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PARDON ME BUT YOU GOT MY BEST BITS: MISAPPROPRIATION OF PERSONAL CHARACTERISTICS AND THE NEW AGE OF PRIVACY AND PUBLICITY RIGHTS IN DIGITALLY MANIPULATED WORKS

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I. INTRODUCTION

Imagine that you need a crispy white shirt. Perhaps this is a fine opportunity to try out a new cyber-cash account. So you search for and locate http://www.crispywhiteshirt.com and discover a digitized Madonna, or rather, sort of Madonna. This character bears a strong resemblance to Madonna, except she is singing the virtues of linen shirtings with a man's voice that is very reminiscent of the sweet, mellifluous Frank Sinatra. Panning down, you are presented with a pair of legs that, if you didn't know better, and you don't, sure look like those of Julia Roberts. Madonna pauses briefly and says in a breathy voice, "They're crisp" and you notice that the teeth are a little bucky. They actually belong to the CEO of CrispyWhiteShirt.com Inc., whose company identification-badge photo was digitized and infused into Mad's binary soul–just for fun. We all need a little cosmetic work to shape and enhance our natural features.

The gold rush to commercial activity on the Internet will provide a new opportunity for marketing gurus to reach straight through to targeted consumers. Digitally manifested activity has become increasingly interactive and reality-altering to accommodate the Generation X taste for kaleidoscopic head-rush images and sounds.[1] The digital possibilities are infinite and the capacity to sever, morph, and recombine personal characteristics will likely stretch the current bounds of privacy and publicity law. Part I of this Article will provide a brief overview of the historic genesis and development of privacy and publicity protections. Part II will discuss developments in Internet space that portend global marketing opportunities for commercial enterprises. Part III will examine recent cases that indicate possible further refinement of publicity rights. The Article concludes that protection of privacy rights may be more difficult to assert in the rush to put streaming video of everyday activity on Internet sites (so-called reality programming) while publicity rights may be refined to catch commercial exploitation of particular personal attributes.

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1. *See* Azby Brown, *Portrait of the Artist as a Young Geek*, 5.05 WIRED, May 1997, at 186. <http://www.wired.com/wired/archive/5.05/ff_iwai_pr.html>.

II. HISTORIC RISE OF PERSONAL RIGHTS IN PRIVACY AND PUBLICITY

Ancient Roman law recognized a legal right for private citizens "to be let alone" while pursuing personal business.[2] The precise parameters of this right are not fully known but this may be characterized as an early, flickering emanation of privacy rights. Nearly two millennia would pass before the common law developments conceptualized the privacy right. There was no developed history of a common law privacy interest, apart from physical trespass, in Anglo-jurisprudence.[3]

A. Privacy Concerns

The origin of a judicially cognizable cause of action in the United States is traditionally traced to a famous law review article, which proposed a legally cognizable right of privacy.[4] The article proposed a right of privacy providing legal power to prevent intrusive behavior. This concept was predicated on "personal freedom"[5] and was purportedly born of the co-author's distaste for unfavorable press coverage of private social functions hosted by related family members.[6] It was another fifteen years before the academic ponderings found judicial acceptance.

The first case proposing such a right involved the use of the likeness of a young woman on 25,000 posters advertising the virtues of the Franklin Mills Company.[7] The rosy-cheeked image projected wholesome beauty, but the girl's parents objected on the ground that her privacy was impermissibly invaded by the use of the unauthorized image. The plaintiffs were unsuccessful.[8]

The first successful claim was brought a few years later and concerned photographs used in advertisements for life insurance.[9] In that case, the court permitted recovery on the theory that the personal liberty interests of the plaintiff were invaded by the "unwanted publicity" associated with the ad campaign.[10] Here the basis for the claim was not monetary damage, but psychological injury relating to the "injured feelings caused by the unauthorized use" of the plaintiff's likeness.[11] A personal interest in a private life free from the imposition of publicity was thereby born.

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2. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.2, 1-8 (1992).
3. *Id.*
4. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
5. *See* H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1 (1992).
6. MCCARTHY, *supra* note 2, at §1.2.
7. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).
8. *Id.*
9. Pasevich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).
10. Hetherington, *supra* note 5, at 4 (citing *Pasevich*).
11. *Id.* at 5.

The now famous formulation of various interests protected under the privacy rubric was presented by Dean Prosser in a 1960 article.[12] In all, the rights contemplated were aimed at protecting personal liberty and private concerns from public disclosure or commercial exploitation.

B. The Right of Publicity

According to Andy Warhol, America is a nation infatuated with celebrity. The rise of Hollywood, professional sports, television, and radio created a new class of citizen. The new American hero was known in public, thrived on public attention, and demanded money for his public activities. In fact, her financial success required public promotion. The interests protected under privacy concerns were altered by the purposeful public presence inherent in celebrity status.[13]

In 1953, the Second Circuit recognized a legally protectible interest in publicity for a baseball player who had licensed the use of his photograph to promote chewing-gum.[14] A competitor induced the player to breach his contract and defended the action under a theory that the player had only privacy interests at stake.[15] The court disagreed, finding that the player had a "right in the publicity value of his photograph" that could be exploited and transferred by contract.[16] Thus, the right of publicity was born which would be of use to celebrities in the growing economic sectors "being created by the entertainment, media, and advertising industries."[17]

New concerns about the application of rights of privacy and publicity are raised in the context of the World Wide Web and the integrated interface of personal technology and human interconnectedness. The nature of digitally distributed works provide for near global accessibility to images and sounds mixed for the medium. The commercial opportunities are vast, as is the potential for violations of privacy and publicity concerns. The value of these rights increases in relation to the permeation of cyberspace into our daily existence.

III. THE DIGITAL AGE

There is tremendous potential for communicative interaction and commercial opportunity on the Internet.[18] Digital distribution platforms are becoming increasingly interactive, with video on demand and other online applications delivered through coaxial cable, fiber optic networks, and via wireless spectral

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12. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). The rights included:
1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs;
2) Public disclosure of embarrassing private facts about the plaintiff;
3) Publicity that places the plaintiff in a false light in the public eye; and
4) Appropriation for the defendant's advantage of the plaintiff's name or likeness.

13. Hetherington, *supra* note 5, at 6.

14. Haelen Lab. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), *cert denied*, 346 U.S. 816 (1953).

15. *Id.* at 868.

16. *Id.*

17. Hetherington, *supra* note 5, at 2.

18. *See* Selected Tax Policy Implications of Global Electronic Commerce, *Department of the Treasury Office of Tax Policy* § 3.14, (Nov. 1996) <http://www.ustreas.gov.>.

transmissions.[19] In the very near future there will be "[n]o practical distinction . . . between the television screen and the computer monitor; both present viable outlets for the user's end of the pipeline."[20] There may be little to distinguish "between the couch potato and the mouse potato" except the fact that the mouse potato can cut, paste, and rework digital materials to be redistributed via the same networks.[21] These types of electronic activities represent a shift in paradigm as wire and wireless technologies provide a new way to deliver digital entertainment products to customers.[22]

Push technology and the fusion of television with computers will allow digital artists to be transformed into entertainment providers.[23] Push technology allows information and entertainment to cascade through the entire network of "all forms of communications devices," gently propelled by anyone who wishes to broadcast materials throughout the globe.[24] The combination of new distribution pipelines and interactive software distribution platforms will allow everyone to be a moviemaker, music publisher, or international marketeer.[25] This technological convergence of telecommunications capacity and digitally manipulable works[26] creates some interesting challenges for the traditional fields of privacy and publicity.

A. Privacy Issues in Cyberspace

Privacy issues in the Internet space have been much debated in connection with emerging standards governing the collection of personally identifiable information and encryption that centers on the protection of communications and personal information transmitted across the Internet.[27] For purposes of this Article, the focus is on Prosser's fourth privacy category, protection against appropriation of the name and likeness for advantage.[28] It is true that society is becoming more

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19. Bradford C. Auerbach, *The Infobahn: Who Pays What?*, 428 PLI/PAT 7, 9 (1996).

20. *Id.* at 9.

21. *Id.*

22. Craig Harding, *On-line Distribution of Multimedia Products*, 428 PLI/PAT 425, 439-40 (1996). New technology is bringing WebTV to hotel rooms across the country. The packages include unlimited access to the Internet, chat rooms, and "Kid-Friendly" with plans to include the capacity to play Sony video games. *See* Jeff Pelline, *WebTV Wires Hotel Suites*, c/net NEWS.COM (Feb. 4, 1997) <http://www.news.com/News/Item/0%2C4%2C7620%2C00.html?nd>. Digital streaming technology is creating smoother delivery of audio and audio-visual works. *See generally* Jan Ozer, *Web TV Tunes In*, PC MAGAZINE, Mar. 26, 1996, at 129.

23. Kevin Kelly & Gary Wolf, *PUSH! Kiss Your Browser Goodbye: The Radical Future of Media Beyond The Web*, 5.03 WIRED, Mar. 1997, at 12. <wysiwyg://13/http://www.wired.com/wired/archive/5.03/ff_push_pr.html>.

24. *Id.* at 14. Developing technologies such as Castanet, PointCaste, and Netscape In-Box Direct provide software platforms which permit content to be "pushed" to the recipient in a type of individualized broadcast. "[A]nything flows from anyone to anyone—from anywhere to anywhere—anytime . . . a true network like the telephone system, rather than a radiating system like radio or TV."

25. Steven Levy, *How the Propeller Heads Stole the Electronic Future*, N.Y. TIMES MAG., Sept. 24, 1995, at 58-59.

26. *See* Pamela Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 RUTGERS COMPUTER & TECH. L.J. 323, 326 (1990) (discussing pertinent characteristics of digital works); *see also* Don E. Tomlinson, *Journalism and Entertainment as Intellectual Property on the Information Superhighway: The Challenge of the Digital Domain*, 6 STAN. L. & POL'Y REV. 61 (1994).

27. *See* Todd Lappin, *Winning the Crypto Wars*, 5.05 WIRED, May 1997, at 94. <http://www.wired.com/wired/archive/5.05/cyber_rights_pr.html>.

28. *See* Prosser, *supra* note 12, at 383.

"transparent" as personal activities are recorded on everything from security cameras to streaming video shots of everyday activities.[29] We are increasingly aware that we are filmed and recorded. What happens when we are informed that a particular public event is on the Internet in a real-time web cast and we choose to remain? It seems a fair argument that our recorded movements are in some sense given to the camera with our consent. We choose to enter public places where recordation is the order of the day. Capture of personal characteristics in digital media raises some interesting issues.

The extent to which a person may waive certain facets of his right of "privacy" in an electronically connected world is a question in the making. Many people post personal photos on the Internet.[30] The essential notion underlying privacy concerns is the right to seclusion, to lead a private life.[31] Injecting our private lives into the digital stream may waive certain aspects of personal privacy.[32] It is true that most people would still object to the commercial use of digitized materials, which have been made accessible on the Web without permission. The problem is that many recombinant uses of digital materials on the Internet may have no commercial motivation.

The tort, as traditionally outlined, focuses on impermissible commercial exploitation of a person's likeness or image. In a non-commercial setting, it would be difficult to assert damages caused by a transformed use of material placed on the Web with consent.[33] A different relationship between the "outside" public world and a person's private life may be created in the context of the Internet. The concept of implied waiver may become applicable to a certain extent where a person has uploaded audiovisual material featuring a likeness of himself or herself.[34] If someone reconstitutes material on the Web, either through archiving activities or through creation of compiled directories of images and sounds of people in cyberspace, such non-commercial use may be permitted by implied consent. Privacy claims may be difficult to assert in this new medium that permits the projection of personal characteristics into a malleable virtual reality.

The protection of privacy interests in digitally distributed materials will probably continue to focus specifically on commercial appropriation of personal characteristics in situations where the defendant reaps a financial reward for the

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29. *See* David Brin, *The Transparent Society: The Cameras Are Coming. They're Getting Smaller and Nothing Will Stop Them. The Only Question is: Who Watches Whom?*, 4.12 WIRED, Dec. 1996, at 261. <http://www.wired.com/wired/archive/4.12/fftransparent_pr.html>.

30. See <http://www.geocities.com> for an online community with personal addresses and Web-pages featuring photos and information on the page owners.

31. *See* RAYMOND T. NIMMER, INFORMATION LAW, § 8.07[1] (1996).

32. *Id.* Professor Nimmer notes that consent for certain uses is implied in "material committed to the public." The open nature of the Internet probably supports the notion that this is a very public medium—and that activities occurring in cyberspace take on a public character.

33. For purposes of this discussion, we ignore the copyright implications of copied materials that could be the subject of copyright protection. A separate claim may be made out for infringement of the exclusive rights in 17 U.S.C. § 106.

34. *See* NIMMER, *supra* note 31, at § 8.07[1]. Privacy torts are limited by the express or implicit consent of an individual who injects himself into a public environment.

use.[35] It is unlikely that a commercial use of images and sounds placed in the digital stream would overcome the line of cases beginning with *Pasevich v. New England Life Insurance Co.* that provided for protection against commercial appropriation.[36]

The more interesting question focuses on whether, in light of the global reach of Internet-distributed digital materials, essentially non-famous people may begin to acquire cognizable publicity interests. A particularly fetching video clip posted to a Web page on a major community site like GeoCities could provide instant fame. It would be fair to say that due to the Internet buzz surrounding *The Blair Witch Project*, its unknown cast members were widely recognizable prior to release of the film in theaters.

B. Publicity in Cyberspace

Publicity concerns traditionally focus on the protection of persons who exploit personal characteristics for profit.[37] Publicity rights have been considered part of the law of privacy, as based on Prosser's formulation, and have focused on the concern that personal characteristics should not be commercially exploited without permission.[38] The more common application applies to the name and likeness of a celebrity, which may obtain a valuable commercial status.[39]

However, defined broadly, the concept may be characterized as the "inherent right of every human being to control the commercial use of his or her identity."[40] This more sweeping notion would put to rest the need to define "celebrity" status.[41] Perhaps the age of Warhol is here and some degree of fame is possible for many wishing to broadcast themselves to the world via cyberspace. Publicity rights have developed in both statutory and common law realms, and generally create broad interests in commercial exploitation of name and likeness, with certain important exceptions.[42] Beyond the commercial use in advertising, the "publicity right rapidly loses strength."[43] First Amendment concerns present countervailing interests in efforts to "disseminate news, facts, history, and ideas."[44] The so-called "incidental use" exception protects use that is "incidental to a larger purpose" and traditionally relates to the reuse of images that were originally published with the consent of a celebrity.[45] Where a likeness is used to

35. *See* Hetherington, *supra* note 5 (proposing a test for publicity violations of direct commercial exploitation).

36. *See also* Prosser, *supra* note 12.

37. Hetherington, *supra* note 5, at 5.

38. NIMMER, *supra* note 31, at § 6.19.

39. *Id.* at § 7. For general discussion of the right of publicity, see Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

40. MCCARTHY, *supra* note 2, at § 28.01[1].

41. This is an arguably difficult task given that many sports figures and performing artists have a degree of celebrity status defined by geography or niche markets when compared to the Hollywood mega-stars and big name professional athlete endorsement hounds.

42. *See generally* Robert L. Raskopf, *The Right of Publicity and the Internet*, 454 PLI/PAT 59 (1996).

43. NIMMER, *supra* note 31, at § 6.21[2].

44. *See* Raskopf, *supra* note 42, at 63.

45. *Id.* at 69.

convey information about a publication and its content or quality, the use is often excused.[46] A further limitation on the right is a separate category under First Amendment jurisprudence permitting parodic uses.[47] Taken together, the commercial value of personal characteristics is essentially limited to "direct commercial" exploitation under the right of publicity.[48]

Nevertheless, the right has been extended to a fairly wide range of actions relating to the appropriation of signatures, likenesses, photographs and vocal qualities.[49] In the context of cyberspace, digital works make severability and reconstitution of specific human attributes possible. The capacity to morph and alter digital material may require the extension of publicity protection to "all incidents of a person's identity."[50] The problem will undoubtedly focus on cognizability and on the specific value attached to specific incidents of personal characteristics.

IV. RECENT CASE LAW RELATING TO DIGITAL WORKS

In *Pesina v. Midway Manufacturing Co.*, the plaintiff was a martial arts expert, and his services were used in the production of a video game.[51] In 1991, 1992, and 1993, Pesina was hired as a model to provide a basis for the creation of certain digitized game characters.[52] His high-flying movements were captured and scanned into a digital format.[53] Then his "moves" were digitally incorporated into an arcade video game character known as "Johnny Cage."[54]

Subsequently, the defendant licensed the rights to create home video game versions of the games, Mortal Kombat and Mortal Kombat II, which were compatible with Nintendo and Sega game systems.[55] Pesina claimed that the use of his "persona, name, and likeness without authorization in the home version of Mortal Kombat" infringed his right of publicity.[56]

The court began its analysis by noting that the plaintiff had to prove that his persona had a commercial value at the time of the alleged infringement.[57] Here the court found no evidence that Pesina's personal characteristics had obtained

46. *Id.* at 69-71.

47. *See* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996) (holding First Amendment rights outweighed baseball players' publicity interests in parodic baseball cards). It is important to note that parody defenses apply only when a parodist satirizes the very thing that constitutes the content of the work. It is not available for works which only use recognizable materials to parody a separate work.

48. Hetherington, *supra* note 5, at 3. The only U.S. Supreme Court case to directly address the issue held that the complete appropriation of a human cannon-ball act, shown on the evening news, significantly impaired the economic value of the act and was thus not permitted under publicity law. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

49. *See* Hetherington, *supra* note 5, at 7.

50. *Id.* at 12.

51. Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996).

52. *Id.* at 41.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

any value before his "association with Mortal Kombat and Mortal Kombat II."[58] The court further asserted that the plaintiff had to show that his "likeness was recognizable."[59]

Pesina's characteristic moves and his likeness had been "extensively altered prior to being incorporated into the games," and thus he was not recognizable to the video game playing public.[60] Evidence was introduced to show that of the 306 Mortal Kombat video game players surveyed, only six percent identified Pesina as the model for "Johnny Cage."[61] The court held that Pesina was not able to show that his identity had become "inextricably intertwined" with "Johnny Cage" in the public conscience.[62] Since Pesina was not a "widely known martial artist" the public would not recognize him in the Cage character.[63] He just was not famous enough.

The court focused its analysis on the capacity of the relevant consumer group to recognize Pesina. His form and movements were digitally incorporated into Johnny Cage, but the editing process had sufficient cosmetic effect to hide Pesina's attributes from the majority of persons surveyed. The issues raised here relate both to the breadth of protection for incidents of personal characteristics and the scope of the realm designated celebrity status.

A. Severable Personal Characteristics

In *Midler v. Ford Motor Co.*, the Ninth Circuit found that Bette Midler's voice was impermissibly appropriated, through the use of a sound-alike singer, in an automobile commercial.[64] The court found that Midler's distinctive voice merited protection under common law publicity rights.[65] Here we see the protection of a personal characteristic that is closely and strongly associated with a celebrity. This line of reasoning could be extended to a smile, a crop of hair, a prominent nose, ears, musculature, eyes, hands, feet, and any other physical characteristic that has obtained value for a "celebrity." The manipulation and morphing activities on the World Wide Web provide a basis for the assertion that such severable characteristics may become important elements meriting protection under publicity law. An example of the cut-and-paste technologies currently available to digital artists can be seen on *The Mona Mailart Show*, broadcast on the Internet, which features digitally manipulated images of Mona Lisa.[66]

The holding in *Pesina* will serve to limit such protections where the specific characteristics are not sufficiently identifiable and recognizable as associated

58. *Id.*
59. *Id.* at 42 (citing Leval v. Prudential Health Care Plan, Inc., 610 F. Supp. 279, 281 (N.D. Ill. 1985)).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), *cert denied*, 503 U.S. 951 (1992).
65. *Id.* at 463.
66. *See* Rusty Clark, *The Mona Mailart Show* (visited Feb. 11, 1998) <http://www.geocities.com//SoHo/7022/>.

with a particular person. The more difficult issue may be where to draw the line around the class of persons that will be considered celebrities.

B. Fame and the Line Between Privacy and Publicity

It may be that the distinction between a commercial appropriation that violates privacy and one that violates publicity rights will become less relevant in cyberspace. As people "project" themselves into the public virtual reality, they do so in a form of digital manifestation that is subject to recombinant and altered treatment. Characterizing the Web as a public place may blur the lines between the traditional concepts of privacy and publicity. Where the touchstone of publicity has been that it protects the persons who make their livelihood from exploitation of personal characteristics, privacy has protected persons in their solitude. To the extent that the Web becomes a commercial marketplace, where people use audiovisual works in their Web pages to promote their own products or services, notoriety and fame may no longer be purely a function of the silver screen or traditional broadcast media.

Publicity and privacy concerns may begin to collapse into a generalized protection against appropriation of personal characteristics for commercial advantage, regardless of traditional status awarded to those members of the professional sports and entertainment world.

V. CONCLUSION

The advent of the digitally interconnected virtual reality known as cyberspace will cause a certain strain on the distinctions between protectible privacy concerns and publicity rights. Protection may have to extend to severable personal characteristics that are closely identified with a person. Where a digitized work portrays cognizable features in a manipulated way, protection should be provided where the work has a direct commercial marketing purpose. As for the blending of privacy and publicity, projection of personal characteristics into digital virtual reality may serve to waive some of the traditional rights upheld in privacy jurisprudence.