

The Right of Publicity and the First Amendment

The right of publicity is not a constitutional right. In fact, the United States constitution does not so much as mention the right of publicity (not even the penumbra). The right of publicity is fundamentally an economic right to exploit your name, image and likeness for commercial gain.

The constitution, more specifically, the First Amendment, keeps the right of publicity in check. The First Amendment protects our right to comment on, parody, and make other expressive uses of a person's image. Much to the consternation of celebrities lampooned on Southpark, the right of publicity does not give someone the right to control his image by censoring distasteful or offensive portrayals.

Enter the First Amendment. The First Amendment protects information in the public interest. From a journalist's point of view, the First Amendment protects the right of the public to know and the freedom of the press to tell it. The First Amendment protects the use of someone's name, image or likeness if the use is newsworthy. Newsworthiness is not limited to news reporting. Newsworthiness extends to information that the public may have a legitimate interest in knowing. This would include current events, education, enlightenment and even amusement.

California spells out the newsworthiness defense. Civil Code section 3344(d) provides that "use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign" is exempt from constraints of the right of publicity.

The First Amendment also protects works that are transformative. This transformation occurs when other elements are added such that the work is no longer a literal translation of a celebrity's image. Transformative uses are protected because, as one court put it, such uses are "not good substitutes for the conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia."