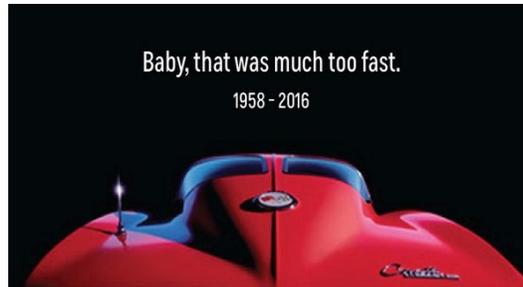


## RETHINKING THE RIGHT OF PUBLICITY IN THE CONTEXT OF SOCIAL MEDIA

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### INTRODUCTION

This article was inspired by a tweet:



The above image was tweeted by Chevrolet, a corporation that makes the iconic Chevy Corvette, in reference to the death of singer, Prince, who is famous for a song entitled “Little Red Corvette” and featured the lyrics, “Baby, that was much too fast.”<sup>1</sup> The tweet clearly features one of the company’s premier products and also clearly references a famous person. There are some jurisdictions in which the case law could be construed to support a claim for violating Prince’s right of publicity if a claim were brought.<sup>2</sup> And yet the speech at issue is clearly commentary of a matter of public concern, the kind of speech that would ordinarily be protected by the First Amendment.

Right of publicity law is famously a mess. Interpretations of the claim vary from state to state. The only United States Supreme Court case to ever address the subject, which was an interpretation of a particular state statute as applied to an unusual set of facts, provides practitioners and judges little guidance with respect to the contours of the claim.<sup>3</sup> Moreover, the Court never addressed how the First Amendment would apply to any such claim,

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<sup>1</sup> Chevrolet (@chevrolet), TWITTER (Apr. 21, 2016, 6:07 PM), <https://twitter.com/chevrolet/status/723317157157691392>.

<sup>2</sup> To be clear, no lawsuit has been filed to my knowledge. Prince died in Minnesota, which is one of the states that does not recognize the testation of publicity rights.

<sup>3</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

and the lower courts have been inconsistent in how they apply constitutional principles.

This article attempts to unravel the confusion and give context to how the First Amendment should apply to right of publicity claims. In order to do so, I look at what the right of publicity purports to protect (it is a claim that is doctrinally unclear, to say the least); what counts as a “commercial use” for the purposes of a right of publicity claim; how the concept of “commercial use” interacts with the concept of “commercial speech”; and to what degree the First Amendment protects commercial speech/use.

In particular, I use examples from social media, namely Twitter, to show that the conventional definition of “commercial” is too cramped. Social media allows a wide range of speakers to present views that are neither classically editorial nor classically advertising but may contain elements of each. These examples help us focus on which elements of speech genuinely constitute a commercial purpose—something beyond a mere utterance by a corporate entity.

Section I of this article examines the history and current status of right of publicity law. Section II looks at how the United States Supreme Court has treated commercial speech (which is often conflated with “corporate speech”) and how this treatment may interact with the concept of “commercial use” for the purposes of a right of publicity claim.<sup>4</sup> Section III looks at examples of how corporations use social media, specifically Twitter, and evaluates the different ways in which companies communicate for different purposes. Finally, the article concludes with some suggestions about how First Amendment principles should be applied to right of publicity claims going forward.

## I. RIGHT OF PUBLICITY: ORIGINS AND CURRENT PROBLEMS

### *A. What is the right of publicity?*

The notion that a person’s name and likeness should be protected in some way was originally an offshoot from the concept of the tort of “privacy.”<sup>5</sup> In an 1890 law review article, Samuel Warren and Louis Brandeis famously argued for a “right to be left alone.”<sup>6</sup> Prosser then, in his famous treatise on tort law, described several privacy torts—publication of private facts, misappropriation of likeness, intrusion into seclusion, and false light—each with their own unique elements to address slightly different aspects of the personal desire to be free from unwarranted

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<sup>4</sup> All cites referring to the “Supreme Court” mean the United States Supreme Court, unless explicitly stated otherwise.

<sup>5</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

<sup>6</sup> *Id.*

intrusion into one's private life.<sup>7</sup> The right of publicity was described as appropriation, for the defendant's advantage, of plaintiff's name or likeness.<sup>8</sup> In fact, many of the first "privacy" lawsuits were claims based on the right of publicity or misappropriation of name or likeness.<sup>9</sup>

This is one of the first points of confusion: "right of publicity" is often conflated with "misappropriation of name or likeness."<sup>10</sup> Both torts hinge on the notion that a person uses another person's name or likeness for a commercial purpose without consent.<sup>11</sup> But traditionally, the difference between the claims is that misappropriation focuses on the harm done to a person's privacy right (*i.e.*, the right not to be exposed to the public), whereas the right of publicity focuses on the harm done to a person's right to make money from the use of their likeness (*i.e.*, more of an economic harm than a personal harm).<sup>12</sup> Thus, one could argue that celebrities do not have misappropriation claims because their privacy interests are diminished, and ordinary people do not have publicity claims because their images have no obvious economic value.<sup>13</sup> Over time, however, many courts have treated the two claims interchangeably. One question that continues to perplex the courts is what the right actually protects: Is it privacy or economic harm? Both? Does it matter?

A second point of confusion is that there has been a trend to treat right of publicity as an intellectual property claim rather than a privacy-based tort claim.<sup>14</sup> In fact, a provision of the Lanham Act is often used to seek a remedy for the use of one's likeness,<sup>15</sup> and many plaintiffs bring claims under both the Lanham Act and the common law of torts.<sup>16</sup>

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<sup>7</sup> Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1888-90 (2010).

<sup>8</sup> *See id.* at 1890.

<sup>9</sup> *See id.* at 1892-94.

<sup>10</sup> *See id.* at 1888-90.

<sup>11</sup> *Id.*

<sup>12</sup> *See* Jesse Koehler, *Fraley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L. J. 963, 971 (2013) ("Under such a division, primarily public figures assert the economic right of publicity and non-celebrity private persons generally assert the non-economic misappropriation tort."); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 228 (2005) ("[Supporters of the right of publicity] distinguished the right of publicity from privacy claims on the basis of the economic value of celebrity identities.").

<sup>13</sup> Richards & Solove, *supra* note 7, at 1890.

<sup>14</sup> *See* Richards & Solove, *supra* note 7, at 1892-94.

<sup>15</sup> Many plaintiffs try to use section 43(a) of the Lanham Act, which provides a civil claim for false designation of origin, as a substitute for a right of publicity claim. *See* 15 U.S.C. § 1125(a) (West 2012); *see also* Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM. J.L. & ARTS 123 (1996); Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK RPT. 1202 (2004).

<sup>16</sup> For an example of a celebrity plaintiff who has been able to successfully use the Lanham Act to remedy right of publicity claims, *see* Jackson v. MPI Home Video, 694 F.

Whether we view publicity as a privacy right or property right, however, is an extremely important philosophical issue to resolve. The privacy torts have always been somewhat circumscribed because they present an inherent conflict with First Amendment values. Eugene Volokh pointed out the obvious issue that a person's right to control the use of their information necessarily infringes on another's right to speak about them.<sup>17</sup> Courts have generally ruled that First Amendment interests override privacy rights when the subject of speech is a matter of public concern.<sup>18</sup> Conversely, courts tend to give far greater weight to property rights and allow those rights holders to impose greater restrictions on speakers.<sup>19</sup>

For the purposes of this article, I will use the term "publicity" to refer generically to any or all of the various claims that are based on using a person's name or likeness for commercial purposes. Although there are important questions to resolve about the underlying justifications for protection, any of the claims (whether based on a privacy interest, an economic interest, or the Lanham Act) conflict with the First Amendment. It seems more helpful to discern what the First Amendment should protect and to apply those principles to each claim, as each one would be subject to constitutional scrutiny given that they act as a restriction on speech.

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Supp. 482 (N.D. Ill. 1988); *see also* *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (holding that the defendant violated the Lanham Act when it advertised a photograph using plaintiff's look-alike, which created the "likelihood of consumer confusion over [plaintiffs] endorsement or involvement"); *Rostropovich v. Koch Int'l Corp.*, 34 U.S.P.Q.2d 1609 (S.D.N.Y.) (holding that the plaintiff's Lanham Act claim survived defendants' motion for summary judgment because the "public could easily [have been] confused as to whether [the plaintiff] had endorsed the discs" sold by the defendant when plaintiffs' name "appear[ed] prominently across the front cover of all of the compact discs"), *reh'g denied*, 36 U.S.P.Q.2d (S.D.N.Y. 1995). However, many celebrities have also lost such Lanham Act claims. *See, e.g.*, *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 922 (6th Cir.) (holding that images and likenesses of Tiger Woods are not protectable as a trademark), *reh'g en banc denied*, 2003 U.S. App. Lexis 19044 (6th Cir. Sept. 8, 2003); *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 584 (2d Cir. 1990) (finding that a calendar's use of the name and image of Babe Ruth was not trademark infringement under the Lanham Act); *Seale v. Gramercy Pictures*, 964 F. Supp. 918, 931 (E.D. Pa. 1997) (finding that Bobby Seale failed to present sufficient evidence of consumer deception for his Lanham Act false advertising claim), *aff'd*, 156 F.3d 1225 (3d Cir. 1998).

<sup>17</sup> Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1050-51 (2000) ("The difficulty is that the right to information privacy—my right to control your communication of personally identifiable information about me—is a right to have the government stop you from speaking about me. We already have a code of 'fair information practices,' and it is the First Amendment . . .").

<sup>18</sup> *See e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>19</sup> The Supreme Court recently ruled that the Lanham Act is circumscribed by the First Amendment. *See Matal v. Tam*, 137 U.S. 1744 (2017). It did so in the context of trademark registration, not with respect to one person attempting to enforce their property rights against another. *Id.* at 1751. Nevertheless, the principle that the First Amendment should restrict enforcement of those rights to some degree is an important one.

*B. What is commercial?*

Courts have generally understood that, regardless of the source of the cause of action, publicity claims exist only when the use of the person's name or likeness is "commercial." Yet numerous cases wrestle with defining what is a "commercial" use of that name or likeness.<sup>20</sup>

On one end of the spectrum, courts uniformly acknowledge that there is no publicity right arising from "editorial" uses. One cannot sue another merely for mentioning them in a newspaper, article, or book. It is obvious that speech would grind to a halt if we needed to obtain consent from a person every time we planned to mention their name. The First Amendment protects expressive works such as books, films, artwork, music, and newspapers, even though all those products may be sold for profit. Even though these products are expressive, there is a cost incurred in making them, and the creators generally want to at least recoup the cost, if not make a profit, and thereby make a living from creating expressive works. Nevertheless, people—and celebrities in particular—subjectively feel like they should profit from any use of their identity. The courts have therefore had to address the issue of whether these kinds of works are "commercial," thus giving people the right to control the use of their names/likenesses in such works. In the vast majority of cases, the courts have ruled that expressive works (books, film, art, music, newspapers, etc.) are not "commercial" for the purposes of the "right of publicity" merely because they are sold.<sup>21</sup>

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<sup>20</sup> See *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201 (11th Cir. 2009); *Major League Baseball Advanced Media v. C.B.C. Distribution & Mktg., Inc.*, 505 F.3d 818 (8th Cir. 2007); *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915 (6th Cir. 2003); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001); *Hoffman v. Capital Cities/ABC*, 255 F.3d 1180 (9th Cir. 2001); *White v. Samsung Elec. Am. Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Benavidez v. Anheuser-Busch, Inc.*, 873 F.2d 102 (5th Cir. 1989); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98 (Cal. Ct. App. 2010); *Martin Luther King Jr. Ctr. for Soc. Change v. Am. Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

<sup>21</sup> See *Hoffman*, 255 F.3d at 1186 (holding that a magazine spread featuring an actor in an evening gown does not violate publicity rights); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (finding that a book mentioning the plaintiff did not violate publicity rights); *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003) (holding that a comic book did not violate publicity rights); *Stewart*, 105 Cal. Rptr. 3d at 117, 119 (holding that a magazine feature surrounded by advertisements did not violate publicity rights of the bands spotlighted in the feature); *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal. Rptr. 2d 207, 211-12 (Cal. Ct. App. 1997) (holding that the film "The Sandlot" did not violate publicity rights); *Montana v. San Jose Mercury News*, 40 Cal. Rptr. 2d 639, 642-43 (Cal. Ct. App. 1995) (holding that a poster of quarterback as part of newspaper's football coverage was not a violation of his publicity rights); *Tyne v. Time Warner Enter. Co.*, 901 So. 2d 802, 807 (Fla. 2005) (ruling that the film "The Perfect Storm" did not violate publicity rights). *But see Parks*, 329 F.3d at 461; *Doe*, 110 S.W.3d at 371.

On the other end of the spectrum, in most cases where the use of one's name or likeness is a traditional advertisement, the courts have found such uses to be "commercial."<sup>22</sup> The courts have also been disinclined to protect "merchandise," where products like mugs, t-shirts, or posters are sold only because of the celebrity's image.<sup>23</sup>

But there have been many difficult cases—situations where the line between advertisement and expression is blurred. For example, what if a beer company makes a film about Hispanic recipients of the Congressional Medal of Honor to show at the beer company's hospitality centers?<sup>24</sup> It is a film, which is traditionally considered an expressive work, but it is made by a beer company for use by the beer company to generate good will for the beer company. Would such a use be considered promotional or marketing activity (*i.e.*, a "commercial" use)?<sup>25</sup> Or what if a company that makes disposable cups prints actual, historical facts on the cups?<sup>26</sup> The cups are "merchandise," which suggests they are "commercial," but the facts on the cups about people who won Olympic medals are expressive.<sup>27</sup> Other courts have also protected "merchandise" when the images used are parodies with expressive elements.<sup>28</sup>

In many cases, the use at issue has some expressive elements and some commercial elements. It has proven difficult to draw a clear line to

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<sup>22</sup> See, e.g., *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 415, 416 (9th Cir. 1996) (advertisement for cars); *White v. Samsung Elec. Am. Inc.*, 971 F.2d 1395, 1397-99 (9th Cir. 1992) (advertisement for electronics); *Henley v. Dillard's Dept. Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (advertisement for shirts).

<sup>23</sup> *Martin Luther King Jr. Ctr. for Social Change v. Am. Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982) (finding no protection for mugs with Dr. King's image on them); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1014 (N.Y. App. Div. 1981) (finding no protection for a poster of a model). One of the contemporary conflicts is whether video games count as expressive works or merchandise. See Neil G. Hood, *The First Amendment and New Media: Video Games As Protected Speech and the Implications for the Right of Publicity*, 52 B.C. L. REV. 617, 643-44 (2011). Courts have found video game makers liable in right of publicity cases when they believe the games count as merchandise rather than expressive works. See, e.g., *In re NCAA*, 724 F.3d 1268, 1276 (9th Cir. 2013); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 169 (3d Cir. 2013).

<sup>24</sup> See *Benavidez*, 873 F.2d at 103.

<sup>25</sup> The court ultimately determined that the use was expressive and therefore deserved protection. *Id.* at 104. Even if the company might commercially benefit, as alleged by the plaintiff, the court held that it "would not transform the otherwise unobjectionable documentary into a commercial advertisement . . ." *Id.*

<sup>26</sup> See *Vinci v. Am. Can Co.*, 591 N.E.2d 793 (Ohio Ct. App. 1990).

<sup>27</sup> The court ultimately decided that the First Amendment protected the use. *Id.* ("The reference to the athletes and their accomplishments was purely informational; there was no implication that the athletes used, supported, or promoted the product.")

<sup>28</sup> *World Wrestling Fed'n. Entm't., Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 429 (W.D. Pa. 2003) (finding that t-shirts portraying professional wrestlers as dogs were parodies protected by the First Amendment and did not violate the publicity rights of wrestlers); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 508-09 (NY 1968) (holding that a poster of a comedian who was running a satirical presidential campaign was not a violation of publicity rights).

distinguish commercial from protected uses. Courts have created various tests to make that determination.

The first test, from California, is the “transformative use” test, which asks whether the work uses the likeness in such a way that it is “transformed” so that the work is “primarily the defendant’s own expression rather than the celebrity’s likeness.”<sup>29</sup> Under this test, an exact replica of a celebrity’s image on a t-shirt is unlikely to be protected,<sup>30</sup> but what is unclear is how much commentary or expression must be added to make the use transformative.<sup>31</sup> Portraying musicians as half-human, half-worm characters in a comic book was transformative,<sup>32</sup> but a court declined to say as a matter of law that a spoof of Paris Hilton as a waitress on a greeting card was transformative.<sup>33</sup> Thus, this test has provided little guidance to speakers.

The second test is the “Rogers” test, named after the New York case that established it, *Rogers v. Grimaldi*.<sup>34</sup> Ginger Rogers filed a lawsuit, claiming that the film “Ginger & Fred” violated her publicity rights.<sup>35</sup> Applying the “Rogers” test, works should be protected unless the use of the likeness is “wholly unrelated” to the work or is “simply a disguised commercial advertisement for the sale of goods or services.”<sup>36</sup> This test tends to be protective of expression, except that it does place the court in the position of second-guessing the creative justification of uses of a person’s name or likeness and might not protect expression in cases where the critique is subtle and/or not meant to be interpreted literally.<sup>37</sup>

The third test, from Missouri, is the “predominant use” test, which states that a product violates the right of publicity if it “predominately exploits the commercial value of an individual’s identity,” even if there are expressive elements to the speech.<sup>38</sup> This test gives far more weight to publicity rights

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<sup>29</sup> *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

<sup>30</sup> *Id.*

<sup>31</sup> It is unclear how “transformation” is interpreted. Must it be a literal transformation, meaning that their image is actually distorted in some way? Would it be sufficient to portray the person as him or herself but in a clearly fictional setting? Would some form of commentary count as transformation, and if so, how much is required? In its briefing in *Davis v. Electronic Arts, Inc.*, Electronic Arts argued for an expansive interpretation of transformation and stated, “[g]iven transformative use’s origins in copyright law . . . its application in right of publicity law cannot be limited to fantastical characters.” Appellants’ Reply Brief at 29, *Davis v. Electronic Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015) (No. 12-15737).

<sup>32</sup> *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003).

<sup>33</sup> *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2009).

<sup>34</sup> *See Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1004.

<sup>37</sup> *See Parks v. LaFace Records*, 329 F.3d 437, 459-60 (6th Cir. 2003) (ruling that a song titled Rosa Parks’ was not literally about Rosa Parks and therefore not protected).

<sup>38</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (finding that a comic book with a character inspired by a real-life hockey player was not protected by the First Amendment, using the “predominant use” test).

than to protecting expression and has been criticized for its extreme and unusual outcome.<sup>39</sup> However, the predominant use test has never been used in any case other than *Doe v. TCI Cablevision*, the case that established it.

Courts have occasionally used different analyses than the ones described above to protect speech when publicity claims are filed, but these three tests are the most commonly referenced.<sup>40</sup> Because these tests give different weight to different factors, the outcome of a case could easily be very different depending on the jurisdiction in which the case is filed. This is one complaint that many national companies have: There is no clear, consistent standard to guide their decision-making. Or, more accurately, the Supreme Court has failed to establish a clear guideline for what kind of use would be protected by the First Amendment. The only publicity case to reach the Supreme Court involved a highly unusual set of facts, involving the filming and broadcasting of an entire human-cannonball act, and the decision provides little guidance as to how the First Amendment relates to commentary about celebrities.<sup>41</sup> Thus, speakers lack the ability to gauge whether their speech will have constitutional protection if the context could remotely be considered commercial.

## II. COMMERCIAL SPEECH AND THE FIRST AMENDMENT

Even if speech is found to be “commercial” rather than “expressive,” the Supreme Court has made it clear that, to some degree, commercial speech is entitled to First Amendment protection.<sup>42</sup> The question that state courts have generally not considered is how constitutional protection for commercial speech aligns with the common-law principles interpreting right of publicity claims. However, there are Supreme Court cases that may shed some light on how the First Amendment *should* apply in relation to “commercial” speech, even in publicity cases.

On one hand, in *First National Bank of Boston v. Bellotti*,<sup>43</sup> the Supreme Court affirmed that corporations should have a First Amendment right to comment on issues of public concern. In that case, the Supreme Court struck down as unconstitutional a Massachusetts law that prohibited corporations from making contributions or expenditures for the purpose of

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<sup>39</sup> See, e.g., Diane Zimmerman, *Money as Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C.L. REV. 1503, 1510 (2009).

<sup>40</sup> See, e.g., *Sarver v. Chartier*, 813 F.3d 891, 905-06 (9th Cir. 2016) (finding that the right of publicity statute was a content-based restriction subject to strict scrutiny when applied to expressive works); *Namath v. Sports Illustrated*, 363 N.Y.S.2d 276, 278 (Sup. Ct. 1975) (protecting the use of Joe Namath’s image as incorporated on the cover of a magazine on a subscription card for that magazine because the use was “incidental” to showing the product).

<sup>41</sup> See generally *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

<sup>42</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

<sup>43</sup> 435 U.S. 765, 771 (1978).

influencing the vote on questions submitted to voters, unless the issue “materially” affected the property or business of the corporation.<sup>44</sup> The lower court had asked whether corporations have First Amendment rights coextensive with natural persons, but the Supreme Court said that was the wrong question,<sup>45</sup> stating: “[T]he question must be whether [the law] abridges expression that the First Amendment was meant to protect.”<sup>46</sup> The freedom of speech and of the press “embraces at least the liberty to discuss publicly and truthfully all matters of public concern . . . .”<sup>47</sup> The Court stated that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source . . . ,” noting that no one would suggest that the speech at issue should be restricted if the speakers were not corporations.<sup>48</sup>

The Court in *Bellotti* also noted that media companies—newspapers, film companies, etc.—had broad First Amendment rights, and no one disputed that media companies had the right to speak on any topic, because their business was communication.<sup>49</sup> Nevertheless, the Court reasoned, “the press does not have a monopoly on either the First Amendment or the ability to enlighten.”<sup>50</sup> The First Amendment prohibits the government from “limiting the stock of information from which members of the public may draw.”<sup>51</sup>

So clearly, it seems that there is Supreme Court precedent supporting a free speech interest for corporations, insofar as they speak expressively. However, the Court has also struggled with separating “expressive” or “political” speech by corporations from “commercial” speech, which gets less protection.<sup>52</sup>

For example, in *Bolger v. Youngs Drug Products Corp.*,<sup>53</sup> the Court had to determine whether informational pamphlets, produced and distributed by a condom manufacturer, were “commercial” speech. The company created mailings that discussed “important public issues, such as venereal disease and family planning.”<sup>54</sup> However, they also mentioned Trojan-brand

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<sup>44</sup> *First Nat'l. Bank of Boston*, 435 U.S. at 767.

<sup>45</sup> *Id.* at 776.

<sup>46</sup> *Id.* at 775-76.

<sup>47</sup> *Id.* at 776.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 777.

<sup>50</sup> *First Nat'l. Bank of Boston*, 435 U.S. at 782.

<sup>51</sup> *Id.* at 783.

<sup>52</sup> Commercial speech has traditionally received less constitutional protection than expressive speech. See C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L. J. 981, 987-88 (2009). However, some scholars question whether the Court is gradually moving away from that position and will grant equal protection to commercial speech. See Frederick Schauer, *Commercial Speech and the Perils of Parity*, 25 WM. & MARY BILL RTS. J. 965, 965-966 (2017).

<sup>53</sup> 463 U.S. 60, 65 (1983).

<sup>54</sup> *Id.* at 68.

condoms, the product sold by the company.<sup>55</sup> In an unfortunately brief analysis, the Court concluded that the pamphlets at issue were commercial.<sup>56</sup> The Court said that “the reference to a specific product does not by itself render the pamphlets commercial speech,” and the fact that the company had “an economic motivation for mailing the pamphlets” was insufficient to turn the materials into commercial speech, but collectively, these factors supported the conclusion that the speech was commercial.<sup>57</sup> The Court noted that a company cannot simply link a product to a current public debate to claim the higher level of protection given to noncommercial speech.<sup>58</sup> “A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions.”<sup>59</sup>

In short, the Court seemed to reinforce the principle in *Bellotti* that companies may express views on generic policy issues (like tax policy), but carved back any broad right of companies to speak, finding that information or views about issues that might be related to its products is “commercial,” and therefore gets less protection from a First Amendment standpoint.

The impact of *Bolger* and its relatively light analysis is most evident in the Seventh Circuit’s decision in *Jordan v. Jewell Food Stores, Inc.*<sup>60</sup> *Jordan* is a right of publicity case in which the court was asked to determine how the First Amendment applies to right of publicity cases given the sparse guidance provided by the Supreme Court.<sup>61</sup>

The facts of the case are relatively straightforward: Michael Jordan, a famous basketball player, was inducted into the Basketball Hall of Fame, and *Sports Illustrated*—a magazine focused on sports—published a commemorative issue focusing on Jordan’s career.<sup>62</sup> Jewell, a supermarket chain, was offered a page of advertising space in exchange for carrying the issue in its stores.<sup>63</sup> Jewell’s “ad,” which consisted of a congratulatory message, ran on the inside back cover and said:

After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan’s elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many

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<sup>55</sup> *Bolger*, 463 U.S. at 66.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 66-67.

<sup>58</sup> *Id.* at 68.

<sup>59</sup> *Id.*

<sup>60</sup> *Jordan v. Jewel Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

<sup>61</sup> *Id.* at 511. The plaintiff brought claims both under the Illinois right of publicity statute and the federal Lanham Act. *Id.* For the purposes of this article, it makes little difference which claim is at issue because the First Amendment would act as a restriction on either law.

<sup>62</sup> *Id.* at 511-12.

<sup>63</sup> *Id.* at 511.