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## Jordan v. Jewel Food Stores: A Case of Right to Publicity v. Commercial Speech

### Abstract

Product endorsements by athletes are common brand building tactics. The brand receives additional consumer attention and goodwill created by the athlete. The athlete receive compensation that may exceed their player salary. However, local sport heroes create community pride for their accomplishments. Fans show their pride by congratulating the sport star. Is a local, non-endorsing company allowed to offer similar congratulations? Recently, a US appellate court was asked to decide a case where Michael Jordan claimed a Chicago grocery store chain's congratulatory message violated his right to publicity. Through an analysis of this legal case, this paper will discuss the following issues: the legal protections of non-commercial speech and commercial speech; should image advertising be considered commercial speech for legal purposes; and, Jordan's right to publicity claims. Finally, an examination of the legal holding's impact on sport marketing strategy will be offered.

Keywords: legal, sport marketing, image advertising, right to publicity, commercial speech

### Principal Management Implications

- Congratulatory messages may be considered commercial speech for legal purposes
- Image advertising may be considered commercial speech for legal purposes
- A celebrity endorses right to publicity trumps the limited commercial speech protection
- A marketing agency that creates a violating advertisement and a publishing company that distributes the violating advertisement may be held legally liable

### Introduction

When a team wins a championship or an individual player wins a singular honor, commercial enterprises take the opportunity to praise the team or player in a congratulatory message. Often times these congratulations include the name, the logo, or the slogan of the commercial enterprise and it does not matter if the business is an official sponsor of the team or the player. Previously, these congratulations were protected from litigation by angry teams and players by the company's right to freedom of speech. But, if those congratulations entice customers to patronize those businesses, legal problems can arise.

Recently, a US appellate court ruled on legal claim from basketball star Michael Jordan. This paper will analyze that case, and its legal questions. At issue, should the congratulatory message be considered commercial speech and given a lesser amount of legal protection, or does Jordan's right to publicity trump that protection?

### **Non-Commercial speech vs. Commercial speech**

The First Amendment of the United States Constitution grants the right to freedom of speech. This right was to protect the individuals from the actions of the government for speaking their minds. The right to freedom of speech has been extended by case law to include commercial speech. Commercial speech is defined as "speech that proposes a commercial transaction."<sup>1</sup> A problem arises when determining what a commercial transaction is. This matters as commercial speech receives less protection than non-commercial speech. It receives less protection because in commercial speech, the facts are more easily verified. Does the local grocery store claim to have the lowest prices? One can verify that claim by visiting other local grocery stores. Commercial speech is also less likely to be chilled by government regulation. This type of speech is already regulated by the government. For example, beginning with the Public Health Cigarette Smoking Act of 1969 and continuing with the Family Smoking Prevention and Tobacco Control Act of 2010, the federal government has increasingly restricted the amount and type of advertising that tobacco companies are allowed to do. **(Cite to laws)**

## **Image advertising**

Image advertising creates an image of a specific corporate personality in the minds of the general public without featuring a singular product, but rather focuses on the corporation itself.<sup>2</sup> The tactic is often used to increase awareness and build a better reputation for the corporation.<sup>3</sup> As detailed below, this *Jordan* court ruled that although image advertising does not propose a commercial transaction, it may be considered commercial speech.

## **Right to Publicity claims**

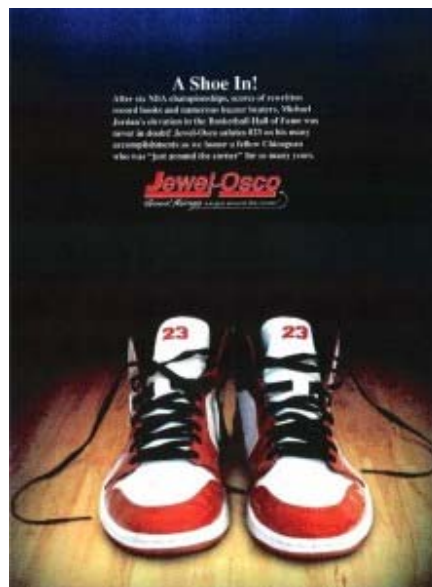
The right to publicity is the right of every person to control the commercial use of his or her identity.<sup>4</sup> In other words, an advertiser cannot use the identity (name, likeness, autograph, distinguishing characteristics, etc.) of a prominent celebrity for a commercial purpose without authorization.<sup>5</sup> This authorization often includes monetary compensation.<sup>6</sup> Right to publicity laws are created to stop the “unfair gain for (a business) through the use of something that people associate with another”<sup>7</sup>. Right to publicity protection is created via a state statute, meaning although the premise of the law is similar, the actual law may be different from state to state.

## **Jordan v. Jewel Food Stores**

In September 2009, Michael Jordan, arguably the greatest basketball player ever to play the game, was enshrined in the Naismith National Basketball Hall of Fame. Jordan was best known as a member of the Chicago Bulls, the team he won six National Basketball Association championships with. To commemorate his enshrinement, Time, Inc., the publisher of *Sports Illustrated*, created a special edition of *Sports Illustrated Presents* to celebrate Jordan’s career. *Sports Illustrated Presents* are editions printed to commemorate championships and select individual athletes with an issue dedicated solely to them. These editions are not part of the regular magazine subscription and are generally for sale only in the geographical area of the team or athlete. Jewel Food Stores, a grocery chain based in Chicago, was offered free advertising space in the issue in exchange for stocking the issue in its stores. Jewel agreed

and created a congratulatory message for its Jewel-Osco stores congratulating Jordan by name and featuring a pair of red and white high top sneakers with Jordan's famous 23 on the sneakers. Also featured prominently in the ad were Jewel's trademarked logo and slogan, "just around the corner". The ad itself read:

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>8</sup>



Jordan alleges that Jewel's message misappropriated his identity and filed suit in Illinois state court alleging violations of the Illinois Right of Publicity Act, the Illinois Consumer Fraud and Deceptive Practices Act, the Illinois common law of unfair competition, and the federal Lanham Act. Jordan is seeking \$5 million in damages, plus punitive damages on the state law claims, and triple damages under the Lanham Act from Jewel. Jewel removed the case to federal court, claiming that the First Amendment of

the US Constitution protects its ad as non-commercial speech. The District Court agreed with Jewel, but the Seventh Circuit Court of Appeals agreed with Jordan.

Jewel argued that the commercial speech category is limited to speech that either directly or indirectly offers a commercial transaction and that their message does not offer a commercial transaction and is therefore not commercial speech. The Seventh Circuit, using guidelines established in *Bolger, et al. v. Youngs Drug Products Corp.* (1983)<sup>9</sup>, ruled that Jewel-Osco's message was commercial. The *Bolger* guidelines say that for a message to be commercial speech, "(1) the speech needs to be an advertisement, (2) the speech refers to a specific product, and (3) the speaker has an economic motive for the speech."<sup>10</sup> (*Benson, 2009, quoting Bolger, 1983*) The court ruled that the Jewel-Osco ad was an advertisement, stating that the message does not have to promote an actual product or service; it is enough to promote a brand via image advertising. By using the logo and slogan, Jewel was promoting the stores themselves and brand loyalty. Jewel-Osco's ad was to enhance its image with the people of Chicago by placing its logo and tagline in the message. This was enough to make this a commercial advertisement.

Jewel tried to argue that it was a congratulatory message, similar to other Jewel-Osco promotions of community organizations, but the court stated that athletes do not need gratuitous publicity and that Jewel's message can only be thought of as a promotion for Jewel-Osco.<sup>11</sup> The court also stated that while the message did not create a specific commercial transaction, because it promotes shopping at Jewel-Osco, it was enough to meet the second prong. Finally, the court stated that "...there is no question that the [message] serves an economic purpose: the burnish the Jewel-Osco brand name and enhance consumer good will."<sup>12</sup>

### **Impact on sport marketing strategy**

The use of celebrity endorsers is a common advertising strategy because "developing a partnership with an "athlete endorser" allows brands to gain access to sports fans without formal relationships with teams,

leagues, or governing bodies”<sup>13</sup>. Creswell estimates that almost 20% of advertisements that are aired in the United States feature a celebrity endorser<sup>14</sup> because sales are expected to increase due to this strategy.<sup>15</sup> Celebrity endorsements enlarge the customer base by influencing the consumer’s buying process<sup>16</sup> and refining the brand image<sup>17</sup>. Brondrea and Stefanscu-Mihaila<sup>18</sup> propose that an advantage of an advertisement featuring celebrity endorsement is the positive impact on the feeling of the customers. The celebrity’s (in many cases an athlete) positive and championship brand image would transfer to the partner’s brand.<sup>19</sup> Additional research validates an advantage exists where there is a nexus between the endorser and the product.<sup>20</sup> This advantage may exist even if celebrity makes no endorsement statement and only appears with the brand.<sup>21</sup>

However, celebrity endorsers are costly.<sup>22</sup> Said (2013) listed the top five athlete endorsers and the compensation as: Tiger Woods (golf, \$100 million from Nike); George Foreman (boxing, \$137.25 million from Salton Inc.); David Beckman (football, \$160 million from Adidas); Rory McIlroy (golf, \$200 million – estimated from Nike); and, Derrick Rose (basketball, \$260 million from Adidas)<sup>23</sup>. This market is also competitive. Michael Jordan has over 30 federal trademark applications or registrations protecting his name and image.<sup>24</sup>

The use of a congratulatory message, such as the one in *Jordan*, attempted to take advantage of the positive attributes of an endorsement without the cost of paying Michael Jordan. Jewel Food Stores sought to enhance its positive image via a nexus of being “fellow Chicagoians” without paying Michael Jordan’s endorsement fee. Although the message did not propose a commercial transaction, its image advertising focus of building goodwill for the grocery store by using the market’s affection for Jordan was considered commercial speech which was not protected.<sup>25</sup>

The *Jordan* ruling protects the celebrity's endorsement value. Because of the right to publicity protection, the celebrity controls its name and image and may limit its use in order to maximize the price and/or create its own brand image by endorsing brand of similar image. Doss proved that a poorly viewed brand has a negative impact on a positively viewed celebrity and a positively viewed brand has a positive impact on a negatively viewed celebrity.<sup>26</sup> This study demonstrates that there are brand implications as well as financial considerations for a celebrity when evaluating potential endorsement deals.

This legal holding prevents competitive messaging. A different ruling from this court would have created a legal loophole where businesses might take advantage of the benefits of congratulatory messages. This would give a direct competitor the ability to place its name and logo next to an athlete who endorses a different brand. For instance, Beyonce is associated with Pepsi-Cola via her long-standing association. *Jordan* prevents another soft-drink company from placing its brand images next to Beyonce's image. This would include a congratulatory message such as Jewel Foods, or, perhaps, an empathetic message agreeing with Kanye's thoughts during the 2015 Grammy awards.

### **Recommendations**

Because of the ruling in *Jordan*, sport marketers need to evaluate their use of celebrity names in all messages, regardless of using a formal endorsement. Although the *Jordan* holding is very fact specific, there are key learnings for a brand to apply.

1. All brand messages must comply with the law. Because right to publicity laws are created by individual states, an advertiser must comply with the right of publicity law of the state with the "tightest restrictions"<sup>27</sup>. This would protect the brand from any potential claims.
2. Any message containing the protectable property of another person (name, likeness, etc.) should avoid too much brand imaging. Unfortunately the *Jordan* court did not describe where the line of what



may be allowable would be, the court based its ruling against Jewel Foods because of the inclusion of Jewel Foods logo and taglines.

3. A brand should seek indemnify agreements from marketing agencies that create the messages and publications. A business may have legal claims against its marketing agency that creates a violating message and, perhaps, the publishing company that distributes that violating message.<sup>28</sup>

As the *Jordan* case demonstrated, there is a conflict between a brand's commercial speech protection and an individual's right to publicity. This case is a "significant departure from prior case law, and presents important implications for marketers."<sup>29</sup> It would be wise for brands to understand the potential impact of this case on their brand messaging, especially if the messages include celebrity not under an endorsement contract.

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<sup>1</sup> Fox

<sup>2</sup> Sethi, S. Prakash. (1979). Institutional/image advertising and idea/issue advertising as marketing tools: some public policy issues. *Journal of Marketing*, 43(79): 68-78.

<sup>3</sup> Pomeroy, A, & Johnson, L. (2009). Constructing a corporate social responsibility reputation using corporate image advertising. *Australasian Marketing Journal*, 17, 106-114.

<sup>4</sup> McCarthy, J. T. (2000). *The Rights of Publicity and Privacy §1:3 (2<sup>nd</sup> ed.)*. Clark Boardman Callaghan: Deerfield, IL.

<sup>5</sup> McCarthy, J.T., & Anderson, P.M. (2001). Protection of the athlete's identity: The right of publicity, endorsements and domain names. *Marquette Sports Law Review*, 11(2): 195-209.

<sup>6</sup> Ibid.

<sup>7</sup> Fabio, M. (2012). What to know about rights of publicity. At <https://www.legalzoon.com/articles/what-to-know-about-rights-of-publicity>

<sup>8</sup> *Jordan*, 2014

<sup>9</sup> Bolger

<sup>10</sup> Benson

<sup>11</sup> *Jordan*, *supra* at XXX.

<sup>12</sup> *Jordan*, *supra* at XXX.

<sup>13</sup> DeGaris, L. (2015). *Sports Marketing: A Practical Approach*. Routledge: London.

<sup>14</sup> Creswell, J. (2008). Nothing sells like celebrity. *New York Times*, June 22, 2008.

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- <sup>15</sup> Elberse, Anita, & Jeroen Verleun (2012). The economic value of celebrity endorsements. *Journal of Advertising Research*, 52(2): 149-165.
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- <sup>20</sup> Lee, Jung-Gyo, & Jaejin Park. (2014). The effects of endorsement strength and celebrity-product match on the evaluation of a sports-related product: the role of product involvement. *International Journal of Sports Marketing & Sponsorship*, October: 55-74.
- <sup>21</sup> *Ibid.*
- <sup>22</sup> Popescu, *supra* at XX.
- <sup>23</sup> Said, S. (2013). Top 10 Current Biggest Athlete Endorsement Deals. *The Richest*. (April 17). At <http://www.therichest.com/sports/top-10-current-biggest-athlete-endorsement-deals/>
- <sup>24</sup> Goins, Jonathan. (2012). Jordan v. Jewel Food Stores, Inc." Do the shoes make the man? *Sport Marketing Quarterly*, 21(4): 253-255.
- <sup>25</sup> *Jordan, supra* at XX
- <sup>26</sup> Doss, S. (n.d.). The transference of brand attitude: the effect on the celebrity endorser. *Journal of Management and Marketing Research*, at <http://www.aabri.com/manuscripts/10636.pdf>
- <sup>27</sup> McCarthy & Anderson, *supra* at XX.
- <sup>28</sup> Goins, *supra* at XXX.
- <sup>29</sup> McKelvey, S., & Grady, J. (2014). On second thought...recent decisions continue to reshape intellectual property landscape. *Sport Marketing Quarterly*, 23(3): 176-179.