factors involved in the case, including the nature and extent of the violation, the degree of certainty with which the plaintiff can prove the loss and extent of the pecuniary loss or the pecuniary gain, the relative benefits resulting from the violation, (b) the nature and extent of the appropriation, (c) the relative benefits to the plaintiff of various remedies, and (d) the extent to which the actor knew or should have known that the actor's use would be unauthorized, (e) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights, and (f) any related violations on the part of the plaintiff.")

[27] Roberta Rosenthal Kwall, *The Right of Publicity vs the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47, 91-92 (1994)

[28] ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS 29 (1994).

[29] Kwall, *supra* note 29, at 54-55.

[30] 433 U.S. 562, 576 (1977) (holding that a local television news program had violated the publicity rights of a "human cannonball" performer by broadcasting the entirety of his act on the air against his wishes and this "pocking] a substantial threat to the economic value of that performance." *Id.* at 573).

[31] Kwall, *supra* note 26, at 101 ("Especially in commercial contexts, the production of fame and image has become more organized, centralized, methodical, even 'scientific.' The work of 'fashioning the star out of the raw material of the actor' is done not by the actor herself, but by an army of specialists consultants, mentors, coaches, advisors, agents, photographers, and publicists.")

[32] *See*, *id.* at 175-176, 182-185.

[33] *Id.* at 182-196.

[34] *Id.* at 228-238.

[35] *Id.* at 196.

[36] Kwall, *supra* note 29, at 85.

[37] *See*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. at 576; and Midler v. Ford Motor Co., 849 F.2d at 462.

[38] MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, *supra* note 23, at 4-3[F]. *See also*, Nimmer, *supra* note 14, at 203; McCarthy, *supra* note 29, at 55-56; McCarthy, *The Human Persona as Commercial Property*, *supra* note16, at 134; *Symposium: Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209, 227 (1998).

[39] Kwall, *supra* note 29, at 55.

[40] Peter L. Felcher and Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 n.78 (1979).

[41] *See id.* at 1591-1592.

[42] *See* McCarthy, *The Human Persona as Commercial Property*, *supra* note 16; Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098, 1101-1102 (9th Cir. 1992); Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996); Cheatham, 891 F. Supp. at 386-387.

[43] McCarthy, *The Human Persona as Commercial Property*, *supra* note 16, at 135.

[44] Monachenkopf, 498 F.2d at 827 (holding that a famous race car driver's unique red and white car design was sufficiently recognizable to give that driver a claim under the right of publicity when his car and no part of his likeness was replicated in a television commercial).

[45] 891 F. Supp. 381 (W.D. Ky. 1995).

[46] *Id.* at 384.

[47] *Id.* at 383.

[48] 948 F. Supp. 40 (N.D. Ill. 1996).

[49] *Id.* at 42.

[50] Waits, 978 F.2d at 1098, 1101-1102.

[51] Dora, 15 Cal. App. 4th at 542. *See also*, Zacchini, 433 U.S. at 574 (stating that the right of publicity may not be invoked to prevent the publication of "newsworthy facts").

[52] Kwall, *supra* note 29, at 50-51.

[53] McCarthy, *The Human Persona as Commercial Property*, *supra* note 16, at 131.

[54]

[55] White, 989 F.2d at 1520 (Kozinski, J., dissenting).

[56] *See*, Leary v. Patsi, 1999 N.Y. Misc. LEXIS 90 (Sept. Ct. N.Y. 1999) (holding that "Plaintiff's publicity rights... were not violated when her name was used on a Web site in a fleeting and incidental manner and not in directly promote the organization. The Web site, maintained by a third party and based on outdated information, listed her name as a contact person for the former employee.").

[57]

[58] *See infra* note 44.

[59] *See, e.g.*, Midler, 849 F.2d 460 (9th Cir. 1988); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Martin Luther King Jr. Ctr. For Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697 (Ga. 1982).

[60] *See, e.g.*, Motschenbacher, 498 F.2d at 824 n.11; Dora v. Frontline Video, 15 Cal App. 4th 536, 536 n.2 (1993); Cheatham v. Paisano Publns, Inc., 891 F. Supp. 381, 386 (W.D. Ky. 1995).

[61] *See* McCarthy, *The Human Persona as Commercial Property*, *supra* note 16; Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098, 1101-1102 (9th Cir. 1992); Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996); Cheatham, 891 F. Supp. at 386-387.

[62] McCarthy, *The Human Persona as Commercial Property*, *supra* note 16, at 135.

[63] Monachenkopf, 498 F.2d at 827 (holding that a famous race car driver's unique red and white car design was sufficiently recognizable to give that driver a claim under the right of publicity when his car and no part of his likeness was replicated in a television commercial).

[64] *See* Kwall, *supra* note 29, at 55.

[65] Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213 at 213-214 (1999).

[66] Prosser, *supra* note 11, at 389.

[67] William J. Fenrich, *Common Law Protection of Individuals' Rights in Personal Information*, 65 FORDHAM L. REV. 951, 998 (1996). *See also*, RESTATEMENT (SECOND) OF THE LAW OF TORTS 652A (1977).

[68] 50 S.E. 68 (Ga. 1905).

[69] *Id.* at 80.

[70] Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 968 (1964).

[71] *Id.* at 987. *See also*, Kahn, *supra* note 65, at 224-225.

[72] Nimmer, *supra* note 14, at 204-206.

[73] MCCARTHY, THE RIGHTS OF PRIVACY AND PUBLICITY, *supra* note 23, at 5.[8][B]

[74] *Id.* at 4.3 [E].

[75] Indeed, in PPCW, the plaintiffs abandoned their tort claim against the publisher of the Nuremberg Files of intentional infliction of emotional distress because they decided that the difficulty of proving emotional distress outweighed the benefits of prevailing on that claim. Telephone Interview with Paul Wolf, *supra* note 11.

[76] Nolley v. County of Erie, 802 F. Supp. 898, 904 (W.D.N.Y. 1992). *But c.f.* Prosser, *supra* note 11, at 409 (arguing that "[]he difficulty of measuring damages is no [] reason to deny relief [since] substantial damages may be awarded for the presumed mental distress of the plaintiff and other probably harm, without proof").

[77] Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 825 (1997).

[78] J. Thomas McCarthy, *Melvin B. Nimmer and The Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1710 (1987) [hereinafter McCarthy, *Melvin B. Nimmer and The Right of Publicity: A Tribute*].

[79] MCCARTHY, THE RIGHTS OF PRIVACY AND PUBLICITY, *supra* note 23, at 5.[B]

[80] Kahn, *supra* note 63, at 244.

[81] J. Thomas McCarthy, *Melvin B. Nimmer and The Right of Publicity: A Tribute*, *supra* note 80, at 1710.

[82] Madow, *supra* note 26, at 2.

[83] *See* Kahn, *supra* note 63, at 225-226. *See also*, Kalven, *supra* note 65.

[84] Nimmer, *supra* note 14, at 207.

[85] Kahn, *supra* note 63, at 255 (noting that the inconsistent application of the criteria used in privacy cases "function[] to reinforce the social rules which underpin the hierarchy of persons").

[86] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1905 (1987). *See also*, Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1238 (1986).

[87] Kahn, *supra* note 63, at 222.

[88] *See supra* notes 116-118 and accompanying text.

[89] See Kwall, *supra* note 29, at 81-85; Madow, *supra* note 26, at 133 n.27; Felcher & Rubin, *supra* note 42, at 1593-1594.

[90] Prosser, *supra* note 11, at 408-409.

[91] *See, e.g.*, Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Martin Luther King Jr. Ctr. For Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697 (Ga. 1982).

[92] *Symposium: Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209, 227-228 (1998) (quoting Diane L. Zimmerman, Professor of Law, New York University School of Law).

[93] CATE, *supra* note 15, at 98.

[94] *Id.* at 1.6.

[95] MCCARTHY, THE RIGHTS OF PRIVACY AND PUBLICITY, *supra* note 23, 4.[C]; See, Carroll v. J. J. Kidde, Inc., 97 N.J. Super. 327, 235 A.2d 62, 75 (1967); Motschenbacher, 498 F.2d 825; Dora, 15 Cal. App. 4th at 542. *See also*, Mundrev v. Harris, 153 Mo. App. 652 (1911) (holding that a child has a right to control the use of his identity, even if he has not previously commercially exploited).

[96] CATE, *supra* note 15, at 1.6.

[100] *Suddenly Everyone Can Be a Publisher Watch Out!*, INTERACTIVE PR & MARKETING NEWS, April 30, 1996 at 8 (explaining that "content gets analyzed and indexed by the Web engine searches based on many factors including meta tags", which are "key words specifically included on the source page of your HTML document that allow search engines to respond to user queries").

[101] Ian Zack, *UVA to First to 'Print' a Book On-Line*, ROANOKE TIMES & WORLD NEWS, January 29, 1995, at D6.

[102] Alice McKeever, *The Good, the Bad, the Political*, THE DALLAS MORNING NEWS, August 19, 1998 at F1.

[103] Tim Jones, *Newspapers Rush Across Technological Threshold to Secure a Future: Behind an Innovating Industry, 'Everyone's a Little Bit Scared'*, CHI. TRIB., April 10, 1994, at 1.

[104] See, Jonathan Zittrain, *The Rise and Fall of Sysopdom*, 10 HARV. J.L. & TECH. 495, 507 (1997) ("It's just too expensive for the physical world for an individual to successfully invest in the journalism trade (and hired or backed by a publisher of some kind) to get [an] article in front of many pairs of eyes.").

[105] Kahn, *supra* note 63, at 245, 258-259 (explaining that an appropriated image's ability "to draw attention to the publication is one of the primary measures of the value of that image").

[106] Louder v. Computerworld, Inc., BC153274 (Los Angeles Superior Court, filed July 5, 1996). Case settled, per telephone conversation with Joel Ardatzer, attorney for plaintiff, March 14, 2001.

[107] Bloustein v. Dodge, 992 F. Supp. 48 (D.D.C. 1998). *See also*, Matthew Dredge, *Dodge Report: New White House Recruit Sidney Blumenthal has Spousal Abuse Past*, *at* http://homepage.ccpu.com/archive/jbennet/dodge.html (last visited March 8, 2001).

[108] *See*, Jonathan Zittrain, *supra* note 103, at 507 ("A total free-lancer [in the physical world] would have to be risk-assuming enough to have his or her antique, nasty letter to the editor about the next-door neighbor actually published in the paper which, wanting to be publicity-loving itself, would put its relatively sophisticated knowledge of libel law to work to help filter such material out. The sorts of speech-based harms for which individuals would generally not think about doing so from the real world because to the cost would be disproportionate to their pecuniary gain, would be rendered worthwhile and cost-effective speech to the world at large. Not so on the Net.").

[109] Mark Leonard, *Live on Vayvar Vision*, THE TIMES-PICAYUNE, May 2, 2000, at F1 ("There are a number of ways to know if someone has seen I available on the Net. The best way that is available is to sacrifice your privacy, and possibly some of your dignity. For some people, that cost is worth the means").

[110] Kwall, *supra* note 29, at 14-15.

[111] *Suddenly Everyone Can Be a Publisher Watch Out!*, INTERACTIVE PR & MARKETING NEWS, April 30, 1996 at 8 (explaining that "content gets analyzed and indexed by the Web engine searches based on many factors including meta tags", which are "key words specifically included on the source page of your HTML document that allow search engines to respond to user queries").

[112] Ian Zack, *UVA to First to 'Print' a Book On-Line*, ROANOKE TIMES & WORLD NEWS, January 29, 1995, at D6.

[113] Alice McKeever, *The Good, the Bad, the Political*, THE DALLAS MORNING NEWS, August 19, 1998 at F1.

[114] Tim Jones, *Newspapers Rush Across Technological Threshold to Secure a Future: Behind an Innovating Industry, 'Everyone's a Little Bit Scared'*, CHI. TRIB., April 10, 1994, at 1.

[115] *The Smoking Gun: Prensp*, *at* http://www.thesmokinggun.com/archive/prensp1.html (last visited March 8, 2001).

[116] Madow, *supra* note 26, at 191-192.

[117] *See, e.g.*, Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 962-964 (1964) (arguing that the privacy tort is "not about appropriating something of monetary value," but about "humiliating and humiliated feelings" which "flow from the violation of his likeness).

[118] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1899 (1987).

[119] *Id.* at 1905.

[120] NIMMER, 19 LAW & CONTEMP. PROBS. at 217.