

Identifying Information

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Paper Information

Title:	Drawing Trump Naked: Curbing the Right of Publicity to Protect Portrayals of Real People
Abstract:	<p>From Donald Trump to Lindsay Lohan to Manuel Noriega, real people who are portrayed in expressive works are increasingly targeting creators of those works for allegedly violating their “right of publicity”—a state-law tort, grounded in IP and privacy concerns, that prohibits the unauthorized use of a person’s name, likeness, and other identifying characteristics. This Article provides a new framework to reconcile publicity rights with a robust commitment to free speech under the First Amendment. After describing the current landscape in the courts, this Article scrutinizes the First Amendment theory that has motivated many of the past decisions confronting the right of publicity. It then reframes the doctrine in a new way: as four distinct defenses that have developed to assuage concerns about publicity rights interfering with speech on matters of public concern. These four defenses might seem encouraging to those who worry that publicity rights impair expressive rights. But all too often they have instead complicated and undermined the opposition to publicity rights and, as a result, they pose an unexpected and underestimated threat to free speech. To combat this threat, this Article discusses alternatives that would reframe First Amendment theory as it relates to the right of publicity. This Article argues that to best protect creators and their expressive works under the First Amendment, we must abandon traditional “educative” listener-based models of the First Amendment and instead adopt an approach that also protects the speaker-creator as a central part of enabling public discourse. Failure to adopt this speaker-focused theory in publicity doctrine will perpetuate confusion in the courts and state legislatures, an outcome that will have a chilling effect on creators who seek to portray real people in their work. Yet we must also recognize the IP and privacy interests that publicity rights may serve. As we move into an era of new technology and innovation—from “deep fakes” to revenge porn—this challenge will only intensify. To address it, courts should apply a different framework when publicity rights face off against expressive rights—a framework that not only empowers free expression, but also considers the narrow IP and privacy interests that we should all have in preventing certain uses of our images.</p>