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## By Any Other Name: Image Advertising and the Commercial Speech Doctrine in *Jordan v. Jewel*

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# **BY ANY OTHER NAME: IMAGE ADVERTISING AND THE COMMERCIAL SPEECH DOCTRINE IN JORDAN V. JEWEL**

KELLY MILLER\*

This Comment focuses on the commercial speech doctrine as applied to modern advertising strategies, specifically, corporate image advertising. It centers on the recent litigation between basketball superstar Michael Jordan and a Chicago-area grocery chain, Jewel-Osco. When Michael Jordan was inducted into the Basketball Hall of Fame, Jewel-Osco was invited to submit a congratulatory ad for a commemorative issue of *Sports Illustrated* devoted exclusively to Jordan's career and accomplishments. Because Jordan had spent the bulk of his storied professional basketball career with the Chicago Bulls, the ad seemed a natural fit. Jordan, who did not give permission for his name to be used in the ad, sued the grocery chain for \$5 million, asserting various trademark, unfair competition, and right of publicity claims. Against these claims, Jewel-Osco asserted that the ad was noncommercial speech and thus sheltered from liability under the First Amendment.

The Seventh Circuit concluded the ad was commercial speech not shielded under the First Amendment. Despite the fact that the ad neither made reference to a particular product nor identified Jewel-Osco as any type of corporate entity, the court deemed the ad a form of image advertising aimed at promoting the supermarket's brand and enhancing consumer goodwill by exploiting public affection for Jordan at an auspicious moment in his career.

This Comment summarizes the framework of speech protection under the First Amendment, including the commercial speech doctrine, followed by a brief history of advertising, trademark law, and the right of publicity. It then discusses both the district court and Seventh Circuit opinions.

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Finally, this Comment concludes that the Seventh Circuit was correct in determining that Jewel's ad was commercial speech.

## I. INTRODUCTION

You say something nice about someone you have known for years, and instead of a "thanks," you get sued! Worse yet, it was not your idea to say anything in the first place; you had been invited to do so. This was the uncomfortable position that a Chicago-area grocery chain, Jewel-Osco ("Jewel"), found itself in when invited by Time, Inc., owner of *Sports Illustrated*, to submit an ad that contained a message congratulating Michael Jordan ("Jordan") on his induction into the Basketball Hall of Fame.<sup>1</sup> Because Jordan had spent the bulk of his storied professional basketball career with the Chicago Bulls,<sup>2</sup> the ad seemed a natural fit. The ad appeared in a commemorative issue of *Sports Illustrated*, devoted exclusively to Jordan's career and accomplishments.<sup>3</sup> Jordan, unfortunately, was not appreciative of Jewel's quaint tribute, and he sued the grocery chain for \$5 million, asserting various trademark, unfair competition, and right of publicity claims.<sup>4</sup>

Against these claims, Jewel asserted the ad was noncommercial speech and thus sheltered from liability under the First Amendment—the ad incorporated Jewel's corporate slogan into the congratulatory message, but made no reference to any products or services sold by Jewel, much less identified "Jewel-Osco" as a grocery store.<sup>5</sup> The district court agreed, reasoning that consumers viewing the ad would "be at a loss to explain what they [had] been invited to buy."<sup>6</sup> The sole issue on appeal was whether the ad constituted commercial or noncommercial speech.<sup>7</sup> In reversing the district court's decision, the Seventh Circuit held that the ad

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1. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 511 (7th Cir. 2014).

2. *Michael Jordan*, ESPN, [http://espn.go.com/nba/player/\\_id/1035/michael-jordan](http://espn.go.com/nba/player/_id/1035/michael-jordan) [<http://perma.cc/766M-2Y4G>].

3. *Jordan*, 743 F.3d at 512.

4. *Jordan v. Jewel Food Stores, Inc.*, 851 F. Supp. 2d 1102, 1104–05 (N.D. Ill. 2012).

5. *Jordan*, 743 F.3d at 511–12.

6. *Jordan*, 851 F. Supp. 2d at 1107.

7. *Jordan*, 743 F.3d at 511.

in question, while containing a congratulatory message to Jordan and making no reference to a particular product, nonetheless was a form of “image advertising.”<sup>8</sup> This form of image advertising was aimed at promoting the supermarket’s brand and enhancing consumer goodwill by exploiting public affection for Jordan at an auspicious moment in his career.<sup>9</sup> Therefore, the Seventh Circuit concluded the ad was commercial speech.<sup>10</sup>

This Comment submits that the Seventh Circuit was correct in its ruling. Rather than focusing solely on “the literal import of the words” in the “celebratory tribute,”<sup>11</sup> the court focused on the context of the speech.<sup>12</sup> If this ad were deemed noncommercial speech fully protected under the First Amendment, corporations would be permitted to use the image or identity of a celebrity or athlete in an ad with impunity, so long as the commercial elements of the ad were sufficiently couched in noncommercial speech.<sup>13</sup> To do so would ignore the reality of modern marketing strategies,<sup>14</sup> the most successful of which often rely on celebrity and athlete endorsements.<sup>15</sup> Additionally, due to over-exposure or involuntary

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8. *Id.* at 519.

9. *Id.* at 518–19.

10. *Id.* at 512.

11. *Id.* at 517.

12. *Id.*

13. *See Jordan*, 743 F.3d at 520; *see also* Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 188–99 (2005).

14. *See Jordan*, 743 F.3d at 518.

15. *See, e.g.*, Kristina Monllos, *Matthew McConaughey Returns for Another Round of Strange Spots for Lincoln*, ADWEEK (Dec. 30, 2014, 1:50 PM), <http://www.adweek.com/adfreak/matthew-mcconaughey-returns-another-round-strange-spots-lincoln-162104> [<http://perma.cc/J76B-FNLR>]; Rebecca Cullers, *Salt-N-Pepa Tell Football Players and Pregnant Ladies to Push It for Geico*, ADWEEK (Dec. 8, 2014, 9:47 AM), <http://www.adweek.com/adfreak/salt-n-pepa-tell-football-players-and-pregnant-ladies-push-it-geico-161823> [<http://perma.cc/FYJ6-DXAD>]; Tim Nudd, *Scrawny Arms Rob Lowe Is DirecTV’s Freakiest Rob Lowe Yet*, ADWEEK (Nov. 24, 2014, 2:36 PM), <http://www.adweek.com/adfreak/scrawny-arms-rob-lowe-latest-subpar-rob-lowe-join-directv-campaign-161627> [<http://perma.cc/CDR4-H99H>]; David Gianatasio, *Ad of the Day: Beats by Dre Thrillingly Welcomes LeBron James Home to Ohio*, ADWEEK (Oct. 20, 2014, 9:26 AM), <http://www.adweek.com/news/advertising-branding/ad-day-beats-dre-thrillingly-welcomes-lebron-james-home-ohio-160868> [<http://perma.cc/6FJ8-9YX2>].

association with undesirable or inelegant products, the commercial value of a celebrity's image could be greatly reduced.<sup>16</sup> Further, the celebrity would lose future revenues because the corporation, in attempting to align itself with the celebrity, would have no reason to pay the celebrity without a formal image licensing or endorsement agreement.<sup>17</sup> These economic injuries run counter to the purpose of the right of publicity.<sup>18</sup> Part II lays out the framework of speech protection under the First Amendment. Part III outlines the commercial speech doctrine, its development, and how it stands today. Part IV offers a brief history and overview of advertising, trademark law, and the right of publicity. Part V examines the case, *Jordan v. Jewel Food Stores, Inc.*, and discusses the parties, the ad in question, and reasoning of both the district court and Seventh Circuit decisions. Part VI endorses the Seventh Circuit's holding as in line with the principles behind both trademark and right of publicity laws. Part VII provides a brief conclusion.

## II. SPEECH AND THE FIRST AMENDMENT

The First Amendment states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>19</sup> However, not all speech (or activity) that falls within the ambit of the First Amendment is immune from legal liability.<sup>20</sup> As Justice Frankfurter articulated, "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest."<sup>21</sup>

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16. See, e.g., *Hornby v. TJX Cos., Inc.*, 87 U.S.P.Q.2d (BNA) 1411, 1414 (T.T.A.B. 2008).

17. See generally Darren Rovell, *Jordan Ruling Could Set Precedent*, ESPN (Feb. 20, 2014), <http://m.espn.go.com/general/story?storyId=10491664&city=chicago&src=desktop&wjb> [<http://perma.cc/C9T4-Q7R2>].

18. See Scott Slavick, *Out of Bounds? Playing Ball with Celebrity Right of Publicity and Fair Use*, INSIDE COUNSEL (May 21, 2014), <http://www.insidecounsel.com/2014/05/21/out-of-bounds-playing-ball-with-celebrity-right-of> [<http://perma.cc/BY8W-2TGR>] ("[T]he right of publicity . . . allows [an] individual to keep her or his image and likeness from being commercially exploited without permission or contractual compensation.").

19. U.S. CONST. amend. I.

20. 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8:13 (2d ed. 2000).

21. *Dennis v. United States*, 341 U.S. 494, 521 (1951) (Frankfurter, J., concurring).

Courts divide speech into three categories in order to determine the level of First Amendment protection the speech should be afforded.<sup>22</sup> Speech involving “political news” is given the most protection under the First Amendment because it advances “liberty,” which Justice Brandeis identified as a “fundamental principle of the American government.”<sup>23</sup> That is, political news provides “information about the real world and is essential to clear thinking and public debate in a free society.”<sup>24</sup> The second category of speech is expressive speech, which is “primarily designed to entertain.”<sup>25</sup> Expressive speech is understood to “encompass all of the ‘arts’ . . . [and] can be communicated through any medium.”<sup>26</sup> While there may be a “message” or informational aspect to the “story,”<sup>27</sup> some forms of entertainment are “taken by the reader or listener as ‘conscious departures from accurate reporting.’”<sup>28</sup> Nonetheless, because all forms of entertainment help society “understand and cope with reality,” entertainment receives constitutional protection, albeit to “some slightly lesser degree than does political news.”<sup>29</sup>

In the case of political news and expressive speech, First Amendment

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22. See Joshua Waller, Comment, *The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting the Exploitation of the First Amendment?*, 9 UCLA ENT. L. REV. 59, 64 (2001).

23. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”).

24. MCCARTHY, *supra* note 20; see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*150–53 (“The liberty of the press is indeed essential to the nature of a free state.”).

25. MCCARTHY, *supra* note 20, § 8:15.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

protection extends even to false or misleading statements.<sup>30</sup> Courts rationalize this tolerance for two reasons. First, both political news and expressive speech are capable of being confronted by countering or correcting speech.<sup>31</sup> Second, it is desirable in a vibrant democracy that “[k]nowledgeable persons should be free to participate in [debates about important public issues] without fear of unfair reprisal . . . [or] expensive litigation.”<sup>32</sup>

The third and final category of speech protected by the First Amendment is “advertising,” now known as “commercial speech.”<sup>33</sup> Initially, “commercial speech”—which neither informs nor entertains, but only sells<sup>34</sup>—received no protection under the First Amendment.<sup>35</sup> Delivered by a unanimous court in a four-page opinion, *Valentine v. Chrestensen* disposed of the issue in a single sentence—“[w]ithout citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating Chrestensen’s contentions; the Court found it clear as day that commercial speech was not protected by the first amendment.”<sup>36</sup> At the

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30. *See* *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration . . . and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (“That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive . . . .’”).

31. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (“[D]iscussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . .”; *see also* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154 (2012) (explaining that this corrective element is “an essential predicate for the protection of speech by the First Amendment”).

32. *Nike, Inc. v. Kasky*, 539 U.S. 654, 664 (2003); *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (“[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; . . . [T]he fitting remedy for evil counsels is good ones.”); *N.Y. Times Co.*, 376 U.S. at 279 n.19 (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” (citations omitted)).

33. MCCARTHY, *supra* note 20, § 8:16.

34. *See id.*

35. *See* *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

36. Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L.

time, this was not a controversial view.<sup>37</sup> Nonetheless, that view has long since been displaced.<sup>38</sup> The current view is that “‘commercial speech’ is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded ‘noncommercial speech.’”<sup>39</sup>

### III. COMMERCIAL SPEECH DOCTRINE

The commercial speech doctrine establishes a subcategory of protected speech under the First Amendment.<sup>40</sup> As discussed above, commercial speech is given some protection under the First Amendment, but to a lesser degree than political or expressive speech.<sup>41</sup> Those whose speech is subject to a particular regulation or held in violation of a particular law will argue that the speech in question is noncommercial in

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REV. 627, 628 (1990).

37. See Thomas W. Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 205 (1976) (“Until recently, the majority of courts upheld such regulations [for commercial advertising] under the Supreme Court’s ruling in *Valentine v. Chrestensen* that ‘purely commercial advertising’ is unprotected by the first amendment.”); see also Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 178–80 (“In all the fuss about freedom of speech for corporations . . . it is easy to lose sight of the fact that mere *possibility* of such a claim is a product of late-twentieth century thought, not a venerable principle of long standing. Previously, the majority opinion seemed to be that corporations . . . did not enjoy any First Amendment protection at all.”); Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 381 (2006) (“The term ‘commercial speech’ has never been very satisfactorily defined . . .”).

38. See *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (“The [*Valentine v. Chrestensen*] ruling was casual, almost offhand. And it has not survived reflection.”); *Bigelow v. Virginia*, 421 U.S. 809, 820 (1975) (“[*Valentine v. Chrestensen*] obviously does not support any sweeping proposition that advertising is unprotected per se.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (concluding that “speech which does ‘no more than propose a commercial transaction’ is [not] so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government’” to deprive the speech of all First Amendment protection (citations omitted)); *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) (“There is no longer any room to doubt that what has come to be known as ‘commercial speech’ is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded ‘noncommercial speech.’”).

39. *Zauderer*, 471 U.S. at 637.

40. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983).

41. *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985).



order to obtain more shelter under the First Amendment.<sup>42</sup> Drawing a clear line between commercial and noncommercial speech often bedevils courts, in part because the Supreme Court has yet to clearly delineate the boundary.<sup>43</sup>

The sophistication of modern corporate marketing strategies complicates the matter.<sup>44</sup> Modern corporate advertisers routinely infuse social commentary, humor, and entertainment elements into their product advertisements.<sup>45</sup> These advertisements go beyond the “core notion” of commercial speech, which does “no more than propose a commercial transaction.”<sup>46</sup> Often, corporate advertisements do not mention a product or service at all, but instead “sell” a positive image about the corporation itself.<sup>47</sup> “Image advertisements” are designed to be emotionally evocative and dramatically compelling in order to build consumer goodwill in the brand.<sup>48</sup> Therefore, image advertisements do not easily align with the Supreme Court’s concept of commercial speech.

In determining the level of protection speech should be granted under the First Amendment, the Supreme Court has set forth two tests to

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42. See 1-6 JAMES B. ASTRACHAN ET. AL., *THE LAW OF ADVERTISING* § 6.03 (Matthew Bender ed.).

43. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001); Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 370 (2006) (“[T]he Court has not clearly defined what constitutes ‘commercial speech’ . . . .”); Thomas W. Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 206 (1976) (“Neither *Bigelow* nor *Virginia Board of Pharmacy* defines commercial speech . . . .”); Patrick D. Curran, Comment, *Diluting the Commercial Speech Doctrine: “Noncommercial Use” and the Federal Trademark Dilution Act*, 71 U. CHI. L. REV. 1077, 1091 (2004) (“[Lower] courts have failed to settle on a single definition of ‘noncommercial use,’ . . . [which] may be related to the Supreme Court’s difficulties in establishing uniform standards for distinguishing between commercial and noncommercial speech.”).

44. See Scott Slavick, *Out of Bounds? Playing Ball with Celebrity Right of Publicity and Fair Use*, INSIDE COUNSEL (May 21, 2014), <http://www.insidecounsel.com/2014/05/21/out-of-bounds-playing-ball-with-celebrity-right-of> [http://perma.cc/BY8W-2TGR].

45. See Piety, *supra* note 43, at 385–87.

46. *Bolger*, 463 U.S. at 66.

47. Piety, *supra* note 43, at 390.

48. *Id.* at 391.

differentiate commercial from noncommercial speech.<sup>49</sup> The Court articulated the first test in the 1973 case, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.<sup>50</sup> There, the Court defined commercial speech as speech that does “no more than propose a commercial transaction.”<sup>51</sup> Under this initial narrow definition, commercial speech has no informing or entertainment purpose or feature whatsoever,<sup>52</sup> it merely says, “buy me.”<sup>53</sup> However, the most effective and memorable advertisements are those that contain humor or social commentary, rather than solely serving to inform prospective customers about price and product features.<sup>54</sup> Under this narrow definition of commercial speech, an advertisement may mislead and manipulate consumers with the highest level of First Amendment protection so long as it also contains elements of entertainment or news dissemination.<sup>55</sup>

The second definitional test is found in the 1983 case, *Bolger v. Youngs Drug Products Corp.*<sup>56</sup> Justice Marshall identified three factors for consideration: (1) whether the speech is in the form of an advertisement; (2) whether the speech refers to a specific product; and (3) whether the speech has an economic motivation.<sup>57</sup> The Court states that no single factor, standing alone, is dispositive, but the combination of *all* of these characteristics provides strong support for determining that the speech at issue is commercial speech, and thus entitled to a lesser degree of First

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49. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

50. *Pittsburgh Press Co.*, 413 U.S. at 385.

51. *Id.*

52. *See* 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8:16 (2d ed. 2000).

53. *See id.*

54. *See* Jacquelyn Smith, *The Most Unforgettable Ad Campaigns of 2013*, *FORBES* (Dec. 17, 2013, 3:14 PM), <http://www.forbes.com/sites/jacquelynsmith/2013/12/17/the-most-unforgettable-ad-campaigns-of-2013> [http://perma.cc/VV3B-F9JK].

55. *See id.*

56. *See Bolger*, 463 U.S. at 64–67.

57. *See id.*

Amendment protection from liability.<sup>58</sup> The *Bolger* Court declined to say whether reference to any particular product or service is a necessary element of commercial speech.<sup>59</sup> Instead, the Court preferred to rely on a “common-sense” distinction between commercial speech—speech which proposes a commercial transaction and “occurs in an area traditionally subject to government regulation”—and noncommercial speech, which comprises “constitutionally safeguarded forms of expression.”<sup>60</sup>

Under either definitional test, the Court has stated that misleading or false commercial speech receives no protection under the First Amendment.<sup>61</sup> However, even this assertion is not entirely settled.<sup>62</sup> The Court’s lack of clarity in the area of commercial speech leads to inconsistent decisions in the lower courts and confusion in the corporate world.<sup>63</sup>

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58. *Id.* at 66–67.

59. *Id.* at 67 n.14.

60. *Id.* at 64–65 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

61. *See Va. State Bd. of Pharmacy*, 425 U.S. at 771 (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1974) (“For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (“The government may ban forms of communication more likely to deceive the public than to inform it . . . .”); *see also* Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 178 (2005) (“[T]he [commercial speech] doctrine’s premise is the assumption that whatever protection commercial speech may or may not be entitled to, its protection is dependent upon the communication being truthful.”).

62. *See* Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (arguing that commercial speech should be offered the same level of protection as noncommercial speech); *Nike, Inc. v. Kasky*, 539 U.S. 654, 682 (2003) (Breyer, J., dissenting) (“If permitted to stand, the state court’s decision [finding Nike liable for false or misleading commercial speech] may well ‘chill’ the exercise of free speech rights.”).

63. *See* Slavick, *supra* note 44 (“[R]ecent lawsuits [have] left companies questioning the difference between commercial and noncommercial speech. . . . [It is difficult] to determine what constitutes commercial use (thus potentially infringing use) and noncommercial use (and thus fair use) of a celebrity’s identity.”).

#### IV. BACKGROUND: ADVERTISING, TRADEMARK LAW, AND THE RIGHT OF PUBLICITY

##### A. *Traditional Advertising*

The first time commercial speech was afforded First Amendment protection by the Supreme Court was in the 1976 case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>64</sup> in which the Court held that Virginia could not limit pharmacists' right to provide information about prescription drug prices through advertisements.<sup>65</sup> There, the Court laid out its conception of advertising's function as "dissemination of information as to who is producing and selling what product, for what reason, and at what price."<sup>66</sup> The Court acknowledged the sometimes "tasteless and excessive" nature of advertising, but nonetheless deemed the "free flow of commercial information . . . indispensable" to consumers making "economic decisions" as part of our "free enterprise economy."<sup>67</sup> The Court reiterated this "informational function of advertising" in the 1980 case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>68</sup> There, a New York Public Service Commission regulation banning an electric utility from advertising to promote the use of electricity was deemed a First Amendment violation.<sup>69</sup> Advocates for expanded commercial speech protection and the founders of modern advertising highlight the public benefit of this informational function.<sup>70</sup>

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64. See generally *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748 (1976).

65. *Va. State Bd. of Pharmacy*, 425 U.S. at 773 (concluding that even in the commercial context, a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity").

66. *Id.* at 765.

67. *Id.*

68. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

69. *Id.* at 567.

70. See Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 384 (2006) (asserting that many of the founders of the advertising profession took the position that advertising performed a function "crucial to the operation of the economy, progress, and perhaps even democracy itself"). See generally PAMELA

### B. Image Advertising

Most corporations have moved away from traditional advertising methods to sell their products and services and instead work to increase or improve the public's perception of the corporation's identity itself.<sup>71</sup> This advertising evolution stems partly from an increased understanding of human biology and neuroscience.<sup>72</sup> The neocortex controls language and enables humans to "understand vast amounts of complicated information like features and benefits and facts and figures," but that comprehension, by itself, "doesn't drive behavior."<sup>73</sup> Instead, decision-making happens in the limbic brain, which is also responsible for all of our feelings, like trust and loyalty.<sup>74</sup> The separation of comprehension from decision-making in the brain results in so-called "gut decisions."<sup>75</sup> Even when facts and figures tell us Option A is the rational choice, we nonetheless choose irrational Option B, based on sentimentality driven by the limbic brain.<sup>76</sup> Because language resides in the neocortex, separate and apart from our decision-making limbic brain, often the only justification put forth for the irrational choice is that it "felt right."<sup>77</sup>

Modern advertisers count on the irrational sentimentality of decision-making consumers.<sup>78</sup> While traditional advertising methods use facts and

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WALKER LAIRD, *ADVERTISING PROGRESS: AMERICAN BUSINESS AND THE RISE OF CONSUMER MARKETING* (1998); Rodney A. Smolla, *Response, Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 *TEX. L. REV.* 777 (1993); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 *VA. L. REV.* 627 (1990); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 *BROOK. L. REV.* 437 (1980); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *GEO. WASH. L. REV.* 429 (1971).

71. See Piety, *supra* note 70, at 391.

72. Simon Sinek, *How Great Leaders Inspire Action*, TED (Sept. 2009), [http://www.ted.com/talks/simon\\_sinek\\_how\\_great\\_leaders\\_inspire\\_action#t-499668](http://www.ted.com/talks/simon_sinek_how_great_leaders_inspire_action#t-499668) [<http://perma.cc/WC6F-KU2D>].

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See Piety, *supra* note 70, at 385.

figures to lure consumers, modern advertising is geared towards eliciting an emotional response in the minds of consumers.<sup>79</sup> Modern advertisements incorporate noncommercial elements in commercial speech to effectuate this purpose.<sup>80</sup> The advertisement gets folded into a touching or humorous story, or remarks upon or inserts itself into a culturally relevant event.<sup>81</sup> Occasionally, image advertisements say very little, but instead use stark or striking imagery to tell a visual story about the corporation.<sup>82</sup> The range of noncommercial elements incorporated into commercial advertisements is only limited by the “sellers’ or their advertisers’ fertile imaginations.”<sup>83</sup> Image advertising is also about creating perceptions, often with respect to the corporate identity of the company.<sup>84</sup> But image advertising goes even

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79. *See id.* at 385–86.

80. *See id.* at 386–87.

81. *See, e.g.*, Victoria Taylor, *In Pictures: The Most Imaginative CSR Campaigns*, FORBES (July 9, 2010, 1:00 PM), [http://www.forbes.com/2010/07/09/pepsi-macys-twitter-tide-levis-advertising-responsibility-cmo-network-imaginative-csr\\_slide.html](http://www.forbes.com/2010/07/09/pepsi-macys-twitter-tide-levis-advertising-responsibility-cmo-network-imaginative-csr_slide.html) [<http://perma.cc/V3WH-XB6Z>] (describing various corporate social responsibility campaigns such as Tide’s Loads of Hope program, which was initiated after Hurricane Katrina to provide free laundry services to families affected by natural disasters, and Dove’s Campaign for Real Beauty, which uses real women, rather than professional models, to sell its products while helping girls and women with their self-esteem).

82. *See* Brian Gainor, *Billboard(s) of the Week - Kobe and Michael*, PARTNERSHIP ACTIVATION (Feb. 16, 2009), <http://www.partnershipactivation.com/sportsbiz/2009/2/16/billboards-of-the-week-kobe-and-michael.html> [<http://perma.cc/7U8U-LREZ>] (featuring “captivating messaging campaigns” where a Nike billboard composed solely of basketball superstar Kobe Bryant’s face had basketball shoe tread superimposed on it and a Gatorade billboard overlaid the Gatorade logo on a photo of basketball player Michael Jordan jumping several feet in the air preparing to take an impossible shot).

83. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1206 n.175 (2012) (“It may contain allusions to matters of self-government or public policy (e.g., to claims to preferability of synthetic to natural furs, of local manufacturing to outsourcing, or of greening) as well as to matters of lifestyle (e.g., in personal appearance like clothes, jewelry, or body shape or beauty aids, or in material possessions like automobiles, houses, or athletic equipment) or more conventional notions of culture (e.g., art, literature, music, theatre, movies, athletic events).”).

84. *See, e.g.*, Dove US, *Dove Real Beauty Sketches | You’re More Beautiful Than You Think*, YOUTUBE (Apr. 14, 2013), <https://www.youtube.com/watch?v=litXW91UauE> [<https://perma.cc/V77W-HX3>]; Tide, *Tide | Tide Loads of Hope: About Tide Loads of Hope*, YOUTUBE (May 3, 2011), <https://www.youtube.com/watch?v=XGcBgc4xPTI> [<https://perma.cc/8AZQ-2QR>]; Taylor, *supra* note 81.

further.<sup>85</sup> Rather than relying on commercials, print, or online advertisements, which alert customers of the “buy me” nature of the advertisements, many corporations disguise the commercial purpose by paying to have their products incorporated into the story lines of television shows and movies.<sup>86</sup> In all cases, image advertising attempts to build positive associations with the product or services being offered, or with the corporation itself.<sup>87</sup> These advertisements will rarely, if ever, provide information about the price or quality of a product or service for sale.<sup>88</sup> Nonetheless, whether the ad features facts and figures, or an especially poignant story, the primary motivation is always increased profits for the corporation.<sup>89</sup>

### C. Trademark Law

The Lanham Act,<sup>90</sup> which was signed into law in 1946 by President Harry Truman and named after Representative Fritz G. Lanham of Texas, has two major purposes. The first purpose is to protect the “commercial class against unscrupulous commercial conduct.”<sup>91</sup> The second is to “protect consumers . . . against all forms of misdescription or misrepresentation of products and services in commerce.”<sup>92</sup> A trademark is “a word, name, symbol, device, or other designation . . . that is distinctive of a person’s goods or services and that is used in a manner that identifies

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85. See *The 9 Most Blatant Uses of Product Placement in Film*, SHORTLIST, <http://www.shortlist.com/entertainment/films/the-9-most-blatant-uses-of-product-placement-in-film> [<http://perma.cc/SET9-K27R>].

86. See, e.g., *id.*; Mallory Russell, *Here are Some of TV’s Most Successful Product Placements*, BUS. INSIDER (Mar. 14, 2012, 5:52 PM), <http://www.businessinsider.com/here-are-some-of-tvs-best-product-placements-2012-3?op=1> [<http://perma.cc/BYZ8-UJAF>].

87. See Piety, *supra* note 70, at 386–88.

88. See, e.g., Taylor, *supra* note 81.

89. See Piety, *supra* note 70, at 386 n.111 (“Advertisers and marketers may not be able to draw a straight line of cause and effect between a particular ad and sales, but all such efforts are ultimately intended to generate positive economic results.”).

90. Lanham (Trademark) Act, 15 U.S.C. §§ 1051–1141n (2012).

91. *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971).

92. *Yameta Co. v. Capitol Records, Inc.*, 279 F. Supp. 582, 586 (S.D.N.Y. 1968).

those goods or services and distinguishes them from the goods or services of others.”<sup>93</sup> Essentially, a trademark reliably indicates to consumers those products they want to buy.<sup>94</sup> This source identification purpose benefits both consumers and producers.<sup>95</sup> Guided by trademarks, consumers spend less time searching for the products they desire.<sup>96</sup> Additionally, trademarks “ensure that producers reap the rewards of satisfying customers because they, not an imposter, retain the benefit of increased goodwill and future repeat purchases.”<sup>97</sup> The remedy sought in trademark cases is “based upon the party’s right to be protected in the goodwill of a trade or business.”<sup>98</sup>

#### *D. The Right of Publicity*

The genesis of the right of publicity can be found in an 1890 law review article by Samuel Warren and Louis Brandeis,<sup>99</sup> written in response to the portable camera—then, a recent technological innovation that enabled surreptitious photography<sup>100</sup> by the all “too enterprising press,”<sup>101</sup> who “overstep[ped] in every direction the obvious bounds of propriety and of decency.”<sup>102</sup> Citing “the intensity and complexity of life”<sup>103</sup> and the need to “retreat from the world,”<sup>104</sup> Warren and Brandeis speak of privacy

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93. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995).

94. See William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 54 (2008).

95. *Id.*

96. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268–70, 275 (1987).

97. McGeeveran, *supra* note 94, at 54.

98. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916).

99. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

100. *Id.* at 211.

101. *Id.* at 206.

102. *Id.* at 196.

103. *Id.*

104. *Id.*



as “the right to be let alone.”<sup>105</sup> A violation of this right of privacy resulted in a “mere injury to the feelings,”<sup>106</sup> which deserves no less a legal remedy, they argued, than an injury to the body or property.<sup>107</sup>

Georgia was the first state to adopt right of privacy legislation.<sup>108</sup> The Supreme Court of Georgia found a life insurance company liable for invasion of privacy for using the plaintiff’s image without consent in a newspaper advertisement.<sup>109</sup> Echoing Warren and Brandeis, the court declared, “the body of a person cannot be put on exhibition at any time or at any place without his consent.”<sup>110</sup> In 1960, legal scholar William Prosser identified four torts under the right of privacy—intrusion upon seclusion, appropriation, public disclosure of private facts, and false light publicity—that were then incorporated into the Restatement (Second) of Torts in 1977.<sup>111</sup>

While these four torts protect private citizens from being involuntarily propelled into the public eye, courts were initially unwilling to apply them to public figures, reasoning “the public interest in obtaining information becomes dominant over the individual’s desire for privacy.”<sup>112</sup> One such public figure was Davey O’Brien, a famous collegiate and professional football player who encouraged teenagers not to drink alcohol and refused endorsement opportunities from beer companies.<sup>113</sup> Pabst Brewing Company used O’Brien’s image without his consent in an advertising

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105. Warren & Brandeis, *supra* note 99, at 193.

106. *Id.* at 197.

107. *Id.* at 195–97.

108. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70–71 (1905).

109. *See id.*

110. *Id.* at 70.

111. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

112. *See, e.g., Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (dismissing an invasion of privacy claim where the former child prodigy plaintiff, who sought obscurity as an adult, had details of his life published without his consent in a factual but unflattering magazine article).

113. *See O’Brien v. Pabst Sales, Co.*, 124 F.2d 167, 168–69 (5th Cir. 1941).

calendar and he sued for invasion of privacy.<sup>114</sup> Finding for Pabst, the Fifth Circuit acknowledged that although O'Brien may have been injured by "the fact that the publication impliedly declared that O'Brien was endorsing or recommending the use of Pabst beer," there was no invasion of privacy because O'Brien was not a private figure and could not be harmed by more publicity.<sup>115</sup>

Less than ten years later, in another case involving a famous athlete, the term "right of publicity" was coined.<sup>116</sup> In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a 1953 case between two rival chewing gum manufacturers fighting over the right to use the images of Major League Baseball players on trading cards, the Second Circuit recognized that "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph."<sup>117</sup> Further, celebrities' feelings are not "bruised" by public exposure.<sup>118</sup> Rather, public exposure allows celebrities to receive compensation for authorizing the use of their name or image in advertisements, compensation without which they would "feel sorely deprived."<sup>119</sup> Thus, "[t]his right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."<sup>120</sup>

As J. Thomas McCarthy stated, "After the 1953 *Haelan* decision, the rest is history."<sup>121</sup> Today, the right of publicity is the right of every person "to control the commercial use of his or her identity."<sup>122</sup> Both celebrities

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114. *Id.* at 168.

115. *Id.* at 169–70.

116. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. J. Thomas McCarthy & Paul M. Anderson, Essay, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 197 (2001).

122. 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2000).

and noncelebrities find protection under the right of publicity,<sup>123</sup> though it is much more common for celebrities to avail themselves of the right. Identity has been construed broadly to include not just a person's name or image, but also a distinctive voice,<sup>124</sup> nickname,<sup>125</sup> and catchphrase.<sup>126</sup> As of the writing of this Comment, twenty-one states have right of publicity statutes.<sup>127</sup> In addition, thirty-eight states recognize the right via common law.<sup>128</sup> While the right of publicity affords an individual the ability to permit or prevent the use of his or her identity in an advertisement to help sell a product, it cannot be used to prevent the use of his or her identity in a news story, an entertainment parody or satire, or an unauthorized biography.<sup>129</sup>

Practically speaking, then, “the only kind of speech impacted by the right of publicity is commercial speech – advertising – not news, not stories, not entertainment and not entertainment satire and parody – only advertising and other purely commercial uses.”<sup>130</sup> Notably, therefore, the distinction between commercial and noncommercial speech is especially important in right of publicity cases.<sup>131</sup> While noncommercial speech is

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123. J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 134 (1995).

124. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (affirming the jury verdict in favor of the plaintiff-singer claiming voice misappropriation and false endorsement in violation of the Lanham Act); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (holding that appropriation occurs “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product”).

125. See, e.g., *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 382–83 (Wis. 1979) (recognizing that a famous football player has a right of publicity concerning his nickname, “Crazylegs”).

126. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987) (upholding injunction against defendant from using Johnny Carson's catchphrase, “Here's Johnny,” in advertisements for portable toilets).

127. *Statutes, RIGHT OF PUBLICITY*, <http://rightofpublicity.com/statutes> [<https://perma.cc/D4A9-JFTF>].

128. *Id.*

129. See 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8:15 (2d ed. 2000).

130. McCarthy & Anderson, *supra* note 121, at 198.

131. See *id.* at 202.

afforded the full protection of the First Amendment and is generally a valid defense to a right of publicity claim, commercial speech is given less protection under the First Amendment, and, therefore, does not support a valid defense to a right of publicity claim.<sup>132</sup> As *Jordan v. Jewel* notes, however, a determination that the speech at issue is noncommercial does not necessarily absolve a defendant from liability in Lanham Act or unfair competition claims.<sup>133</sup>

#### V. THE CASE: JORDAN V. JEWEL

In *Jordan v. Jewel Food Stores, Inc.*, the Seventh Circuit addressed Michael Jordan's claims of trademark and right of publicity alleged against Jewel Food Stores, Inc., the operator of supermarkets in the greater Chicago area.<sup>134</sup> In 2009, Michael Jordan was inducted into the Naismith Memorial Basketball Hall of Fame.<sup>135</sup> To mark the occasion, Time, Inc. produced a special commemorative issue of *Sports Illustrated Presents* devoted entirely to Jordan's career.<sup>136</sup> Time offered Chicago-area businesses, including Jewel Food Stores, Inc., free advertising space in the issue in exchange for agreeing to stock the magazine in stores.<sup>137</sup> The dispute between Michael Jordan and Jewel-Osco arose out of Jewel-Osco's ad in the commemorative issue of *Sports Illustrated Presents*.<sup>138</sup>

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132. *Id.*

133. *See Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515 (7th Cir. 2014).

134. *See generally Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

135. *Legends Profile: Michael Jordan*, NBA (Mar. 4, 2013, 4:14 PM), <http://www.nba.com/history/legends/michael-jordan/index.html> [<http://perma.cc/RVR7-8Z4C>].

136. Alexander Wolff, *Witnesses to History: Five Sports Illustrated Writers Share Their Reminiscences of the Defining Moments in Michael Jordan's Career*, SPORTS ILLUSTRATED (Nov. 4, 2009), <http://www.si.com/vault/2009/11/04/105873765/witnesses-to-history> [<http://perma.cc/Z223-H2BV>].

137. *Jordan*, 743 F.3d at 511.

138. *Id.* at 509.

## A. *The Parties*

### 1. Michael Jordan

Routinely referred to as one of the greatest<sup>139</sup>—if not *the* greatest<sup>140</sup>—basketball players of all time, Michael Jordan is still the NBA’s biggest star thirteen years after his retirement in 2003.<sup>141</sup> Michael Jordan first came to national attention his freshman year at the University of North Carolina at Chapel Hill when he scored the game-winning shot in the 1982 NCAA Championship game.<sup>142</sup> Drafted third overall in the 1984 season by the Chicago Bulls, Jordan is responsible for reviving the Bulls franchise.<sup>143</sup> Jordan’s accolades and accomplishments during his fourteen-year playing career are legendary. Jordan is a five-time NBA MVP.<sup>144</sup> He won six NBA championships with the Chicago Bulls.<sup>145</sup> He was selected as an NBA All-Star fourteen times.<sup>146</sup> In both 1984 and 1992, he was selected for the United States Olympic basketball team.<sup>147</sup> He still holds the record

139. Fred Mitchell, *NBA’s Best All-Time? You Be the Judge*, CHI. TRIBUNE (Mar. 23, 2012), [http://articles.chicagotribune.com/2012-03-23/sports/ct-spt-0324-mitchell--20120324\\_1\\_the-nba-kareem-abdul-jabbar-lebron-james](http://articles.chicagotribune.com/2012-03-23/sports/ct-spt-0324-mitchell--20120324_1_the-nba-kareem-abdul-jabbar-lebron-james) [<http://perma.cc/LXF6-TBF9>] (acknowledging Jordan’s greatness, but arguing that Kareem Abdul-Jabbar, the NBA’s all-time leading scorer, should get the title).

140. See *Legends Profile: Michael Jordan*, *supra* note 135; see also Jeff Fox, *Top 10 NBA Players of All-Time – 2014 Update*, HOOPS MANIFESTO (Jul. 16, 2014, 7:16 PM), <http://hoopsmanifesto.com/articles/basketball/top-10-nba-players-of-all-time-2014-update.html> [<http://perma.cc/N93Q-Y8QT>].

141. See generally Kurt Badenhausen, *How Michael Jordan Made \$90 Million in 2013*, FORBES (Feb. 27, 2014, 12:00 PM), <http://www.forbes.com/sites/kurtbadenhausen/2014/02/27/how-michael-jordan-made-90-million-in-2013> [<http://perma.cc/MRT8-8RB9>].

142. *Id.*

143. See *Michael Jordan*, ESPN, [http://espn.go.com/nba/player/\\_/id/1035/michael-jordan](http://espn.go.com/nba/player/_/id/1035/michael-jordan) [<http://perma.cc/766M-2Y4G>]; see also Mark Vancil, *Michael Jordan: Phenomenon*, HOOP MAGAZINE, Dec. 1991, [http://www.nba.com/jordan/hoop\\_phenomenon.html](http://www.nba.com/jordan/hoop_phenomenon.html) [<http://perma.cc/84VK-FP8J>].

144. See *Michael Jordan*, *supra* note 143.

145. See Fox, *supra* note 140.

146. See *id.*

147. See *Legends Profile: Michael Jordan*, *supra* note 135.

for the highest career-scoring average,<sup>148</sup> and was named the ESPN North American Athlete of the Twentieth Century.<sup>149</sup>

Michael Jordan is a marketing juggernaut and has been since the beginning of his career.<sup>150</sup> In 1984, after Jordan and the U.S. Olympic men's basketball team "tore through the Olympic competition, winning its eight games by an average of 30 points,"<sup>151</sup> Nike recognized Jordan's potential as a product spokesman and offered him a five-year contract worth \$500,000 annually plus royalties.<sup>152</sup> The first "Air Jordans"—Nike's Jordan-endorsed sneaker—were black and red, designed to match the Bulls uniforms, but were in violation of NBA regulations because they did not feature any white.<sup>153</sup> Jordan was fined \$5,000 for each game he wore them.<sup>154</sup> Nike happily paid Jordan's fines and capitalized on the attention by designing a commercial around the controversy.<sup>155</sup> The Jordan shoe controversy was one of the biggest stories of the 1984–85 basketball season.<sup>156</sup> In February 2013, Nike released the twenty-eighth shoe in the Jordan franchise, the Air Jordan XX8, with a suggested retail price of \$250.<sup>157</sup> In addition, "retro" versions of the Air Jordan sell for a retail price of \$130 to \$150.<sup>158</sup> In 2012, the Jordan brand contributed roughly \$2

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148. See Fred Kiger, *ESPN SportsCentury Air Supreme*, ESPN, <http://espn.go.com/sportscentury> [<http://perma.cc/5PTP-GTBK>].

149. *Id.*

150. Badenhausen, *supra* note 141.

151. Jack McCallum, *How Michael Jordan and Nike Teamed Up to Conquer the World*, DEADSPIN (July 10, 2012, 1:45 PM), <http://deadspin.com/5924825/how-michael-jordan-and-nike-teamed-up-to-conquer-the-world> [<http://perma.cc/Y8E6-38SW>].

152. Michael Brouillet, *Top 5 Ways Michael Jordan Still Makes His Money?*, HOOPSVIBE (July 2, 2013), <http://www.hoopsvibe.com/features/170597-hows-michael-jordan-make-his-money> [<http://perma.cc/W44E-39EX>].

153. Badenhausen, *supra* note 141.

154. *Id.*

155. See KicksOnFire.com, *Banned Air Jordan 1 Commercial*, YOUTUBE (Feb. 25, 2010), <https://www.youtube.com/watch?v=eEmAgKYV1uo> [<http://perma.cc/B47S-6HDK>].

156. See McCallum, *supra* note 151.

157. Badenhausen, *supra* note 141.

158. *Id.*

billion of Nike's \$26 billion revenue.<sup>159</sup>

Forbes listed Michael Jordan as the highest earning retired athlete of 2013.<sup>160</sup> In addition to his highly lucrative deal with Nike, Jordan also enjoys long-time endorsement deals with Gatorade, Hanes, Upperdeck and Five Star Fragrances.<sup>161</sup> The value of Jordan's name is due, at least in part, to the scarcity with which he lends it to product endorsements; more often than not, Jordan refused offers for what would have been highly profitable appearances and endorsements.<sup>162</sup> In 1991, after he won his first NBA Championship with the Bulls, Jordan was analyzed by a marketing evaluation firm according to his "recognition value" and was found to be "more 'lovable' than Walter Cronkite" in the public's mind.<sup>163</sup> Thirteen years after his retirement from the NBA, Jordan is still the most identifiable athlete in the world.<sup>164</sup>

## 2. Jewel-Osco

Founded in 1899, Jewel Food Stores, Inc. expanded steadily throughout the twentieth century<sup>165</sup> and is now the "operator of 175 Jewel-Osco supermarkets in and around Chicago."<sup>166</sup> Jewel's corporate philosophy is offering products to customers "at a fair price, with lots of tender, loving care."<sup>167</sup> Jewel also claims a tradition of fostering local

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159. *Id.*

160. *Id.*

161. *Id.*

162. See Vancil, *supra* note 143; Darren Rovell, *Supermarket Chain Must Pay Michael Jordan \$8.9 Million for Use of Name*, ESPN (Aug. 22, 2015), [http://espn.go.com/nba/story/\\_/id/13486052/supermarket-chain-pay-michael-jordan-89-million-use-name](http://espn.go.com/nba/story/_/id/13486052/supermarket-chain-pay-michael-jordan-89-million-use-name) [<http://perma.cc/9RC9-JZH3>] ("Jordan also revealed he turned down an \$80 million offer to endorse headphones.").

163. Vancil, *supra* note 143.

164. See Brouillet, *supra* note 152.

165. *Our Story*, JEWEL-OSCO, <http://www.jewelosco.com/our-company/traditions-history> [<http://perma.cc/KFK5-VMD6>].

166. *Jordan*, 743 F.3d at 511.

167. *Our Story*, *supra* note 165.

organizations and charities serving those in need.<sup>168</sup> To that end, Jewel occasionally issues “civic booster” ads commending local community organizations on “notable achievements.”<sup>169</sup> For example, Jewel made and distributed “two public-service ads celebrating the work of Chicago’s Hispanocare and South Side Community Services.”<sup>170</sup>

### B. The Tribute Advertisement

In response to Time’s offer to advertise in the Michael Jordan commemorative issue of *Sports Illustrated*, Jewel submitted a full-page ad congratulating Jordan on his induction into the Hall of Fame.<sup>171</sup> Jewel paid no money for the ad space in the magazine.<sup>172</sup> Following the Hall of Fame ceremony, the issue was available for a three-month period.<sup>173</sup> Time’s offer was also extended to and accepted by “rival Chicago-area grocery chain” Dominick’s Finer Foods, LLC.<sup>174</sup> Not surprisingly, Jordan also sued Dominick’s for its ad in the commemorative issue.<sup>175</sup>

On its face, the Dominick’s ad clearly resembles an advertisement. The top three-quarters of Dominick’s full page tribute featured a recreation of Jordan’s jersey from the Chicago Bulls.<sup>176</sup> The number “23”

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168. See *Community Leaders, Coca-Cola and Jewel-Osco Kick-Off “Recycle & Win” Contest*, CITY OF CHI. (Sept. 15, 2004), [http://www.cityofchicago.org/city/en/depts/streets/provdrs/streets\\_san/news/2014/sep/community-leaders--coca-cola-and-jewel-osco-kick-off--recycle---.html](http://www.cityofchicago.org/city/en/depts/streets/provdrs/streets_san/news/2014/sep/community-leaders--coca-cola-and-jewel-osco-kick-off--recycle---.html) [<http://perma.cc/7TMG-UTNW>]; *In the Community*, JEWEL-OSCO, <http://www.jewelosco.com/our-company/in-the-community> [<http://perma.cc/M57R-GXQB>].

169. *Jordan*, 743 F.3d at 518.

170. *Id.*

171. See *id.* at 511.

172. See *id.* at 512.

173. *Id.* at 511.

174. *Id.* at 512 & n.2.

175. David Haugh, *Brand Michael Jordan a Bully in Winning Fight with Dominick’s*, CHI. TRIBUNE (Aug. 23, 2015, 4:57 PM), <http://www.chicagotribune.com/sports/columnists/ct-michael-jordan-david-haugh-spt-0824-20150823-column.html> [<http://perma.cc/WPP6-7PEH>] (reporting that in August 2015, a Chicago jury ordered Dominick’s parent company to pay Jordan \$8.9 million for the unauthorized use of his image in its *Sports Illustrated* tribute ad).

176. *Why Michael Jordan Wants \$5 Million for a \$2 Coupon*, COUPONS IN THE NEWS



appeared in black with white trim against a red background.<sup>177</sup> The words “Congratulations, MICHAEL JORDAN” appear above the number “23.”<sup>178</sup> “Congratulations” is in a cursive font, while “MICHAEL JORDAN” is in a serif font similar to that used to display athletes’ last names on the back of NBA jerseys.<sup>179</sup> A black silhouette approximating Jordan’s signature “Air Jordan” silhouette is positioned between the “D” and “A” of “JORDAN.”<sup>180</sup> The page also features a simulation of a basketball ripping through the page between the “2” and “3” of “23.”<sup>181</sup> A thick black bar separates the bottom quarter of the page.<sup>182</sup> There is a dashed line at the top of the black bar.<sup>183</sup> The words “Dominick’s COUPON” are superimposed on the black bar.<sup>184</sup> Directly above the black bar are the words “YOU ARE A CUT ABOVE.”<sup>185</sup> The bottom quarter of the page has a white background and features a two dollars off coupon for Rancher’s Reserve steak.<sup>186</sup> There is a color photograph of grilled steak sitting in its juices on a white plate with a bit of green garnish.<sup>187</sup> Next to the steak, the words “\$2<sup>00</sup> off RANCHER’S RESERVE STEAK” appear above a

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(June 17, 2013), <http://couponsinthenews.com/2013/06/17/why-michael-jordan-wants-5-million-for-a-2-coupon> [<http://perma.cc/VWG2-Y38H>].

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Why Michael Jordan Wants \$5 Million for a \$2 Coupon*, *supra* note 176.

183. *Id.*

184. *Id.*

185. *Id.* In essence, the ad compares Jordan with a piece of meat. This no doubt influenced the jury in awarding Jordan \$8.9 million for the unauthorized use of his image in the advertisement. See Kim Janssen, *Jordan Says ‘It Was Never About the Money’ After \$8.9M Jury Award*, CHI. TRIBUNE (Aug. 21, 2015, 9:46 PM), <http://www.chicagotribune.com/business/ct-michael-jordan-dominicks-case-0822-biz-20150821-story.html> [<http://perma.cc/C7H2-XNCQ>].

186. *Why Michael Jordan Wants \$5 Million for a \$2 Coupon*, *supra* note 176.

187. *Id.*

barcode and Dominick's corporate logo.<sup>188</sup>

Jordan sued both Dominick's and Jewel for their respective advertisements in the commemorative issue of *Sports Illustrated*.<sup>189</sup> The Dominick's ad very clearly aligns with the general understanding of an "advertisement;" it references Jordan's achievements but unequivocally proposes a commercial transaction by including a coupon for two dollars off the price of a particular product for sale at Dominick's stores.<sup>190</sup> Conversely, the purpose of Jewel's page is harder to discern. The Jewel ad conveys no information about any products sold or services offered by Jewel, nor is there any information conveyed about Jewel's business.<sup>191</sup>

The top half of Jewel's full-page ad included the Jewel-Osco logo and slogan, "Good things are just around the corner."<sup>192</sup> Above the Jewel-Osco logo and slogan was the following text:

#### A Shoe In!

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 accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.<sup>193</sup>

A pair of basketball shoes dominated the bottom half of the ad, each bearing Jordan's jersey number 23.<sup>194</sup> The shoes were in a spotlight on a

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188. *Id.*

189. *Jordan*, 743 F.3d 509; Haugh, *supra* note 175.

190. *Why Michael Jordan Wants \$5 Million for a \$2 Coupon*, *supra* note 176.

191. *Jordan*, 743 F.3d at app..

192. *Id.*

193. *Id.*

194. *See id.* Jordan wore the number "23" during his entire NBA playing career, with the exception of one game when he had to wear the number "12" because his jersey was allegedly stolen before the game. Tony Andracki, *Why Did Michael Jordan Choose No. 23?*, COMCAST SPORTSNET (Nov. 14, 2013, 9:00 AM), <http://www.csnchicago.com/bulls/why-did-michael-jordan-choose-no-23> [<http://perma.cc/PV2T-R5CU>].

bare hardwood floor, presumably to resemble a basketball court.<sup>195</sup> Jewel's page does not identify whether and what types of products or services are sold by Jewel.<sup>196</sup> While the ad included Jewel's trademarked logo and slogan, neither solved the mystery of who or what "Jewel-Osco" is. Indeed, the only identifying indicator included in the ad was that Jewel is a "fellow Chicagoan . . . just around the corner."<sup>197</sup> Just as anyone who has never been to New York City would have no idea that Duane Reade is a chain of regional drugstores, anyone who has never been to the greater Chicago area would have no idea that Jewel-Osco is a grocery store chain.<sup>198</sup>

As the Seventh Circuit observed, "To Jordan the [Jewel] ad was not a welcome celebratory gesture but a misappropriation of his identity for the supermarket chain's commercial benefit."<sup>199</sup> Indeed, shortly after the commemorative issue hit newsstands, Jordan filed suit against Jewel Food Stores, Inc. in Illinois state court.<sup>200</sup> He sought \$5 million in damages for violations of the Illinois Right of Publicity Act,<sup>201</sup> the Illinois Consumer Fraud and Deceptive Business Practices Act,<sup>202</sup> the Illinois common law of unfair competition, and the federal Lanham Act.<sup>203</sup> Jewel removed the case to federal court.<sup>204</sup>

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195. *Jordan*, 743 F.3d at app..

196. *Id.*

197. *Id.*

198. *About Duane Reade*, DUANEREADE, <http://www.duanereade.com/Company.aspx> [<http://perma.cc/5N9D-QQQ5>] ("Duane Reade has grown to become the most recognized drug store chain in metropolitan New York.").

199. *Jordan*, 743 F.3d at 511.

200. Complaint, *Jordan v. Jewel Food Stores, Inc.*, No. 2009-L-015549, 2009 WL 5068519 (Ill. Cir. Ct. Jan. 20, 2010).

201. Complaint, *supra* note 200, at 5–6 (citing 765 ILL. COMP. STAT. §§ 1075/1–60).

202. *Id.* at 8–9 (citing 815 ILL. COMP. STAT. §§ 505/2–12).

203. *Id.* at 6–8 (citing 15 U.S.C. § 1125(a)).

204. *Jordan*, 743 F.3d at 513.

### C. The Courts' Decisions

#### 1. The District Court

The classification of speech as commercial or noncommercial presented an issue of law for the court.<sup>205</sup> The district court “agreed with Jewel that the ad was noncommercial speech.”<sup>206</sup> In coming to this conclusion, the district court placed “substantial weight” on the fact that the Jewel ad did not propose a commercial transaction.<sup>207</sup> The district court also noted that the Seventh Circuit has followed this formulation.<sup>208</sup> The ad could not be viewed, “even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction.”<sup>209</sup> At its most “basic level,” the court concluded, “the page does not propose any kind of commercial transaction, as readers would be at a loss to explain what they have been invited to buy.”<sup>210</sup>

Jordan argued that “Jewel’s use of its trade name, Jewel-Osco, and its advertising slogan, ‘Good things are just around the corner,’ . . . excites consumers with the thought that the ‘good things’ those stores offer are readily available and easy to get,” and “the slogan’s placement under Jewel’s logo, and its deployment in the congratulatory text, means that the page proposes a commercial transaction.”<sup>211</sup> The district court rejected Jordan’s argument, however, and determined his assertion “utterly fail[ed]

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205. *Jordan v. Jewel Food Stores, Inc.*, 851 F. Supp. 2d 1102, 1105 (N.D. Ill. 2012); *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (“Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech, we must first determine the proper classification of the mailings at issue here.”); *see also United States v. Benson*, 561 F.3d 718, 725–26 (7th Cir. 2009) (employing the same approach when classifying speech as commercial or noncommercial).

206. *Jordan*, 743 F.3d at 513.

207. *Id.* at 517.

208. *Jordan*, 851 F. Supp. 2d at 1106 (citing *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 149 F.3d 679, 684–86 (7th Cir. 1998) (“The advertised publications . . . are not commercial speech because they do not propose a commercial transaction between [the speaker] and a specific customer.”)).

209. *Id.* at 1106–07.

210. *Id.* at 1107.

211. *Id.*

to account for context.”<sup>212</sup> Because Jewel’s tribute page appeared in a special commemorative issue of *Sports Illustrated* “expressly designed as a paean to Jordan, . . . Jewel’s page embraces the issue’s theme, focusing not on Jewel or its particular products and services, but on Jordan.”<sup>213</sup> This issue was “not ordinary *Sports Illustrated* fare.”<sup>214</sup> As for the use of Jewel’s logo, “Jewel-Osco,” in the tribute, the court surmised that this was merely the “most effective way to identify Jewel as the speaker.”<sup>215</sup> If the page had been attributed to “Supervalu, Inc.” (Jewel’s parent company) or “Jewel Food Stores, Inc.” (Jewel’s formal corporate name), “[r]eaders, particularly in Chicago, would have had trouble identifying the speaker” of the page.<sup>216</sup>

According to the court, the incorporation of Jewel’s slogan into the tribute—by “describing Jordan as being ‘just around the corner’—was simply a play on words.”<sup>217</sup> It was, the court determined, simply a “cheeky way to ensure that the congratulatory message *sounded* like it was coming from Jewel and not from any other person or entity.”<sup>218</sup> The court analogized Jewel’s tribute ad with a hypothetical ad that might be placed in the *Los Angeles Times* by “Arnold Schwarzenegger, the movie star turned Governor of California,” congratulating the Los Angeles Lakers on winning the 2009 NBA championship.<sup>219</sup> Schwarzenegger’s imaginary tribute page might include text similar to the Jewel ad, with references to “Schwarzenegger’s memorable catch-phrase” from the “Terminator” movie franchise.<sup>220</sup> No one but Schwarzenegger would formulate a congratulatory

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212. *Id.*

213. *Id.*

214. *Jordan*, 851 F. Supp. 2d at 1107.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Jordan*, 851 F. Supp. 2d at 1107–08. The district court’s imaginary Schwarzenegger tribute to the Los Angeles Lakers reads: “Congratulations to our Lakers for ‘terminating’ the Orlando Magic and bringing home yet another NBA title, and to Kobe Bryant for winning the Finals MVP. Let me join all Angelenos in saying that Kobe and the team surely will ‘be back’ in

message in “precisely that way.”<sup>221</sup> The imaginary Schwarzenegger ad deploys “Terminator” references to make the congratulatory message more effective, not as an attempt “to tie the Lakers . . . to the ‘Terminator’ franchise in an effort to encourage readers to buy Terminator DVDs and video games and thereby enhance Schwarzenegger’s royalty checks.”<sup>222</sup> Similarly, the district court stated, Jewel’s incorporation of the “just around the corner” language in the congratulatory message to Jordan, when viewed in context, is “deployed to serve the congratulatory theme—it personalizes the message and reinforces the notion that Jordan is Jewel’s ‘fellow Chicagoan’ and therefore a source of pride for Jewel and all other Chicagoans.”<sup>223</sup> The court concluded that “[i]t is highly unlikely that the slogan’s presence would lead a reasonable reader to conclude that Jewel was linking itself to Jordan in order to propose a commercial transaction.”<sup>224</sup>

Jewel then asserted that the “commercial-speech ruling conclusively defeated all of Jordan’s claims. Jordan agreed, accepting Jewel’s position that the First Amendment provided a complete defense.”<sup>225</sup> Final judgment was entered in favor of Jewel, and Jordan appealed.<sup>226</sup>

## 2. The Court of Appeals

Because both parties agreed that “if Jewel’s ad [was] ‘noncommercial speech’ in the constitutional sense, then the First Amendment [would provide] a complete defense to all claims,”<sup>227</sup> the sole issue on appeal before the Seventh Circuit was whether Jewel’s ad was properly classified

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2010!” *Id.* It is worth noting that the district court’s Schwarzenegger/Lakers analogy does not quite line up with the Jewel/Jordan situation. While Jewel is a regional supermarket generally unknown outside of the greater Chicago area, Schwarzenegger is a world-famous celebrity in his own right.

221. *Id.* at 1108.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Jordan*, 743 F.3d at 513.

226. *Id.*

227. *Id.* at 515.

as commercial speech or noncommercial speech.<sup>228</sup> If the ad was commercial speech, then it could be regulated, normal liability rules would apply (statutory and common law), and the battle would move to the merits of Jordan's claims.<sup>229</sup>

Before commencing the analysis, Judge Sykes noted that the commercial speech doctrine was generally developed by the Supreme Court in public law cases, that is, cases in which the validity of a state law prohibiting certain types of speech was challenged by a would-be citizen speaker or corporate entity upon whom the speech prohibition was imposed.<sup>230</sup> When balancing the interests in a public law case, the court weighs the state's proffered reasons for the law in question against the importance of the speaker's speech rights.<sup>231</sup> In the instant case, however, the state was not a party to the case. Rather, *Jordan v. Jewel* was a "clash of private rights."<sup>232</sup> Therefore, the court serves as the state actor "regulating" Jewel's speech; the court, in determining that the Jewel ad was commercial speech, essentially removed Jewel's First Amendment shield against Jordan's claims.<sup>233</sup>

The court briefly sketched the history of the commercial speech doctrine, from *Valentine*, which afforded no First Amendment protection to commercial speech, to the current level of protection afforded commercial speech, as outlined in *Fox*<sup>234</sup> and *Zauderer*.<sup>235</sup> The court also addressed the

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228. *Id.*

229. *Id.* at 511.

230. *Id.* at 514.

231. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561-66 (1980).

232. *Jordan*, 743 F.3d at 514.

233. *Id.* at 515.

234. *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) ("Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'")

235. *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) ("There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'")

two justifications generally put forth for the lesser degree of protection granted to commercial speech.<sup>236</sup> First, “commercial speech is ‘more easily verifiable by its disseminator’ and ‘more durable’—that is, less likely to be chilled by regulations—than fully protected noncommercial speech.”<sup>237</sup> Second, “commercial speech ‘occurs in an area traditionally subject to government regulation.’”<sup>238</sup>

Next, the court attempted to clarify the definitional tests for commercial speech set forth by the Supreme Court. First, the court noted the “basic definition” of commercial speech as “speech that proposes a commercial transaction.”<sup>239</sup> The court emphasized that this “core notion of commercial speech” was merely the definitional “starting point”<sup>240</sup> and that additional variants of communication could also “constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.”<sup>241</sup> Cautioning against a simplistic reading of the distinction between commercial and noncommercial speech based solely on whether the speech at issue proposes a commercial transaction, the court reasoned that this common misunderstanding was perhaps due to the Supreme Court’s phrasing of the issue in *Virginia State Board of Pharmacy*, the case in which First Amendment protection was first extended to commercial speech.<sup>242</sup>

In clarifying the difference between commercial and noncommercial speech, the Seventh Circuit was mindful of the “commonsense distinction”

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236. *Jordan*, 743 F.3d at 515.

237. *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976)).

238. *Id.* (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001)).

239. *Id.* at 516 (citing *Bd. of Trs.*, 492 U.S. at 482). The court also cites *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 917–18 (7th Cir. 1984) to demonstrate that the “hallmark of commercial speech” is that it “pertains to commercial transactions,” including those “facilitated through use of a trademark.” *Id.*

240. *Id.* (citing *Bolger*, 463 U.S. at 66).

241. *Id.* (quoting *Bd. of Trs.*, 492 U.S. at 475). The court also cites several other cases in line with this definitional expansion beyond the core notion, that is, speech that proposes a commercial transaction.

242. *Jordan*, 743 F.3d at 516 & n.7 (discussing *Va. State Bd. of Pharmacy*, 425 U.S. at 762, which phrased the issue as “whether speech which does *no more than* propose a commercial transaction is so removed from any exposition of ideas . . . that it lacks all protection”).



between commercial speech and other varieties of speech.<sup>243</sup> The court noted that the *Bolger* decision was instructive on the commonsense distinction<sup>244</sup> and would be especially helpful in applying the commercial speech doctrine in this case because the speech at issue in both *Bolger* and the Jewel ad contained commercial and noncommercial elements.<sup>245</sup> The court described the speech at issue in *Bolger* as “informational pamphlets providing general factual information about prophylactics but also containing information about the manufacturer’s products in particular.”<sup>246</sup> Because the *Bolger* pamphlets “were a form of advertising, . . . referred to specific commercial products, and . . . were distributed by the manufacturer for economic purposes,” the pamphlets were “properly classified as commercial speech.”<sup>247</sup> The court then outlined the interpretation of the *Bolger* formulation examining speech containing commercial and noncommercial elements adopted in the Seventh Circuit: “We have read *Bolger* as suggesting certain guideposts for classifying speech that contains both commercial and noncommercial elements; relevant considerations include ‘whether (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech.’”<sup>248</sup>

In applying the commercial speech doctrine to Jewel’s tribute page, the Seventh Circuit was cognizant of the realities of commercial advertising, which it characterized as “enormously varied in form and style . . . highly creative, sometimes abstract, and frequently [reliant] on subtle clues.”<sup>249</sup> Rejecting the reasoning of the district court, which concluded that the tribute page must have been noncommercial speech because it did not propose a commercial transaction,<sup>250</sup> the appellate court

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243. *Id.* at 517 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

244. *Id.*

245. *Id.*

246. *Id.* (citing *Bolger*, 463 U.S. at 62).

247. *Id.* (citing *Bolger*, 463 U.S. at 62).

248. *Jordan*, 743 F.3d at 517 (citing *Benson*, 561 F.3d at 725).

249. *Id.* at 517–18.

250. *Id.* at 517; *Jordan*, 851 F. Supp. 2d at 1107.

noted that “[a]pplying the ‘core’ definition of commercial speech too rigidly ignores” the “reality” that “[a]n advertisement is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service.”<sup>251</sup> The district court may have been swayed by the Supreme Court, which indicated, “failure to reference a specific product is a relevant consideration in the commercial-speech determination.”<sup>252</sup> The appellate court acknowledged that Jewel’s tribute page might well be deemed noncommercial “[i]f the literal import of the words were all that mattered,”<sup>253</sup> but flatly rejected as nonsensical the “notion that an advertisement counts as ‘commercial’ only if it makes an appeal to purchase a particular product.”<sup>254</sup>

The court determined that Jewel’s tribute page had two purposes: first, to congratulate Jordan on his induction into the NBA Hall of Fame; and second, to promote Jewel supermarkets and “enhanc[e] the Jewel-Osco brand in the minds of consumers.”<sup>255</sup> While the noncommercial element of the tribute was explicit and the commercial element only implied, the appellate court nonetheless deemed Jewel’s commercial purpose “unmistakable” and “easily inferred.”<sup>256</sup>

## VI. ARGUMENT

While it may seem unfair to Jewel—who, after all, did not seek out the advertising opportunity but instead was approached and offered free ad space in *Sports Illustrated*<sup>257</sup>—the Seventh Circuit’s decision nevertheless aligns with the principles of both trademark and right of publicity law.

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251. *Jordan*, 743 F.3d at 518.

252. *Id.* at 519 (citing *Bolger*, 463 U.S. at 66–67).

253. *Id.* at 517.

254. *Id.* at 518.

255. *Id.*

256. *Id.* In holding that “Jewel’s ad in the commemorative issue qualifie[d] as commercial speech,” the court accordingly reversed the lower judgment and remanded the case for briefing on the merits of Jordan’s federal claim, and/or whether to retain supplemental jurisdiction over his state law claims. *Id.* at 522.

257. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 511 (7th Cir. 2014).

### A. In Line With Principles of Trademark Law

As stated above, trademark law serves two major purposes: to protect against consumer confusion as to the source of products in commerce<sup>258</sup> and to safeguard the goodwill earned by producers for putting high quality, innovative, or desirable products into the stream of commerce.<sup>259</sup> However, modern consumers make buying decisions based not only on the price or quality of the goods but also the feelings engendered about the product or producing corporation by a particular marketing campaign.<sup>260</sup> Many of the most successful marketing campaigns rely on the appeal of the celebrity to help bring style, glamour, and attractiveness to their product.<sup>261</sup> And while nearly all advertisements employ a certain amount of dishonesty and manipulation,<sup>262</sup> allowing corporations to use the image or identity of a celebrity or athlete in an ad with impunity<sup>263</sup>—so long as the commercial elements of the ad are sufficiently couched in noncommercial speech—would unfairly confuse consumers as to which products their favorite

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258. See *Yameta Co. v. Capitol Records, Inc.*, 279 F. Supp. 582, 586 (1968).

259. See William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 54 (2008).

260. See Simon Sinek, *How Great Leaders Inspire Action*, TED (Sept. 2009), [http://www.ted.com/talks/simon\\_sinek\\_how\\_great\\_leaders\\_inspire\\_action#t-499668](http://www.ted.com/talks/simon_sinek_how_great_leaders_inspire_action#t-499668) [<http://perma.cc/WC6F-KU2D>] (“People don’t buy what you do; they buy why you do it and what you do simply proves what you believe.”).

261. See, e.g., Kristina Monillos, *Matthew McConaughey Returns for Another Round of Strange Spots for Lincoln*, ADWEEK (Dec. 30, 2014, 1:50 PM), <http://www.adweek.com/adfreak/matthew-mcconaughey-returns-another-round-strange-spots-lincoln-162104> [<http://perma.cc/J76B-FNLR>]; Rebecca Cullers, *Salt-N-Pepa Tell Football Players and Pregnant Ladies to Push it for Geico*, ADWEEK (Dec. 8, 2014, 9:47 AM), <http://www.adweek.com/adfreak/salt-n-pepa-tell-football-players-and-pregnant-ladies-push-it-geico-161823> [<http://perma.cc/FYJ6-DXAD>]; Tim Nudd, *Scrawny Arms Rob Lowe Is DirecTV’s Freakiest Rob Lowe Yet*, ADWEEK (Nov. 24, 2014, 2:36 PM), <http://www.adweek.com/adfreak/scrawny-arms-rob-lowe-latest-subpar-rob-lowe-join-directvs-campaign-161627> [<http://perma.cc/CDR4-H99H>]; David Gianatasio, *Ad of the Day: Beats by Dre Thrillingly Welcomes LeBron James Home to Ohio*, ADWEEK (Oct. 20, 2014, 9:26 AM), <http://www.adweek.com/news/advertising-branding/ad-day-beats-dre-thrillingly-welcomes-lebron-james-home-ohio-160868> [<http://perma.cc/6FJ8-9YX2>].

262. See, e.g., David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1397 (2006) (providing a detailed analysis of the puffery doctrine, defined as a “‘vague statement’ boosting the appeal of a service or product that, because of its vagueness and unreliability, is immunized from regulation”).

263. *Jordan*, 743 F.3d at 520; see also Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 188–99 (2005).

celebrities are endorsing.<sup>264</sup> Thus, they would be more inclined to buy a product they otherwise would not. Such impunity also hurts corporations; corporations that have not paid for the right to align their corporate image with that celebrity could easily hijack the goodwill earned by those corporations that spend millions hiring and designing a marketing campaign around a celebrity endorsement.<sup>265</sup> By focusing on the overall context of Jewel's ad,<sup>266</sup> rather than focusing solely on "the literal import of the words" in the "celebratory tribute,"<sup>267</sup> the Seventh Circuit protected the goodwill earned by corporations like Nike and Gatorade, who pay dearly for the right to align their corporate image and products with one of the greatest athletes of all time.<sup>268</sup> Similarly, the Seventh Circuit's ruling prevents future instances in which a potentially calculating and insincere congratulatory message directed towards a celebrity is nothing more than an attempt to enhance a corporate image in the minds of consumers.<sup>269</sup>

### *B. In Line With Principles of the Right of Publicity*

Likewise, the Seventh Circuit's *Jordan v. Jewel* decision is consistent with the purpose of the right of publicity, which is to allow every person to control the commercial use of his or her identity.<sup>270</sup> For celebrities, especially retired athletes who rely on endorsement earnings as their

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264. See, e.g., *Hornby v. TJX Cos., Inc.*, 87 U.S.P.Q.2d 1411 (T.T.A.B. 2008); see also Eriq Gardner, *Sandra Bullock Settles Lawsuit over 'Bullock Watch,'* HOLLYWOOD RPT. (May 20, 2014), <http://www.hollywoodreporter.com/thr-esq/sandra-bullock-settles-lawsuit-bullock-705852> [<http://perma.cc/A96U-5UD8>].

265. Darren Rovell, *Jordan Ruling Could Set Precedent*, ESPN (Feb. 20, 2014), <http://m.espn.go.com/general/story?storyId=10491664&city=chicago&src=desktop&wjb> [<http://perma.cc/38ZM-KS2K>].

266. *Jordan*, 743 F.3d at 517.

267. *Id.*

268. See *Why Michael Jordan Wants \$5 Million for a \$2 Coupon*, COUPONS IN THE NEWS (June 17, 2013), <http://couponsinthenews.com/2013/06/17/why-michael-jordan-wants-5-million-for-a-2-coupon> [<http://perma.cc/VWG2-Y38H>] (stating that, according to Jordan's attorneys, \$5 million is the fair market value of a Jordan endorsement).

269. See *Jordan*, 743 F.3d at 518.

270. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2000).

primary source of income, this right is especially important.<sup>271</sup> As such, celebrities are very careful about which products and companies they align themselves with.<sup>272</sup> This overexposure or involuntary association with undesirable or inelegant products would greatly reduce the commercial value of a celebrity's image.<sup>273</sup> After all, why would any company pay Jordan's \$5 million endorsement fee when it could use his image without paying him, so long as the ad entwined some noncommercial elements in its commercial message?<sup>274</sup> Because the Seventh Circuit ruled that the ad was, in fact, commercial speech, the court simultaneously protected Jordan and other celebrities' ability to control the commercial use of their identity.<sup>275</sup>

## VII. CONCLUSION

While ruling in favor of Jordan, the world's most recognized athlete,<sup>276</sup> and against a regional grocery store chain, may seem a bit like rooting for Goliath rather than David, the Seventh Circuit nevertheless was right in determining that Jewel's ad was commercial speech.<sup>277</sup> Like it or not, we live in a world saturated with advertising images,<sup>278</sup> many of which

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271. See Adrian Asis, *10 Retired Athletes Who Continue to Earn Millions*, *THE RICHEST* (Mar. 25, 2014), <http://www.therichest.com/sports/10-retired-athletes-who-continue-to-earn-millions> [<http://perma.cc/K4UH-NZMW>].

272. See, e.g., Gardner, *supra* note 264 (“[Bullock] will not voluntarily appear in print or other media for a company or product unless she carefully selects and believes in the company and product, and unless the compensation she receives is commensurate with the value or the exploitation of her name, image, identity, and persona.”).

273. See, e.g., *Hornby*, 87 U.S.P.Q.2d 1411.

274. *Why Michael Jordan Wants \$5 Million for a \$2 Coupon*, *supra* note 268.

275. *Jordan*, 743 F.3d at 520; 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8:13 (2d ed. 2000); see also Piety, *supra* note 263, at 188–99.

276. Michael Brouillet, *Top 5 Ways Michael Jordan Still Makes His Money?*, *HOOPSVIBE* (July 2, 2013), <http://www.hoopsvibe.com/features/170597-hows-michael-jordan-make-his-money> [<http://perma.cc/W44E-39EX>].

277. See *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 520 (7th Cir. 2014).

278. William McGeveran, *Rethinking Trademark Fair Use*, 94 *IOWA L. REV.* 49, 58 (2008) (“Our most widely shared cultural references now come from advertising, not literature or scripture.”).

feature celebrity images.<sup>279</sup> Through the right of publicity, celebrities have the right to control the commercial use of their identity.<sup>280</sup> Additionally, trademark law protects consumers from misleading advertisements.<sup>281</sup> Finally, corporations who elect to compensate a celebrity for using the celebrity's identity to promote their corporate image and products have the right to retain any consumer goodwill earned by the celebrity association.<sup>282</sup> Since a determination that Jewel's ad was protected noncommercial speech would undercut the aforementioned rights,<sup>283</sup> the Seventh Circuit's decision was ultimately correct in finding that Jewel's tribute ad was commercial speech.

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279. See, e.g., Kristina Monllos, *Matthew McConaughey Returns for Another Round of Strange Spots for Lincoln*, ADWEEK (Dec. 30, 2014, 1:50 PM), <http://www.adweek.com/adfreak/matthew-mcconaughey-returns-another-round-strange-spots-lincoln-162104> [<http://perma.cc/J76B-FNLR>]; Rebecca Cullers, *Salt-N-Pepa Tell Football Players and Pregnant Ladies to Push it for Geico*, ADWEEK (Dec. 8, 2014, 9:47 AM), <http://www.adweek.com/adfreak/salt-n-pepa-tell-football-players-and-pregnant-ladies-push-it-geico-161823> [<http://perma.cc/FYJ6-DXAD>]; Tim Nudd, *Scrawny Arms Rob Lowe Is DirecTV's Freakiest Rob Lowe Yet*, ADWEEK (Nov. 24, 2014, 2:36 PM), <http://www.adweek.com/adfreak/scrawny-arms-rob-lowe-latest-subpar-rob-lowe-join-directvs-campaign-161627> [<http://perma.cc/CDR4-H99H>]; David Gianatasio, *Ad of the Day: Beats by Dre Thrillingly Welcomes LeBron James Home to Ohio*, ADWEEK (Oct. 20, 2014, 9:26 AM), <http://www.adweek.com/news/advertising-branding/ad-day-beats-dre-thrillingly-welcomes-lebron-james-home-ohio-160868> [<http://perma.cc/6FJ8-9YX2>].

280. Scott Slavick, *Out of Bounds? Playing Ball with Celebrity Right of Publicity and Fair Use*, INSIDE COUNSEL (May 21, 2014), <http://www.insidecounsel.com/2014/05/21/out-of-bounds-playing-ball-with-celebrity-right-of> [<http://perma.cc/BY8W-2TGR>] (“[T]he right of publicity . . . allows [an] individual to keep her or his image and likeness from being commercially exploited without permission or contractual compensation.”).

281. *Yameta Co. v. Capitol Records, Inc.*, 279 F. Supp. 582, 586 (1968).

282. McGeeveran, *supra* note 278, at 54.

283. Darren Rovell, *Jordan Ruling Could Set Precedent*, ESPN (Feb. 20, 2014), <http://m.espn.go.com/general/story?storyId=10491664&city=chicago&src=desktop&wjb> [<http://perma.cc/C9T4-Q7R2>].