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The Volokh Conspiracy Opinion

The First Amendment, the right of publicity, video games and the Supreme Court

By Eugene Volokh

The "right of publicity" gives people considerable exclusive control over the commercial use of their name, likeness and other identity attributes. But obviously, that control can't be complete: To take the clearest example, no one can stop newspapers from writing accurate stories that use their names or likenesses. The Court held in *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) that such a right is constitutional as to at least a very narrow range of uses, where a broadcaster copies a performer's entire act (there it was Hugo Zacchini's Human Cannonball performance). But what are the boundaries of that right? The Court has never made that clear, and lower courts are hopelessly divided.

This is why the Supreme Court petition in *Electronic Arts v. Davis* (you can read the relevant documents here) is so interesting. "Petitions for certiorari" — requests that the Court review a lower court decision — are generally longshots. But this petition, which the Court is considering Friday, is both very important and unusually likely to be heard.

Prof. Jennifer Rothman (Loyola L.A., and author of Rothman's Roadmap to the Right of Publicity) and I co-wrote an amicus brief on behalf of 31 law professors supporting the petition, and here's an excerpt, which should give you a flavor of why we think the case is so significant (some paragraph breaks added):

The right of publicity affects a vast range of fully constitutionally protected speech. Right of publicity lawsuits are routinely brought over books, films, songs, paintings and prints (in traditional media or on T-shirts or cards), and video games that mention someone's name, likeness, or other "attributes" "of identity."

The First Amendment must often protect such references to people, whether in news, entertainment, or art. Courts throughout the country have therefore recognized First Amendment defenses in many right of publicity cases involving expressive works.

Unfortunately, there are now five different First Amendment tests that lower courts use in right of publicity cases (setting aside cases involving commercial advertising, which is less constitutionally protected than other speech). [Footnote: *Amici* express no opinion on what First Amendment protections should apply in the context of commercial advertisements.] Unsurprisingly, these different tests often lead to inconsistent results, which leave creators and publishers uncertain about what they may say.

For instance, say you are writing a comic book, and want to name a fictional character after a real person. You read *Winter* v. *D.C. Comics*, 69 P.3d 473 (Cal. 2003), which states you are free to do so. But then you read *Doe* v. *TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), which allowed a right of publicity claim against an author who did so; *Doe* eventually led to a $15 million verdict against the author. *Doe* v. *McFarlane*, 207 S.W.3d 52, 56 (Mo. Ct. App. 2006).

Or say you want to create a computer sports game that includes players based on real athletes. The Eighth Circuit said this is just fine, when athletes' names and statistics were used in an online fantasy sports game. *C.B.C. Dist. & Mktg., Inc.* v. *Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007). The Third and Ninth Circuits said no, when athletes' general body types, team affiliations, and player numbers were used in sports video games. But the First Amendment draws no distinctions between fantasy sports games and video sports games.

Or say you want to make cards or prints containing a famous person's picture, coupled with additional material. The Sixth Circuit said this was protected by the First Amendment, when an artist sold prints depicting Tiger Woods, with some other golfers in the background. *ETW Corp.* v. *Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003). The Ninth Circuit took a different view when a card company sold greeting cards depicting Paris Hilton together with a joke playing off her television persona. *Hilton* v. *Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009). Yet there is no First Amendment line between cards and prints, or between juxtaposing sports celebrities with each other and juxtaposing a TV celebrity with jokes about her.

This is the sort of uncertainty that leads speakers to "steer far wide[] of the unlawful zone" and change their speech to avoid risking ruinous litigation — even when most courts would see their speech as constitutionally protected. *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972). This Court should agree to hear the case and resolve the split among lower courts.

If you want to see more about the five tests — the transformative use test, the transformative work test, the relatedness test, the predominant purpose test and the balancing test — see the brief, which is signed by Profs. Jack Balkin, Erwin Chemerinsky, Mark Lemley, Martin Redish, Steven Shiffrin, Geoffrey Stone, Rebecca Tushnet and many more.

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