# THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT: A FUNDAMENTAL RE-EXAMINATION

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*Abstract*

As courts have steadily expanded the right of publicity, defendants and academic commentators have searched for legal theories and principles that will serve to cabin the right. In a series of recent cases, defendants have argued that the free speech guarantees of the First Amendment provide, or should provide, one meaningful limit. In response to these arguments, the California Supreme Court in *Comedy III Productions v. Saderup* acknowledged that overbroad right of publicity claims could impinge on First Amendment interests. In an attempt to balance what it saw as the competing interests, the court articulated a test, now widely followed, that focused on whether the defendant's use was sufficiently transformative. If it was, then it fell within the protection of the First Amendment, and the right of publicity would not reach it. If it was not, then the First Amendment would not protect the use at issue, and the right of publicity could reach it. In this article, I argue that this approach is fundamentally flawed. Transformativeness is not a First Amendment value. The First Amendment insulates the first speaker that says "Fuck the Draft" from prosecution for her speech; it insulates every subsequent speaker as well, even if they copy the first speaker's phrasing exactly. Under well-established First Amendment jurisprudence, there is simply no need for subsequent speakers to vary their phrasing of the sentiment, or otherwise transform the first speaker's message, in order to receive First Amendment protection. To the contrary, a subsequent speaker can copy the first speaker's words exactly, and the First Amendment will protect his speech as fully as it protects the first speaker's.

When we look at courts that have applied the "sufficiently transformative" test, we find that courts, while they use free speech interests to justify the test, are not using the test to vindicate free speech interests at all. Rather, they use it to value the relative contributions of the plaintiff and defendant, and assign ownership accordingly. But, even in this guise, the approach remains flawed. In part, it is flawed because some courts, perhaps misled by the First Amendment window dressing, do not recognize that this is what the test is supposed to be doing. More fundamentally, however, it is flawed because it simply makes no sense for a court to value the relative contributions of the two parties in these cases. The parties themselves are far better situated to make that judgment in setting the price for licensing the use at issue. What the court should be doing, instead, is deciding whether society would be better off by requiring the use at issue to be licensed at all. Answering this question entails an examination not of any First Amendment interests, but of the structure of the market at issue, and the costs and benefits that will follow from imposing a licensing requirement. Focusing on these issues directly provides a far more useful and workable framework for defining and de-limiting the right of publicity than our current approach.