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## **[Insert Company Name] Sucks: A Response to Speech, Citizenry and the Market**

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# **[Insert Company Name] Sucks: A Response to Speech, Citizenry and the Market**

**Byron Crowe II**\*

In his article “Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine,” Professor Deven Desai argues that corporations have a privileged amount of control over speech about them. As a result, he says that the Supreme Court’s First Amendment jurisprudence requires the law to recognize a corporate public figure doctrine that applies in trademark infringement and dilution actions.<sup>1</sup> Doing so, according to Desai, would “ensure that speech rights are properly balanced” while collapsing the supposedly unnecessary legal distinction between commercial and political speech.<sup>2</sup>

Professor Desai is correct that corporations today are able and willing to have a powerful impact on public dialogue regarding both commercial and political matters. In this sense, corporations often play a role that is analogous to a public figure. However, his analysis leading up to his conclusion falls short for several reasons. This essay responds to Desai’s article, focusing on his analysis of infringement and dilution suits. Part I argues that corporations do not have a privileged amount of control over speech about them because trademark infringement and dilution actions do not place any meaningful limits on peoples’ ability to critique corporations. Part II argues that, even if corporations did enjoy a privileged amount of control over speech about them, the Supreme Court’s First Amendment jurisprudence does not require the adoption of a corporate public figure doctrine. Part III presents a conclusion.

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1. Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. 455, 457–59, 501 (2013).

2. *Id.* at 457.

## I. CORPORATIONS DO NOT HAVE A PRIVILEGED AMOUNT OF CONTROL

Professor Desai's first premise is that corporations have a privileged amount of control over speech about them relative to natural persons. According to Desai, in light of the rights granted to corporations in *Citizens United*,<sup>3</sup> "an imbalance in corporate speech law"<sup>4</sup> has emerged that "provide[s] corporations with a speech advantage"<sup>5</sup> over individuals. Thus, "[i]f corporations are afforded the same speech rights as and against individuals . . . , individuals should have the same rights against corporations."<sup>6</sup>

Desai's argument is problematic because individuals and corporations *do* have the same speech rights as and against each other. As he notes, *Citizens United* provided corporations with essentially the same First Amendment speech rights as natural persons.<sup>7</sup> However, trademark law and defamation law do not make a distinction between corporations and individuals for the purpose of bringing suits. Both natural persons and corporations can own and enforce trademarks<sup>8</sup> as well as initiate defamation suits.<sup>9</sup>

This symmetry also extends to defending speech suits. In defending a defamation suit, natural persons and corporations can invoke the public figure doctrine, which requires the plaintiff to make a showing of actual malice where the plaintiff is a public figure.<sup>10</sup> While the Supreme Court has not officially

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3. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

4. *See* Desai, *supra* note 1 at 479.

5. *Id.* at 480.

6. *Id.* at 495.

7. *Id.* at 459; *see Citizens United*, 558 U.S. at 343 ("The Court has thus rejected the argument that political speech of corporations . . . should be treated differently under the First Amendment simply because such associations are not 'natural persons.'") (citation omitted).

8. *See, e.g., Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1143 (9th Cir. 2011) (involving a corporate plaintiff suing a corporate defendant for trademark infringement); *Lamparello v. Falwell*, 420 F.3d 309, 311 (4th Cir. 2005) (involving individual plaintiff suing an individual defendant for trademark infringement).

9. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (involving an individual plaintiff suing a corporation for libel); *VECC, Inc. v. Bank of Nova Scotia*, 296 F. Supp. 2d 617, 621 (D.V.I. 2003) (involving a corporate plaintiff suing a corporate defendant for defamation).

10. *See Gertz*, 418 U.S. at 342 ("Those who . . . are . . . public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth."); D. Mark

recognized the status of corporate plaintiffs for the purposes of the doctrine,<sup>11</sup> the lower courts have widely held that corporate plaintiffs can be public figures in defamation suits.<sup>12</sup> In suits for trademark infringement or dilution, the courts uniformly do not apply the public figure doctrine whether the plaintiff is a natural person or a corporation.

Moreover, individuals enjoy certain speech-related rights that corporations do not. The right of publicity, for example, which is the state-law based “right of every human being to control the commercial use of his or her identity,”<sup>13</sup> gives individuals but not corporations a cause of action for misappropriation of their identity or persona.<sup>14</sup> This right, which the Supreme Court has validated,<sup>15</sup> gives individuals additional control over speech about them beyond trademark and defamation law. Likewise, the right against being placed in a false light, which is recognized in about two-thirds of states,<sup>16</sup> protects human plaintiffs but not business entities.<sup>17</sup> Considering these exclusively individual rights, Desai’s statement that “a nationally famous corporate person is treated differently than its natural-person counterpart”<sup>18</sup> is only true in the opposite manner of what he intended.

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Jackson, *The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan*, 9 WM. & MARY BILL RTS. J. 491, 497–99 (2001).

11. See Jackson, *supra* note 10, at 502 (“the Supreme Court has yet to establish the status of corporate defamation plaintiffs.”). *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

12. See, e.g., *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (holding that the corporate plaintiff was a public figure because it “injected itself into a matter of public interest” through a four-day meat sale with a large amount of advertising); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980) (recognizing that corporations can be public figures); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 957 (D.D.C. 1976) (holding that corporate defense contractor was a public figure). See generally Jackson, *supra* note 10, at 503–08.

13. J. THOMAS MCCARTHY, 1 RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed).

14. See THOMAS PHILLIP BOGGESS V, 31 CAUSES OF ACTION § 5 (West 2013).

15. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 (1977).

16. *Getting It Right, But in a “False Light,”* REPORTER’S COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/getting-it-right-false-light-0> (last visited Aug. 5, 2014).

17. See J. THOMAS MCCARTHY, 1 RIGHTS OF PUBLICITY AND PRIVACY § 4:41 (2d ed).

18. Desai, *supra* note 1, at 458.

	Natural Persons	Corporations
Speech protected by First Amendment?	Yes	Yes
Can own and enforce trademarks?	Yes	Yes
Can initiate a defamation action?	Yes	Yes
Courts have applied public figure doctrine to plaintiffs in defamation suits?	Yes	Yes
Courts have applied public figure doctrine to plaintiffs in trademark infringement and dilution suits?	No	No
Rights of publicity and privacy (false light)?	Yes	No

Symmetry, however, is not Desai's primary concern. The problem, he says, is that the current regime of corporate reputational laws,<sup>19</sup> "limits [everyone's] ability to critique a corporate public figure."<sup>20</sup> Desai supports this assertion by pointing to actions for trademark infringement and dilution under the Lanham Act. Because corporations are aggressive enforcers of trademarks, he says infringement and dilution actions "hinder [everyone's] ability to use speech to question and police corporations."<sup>21</sup> Unfortunately, Desai's characterization of U.S. trademark law is incomplete.

#### A. FEDERAL TRADEMARK DILUTION

As Desai notes, federal dilution law protects famous marks from blurring or tarnishment and allows corporations to sue even where there is no risk of confusion,<sup>22</sup> so long as there has been actual dilution of the holder's trademark.<sup>23</sup> Dilution actions also do not inquire into whether the information

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19. Desai mentions defamation as being included in this group of "corporate reputation laws." *Id.* at 457. However, his analysis focuses on trademark infringement and dilution.

20. *Id.* at 475.

21. *Id.* at 482.

22. *See id.* at 483; 15 U.S.C. § 1125(c)(1) (2012).

23. *See Moseley v. V Secret Catalogue*, 537 U.S. 418 (2003).

conveyed was false.<sup>24</sup> As a result, Desai claims that “[d]ilution law fails to accommodate the criticism that should be possible for a public figure.”<sup>25</sup>

However, Desai’s claim ignores the federal dilution exemptions. These statutory provisions explicitly protect criticizing, parodying, and commenting on famous marks, on their owners, or on their owners’ goods or services.<sup>26</sup> The exemptions also include news commentary and any other non-commercial use of a mark.<sup>27</sup> Thus, it is unclear how federal dilution law keeps an individual from criticizing a corporation or its products.

This inconsistency does not stop Desai. He states that, despite their current breadth, “the exemptions simply do not cover what they should.”<sup>28</sup> What should they cover? Desai tells us that the exemptions should focus on “the criticism and commentary inquiries needed for speech about public figures.”<sup>29</sup> This is an unsatisfactory explanation for two reasons. First, as abovementioned, the exemptions *already* include criticism and commentary. Second, even if they did not, Desai’s reasoning is circular: he argues that the inadequacy of dilution exemptions is why the law must recognize a corporate public figure doctrine but uses the absence of the doctrine as the reason the dilution exemptions are inadequate.

Lastly, Desai critiques the dilution exemptions for being ambiguous, which he says “put[s] us in a world of late case resolution and uncertainty about liability.”<sup>30</sup> However, in the context of critical speech about corporations, his concern over the statute’s ambiguity is completely unfounded: “parodying, criticizing, or commenting” unquestionably includes the type of speech Desai is concerned about. Indeed, under the current framework, individuals are free to compare large corporations to Nazis and terrorists and even make a profit from doing so.<sup>31</sup>

Moreover, it is unlikely that the alternative, a corporate public figure doctrine, would be much better. Under Desai’s

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24. 15 U.S.C. § 1125(c)(1).

25. Desai, *supra* note 1, at 484.

26. See 5 U.S.C. § 1125(c)(3) (2012). It is worth noting that while Desai recognizes some of the exemptions, he conveniently omits criticism in his above-the-line analysis. See Desai, *supra* note 1, at 484.

27. See 5 U.S.C. § 1125(c)(3).

28. Desai, *supra* note 1, at 484.

29. *Id.*

30. *Id.* at 485.

31. See, e.g., *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302 (N.D. Ga. 2008).

proposal, public figure corporations would be required to prove actual malice for dilution actions. Actual malice, in turn, would require the plaintiff to show that the statement including the mark was false and that it was made with knowledge of its falsity or with reckless disregard for the statement's truth.<sup>32</sup> While this higher standard would mean summary judgment could be a more effective tool for defending dilution suits, actual malice is still a highly-factual inquiry and the additional step of determining which corporations are public figures could complicate litigation, meaning less certainty at the outset.

## B. FEDERAL TRADEMARK INFRINGEMENT

After exhausting his dilution analysis, Desai moves on to the Lanham Act's provisions on trademark infringement. Here, he critiques the current infringement framework because it allows the object of speech to control the speech's content.<sup>33</sup> According to Desai, current trademark law is flawed because "[m]ark holders, not consumers, bring trademark suits"<sup>34</sup> and because mark holders can use cease-and-desist letters and strike suits to chill speech.<sup>35</sup> However, this would still be possible under his proposed arrangement. Even if a corporate public figure doctrine applied to the Lanham Act, consumers would still be unable to bring infringement suits and trademark owners would still be able to send cease-and-desist letters and bring meritless infringement suits.

Moreover, the fact that trademark holders *can* bring lawsuits under the current regime does not mean that they are successful. As Desai notes, a successful claim for infringement requires at the very least a showing that the use of the mark is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association" between the plaintiff and defendant or their products.<sup>36</sup> This test is fact-intensive, has multiple factors, and is rarely amenable to summary judgment.<sup>37</sup> However, just because the test is fact-driven does not mean it does not protect the types of speech Desai is concerned with. Indeed, it is hard to see how any fact

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32. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, (1974).

33. Desai, *supra* note 1, at 486.

34. *Id.* at 485.

35. *Id.* at 486.

36. *Id.*; 15 U.S.C. 1125(a)(1)(A) (2012).

37. See Desai, *supra* note 1, at 486. However, in cases involving unrelated goods, for example, the analysis can be much simpler: "If the goods are totally unrelated, there can be no infringement because confusion is unlikely." See *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979).

finder could be confused about the association of the plaintiff and defendant where the defendant is *criticizing* a corporation or its products.

Of course, the fact-intensive nature of the confusion analysis under the current regime means defendants must incur great costs to defend meritless suits. However, these costs are also borne by plaintiffs, and corporations may be unwilling to bear these additional costs where an infringement suit is meritless. This along with the possibility of sanctions<sup>38</sup> and disciplinary action<sup>39</sup> for attorneys who bring meritless claims reduces the risk of meritless suits under the current infringement and dilution frameworks.

### C. DILUTION AND INFRINGEMENT: THE COMMERCIAL USE REQUIREMENT

Desai's worry that the Lanham Act is being used to silence corporate critics is also problematic for a more fundamental reason: actions under the Lanham Act for infringement or dilution must be predicated on a "commercial use" of a mark.<sup>40</sup> The Lanham Act does not prohibit a noncommercial use of another's trademark,<sup>41</sup> and courts have generally construed what constitutes commercial use in a narrow manner.

What is a commercial use? For the purposes of trademark infringement, the Sixth,<sup>42</sup> Ninth,<sup>43</sup> and Tenth<sup>44</sup> Circuits, as well as the District Court for District of Columbia,<sup>45</sup> have all

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38. See, e.g., FED. R. CIV. P. 11.

39. See American Bar Association Model Rule 3.1.

40. See 15 U.S.C. § 1114(1); 15 U.S.C. § 1125(a)(1) & (c).

41. R. Kent Warren, *Interpreting Commercial Speech under the Lanham Act's Commercial Use Requirement: Tension Between Online Trademark and First Amendment Free Speech Rights*, 4 FIRST AMEND. L. REV. 342, 343 (2006).

42. See *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003) ("As long as [the defendant] has no commercial links on either of his websites . . . we find no use 'in connection with the advertising' of goods and services to enjoin, and the Lanham Act cannot be properly invoked.").

43. See *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 678 (9th Cir. 2005) (finding no commercial use where defendant created website to expose negative information about plaintiff's services on the internet).

44. See *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1052 (10th Cir. 2008) (upholding district court's finding that defendant's use was not a commercial because it "provided no goods or services, earned no revenue, and had no direct links to any commercial sites.").

45. See *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931, 934 (D.D.C. 1985) ("Defendants' only activity is trying to communicate their ideas. Purveying points of view is not a service. Even if promoting of ideas was

concluded that there is no commercial use unless a trademark was used for some type of commercial gain, like the sale of products or services. The First Circuit has also suggested it would follow this reasoning.<sup>46</sup> Only a minority of federal courts have adopted a more expansive boundary for the commercial use requirement in infringement suits.<sup>47</sup> And even in these courts, plaintiffs still must show that the mark was either used in connection with the provision of a product or service<sup>48</sup> or used to harm the plaintiff commercially.<sup>49</sup>

Showing commercial use is even more difficult for dilution actions. Congress explicitly included an exemption for “[a]ny noncommercial use of a mark.”<sup>50</sup> Thus, “courts applying the exception have held that all speech which is not purely commercial . . . is subject to the exception.”<sup>51</sup>

Through its infringement and dilution provisions, the only type of speech that the Lanham Act prohibits about a corporation is speech that uses the corporation’s trademark (or a similar one) and that is commercial in nature. When this requirement is combined with infringement’s confusion requirement and dilution’s statutory exemptions, it is hard to see how the broader public is being kept from criticizing corporations. This is especially true where the critical speech is artistic.<sup>52</sup> Indeed, in most of the cases that Desai cites, the

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considered to be conducting an educational ‘service,’ television messages that are only used to express those ideas do not sell or advertise them.”).

46. See *Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 207 (1st Cir. 1996).

47. See *Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 308 (D.N.J. 1998) *aff’d*, 159 F.3d 1351 (3d Cir. 1998) (holding that defendants use constituted a commercial use of the mark because it was to harm the plaintiff commercially); *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 365 (4th Cir. 2001) (holding that plaintiff only needed to show that defendants use prevented users from obtaining or using defendant’s goods or services); see also *United We Stand Am., Inc. v. United We Stand, Am. New York, Inc.*, 128 F.3d 86, 90 (2d Cir. 1997).

48. See *id.*

49. See *Jews For Jesus*, 993 F. Supp. at 308; *Doughney*, 263 F.3d at 365.

50. 15 U.S.C. § 1125(c)(3) (2012).

51. *Griffith v. Fenrick*, 486 F. Supp. 2d 848, 853 (W.D. Wis. 2007); see also *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (stating in its analysis of a dilution action that “[i]f speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.”); *TMI, Inc. v. Maxwell*, 368 F.3d 433, 437 (5th Cir. 2004).

52. See *Mattel*, 296 F.3d at 902; *Rogers v. Grimaldi*, 875 F.2d 994, 1000 (2d Cir. 1989) (“[Our] construction of the Lanham Act accommodates consumer and artistic interests. It insulates from restriction titles with at least minimal artistic relevance that are ambiguous or only implicitly misleading but leaves

defendants prevailed.<sup>53</sup> He gives few cases where a defendant's criticism of a corporation was successfully enjoined under the current trademark regime.<sup>54</sup> And even in those cases where the plaintiff was successful, the speech in question was decidedly commercial.<sup>55</sup>

#### D. THE SUPPOSEDLY BLURRED LINE BETWEEN COMMERCIAL AND POLITICAL SPEECH

Desai, however, argues that the commercial use requirement is inadequate to protect speech because "the distinction between commercial and political [speech] has collapsed so much that the need to ensure a high flow of information about corporations and their goods and services is great, regardless of the label on such information."<sup>56</sup> In support of this, he cites examples of corporations taking stances on political issues<sup>57</sup> as well as the influence of consumers' political persuasions on their purchasing decisions.<sup>58</sup>

As an example of the latter, Desai points to *Nike Inc. v. Kasky*.<sup>59</sup> In that case, Nike launched a campaign to protect its

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vulnerable to claims of deception titles that are explicitly misleading as to source or content, or that have no artistic relevance at all.").

53. See *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 269 (4th Cir. 2007); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 807 (9th Cir. 2003); *Mattel*, 296 F.3d at 902.

54. See, e.g., *Deere & Co. v. MTD Products, Inc.*, 41 F.3d 39 (2d Cir. 1994); *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, 10 CIV. 1611 PKC, 2012 WL 1022247 (S.D.N.Y. Mar. 22, 2012); *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972).

55. Of course, that is not to say that none of the cases support his premise that corporations can quash criticism about their brand. One case that is particularly concerning is *Deere & Co. v. MTD Products, Inc.*, 41 F.3d 39 (2d Cir. 1994). In *Deere*, the Second Circuit enjoined an advertisement that depicted a modified version of John Deere's trademark running away from the competitor's lawn tractor and a barking dog. *Id.* at 45. This case is disconcerting from a First Amendment perspective because the defendant's dilutive use was both comparative in nature and critical of John Deere. However, even here, the defendant was a corporation whose primary motive for running the advertisement was profit, not public dialogue. Moreover, the *Deere* case is likely the low-water mark for commercial speech protection since it appears to be the first case ever to hold a defendant liable for making good-humored and non-confusing fun of a competitor's logo. See Mary LaFrance, *Steam Shovels and Lipstick: Trademarks, Greed, and the Public Domain*, 6 NEVADA L.J. 447, 468 (2006).

56. Desai, *supra* note 1, at 467.

57. *Id.* at 487, 506 (noting Chick-fil-A, Google, Nabisco, and J.C. Penney's stance on gay rights).

58. See *id.* at 472-74.

59. *Kasky v. Nike, Inc.*, 45 P.3d 243 (2002); *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972),

image in response to allegations that the company engaged in unethical labor practices abroad.<sup>60</sup> Kasky, a private citizen, then sued Nike under California law, alleging that Nike had made false and misleading statements about its labor practices during its campaign.<sup>61</sup> Because Nike's speech was motivated by commercial concerns, Desai states that it was "simultaneously commercial speech and political speech."<sup>62</sup>

However, this example—along with the rest that Desai explores<sup>63</sup>—only establishes that corporations and people are increasingly considering politics in their economic decision making. It does not support the proposition that commercial information is playing a greater role in people's political decision making and thus deserves greater First Amendment protection. That is, while a consumer may take into account a company's politics in deciding to buy a product, Desai gives us no examples—hypothetical or otherwise—where a corporation's reputation now has an impact on an individual's political choices. Unless and until this is shown, the current framework's requirement of a commercial use for dilution and infringement actions provides sufficient protection for speech about corporations.

## II. FIRST AMENDMENT JURISPRUDENCE DOES NOT REQUIRE A CORPORATE PUBLIC FIGURE DOCTRINE

Professor Desai's argument is also flawed because it mischaracterizes how to apply the Supreme Court's First Amendment jurisprudence. Desai argues that corporate speech is privileged and that commercial speech today has greater political significance. However, even if both these statements were true, it would not follow that "the logic of the Supreme Court's jurisprudence regarding corporate speech and public figures requires that the law recognize a corporate public figure doctrine" for trademark and dilution actions.<sup>64</sup>

Desai is correct in his assertion that the Supreme Court's First Amendment cases prefer more speech,<sup>65</sup> even where the

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60. Desai, *supra* note 1, at 487.

61. *Id.*

62. *Id.* at 488.

63. *See supra* notes 57 & 58.

64. *See* Desai, *supra* note 1, at 459.

65. *See, e.g.,* United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) ("The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less.").

content of that speech is factually incorrect. The Court's prior cases have preferred counter-speech as the appropriate means of correcting a false claim as opposed to banning the initial false statement.<sup>66</sup> As the Court said in *Sullivan*, "erroneous statement[s] are inevitable in free debate, and [they] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"<sup>67</sup> Through the "marketplace of ideas," false statements will tend to be discredited.<sup>68</sup> As a result, the Court's First Amendment jurisprudence has a high tolerance for incorrect political speech.

Also, while commercial speech receives a lower amount of First Amendment protection,<sup>69</sup> the Court has explicitly stated that commercial speech is not stripped of all protection.<sup>70</sup> Why? As the Court has recognized, commercial speech still adds value to the marketplace of ideas.<sup>71</sup> With this in mind, Desai's reasoning seems intuitive: If (A) commercial speech now has a political impact, (B) the Court's jurisprudence tolerates false speech that has a political impact and (C) trademark and dilution actions do nothing more than censor false commercial statements, then (D) the Court's reasoning should require actual malice for some infringement and dilution actions, like it does in defamation cases.

However, even if premises (A) and (B) were correct, premise (C) is not. Trademark infringement and dilution actions do not concern themselves with the truthfulness of the speech in question. Neither action requires the defendant's statements to be untrue.<sup>72</sup> Rather, infringement and dilution are meant to protect the *identity of the speaker*. By contrast, the Court's First Amendment jurisprudence has not primarily

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66. See Desai, *supra* note 1, at 508.

67. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, (1964).

68. See Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1, 3 (2011).

69. See *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

70. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

71. See *id.*; *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.").

72. See 15 U.S.C. § 1114 (2012) & § 1125 (2012). Of course, an action for false advertising does require an untrue statement. However, that is outside the scope of this essay, which focuses on infringement and dilution.

concerned itself with the identity of the speaker. Instead, it has focused on the *content* of the speech. This makes trademark and dilution distinguishable from the Court's previous reasoning on false speech. While the Court tolerates false speech because the marketplace of ideas can sort it out, the marketplace itself may rely on the integrity of the sources of information. That is, if the speech of sources who have a reputation for truth and quality is valued more than others, protecting the identity of the speakers (and the trademarks by which they identify themselves) may be necessary for the marketplace to work. If consumers cannot identify the sources of the products and information in the market, they will be unable to distinguish trustworthy products and information from the rest.

### CONCLUSION

Despite its shortcomings, Desai's analysis brings up a number of important issues in the current legal framework. For example, the power and prominence of corporations in today's society means they *do* sometimes play a role analogous to public figures. Thus, as other scholars have argued, it may be appropriate to treat some types of corporate plaintiffs as *per se* public figures in the context of defamation suits.<sup>73</sup>

Also, while the current framework generally does not give corporations a privileged amount of control over speech about them, there are some jurisdictions where the courts have arguably not done enough to protect speech. For example, the Third and Fourth Circuits have adopted a broad understanding of what constitutes a commercial use for the purposes of infringement suits.<sup>74</sup> These courts only require a showing that the defendant's use will harm the plaintiff commercially.<sup>75</sup> This broad definition of commercial use likely chills noncommercial speech while severely chaffing the First Amendment.

Lastly, as Desai notes, the dilution exemptions of the Lanham Act do not apply to state actions for dilution. While twelve states along with the District of Columbia and Puerto Rico do not have dilution statutes,<sup>76</sup> the statutes of the

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73. See Jackson, *supra* note 10, at 492. I do not weigh in on the wisdom of doing so.

74. See *Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 308 (D.N.J. 1998) *aff'd*, 159 F.3d 1351 (3d Cir. 1998); *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 365 (4th Cir. 2001).

75. See *id.*

76. Patrick Bickley, *Almost Famous: Finding a Role for State Dilution*

remaining states generally do not include explicit exemptions like those of the Lanham Act.<sup>77</sup> In these states, defendants must affirmatively raise a defense under the First Amendment. As Professor Mary LaFrance has noted, judicial responses to these First Amendment arguments have been inconsistent.<sup>78</sup> This has resulted in concerning cases like *Deere*, which was brought under a state dilution statute.<sup>79</sup> Moreover, the trend seems to be that traditional expressive works are receiving less protection under these state statutes than under the Lanham Act.<sup>80</sup> To partially resolve these inconsistencies, some have suggested Congress give preemptive effect to the Lanham Act's dilution exceptions.<sup>81</sup>

However, none of these problems give sufficient support for Desai's conclusion that the law needs to recognize a public figure doctrine in the context of infringement and dilution actions.

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*Law after the Trademark Dilution Revision Act*, at 16 (Chicago-Kent College of Law Honors Scholars Seminar Paper 2011), available at <http://www.kentlaw.iit.edu/Documents/Academic%20Programs/Honors%20Scholars/2011/Patrick-Bickley-paper.pdf>.

77. See LaFrance, *supra* note 55, at 462.

78. See *id.*

79. See *Deere & Co. v. MTD Products, Inc.*, 41 F.3d 39 (2d Cir. 1994) (concerning dilution action under New York law).

80. See LaFrance, *supra* note 55, at 470.

81. See *id.* at 463.