



MJ scores again

Basketball legend taking a shot at grocery store's ad campaign

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In September 2009, legendary Chicago Bulls player Michael Jordan was inducted into the Basketball Hall of Fame. His induction speech was widely regarded as bitter and petty. But the speech wasn't his only lane for settling scores.

Jordan also turned to the courts when he believed a Chicago-area grocery store chain wrongly used his identity in its advertising campaign. Earlier this year, in *Jordan v. Jewel Food Stores, Inc. and SuperValu Inc.*, the U.S. Court of Appeals for the Seventh Circuit Court of Appeals made the call as to whether the case could proceed.

Taking it to the hoop

To commemorate Jordan's Hall of Fame induction, Time Inc. produced a special issue of *Sports Illustrated* devoted exclusively to his career. Jewel Food Stores Inc., a chain of 175 supermarkets in the Chicago area, was offered free advertising space in the issue in exchange for stocking the publication in its stores.

Jewel ran a full-page ad congratulating Jordan on his induction. The ad ran on the inside back cover of the issue and prominently included Jewel's logo and marketing slogan.

Jordan responded with a \$5 million lawsuit alleging violations of the federal trademark law (the Lanham Act), the Illinois Right of Publicity Act, the Illinois deceptive practices statute and the common law of unfair competition. Jewel claimed the ad was noncommercial speech protected by the First Amendment. The district court agreed, dismissing the case before trial.

Posting up some guidance

On appeal, the Seventh Circuit noted that the U.S. Supreme Court has defined commercial speech as speech that proposes a commercial transaction.

It pointed out, though, that this definition is only a "starting point." Other communications may also constitute commercial speech notwithstanding the fact that they contain discussion of public issues as well. The Supreme Court has made clear that advertising that links a product to a current public debate isn't, thereby, entitled to the constitutional protection provided noncommercial speech.

The Seventh Circuit cited three "guideposts" for classifying speech that contains both commercial and noncommercial elements:

1. Is the speech an advertisement?
2. Does the speech refer to a specific product?
3. Does the speaker have an economic motivation for the speech?

No single factor is determinative, but all must be answered in the affirmative for hybrid speech to be deemed commercial.



Boxing out the defense

Before considering the guideposts, however, the Seventh Circuit weighed Jewel’s argument, accepted by the district court, that its ad didn’t propose a commercial transaction. The appellate court acknowledged that the ad’s textual focus was a congratulatory salute to Jordan. “If the literal import of the words were all that mattered,” the Seventh Circuit said, “this celebratory tribute would be noncommercial.” But the text must be evaluated in its context — particularly in the world of modern commercial advertising — where the commercial message is often general and implicit rather than specific and explicit.

According to the court, an ad is no less “commercial” because it promotes brand awareness or loyalty rather than explicitly proposing a transaction. Although Jewel’s ad congratulated Jordan, it also served the “unmistakable commercial function” of enhancing Jewel’s brand in consumers’ minds.

The Seventh Circuit acknowledged that the failure to reference a specific product is a relevant factor in the commercial speech determination. But the court found the factor “far from dispositive, especially where ‘image’ or brand advertising rather than product advertising is concerned.” And here, it concluded, the ad’s commercial nature was “readily apparent.”

Slam-dunking the decision

The Seventh Circuit found its conclusion was confirmed by applying the three guideposts. First, the ad qualified as an advertisement because the page promoted Jewel’s stores to potential buyers and was easily distinguished from the magazine’s editorial content. As to the second element, though the ad didn’t promote a specific product or service, it promoted patronage at Jewel stores.

Finally, the court said, there was no question that the ad served an economic purpose. While Jewel’s tribute was in a certain sense public-spirited, the grocer also had something to gain by joining the chorus of congratulations on Jordan’s induction: valuable brand enhancement. Accordingly, the Seventh Circuit ruled that Jordan’s case could proceed because the ad at issue wasn’t constitutionally protected noncommercial speech.

Making a point

The outcome of this case is likely good news for athletes, actors, celebrities and other trademark holders seeking to protect the use of their identities or marks. As the court observed, classifying so-called image advertising as constitutionally immune noncommercial speech would allow advertisers to misappropriate the identity of athletes and other celebrities and well-known trademarks with impunity.

Sidebar: Court clarifies “inextricably intertwined” doctrine

In *Jordan v. Jewel Food Stores, Inc. and SuperValu Inc.* (see main article), the U.S. Court of Appeals for the Seventh Circuit took the opportunity to clarify the proper use of the “inextricably intertwined” doctrine, which holds that, when commercial and noncommercial speech are so intertwined, the speech as a whole will be classified commercial *or* noncommercial. Thus, if the speech as a whole is characterized as noncommercial, both the noncommercial and commercial aspects are protected by the First Amendment.

The court explained that the central inquiry, however, isn’t just whether the speech combines commercial and noncommercial elements. Rather, the question is whether it was legally or practically impossible for the speaker



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to separate them. Simply combining commercial and noncommercial elements in a single presentation doesn't transform the whole into noncommercial speech.

In *Jordan*, the court said, the commercial and noncommercial elements in the ad weren't inextricably intertwined: "No law of man or nature compelled Jewel to combine commercial and noncommercial messages as it did here."

Jordan v. Jewel Food Stores, Inc. and SuperValu Inc., No. 12-1992, Feb. 19, 2014 (7th Cir.)