

**Abstract****A Study on the Balance between the Right of Publicity and the Freedom of Expression**

- With a special reference to the Balancing Test of the United States -

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This paper intends to seek the proper balancing test, through the U.S. precedents, in order to reconcile an inherent tension between the freedom of expression and the right of publicity. This is a direct part of effort to stipulate the range of the right of publicity in harmony with our existing legal system. Therefore, it is required to understand the background that is an inevitable conflict caused by different purpose and scope of the two rights. It is an effort to resolve conflicts by bifurcating between commercial speech and expressive speech under the double standard of judicial review or different levels of scrutiny, which affecting a determination whether the right of publicity is infringed. Furthermore, this paper explores a newsworthy exception doctrine which is an immunity from liability of the right of publicity infringement with an absoluteness based on democratic self-governance theory.

Equipped with this understanding, this article also aims to research that appropriate criteria (i.e. balancing tests) enable to examine and settle the disputes with a unified standpoint. For this reason, it is necessary to consider the harmony of the two rights thoroughly by exploring the U.S. balancing tests with an in-depth discussion. After *Zacchini v. Scripps-Howard Broadcasting Co.*, it is appeared Predominant use test, Restatement/Rogers test and Transformative use test as an emerging modern balancing test for systemized approach in the United States. In this vein, this paper focuses on evaluating these balancing tests and suggesting the superiority of the transformative use test generated from 'fair use' of Copyright law. Through this research, it is needed to adopt and modify the U.S. transformative use test to Korea. Especially, the right of publicity must be enacted neither a censorship nor a suppression of freedom of expression and prevented from being reckless rights.

## Keywords

The Right of publicity, Freedom of Expression, First Amendment, Commercial Speech, Expressive Speech, Predominant Use Test, Restatement/Rogers Test, Transformative Use Test

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