The First Amendment and the Right(s) of Publicity

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The right of publicity is a state law that limits what can be said, shown, and heard about another person, even a dead person. This poses obvious challenges for free speech. Yet, the analysis of First Amendment defenses in right of publicity cases is a tangled and confused mess of contradictory and inconsistent approaches and conclusions. This Article intervenes in the current debate about how best to analyze First Amendment defenses in right of publicity cases by shifting the conceptual framework for doing so. We provide a doctrinal and theoretical toolkit to resolve what has become a growing and seemingly intractable problem, particularly for creators of expressive works. Part of the problem is that the right of publicity, depending on the context in which it is asserted, does not promote a single interest, but instead many disparate ones. These interests match up differently against the speech interests of the speakers in particular cases.

The answer to whether a particular use of another's name, likeness or voice is allowed by the First Amendment, despite an otherwise legitimate right of publicity claim, will depend on the particular interest or interests asserted by the particular plaintiff in a given case. This does not mean that we are recommending an unpredictable, ad hoc approach, but instead quite the opposite, we seek to provide categories of right of publicity claims that can be consistently handled in predictable ways. The interests asserted by right of publicity plaintiffs often overlap, but when it comes to the First Amendment this unitary conception cannot hold. Much as Prosser, nearly 70 years ago, looked at the "hurricane in the haystack" of privacy law and made sense of it, this Article brings order to the right of publicity.