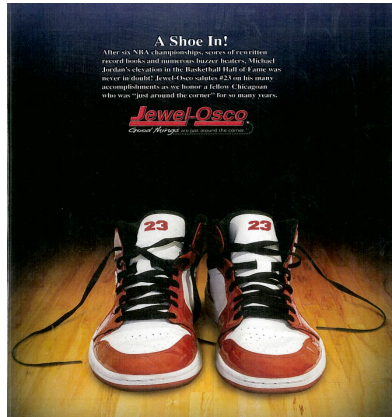


accomplishments as we honor a fellow Chicagoan who was “just around the corner” for so many years.⁶⁴

The ad, shown below, also featured a large photo of basketball sneakers with “23” on them, and the Jewel-Osco logo was centered on the page.⁶⁵



The content of the speech—a congratulatory message and praiseful commentary—is something that we would typically recognize as expressive speech. In fact, the message could easily have been part of any of the articles in the magazine. The photo of the sneakers could also have illustrated any of the stories. The only thing that identified the message as an “advertisement” was the Jewel-Osco logo and the reference to the store’s tagline, “just around the corner.”⁶⁶ No product was advertised, there was no call to action, and the focus of the message was entirely on Jordan’s accomplishments.⁶⁷

The parties had agreed that the key issue was whether the speech was “commercial” or “noncommercial.”⁶⁸ If it were noncommercial, then it would be protected by the First Amendment.⁶⁹ The court never directly addressed the question of whether a “commercial use” for the purposes of publicity law was the same as “commercial speech” in the constitutional context, but the court and the parties all seem to have proceeded on the assumption that they are equivalent.⁷⁰

The court correctly noted that, to the extent the Supreme Court has given guidance on what is “commercial speech,” it has mostly been in the context

⁶⁴ *Jordan*, 743 F.3d at 512.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 515.

⁶⁹ *Id.*

⁷⁰ *Jordan*, 743 F.3d at 516.

of public-law cases.⁷¹ And, although the court did not say it expressly, that is because the Supreme Court has not taken a true right of publicity case, despite the onslaught of *certiorari* petitions begging the Court to clarify this area of law.⁷²

The Supreme Court has said that commercial speech is “speech that proposes a commercial transaction,”⁷³ and advertising that links a product to a current public debate does not lose its commercial nature.⁷⁴ The *Jordan* court specifically evaluated *Bolger* and its finding that speech is commercial if it is a form of advertising, it refers to a specific product, and it is distributed for an economic purpose.⁷⁵

From there, the court applied the commercial speech doctrine to the case at hand and found that Jewel’s speech was commercial.⁷⁶ Despite the fact that it does not propose a commercial transaction or refer to any specific product, and despite the fact that the literal import of the words was clearly noncommercial,⁷⁷ the court found that the speech constituted “image advertising,” which might help the brand, and therefore is commercial.⁷⁸ The court said that the ad “implicitly encourages readers to patronize their local Jewel-Osco store,” and that using their logo and tagline “only makes sense if the aim is to promote shopping at Jewel-Osco stores.”⁷⁹

However, using the logo or tagline would also make sense if the speaker merely wanted to identify itself to the audience. The court’s holding ignores the logic of self-identification and is incredibly restrictive, essentially ruling that any speech by a company will be commercial. The court’s finding that the commercial nature “may be generic and implicit, but it is nonetheless clear,” indicates that anything that is not “product advertising” is “image advertising,” and merely by existing, it is inherently commercial.⁸⁰ Although the court said that it is not trying to suggest that a company cannot use its logo in a noncommercial way without transforming the communication into commercial speech,⁸¹ it is difficult to imagine how that could be possible given the court’s analysis that anything that might

⁷¹ *Jordan*, 743 F.3d at 514.

⁷² See Jacob Danzinger and John Meixner, *Right of Publicity Actions Waning Without High Court Review*, LAW360, (Mar. 22, 2016, 3:47 PM), <http://www.law360.com/articles/772425/right-of-publicity-actions-waning-without-high-court-review>.

⁷³ *Jordan*, 743 F.3d at 516 (footnote omitted).

⁷⁴ *Id.* at 516.

⁷⁵ *Id.* at 517.

⁷⁶ *Id.* at 522.

⁷⁷ *Id.* (“It’s clear that the textual focus of Jewel’s ad is a congratulatory salute to Jordan on his induction into the Hall of Fame. If the literal import of the words were all that mattered, this celebratory tribute would be noncommercial.”).

⁷⁸ *Id.* at 520.

⁷⁹ *Jordan*, 743 F.3d at 519.

⁸⁰ *Id.* at 520.

⁸¹ *Id.*

help promote the brand or make it visible to consumers is implicitly commercial.⁸²

Jewel pointed out that it had traditionally run public-service ads commending local community groups on achievements,⁸³ but the court scoffed at the notion that the Jordan ad was remotely comparable:

There is a world of difference between an ad congratulating a local community group and an ad congratulating a famous athlete. Both ads will generate goodwill for the advertiser. But an ad congratulating a famous athlete can only be understood as a promotional device for the advertiser. Unlike a community group, the athlete needs no gratuitous promotion and his identity has commercial value.⁸⁴

The court tellingly emphasizes the commercial value of the athlete's identity, and its decision has more to do with protecting *his* economic value than with protecting the speech of the speaker.⁸⁵ The court notes that *both* ads will generate goodwill.⁸⁶ If the court were truly concerned with the impact of image advertising, *both* ads are implicit image advertising and should be treated equally.⁸⁷ But instead, the court emphasized Jordan's value, giving greater protection to him than to community groups. While it may be true that his identity has commercial value, it also has *cultural* value.⁸⁸ People should be free to speak about other people in our culture, and the protection we give to speech should not be contingent on the fame (or lack thereof) of the person we are talking about. The court completely

⁸² At one point, the court supports its conclusion by noting that Jewel was happy to have an ad in the Sports Illustrated issue because "having your logo in any location where people see it is going to help your company." *Jordan*, 743 F.3d at 520. If any use of the logo where people actually see it will help the company, then, by the court's broad analysis, any use is commercial.

⁸³ This is a common practice, and groups will often publish brochures or programs related to their events with congratulatory ads from businesses, and those ads are effectively supporting sponsorships for the program. See *infra* notes 92-94 and accompanying text concerning sponsorship.

⁸⁴ *Jordan*, 743 F.3d at 518.

⁸⁵ *Id.* at 520 ("A contrary holding would have sweeping and troublesome implications for athletes, actors, celebrities, and other trademark holders seeking to protect the use of their identities or marks."). Again, the court gives far more deference to famous people than to speech.

⁸⁶ *Id.* at 521.

⁸⁷ I should note that the court's determination that shoppers will be swayed by a reference to Michael Jordan is highly speculative. Some shoppers may not care about famous athletes. Those who support teams from other cities might even be offended.

⁸⁸ However, many celebrities have also lost Lanham Act claims. See, e.g., *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 922 (6th Cir.) (holding that images and likenesses of Tiger Woods are not protectable as a trademark), *reh'g en banc* denied, 2003 U.S. App. Lexis 19044 (Sept. 8, 2003).

discounted the value of speech and the purpose of the First Amendment. As the Court said in *Bellotti*, the question should be whether the speech at issue is the kind of thing the First Amendment would protect.⁸⁹

Ironically, the entire *Sports Illustrated* issue, which was sold for profit, would be entirely protected. Jewel-Osco's message would have been entirely protected if the words had appeared in any of the articles. And though the court said earlier in its opinion that the content of the speech was clearly noncommercial,⁹⁰ it later states that the ad is distinguishable from the editorial content because "[i]t isn't an article, a column, or a news photograph or illustration."⁹¹ In essence, even though the content delivered the same congratulatory import as any article could have, the fact that it was not in the form of an article was problematic in the court's view.

This seems like an unnecessarily rigid viewpoint. The court could not imagine that what Jewel was doing was anything other than "advertising," as if there were no other form of communication that companies could engage in. But there are other clearly established models for corporate speech that reference a brand without being an "advertisement" or deemed "commercial." For example, noncommercial public broadcasters have relied on corporate sponsorships for decades, and the Federal Communications Commission ("FCC") has established very clear guidelines for determining what counts as a "noncommercial" corporate sponsorship.⁹² Sponsorship messages—which the FCC distinguishes from "commercial advertising"—may contain brand names and/or references to products or services, but may not include qualitative or comparative language.⁹³ They may also include logos or slogans, so long as they are there to identify the sponsor rather than promote it.⁹⁴ The FCC gave specific examples of the kinds of statements that would be commercial: price or savings information, calls to action (e.g. "stop by our showroom"), or inducements (e.g. "special gift for the first 50 customers"), but a neutral reference to the brand itself is not.⁹⁵ Thus, a court need not determine that every corporate statement that might generate goodwill for itself is "commercial."

In fact, some courts have found that businesses are entitled to some First Amendment protection, as illustrated by the Second Circuit's decision in *New York Magazine, Inc. v. Metropolitan Transp. Authority*.⁹⁶ The facts

⁸⁹ *First Nat'l. Bank of Boston*, 435 U.S. at 778.

⁹⁰ See *supra* note 77 and accompanying text.

⁹¹ *Jordan*, 743 F.3d at 519.

⁹² See *In the Matter of Comm'n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations*, 97 F.C.C. 2d 255 (1984); see also *In the Matter of Comm'n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations*, 7 F.C.C. Red. 827 (1992).

⁹³ *Jordan*, 743 F.3d at 514-516.

⁹⁴ *In the Matter of Comm'n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations*, 97 F.C.C. 2d at 262-63.

⁹⁵ *Id.*

⁹⁶ 136 F.3d 123 (2d Cir. 1998).

were undisputed: *New York Magazine* entered into an agreement with the Metropolitan Transportation Authority (“MTA”) to run advertisements on the side of city buses.⁹⁷ One of the ads featured the magazine’s logo and the line, “Possibly the only good thing in New York Rudy hasn’t taken credit for.”⁹⁸ Then-Mayor Rudy Giuliani’s office called the MTA and asked that the ad be removed because it violated his right of publicity.⁹⁹ The magazine sought an injunction to prevent the city from interfering with its First Amendment rights.¹⁰⁰

The court ultimately did not rule on either the question of whether the speech was commercial or whether Rudy Giuliani’s publicity rights had been violated.¹⁰¹ Instead, it ruled on procedural grounds that prior restraints are abhorrent, regardless of whether the speech at issue is commercial or political, and therefore the MTA should not bar the magazine’s advertisement.¹⁰² But in doing so, the court noted that the First Amendment should play an important role in the analysis of whether the speech is protected:

This case aptly demonstrates that where there are both commercial and political elements present in speech, even the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as MTA. While the Advertisement served to promote the sales of a magazine, it just as clearly criticized the most prominent member of the City’s government on an issue relevant to his performance of office, subtly calling into question whether the Mayor is actually responsible for the successes of the City for which he claims credit. While we accord somewhat lowered scrutiny to government restrictions on the right to propose commercial transactions, . . . protecting the right to express skeptical attitudes toward the government ranks among the First Amendment’s most important functions.¹⁰³

Thus, the court declined to find that the ad was overtly commercial and seemed to reinforce the principle raised in *Bellotti* that the question should be whether the expression at issue is what the First Amendment was

⁹⁷ *New York Magazine, Inc.*, 136 F.3d at 125.

⁹⁸ *Id.*

⁹⁹ *Id.* at 126.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 131.

¹⁰² *Id.* at 131-32.

¹⁰³ *New York Magazine, Inc.*, 136 F.3d at 131 (citations omitted).

designed to protect, and if so, it should not be restricted merely because of the identity of the speaker.¹⁰⁴

Similarly, in *Joe Dickerson & Assoc., LLC v. Dittmar*,¹⁰⁵ the Supreme Court of Colorado found that the plaintiff did not have a valid right of publicity claim based on an article about her that appeared in a company's newsletter, even though that newsletter may have been for marketing purposes. The court found that there is a "First Amendment privilege that permits the use of a plaintiff's name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern."¹⁰⁶ The court noted that the newsletter had both commercial and noncommercial elements, but, citing Supreme Court cases, determined that "the content of the speech, not the motivation of the speaker," determines whether the speech is commercial or not,¹⁰⁷ and "[a] profit motive does not transform a publication concerning a legitimate matter of public concern into commercial speech."¹⁰⁸ The court concluded that the use was noncommercial:

Further, the fact that the defendant's reason for publishing the newspaper may have been for his own commercial benefit does not necessarily render the speech "commercial." As noted above, a magazine or newspaper article is protected despite the fact that a publisher may publish a particular article in order to make a profit. Similarly, the defendant's speech is protected even if he intends it to result in profit to him, *so long as the contents of the speech qualify for protection*.¹⁰⁹

Moreover, courts have been diligent about applying First Amendment protection to other kinds of tort claims. *New York Times Co. v. Sullivan*¹¹⁰ established the rule that public officials cannot sue for libel unless they can prove that the plaintiff acted with knowledge of falsity or reckless disregard of the truth. That principle was extended to cases brought by public figures

¹⁰⁴ First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 778 (1978).

¹⁰⁵ 34 P.3d 995, 1004 (Colo. 2001).

¹⁰⁶ *Id.* at 1003.

¹⁰⁷ *Id.* at 1004 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)) (criticizing the use of speaker motivation to determine whether a use is commercial); see e.g., *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989).

¹⁰⁸ *Dittmar*, 34 P.3d at 1004.

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ 376 U.S. 254, 280 (1964).

in *Curtis Publishing Co. v. Butts*.¹¹¹ It was also extended to privacy claims in *Time v. Hill*,¹¹² where the Court noted that:

Guarantees for speech and press are not the preserve of political expression or comment upon public affairs Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.¹¹³

The Court went on to extend similar First Amendment protection in cases where plaintiffs brought intentional infliction of emotional distress claims.¹¹⁴ Some have argued that the constitutional standard set forth in these cases should be applied in right of publicity cases as well.¹¹⁵ Though that might work in cases where the gist of the complaint is that the use of the person's likeness constitutes a false endorsement, I am not completely persuaded that applying an "actual malice" rule is a satisfactory standard either for accommodating both the legitimate interests in protecting people from the unauthorized use of their likeness in true commercial contexts or for accommodating legitimate expressive speech.¹¹⁶ But it is clear that some kind of First Amendment analysis is warranted, and courts have not been able to come up with a consistent standard that provides clear guidance to speakers about what is acceptable and what is not. What has happened by default seems to be that courts allow media companies a wide berth to report about and comment on people, but other kinds of companies do not get the same protection.¹¹⁷

This kind of distinction was addressed somewhat in *Citizens United v. FEC*.¹¹⁸ The opinion is one hundred and eighty-three pages long and involves some extremely complex campaign-finance regulations, but the

¹¹¹ 388 U.S. 130, 134 (1967).

¹¹² 385 U.S. 374 (1967). The case was based on a "false light" theory of privacy, but the facts of the case resemble many publicity cases. *Id.* at 377-79. The Hill family had been taken hostage in real life, and later a novel and a play were written based loosely on their ordeal. *Id.* The plaintiffs argued that their story had been fictionalized and exploited for commercial benefit. *Id.* at 378.

¹¹³ *Id.* at 388.

¹¹⁴ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); see also *Snyder v. Phelps*, 562 U.S. 443 (2011).

¹¹⁵ See, e.g., Michael E. Baughman & Eli Segal, *Can The Right of Publicity Be Squared With New York Times v. Sullivan and its Progeny?*, 31 ABA COMM. LAW., no. 4, 2015, at 18.

¹¹⁶ My concerns about the actual malice standard are addressed fully in Ashley Messenger, *The Problem With New York Times Co. v. Sullivan: An Argument for Moving from a "Falsity Model" of Libel Law to a "Speech Act Model,"* 11 FIRST AMEND. L. REV. 172 (2012).

¹¹⁷ See, e.g., *Jordan v. Jewell Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

¹¹⁸ 558 U.S. 310 (2010).

relevant issue was whether a nonprofit corporation that made a film about Hillary Clinton should be subject to particular regulations around the funding and distribution of that film.¹¹⁹

The Court reaffirmed the principle in *Bellotti* that the First Amendment prohibits restrictions on speech that distinguish among different speakers allowing the speech by some but not others.¹²⁰ “Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”¹²¹ Moreover, the Court said:

[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the rights to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.¹²²

The Court then noted, correctly, that media companies are exempt from the regulations at issue, but the government’s arguments for silencing *Citizens United* were equally applicable to media companies.¹²³ Media companies amass funds from the economic marketplace, fund speech, and express views that may or may not be reflected in segments of the public. The Court also noted that:

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” . . . With the advent of the Internet and the decline of print and broadcast media, moreover, *the line between the media and others who wish to comment*

¹¹⁹ *Citizens United*, 558 U.S. at 876.

¹²⁰ *Cf. Jordan*, 743 F.3d at 517-19 (noting that the words themselves were merely a congratulatory message and would be noncommercial in another context and finding liability only because the speaker was a company that might benefit rather than the magazine).

¹²¹ *Citizens United*, 558 U.S. at 886. For example, Rudy Giuliani may have wanted to censor the criticism of him in the New York Magazine ad. *See supra* notes 96-100 and accompanying text.

¹²² *Citizens United*, 558 U.S. at 899.

¹²³ *See id.*

*on political and social issues becomes far more blurred.*¹²⁴

In short, the Court noted that the distinction between traditional media and everyone else is irrelevant when it comes to First Amendment protection.¹²⁵ As noted in *Belotti*, the question should be whether the expression at issue is something the First Amendment should protect *regardless of whether the speaker is a corporation or not*.¹²⁶ In the right of publicity context, this may mean that some corporate speech may be protected and others' speech may not, but the content and context must be fairly and carefully evaluated to determine whether the speech should be protected but for the identity of the corporate speaker.¹²⁷ This is particularly true in social media, which allows everyone to be a publisher. Everyone, including individuals and corporations, can now express views or relay news and information to the public at large.

It is important to note that corporate speech and commercial speech are not necessarily the same. Corporations publish books, make films, and otherwise engage in activity that indisputably receives the greatest degree of First Amendment protection and would not be deemed "commercial."¹²⁸ Conversely, a natural person could certainly engage in activity that is deemed a "commercial use." Given the analysis in *Jordan*, it seems likely that the fact that a corporation is speaking is a factor that will weigh strongly in favor of a court finding that a use is "commercial" in a publicity case. However, examples from social media demonstrate that premise is flimsy.

III. CORPORATE SPEECH IN SOCIAL MEDIA

Prince, a famous musician, died on April 21, 2016.¹²⁹ The Internet exploded with expressions of sympathy and grief.¹³⁰ He was a beloved and talented figure. It is no surprise that there was an outpouring of commentary on social media.¹³¹ Among the posts was the image from

¹²⁴ *Citizens United*, 558 U.S. at 905-06 (emphasis added).

¹²⁵ *Id.* at 884.

¹²⁶ *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978).

¹²⁷ See generally *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001).

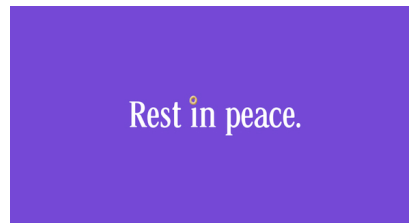
¹²⁸ See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105 (1991) (holding that a book published by a corporation is entitled to the highest degree of constitutional protection); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003) (noting that the sale of a creative work does not render the work commercial).

¹²⁹ Kory Grow, *Prince Dead at 57*, ROLLING STONE (Apr. 21, 2016), <https://www.rollingstone.com/music/news/prince-dead-at-57-20160421>.

¹³⁰ This statement is based on the author's personal observations at the time of Prince's death.

¹³¹ E.J. Schultz, *See Brand Tweets About Prince, Including Ones Cheerios and Four Loko Pulled*, ADVERTISING AGE (Apr. 21, 2016), <http://adage.com/article/cmo-strategy/brand-s-tweet-prince-including-cheerios-pulled/303685/>. Other examples include a

Chevy, previously discussed, and this one tweeted by Cheerios, which contains a purple background, referencing Prince's famous song "Purple Rain":¹³²



As far as I know, Prince had no relationship to Cheerios. The post is simply an expression of respect in light of Prince's death. Is it an effort to impress the public and gain goodwill towards its brand? Probably. But is the public deceived into believing that Prince endorsed Cheerios? Probably not. It is also unlikely that the tweet prompted anyone to rush out to buy Cheerios.¹³³

The Corvette post is far more interesting and complex. One of Prince's most popular songs was called "Little Red Corvette." I don't know what Corvette executives thought about the song, but I would guess that Corvette has gained incalculable benefit from the reference over the years insofar as the song associated the Corvette brand with being very fast and very sexy. The company's post, which quotes Prince's own words, feels like a direct response to Prince's speech about them, a thank you of sorts, from one "person" to another.¹³⁴

Direct responses are another way companies use social media. People use Twitter, for example, to complain to companies about poor service, and the results often have impact.¹³⁵ Companies will often provide a direct response, such as:

purple nebula posted by NASA in Prince's honor and other purple brand-related imagery by 3M, Makers Mark, Minnesota Twins, and Four Loko. *See id.*

¹³² *Id.* Cheerios has since deleted the original tweet.

¹³³ I also doubt that anyone is going to buy Cheerios due to the brand recognition of being mentioned in this article. *Cf. supra* notes 73-79 and accompanying text concerning the benefit of having one's brand mentioned anywhere someone will see it. Moreover, the tweet actually angered fans and resulted in a backlash against the company rather than generating the goodwill it had presumably hoped for. *See* Phil Wahba, *Cheerios Angers Fans with Tweet About Prince's Death*, FORTUNE (Apr. 21, 2016), <http://fortune.com/2016/04/21/cheerios-tweet-prince>.

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

¹³⁵ Grant Martin, *How to Complain to Airlines on Twitter (And What You're Doing Wrong)*, FORBES (Oct. 24, 2014, 1:31 PM), <https://www.forbes.com/sites/grantmartin/2014/10/24/how-to-complain-to-airlines-on-twitter-and-what-youre-doing-wrong/#3916ce1f78af>.