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NOTES

HOW A GROCERY STORE GROUNDED AIR JORDAN AND WHY JORDAN SHOULD SUCCEED IN THE REMATCH: REDEFINING COMMERCIAL SPEECH FOR THE MODERN ERA*

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INTRODUCTION

"Commercial speech is like obscenity. . . we can't seem to define it, but we know it when we see it."—Jef I. Richards, Author

In 2009, when basketball legend Michael Jordan ("Jordan") was inducted into the Hall of Fame, a local Chicago grocery store by the name of Jewel Osco ("Jewel") placed a page in *Sports Illustrated* magazine congratulating Jordan on his induction.[1] The page itself featured a pair of basketball shoes,[2] with Jordan's famous number twenty-three appearing on the tongue of each shoe, spotlighted on a hardwood basketball court.[3] The following message was positioned above the shoes:

> A Shoe In! After six NBA championships, scores of rewritten records 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.[4]

Apparently, Jordan did not take kindly to this page referring to him without his permission and sued Jewel, alleging the page violated the Illinois Right of

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* Many thanks to my friends Chris Park and Taylor Donnell; without their creative input, this Note may have been without a cheeky title.

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

2. Rebecca Tushnet, *Congratulations! Your Ad Isn't Commercial Speech*, REBECCA TUSHNET'S 43(B)LOG (Feb. 17, 2012), http://tushnet.blogspot.com/2012/02/congratulations-your-ad-isnt-commercial.html.

3. *Jordan*, 851 F. Supp. 2d at 1104.

4. *Id.* at 1104.

Publicity Act,[5] the Lanham Act,[6] the Illinois Consumer Fraud and Deceptive Trade Practices Act,[7] and the common law tort of unfair competition.[8]

In February 2012, the United States District Court for the Northern District of Illinois, in the case of *Jordan v. Jewel Food Stores, Inc.* ("*Jordan v. Jewel*") held that the page produced by Jewel was noncommercial speech and thus fully awarded First Amendment protection.[9] The court held the page was not commercial speech because it did not propose a commercial transaction, the page was not an advertisement, the page did not refer to a specific product, and the store having an economic motivation did not necessarily render the page commercial speech.[10]

This Note explores the distinction between commercial and noncommercial speech under the First Amendment, critiques the application of the commercial speech test by the court in *Jordan v. Jewel*, and, finally, proposes an original test for classifying speech as commercial or noncommercial that is more appropriate for modern society.

The most substantial issue with the current test for determining whether speech is commercial or noncommercial for free speech purposes is not that it is simply vague; it is arguably common knowledge that many legal "tests" are vague.[11] The greater issue with the commercial speech test is that rather than viewing the speech itself *and* how consumers may view the speech, the current test focuses almost exclusively on the first element—the content and manner of the speech itself.[12] The test proposed, while by no means suggesting a bright-line rule, provides clarification and an additional "consumer related" aspect to the current commercial speech test to make the test more adaptable to the modern arena of business advertising, promotional activities, marketing and other types of speech in the marketplace today. The speech at issue in *Jordan v. Jewel* is a classic example of what scholars refer to as "mixed speech,"[13] and thus provides

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5. 765 ILL. COMP. STAT. 1075 (2012).

6. 15 U.S.C. § 1125(a) (2006).

7. 815 ILL. COMP. STAT. 505 (2012).

8. *Jordan*, 851 F. Supp. 2d at 1104.

9. *Id.* at 1112.

10. *Id.* at 1106.

11. *See, e.g.*, Larry A. Dimatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 295 (1997) (exploring the vague reasonable person standard and the use of the objective reasonable person being reconciled with the subjective, discretionary nature of judicial decision-making); Thomas V. Mulrine, *Reasonable Doubt: How in the World is it Defined?*, 12 AM. U.J. INT'L L. & POL'Y 195 (1997) (discussing the vagueness of the "beyond a reasonable doubt" standard in criminal cases).

12. Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, CATO Policy Analysis No. 161, CATO INSTITUTE (Sept. 23, 1991), http://www.cato.org/pubs/pas/pa-161.html, *archived at* http://perma.cc/X8HC-5J4B (describing the commercial speech doctrine as a "content-based" approach).

13. For purposes of this Note, "mixed speech" refers to speech that has both commercial and noncommercial aspects. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial*

an excellent vehicle for analysis of both the current test and the proposed test.

To clarify, while mentioned briefly toward the conclusion of this Note, the purpose of this Note is not to discuss the four-factor test, referred to most commonly as the *Central Hudson* test,[14] which is used to determine whether the government may regulate commercial speech, once the speech has been successfully labeled as commercial. This Note focuses on the step prior to the application of the *Central Hudson* test: determining whether the speech is commercial at all.

Part I of this Note discusses the First Amendment and free speech generally, with an emphasis on the underlying justifications for granting freedom of speech. Part II examines the rise of commercial speech and the vague, unsettled test courts use to determine commercial speech. Part III recaps and subsequently critiques the court's reasoning in *Jordan v. Jewel*. Part IV proposes an original test for courts to use in determining whether speech is commercial or noncommercial. This proffered test more accurately embodies the underlying justifications for granting freedom of speech. Part V examines the *Jordan v. Jewel* case under the microscope of the newly proposed test.

I. THE FIRST AMENDMENT AND THE VALUES UNDERLYING THE DOCTRIN0E OF FREE SPEECH

The United States Constitution's First Amendment relevantly provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."[15] Although the text of the amendment mentions only Congress explicitly, the U.S. Supreme Court has held the Due Process Clause of the Fourteenth Amendment makes the freedom of speech provision applicable to state and local governments.[16] This expanded protection permits a broad arena for persons to communicate their ideas, opinions, and beliefs, no matter how unpopular, without fear of prosecution by the government.[17]

Speech?, 76 VA. L. REV. 627, 644 (1990) ("[T]he classification of mixed commercial and noncommercial speech as commercial leads to a result seemingly at odds with the principles underlying the [F]irst [A]mendment.").

14. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (explaining the four-part analysis as (1) a court "must determine whether the expression is protected by the First Amendment" and "[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading, (2) a court asks "whether the asserted governmental interest is substantial" and if both inquiries yield positive answers, a court must determine (3) "whether the regulation directly advances the governmental interest asserted," and "whether it is not more extensive than is necessary to serve that interest").

15. U.S. CONST. amend. I.

16. Gitlow v. New York, 268 U.S. 652, 666 (1925) (noting that "freedom of speech and of the press, which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

17. Scott Wellikoff, *Mixed Speech: Inequities that Result from an Ambiguous Doctrine*, 19

At the time of the ratification of the First Amendment, it would appear that protecting truth and democracy was at the forefront of the Founding Fathers' minds, as almost all commentary surrounding the drafting and ratifying of the First Amendment is focused on protecting politically-oriented speech.[18] Thomas Jefferson wrote the following passage on the importance of free speech to self-government and democracy:

> The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution . . . . The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.[19]

Even today, one may speculate that many people view the most obvious protections granted by the First Amendment as the freedom to express opinions regarding politics and religion.[20] Especially in this age of the Internet, this can be illustrated by the hundreds upon thousands of political and religiously-related posts seen daily on social media sites like Facebook and Twitter, as well as blogs which are devoted to discussions of the same. The Supreme Court has found a few general exceptions to the First Amendment's freedom of speech, including child pornography laws, libel and slander laws, obscenity, speech that incites imminent lawless action, and the regulation of commercial speech.[21]

Legal scholars and writers have long pontificated as to the underlying justifications for free speech.[22] Specifically, some scholars have summed up the arguments that underlie free speech values as truth discovery, social stability and interest accommodation, exposure and deterrence of abuse of authority, autonomy and personality development (also known as self- realization),[23] and liberal

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ST. JOHN'S LEGAL COMMENT. 159, 160 (2004) (citations omitted).

18. Kozinski & Banner, *supra* note 13, at 632 (citations omitted).

19. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* THE FOUNDER'S CONSTITUTION 122 (P. Kurland & R. Lerner eds., 1987).

20. *See* Filip Spagnoli, *What is Democracy? (43): A System Characterized by Free Speech*, P.A.P.-BLOG, HUMAN RIGHTS ETC. (June 19, 2009), http://filipspagnoli.wordpress.com/2009/06/19/human-rights-quote-135-democracy-and-free-speech/ *archived at* http://perma.cc/EK7G-WUNK (summarizing the views of Justice Brandeis, who believed free speech was necessary for democracy in three ways, most relevantly to inform the government of the will of the people).

21. *See* R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (noting that restrictions upon the content of speech are permitted in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality)." (quoting Chaplinksy v. New Hampshire, 315 U.S. 568, 572 (1942)).

22. For a good general discussion and summary, see Kent Greenwalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

23. For an in-depth analysis of the self-realization value as it applies to free speech, see R. George Wright, *The Openness of the Commercial Free Speech Test and the Value of Self-*

democracy.[24] This list is by no means inclusive of all free speech values. However, these are the values used in formulating a new test for distinguishing commercial speech from noncommercial speech as proposed by this Note.

II. COMMERCIAL SPEECH: WHAT IS IT AND HOW DO COURTS KNOW WHEN THEY SEE IT?

At the risk of sounding elementary, one will note that neither the text of the First Amendment nor the documented history surrounding the First Amendment's passing mention the distinction between commercial and noncommercial speech.[25] The concept of "commercial speech" was introduced in 1942 in the case of *Valentine v. Chrestensen*,[26] where the Supreme Court infamously held: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[27] While the Court refers to "commercial advertising," the term "commercial speech" is found nowhere in the opinion.[28] *Valentine* was interpreted for years to mean that "purely commercial advertising" was not duly protected by the First Amendment and could be regulated without question by the government.[29]

The 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[30] overturned *Valentine* and struck down a Virginia law that banned advertising of prescription drug prices on First Amendment grounds.[31] While the Supreme Court did not give an explicit test for determining what *is* commercial speech, it did give some insight into what was *not* considered commercial speech.[32] Commercial speech is neither speech that solicits money nor speech that is sold for a profit.[33] Speech is also not necessarily commercial just because money was spent to project it.[34]

Consider for a moment if commercial speech *was* to be defined as speech that solicits profits, speech sold for a profit, or speech that was economically funded. In this instance, then, movies, books, and works of art, most of which are sold for profit or at least are intended to be, would in turn be subject to government regulation simply for falling under the broadly construed label. However, luckily for the movie lover and the politically-charged author, case law on the subject has

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Realization, 88 U. DET. MERCY L. REV. 17 (2010).

24. Greenwalt, *supra* note 22, at 130.

25. *See* U.S. CONST. amend. I; *see also* Kozinski & Banner, supra note 13, at 627.

26. 316 U.S. 52 (1942).

27. *Id.* at 54.

28. *Id.*

29. *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29, 43 (1971); Martin v. Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413, 416 (1943).

30. 425 U.S. 748 (1976).

31. *Id.* at 750.

32. *See id.* at 761.

33. *Id.*

34. *Id.*

reaffirmed that speech is not automatically commercial just because it solicits money or is sold for a profit.[35]

Further, in *Virginia State Board of Pharmacy*, the Court noted that both the individual consumer and society at large have strong interests in the free flow of information, and thus, the fact that an advertiser's interest in commercial advertisement is purely economic does not necessarily disqualify him from First Amendment protection.[36] One may note, this "free flow of information for society" is very much in sync with the free speech values of truth discovery, social stability and interest accommodation, exposure and deterrence of abuse of authority, as well as self-realization.[37] The Court explained that people will only realize what is best for them if they are well-informed with truthful and non-misleading sources.[38] While the *Virginia State Board of Pharmacy* case expanded upon the commercial speech doctrine, by 1976, there was still no explicit test for distinguishing commercial speech from noncommercial speech.[39] It was not until 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[40] that the Supreme Court gave a definite, albeit vague, test for determining whether speech was commercial or noncommercial. First, the majority defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience."[41] Next, the Court proffered the now infamous test for distinguishing commercial speech from noncommercial, fully protected speech. According to the Supreme Court, commercial speech is "speech that proposes a commercial transaction."[42] Using both the word "speech" and "commercial" in the definition of commercial speech is not ambiguous enough, you say? It gets worse: The Supreme Court further muddied the waters in 1983 when it provided additional factors to determine whether speech is commercial in the *Youngs Drug* case.[43] The Court offered the following considerations: just because the speech being analyzed is an

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35. *See* Smith v. California, 361 U.S. 147, 150 (1959) (holding the distribution of books and literature, although for profit, are within the essential freedoms granted by the First Amendment); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding that expression within motion pictures is protected by the First Amendment).

36. *Va. State Bd. of Pharm.*, 425 U.S. at 762-65.

37. *See supra* Part I.

38. *Va. State Bd. of Pharm.*, 425 U.S. at 770.

39. *See* Joseph T. Hanlon, *CASENOTE: FIRST AMENDMENT – Commercial Speech – Notwithstanding a State's Twenty-first Amendment Power to Ban the Use of Alcohol Entirely, a State May Not Completely Prohibit Truthful, Non-Misleading Advertising of Liquor Prices* – 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996)*, 7 SETON HALL CONST. L.J. 1009 (1997) (describing the development of the commercial speech doctrine).

40. 447 U.S. 557 (1980).

41. *Id.* at 561 (citing Friedman v. Rogers, 440 U.S. 1, 11 (1979); Bates v. State Bar of Ariz., 433 U.S. 350, 363-64 (1977); *Va. State Bd. of Pharm.*, 425 U.S. at 762).

42. *Central Hudson*, 447 U.S. at 562.

43. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964)).

advertisement clearly does not compel the conclusion that it is commercial speech,[44] the reference to a specific product does not by itself render speech as commercial,[45] and a speaker having an economic motivation for the speech would clearly be insufficient by itself to turn the materials into commercial speech.[46]

In sum, the "speech proposing a commercial transaction" test is the most widely accepted, although highly criticized, test for categorizing speech as commercial or noncommercial.[47]

III. THE *JORDAN V. JEWEL* CASE: RECAP AND ANALYSIS

A. The United States District Court for the Northern District of Illinois's Reasoning

The court made the following holdings in the *Jordan v. Jewel* case: (1) the page did not propose a commercial transaction,[48] (2) the page was not an advertisement,[49] (3) the page did not refer to a specific product,[50] and (4) the store having an economic motivation did not render the page commercial speech.[51]

First, in reaching the second holding from above—that the page was not an advertisement—the court noted that something is not an "advertisement" simply because it is referred to as one, and there is no other shorthand name to identify a "page honoring and congratulating a person."[52] As the court's statement on there being no other shorthand for a "page honoring and congratulating a person" is well reasoned, the speech at issue here will hereinafter be referred to as "the page" for the sake of consistency and clarity.

In further explaining why the page cannot be an advertisement, the court notes it is not possible that the page is an advertisement because there was also *another page* in the commemorative issue from *another grocery store* and "fierce competitor," Dominick's.[53] To substantiate this broad statement, the court wrote the presence of both of these pages would "instinctively" alert the consumer to the fact that Jewel's page was not an advertisement, because consumers must know that Jordan "does not play [for two teams]. . . . Jordan is Hanes, not Jockey or Fruit of the Loom; Nike, not Adidas or Reebok; Chevrolet, not Ford or

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44. *Id.*

45. *Id.* (citing Associated Students for Univ. of Cal. at Riverside v. Att'y Gen., 368 F. Supp. 11, 24 (C.D. Cal. 1973)).

46. *Id.*; *see also* Bigelow v. Virginia, 421 U.S. 809, 818 (1975); Ginzburg v. United States, 383 U.S. 463, 474 (1966); Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

47. *See, e.g.*, Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (applying the *Central Hudson* test).

48. Jordan v. Jewel Food Stores, Inc., 851 F. Supp. 2d 1102, 1106-09 (N.D. Ill. 2012).

49. *Id.* at 1109-10.

50. *Id.* at 1110.

51. *Id.* at 1110-11.

52. *Id.* at 1109-10.

53. *Id.* at 1110.

Chrysler; McDonald's, not Burger King or Wendy's."[54] Finally, the court further determined the page is not an advertisement because Jewel paid no money to publish the page.[55]

Next, the court considered whether the page referred to a specific product.[56] Although Jordan argued that the use of Jewel's slogan and logo effectively worked as a reference to *all* of Jewel's products and services, the court found this unpersuasive.[57] The court went on to explain, "[t]he name and slogan of any business will evoke that business's products or services *in general*," but this page did not refer to a specific product, a "relevant inquiry" in the court's opinion.[58] Interestingly, the court then goes on to concede, "[t]his is not to say that the failure to refer to a specific product or service automatically renders speech noncommercial."[59] Confused yet? Just wait, it gets better. Finally, the court explains, "[i]f Jewel's page pictured a fully set Thanksgiving table, but no food or other products sold at Jewel stores, the page might have been commercial."[60] The analysis of the "economic motivation" factor and the "proposing a commercial transaction" test has been saved for last, as these are the most relevant aspects of the commercial speech test and also the most flawed.

In discussing whether Jewel had an economic motivation for the page, the court says, "[t]o say that a for-profit corporation like Jewel has an 'economic motivation' for taking any particular action is to state a truism."[61] Economic motivation found, two points for Jordan, right? Wrong. The court *did* agree with Jordan's contention that Jewel congratulated him "in the commemorative issue to promote itself to customers, to enhance its goodwill, and to convey [itself as] a good Chicago citizen."[62] However, the court then goes on to explain that, although some have argued corporations' speech should *always* be commercial,[63] the prevailing case law from the Supreme Court in *Youngs Drug* has explained that economic motivation by the speaker is simply "not enough."[64] Specifically

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54. *Id.*

55. *Id.* at 1109.

56. *Id.* at 1110.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1111.

63. *See* Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 395 (2006) ("[A]ll corporate expenditures—including expenditures for corporate speech—are supposed to further the interests of the corporation, and the interests of the corporation are purely economic. Thus any speech financed by a for-profit corporation, if it is not a misappropriation of corporate funds, is commercial, in that the only legitimate criterion for deciding to fund the speech is whether it serves the commercial interests of the company.").

64. *Jordan*, 851 F. Supp. 2d at 1109 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983) ("[T]he fact that [the speaker] has an economic motivation for mailing the pamphlets

the court stated, "[t]he governing precedents require that there be something more, and that something is missing from this case."[65] Perhaps unsurprisingly, exactly what the "something more" consists of is not found in the opinion.[66]

In determining whether Jewel's page "proposed a commercial transaction," the court noted, "[i]t is difficult to see how Jewel's page could be viewed, even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction."[67] Next, the court said 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."[68] After this general statement, the court goes no further.

The court does not explicitly address the seemingly obvious argument that consumers may feel invited to buy anything, or everything, or simply use the service of the grocery store. Instead, the court indirectly tackles this issue by dismissing Jordan's argument related to Jewel's use of its trade name and its advertising slogan in effectively linking Jordan to the store and thereby inviting the readers to enter into the commercial transaction.[69] The court writes,

> It 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. And even if the slogan's presence somehow could be viewed as introducing some minimal element of commercialism, that element is intertwined with and overwhelmed by the message's noncommercial aspects, rendering the page noncommercial as a whole.[70]

B. Why this Standard Analysis Does Not Work in This Instance or in the Modern Era

1. The Advertisement Factor.—The court's reasoning that one would know the page was not an advertisement because "instinctively" the reader knows Jordan does not play for "two teams"[71] is unpersuasive as it relies on the bold assumption that the "reader" has an in-depth knowledge about the endorsement background of Jordan and presumes that the reader would use that knowledge to distinguish the page as not an advertisement. There is also no way to tell that the reader would even necessarily *see* the second advertisement by Dominick's or relate it back to Jewel's page.

Imagine, for example, an elderly woman who has never seen a basketball game in her entire life. This elderly woman does not know Michael Jordan from

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would *clearly* be insufficient by itself to turn the materials into commercial speech.").

65. *Id.* at 1111.

66. *Id.* at 1102.

67. *Id.* at 1106.

68. *Id.* at 1107.

69. *Id.*

70. *Id.* at 1108.

71. *Id.* at 1110.

Larry Bird and could not distinguish an alley-oop from an airball. Her only knowledge of Michael Jordan comes from the ramblings of her male grandchildren. Upon viewing the two pages it would not be "instinctive" to her that the Jewel page was not an advertisement under the court's reasoning. If her grandchild were to bring home the commemorative issue, and she were to glance through the pages, she could arguably see both Jewel's page and Dominick's page as being endorsed by Jordan, not understanding the irony of Jordan being so loyal to only certain brands. Thus the court's analysis of the page as not an advertisement on this point fails for its false assumptions regarding consumers.

As to the second element of finding the page as not an advertisement, it is correct that Jewel paid no money for the page, but Jewel *did* agree to stock copies of the commemorative issue in its stores.[72] While many advertisements are paid for, according to the Funk & Wagnalls's Dictionary, there is no specific requirement that an announcement *must* be paid for in order to fall under the classification of "advertisement."[73] By stocking the magazine containing the page within the store, Jewel presumably stood to make a profit in the end (due to sales of the magazine), especially because they did not pay anything for the free publicity to begin with. Further, the Court in *Youngs Drug* stated: "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech."[74] Stemming from this statement, one may logically argue that just because a page is *not* an advertisement does not compel the conclusion that it is necessarily *non-commercial* speech. For example, a consumer would likely not see the statement of alcohol content on the label of a beer bottle or an attorney's letterhead as "advertisements." However, courts have held that these are both areas that fall under commercial speech.[75]

Based on this analysis, the factor determining whether commercial speech is an advertisement is largely irrelevant as a stand-alone factor. For this reason the advertisement factor should be eradicated; it should be the content of the page on the whole and the way consumers view the content, rather than the arbitrary classification as to the type of media it is, which determines the constitutional protection provided.

The content of what is being displayed—the words, pictures, ideas, and beliefs— are the driving force in allowing readers to discover truth and obtain

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72. *Id.* at 1109.

73. FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 42 (Isaac K. Funk et al. eds., 1963) [hereinafter FUNK & WAGNALLS] (defining advertisement as any "public notice, statement or announcement, usually printed . . . giving information, stating a want, fact, intention, or coming event").

74. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983).

75. *See* Wellikoff, *supra* note 17, at 176 n.99 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 481-82 (1995) (accepting statement of alcohol content on the label of beer bottle as commercial speech)); *see also* Ibanez v. Fla. Dep't of Bus. & Pro'f Regulation, 512 U.S. 136, 142 (1994) (explaining commercial speech includes statements on attorney's letterhead and business cards identifying attorney as CPA and CFP).

self-realization because the content is what consumers pay attention to.[76] For this reason, it is also the content which may allow a reader to conclude that a company is abusing authority.[77] If a consumer or reader views something in his or her mind as an advertisement and acts based on that view, it makes no difference whether the advertisement was paid for or if it would technically be classified as an advertisement at all.

2. The Specific Product Factor.—The *Jordan v. Jewel* court's "specific product" analysis is equally as unpersuasive for multiple reasons. Notably, hidden in footnote fourteen of the *Youngs Drug* majority opinion, the Supreme Court writes, "we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech."[78] If the Supreme Court itself did not deem the "specific product" as a necessary element, lower courts should also forego this analysis, as it works only to further complicate an already complex issue.

Additionally, the "specific product" factor is outdated in the realm of commercial transactions in the modern marketplace. The factor is particularly misguided because it does not acknowledge that consumers often subconsciously associate particular products with certain logos, slogans or trademarks, which identify only the *source* of the product and not any particular product.[79] Using the *Jordan v. Jewel* court's own example of McDonald's evoking the idea of fast food,[80] one might argue that instead, a reasonable consumer may automatically think of "Big Mac" or "delicious French fries" rather than "fast food" in a general sense. Likewise, in this case, in seeing the Jewel's slogan and trade name, one may draw to mind that Jewel always has the best prices on fresh deli meat or cheese, rather than thinking of the grocery store in a general sense.

Alternatively, one may argue the logo and slogan *do* refer to a specific service,[81] the service of providing affordable groceries close to home or as Jewel's own slogan indicates, "just around the corner."[82] This would seem to align with the court's example of a Jewel page with a "fully set Thanksgiving table" and no other products likely being commercial speech. The reasoning here would likely be something along the lines of the "fully set Thanksgiving table"

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76. *See* Mike Masnick, *Advertising Is Content; Content Is Advertising*; TECHDIRT (Mar. 19, 2008), http://www.techdirt.com/articles/20080318/004136567/advertising-is-content- content-is-advertising.shtml, *archived at* http://perma.cc/HL2F-4UBC (arguing that "advertising" and "content" can no longer be thought of as separate parts, and that any content is advertising something).

77. *Id.*

78. *Youngs Drug*, 463 U.S. at 67 n.14.

79. *See* 15 U.S.C. § 1051 (2006) (explaining that trademarks are meant to provide a *source*-identifying function with respect to the underlying goods).

80. Jordan v. Jewel Food Stores, 851 F. Supp. 2d 1102, 1110 (2012).

81. *See* JEWEL-OSCO, Registration No. 2,128,535 (identifying the classification of services as "retail supermarket and drug store services featuring food, drugs, household goods, automotive goods, and like general merchandise").

82. *Jordan*, 851 F. Supp. 2d at 1114.

referring to a plethora of Jewel products, ones that would be needed for a Thanksgiving meal.

In light of the foregoing analysis, the "specific product" element is not only superfluous as noted by the Supreme Court, but also furthers no free speech value. Again, a look at the entire speech itself, *on the whole*, and how it is viewed by consumers is a more productive venture in determining whether speech should receive First Amendment protection.[83]

3. The Economic Motivation of the Speaker Factor.—As for the "economic motivation of the speaker" factor, the Court in *Youngs Drug* explained that having an economic motive does not surely and unequivocally render the speech as commercial.[84] However, a finding of economic motivation for speech *should* require a closer analysis of the content of the speech, and the way the speech is viewed by consumers, in order to decide whether or not it should be constitutionally protected.[85]

Take the following example: Imagine the owner of a convenience store has a daughter with Down syndrome. He places a page in a magazine or newspaper with a picture of him and his daughter, a written description of who they are, the logo for the store, and then some type of reference to a specific entity that raises money for Down syndrome research. Surely, one may argue, there is some type of economic motivation for this. There is a strong argument that almost anything a business undertakes has at least a tint of economic motivation.[86] The owner of the store may have wanted the consumer to reason, "well, he supports Down syndrome research, so I should shop at his store," thus effectively bringing more business to his store and increasing his profit.

The difference between the above scenario and most other speech by commercial speakers is that in this instance, the average consumer could just as likely reason the owner had instead placed the page to raise awareness for Down syndrome research and to show support for his child. While the owner of the grocery store in this example may have had an underlying economic motivation, it could arguably be outweighed by the other motivations evidenced by the page, mainly raising awareness for a cause that affects him personally and has a significant impact on his day-to-day life. In this instance, even with a potentially slight economic interest, a court could reasonably find this speech was noncommercial in nature and thus fully protected by the First Amendment.

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83. *See infra* Part IV.

84. *Jordan*, 851 F. Supp. 2d at 1109 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983) (explaining "the fact that [the speaker] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech")).

85. *See infra* Part IV.

86. *See* Bennigson, *supra* note 63, at 395 ("[A]ll corporate expenditures—including expenditures for corporate speech—are supposed to further the interests of the corporation, and the interests of the corporation are purely economic. Thus any speech financed by a for-profit corporation, if it is not a misappropriation of corporate funds, is commercial, in that the only legitimate criterion for deciding to fund the speech is whether it serves the commercial interests of the company.").

Conversely, in the *Jordan v. Jewel* case, it is reasonable to say that the economic motivation heavily outweighs any other motivation of simply "being a good citizen" and "congratulating" Jordan on the induction into the Hall of Fame. Arguably, Jordan's induction was not likely an important "cause" near and dear to Jewel's heart, as in the convenience store owner example above. While many people and businesses take sports and sports honors very seriously, Jewel's page does not have any underlying political message, religious opinions, or charitable cause that works to overtly combat and outweigh its economic motivation of getting consumers to reason: "Well, Jewel supports Michael Jordan, I like Michael Jordan, and thus will support Jewel."

Unlike the "advertisement" and "specific product" factors, which can be dismissed entirely from the commercial speech analysis as independent factors, the "economic motivation" of the speaker is arguably a more a significant and revealing factor to be considered and thus should not be dismissed. This will be discussed further in Part IV, in the proposal of the new test.

4. The "Proposing a Commercial Transaction" Test.—Finally, and most importantly, is a discussion on whether or not the page "proposes a commercial transaction." With no definition ever set forth by the Supreme Court as to what this phrase technically means, judges in lower courts have been free to interpret it however they see fit. Breaking the test down into definable terms is helpful.

Funk & Wagnalls New Standard Dictionary defines the word "propose" most relevantly as "to [set forth] before [the] mind" (as an offer, or to present or put forth for discussion).[87] The definition of "commercial" is commonly "of or related to the nature of commerce."[88] Commerce in this sense means the buying and selling of things. Finally, "transaction" as defined by Funk & Wagnalls means "any act as affecting legal rights, or obligations," such as exchanging or transferring goods or services.[89] Taken literally, in order to be considered a "proposal of commercial transaction," the speech must only set forth an exchange of goods and services.

One important aspect that Jordan did not raise as to the question of a proposal of a commercial transaction is the *placement* of the Jewel Osco trade name and trademarked advertising slogan on the page (as opposed to the argument he did raise regarding its mere presence).[90] "Jewel Osco" is nearly dead center of the page, and stands out in bold colorful lettering.[91] Even a casual observer can see the lettering of "Jewel Osco" is significantly larger than the rest of the text.[92] This stylistic and strategic placement was no coincidence; instead the Jewel Osco name was intentionally placed for maximum consumer recognition. Indeed, this extra placement of Jewel's trade name was not absolutely necessary to "identify

87. FUNK & WAGNALLS, *supra* note 73, at 1987.

88. *Id.* at 536.

89. *Id.* at 2548.

90. Jordan v. Jewel Food Stores, Inc., 851 F. Supp. 2d 1102, 1107 (2012).

91. For a look at the page at issue, see Tushnet, *supra* note 2.

92. *Id.*

the speaker" as the court says,[93] because the text itself says, "Jewel Osco salutes #23. . . ."[94]

To say the page does not "propose a commercial transaction" because it is congratulatory is to assume that consumers even read the text in order to reason that it was "merely a congratulatory ad." Without reading the text, one might see the shoes on the hardwood basketball court and the number twenty-three (the Jordan reference) and the Jewel Osco trade name and registered trademark largely displayed in the center of the page, and without further investigation or contemplation assume there is a connection between the two.

The court seems to hold that the page does not propose a commercial transaction because it does not expressly state, "Hey you! Go to our store and buy X product for Y price." But this is neither what the "proposal of a commercial transaction" test implies based on the simple definitions of the words, nor is it the state of advertising in the modern era. According to the definitions provided *supra*, Jewel's page need only set forth in the mind the idea of doing some type of business with the grocery store. For example, this may be seen in not necessarily running to Jewel and buying groceries right after seeing the page, but rather, when later faced with a choice of grocery stores, choosing Jewel due to the page it posted using a reference to Jordan.

IV. MEET THE NEW TEST, NOT LIKE THE OLD TEST

As the history of commercial speech jurisprudence demonstrates, commercial speech is a very tricky thing. It would be a gross misstatement to say that any one test could or would easily solve any and every commercial versus noncommercial free speech case to ever come about. Commercial speech is not algebra, it is not a scientific study, there is no predefined equation and thus the answers will not always be clear. The commercial versus noncommercial speech distinction is convoluted, but we can and, indeed, must do better at giving this distinction a more defined test.

According to commercial speech case law, whether a communication is commercial or noncommercial is a question of law, and thus, whether a communication is commercial or not will be decided by the court.[95] From a pure efficiency of the court system standpoint, the proposition that judges should decide this issue as a matter of law is sound.[96] However, the test judges use to define the distinction must take into account the communication from the view of the average consumer.[97] This is not a new concept, as many courts have indirectly focused on consumer views, and scholars have taken a similar

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

94. *Id.* at 1104.

95. *See generally* Connick v. Myers, 461 U.S. 138 (1983) (insisting that the ultimate question of whether speech is commercial is not factual, but is a question of law).

96. Roger A. Arnold, *Efficiency vs. Ethics: Which is the Proper Decision Criterion in Law Cases*, J LIBERTARIAN STUD., VOL. VI., NO. 1 (1982).

97. *See infra* Part IV.C.

consumer-oriented view.[98] As the test stands now, with "common sense distinctions" and "proposals of commercial transactions," the court is free to classify the communication in whichever way it pleases.

What follows is an original three-part test that better functions to identify speech as commercial or noncommercial. The test is generally as follows: (1) identify the speaker and weigh the speaker's motivations, (2) look at the content of the speech itself, and (3) assess how the average consumer or reader would view the speech.

A. Identifying the Speaker

The first and most obvious step in determining whether speech is commercial or noncommercial is to identify the speaker and the motive of the speaker. As explained in Part III, having an "economic motivation" for the speech does not certainly and unequivocally render the speech commercial. However, speech from a public or private for-profit corporation should be presumed to be commercial in nature.

For-profit corporations in today's competitive market always have the goal of pushing product or services and gaining profits for their shareholders.[99] Even smaller closely-held businesses share this profit-driven motive.[100] Thus, it is reasonable to allow a rebuttable presumption that their speech is also, at least partially, serving the profit-gaining motive and thus
strongly favoring the speech as commercial. If the company or corporation can then provide a legitimate political, religious, charitable, or informational non-economic motivation, the motivations can be weighed against one another as commercial or noncommercial.

However, identifying the speaker as a corporation or company with an economic motive is not sufficient under this test; it would only count as a strike against the speech having full First Amendment protection.

B. The Content and Mode of the Speech

The content of the speech is undeniably a very significant factor. It is under this "content" factor that the question of "does the speech propose a commercial transaction" would fall. The first thing to examine under the content of the

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98. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (focusing on the consumers' right to truthful information and basing commercial decisions on as much information as possible); *see also* Bennigson, *supra* note 63, at 384 (arguing in favor of the original audience-based rationale for commercial speech doctrine); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK L. REV. 5, 5 (1989) (promoting a "hearer-centered" concept of the First Amendment).

99. *See* Bennigson, *supra* note 63, at 395.

100. *Id.*

speech is whether it is political or religious in nature. Most would agree, based on the fundamental rationale for free speech discussed earlier in this Note, that speech classified as political or religious in nature has a strong presumption of protection under the First Amendment.[101] Under the revised test, speech with a primarily political or religious message would be assumed to be noncommercial even if the speaker was earlier identified as a for-profit corporation.

Assuming the speech is not overtly political or religious, the test must more readily capture the state of commercial speech in this modern day and age. Likely no one would deny that classical advertising and commercial speech has changed from the stereotypical "Store X is selling Y for Z price" seen only in newspapers and on cable channels. Instead, consumers are constantly barraged with "speech proposing a commercial transaction," but instead of only in newspapers and television commercials, advertising and commercial speech can be found on the Internet, buses and billboards, office supplies, door hangers on doorknobs, flyers under windshield wipers, purchased word-of-mouth, T-shirts, publicity stunts, and virtually everywhere else.[102] Commercial speakers have had to get more creative to gain consumer attention and create lasting impressions.[103] Indeed, in recent years, creative marketers have gone so far as "to put messages on fire hydrants and potholes, on eggs, in urinals, [and] on the bellies of pregnant women," all for the sake of attention from consumers and the hope that one may present a lasting impression.[104]

Looking at the content and the mode of the speech itself is where the earlier *Youngs Drug* factors of "is it an advertisement" and "does it refer to a specific product" may fall. While these two factors are not necessarily helpful as stand-alone categories due to the noted changes in types of advertising and marketing, they may be helpful for a court in determining whether the overall content of the speech refers to a commercial transaction.

Finally, in analyzing the content of the speech, this test proposes taking into account the use of intellectual property rights of others by the speaker. For example, does the speech contain the trademark of another? Does it infringe the right of publicity of another? Notably, not all unauthorized use of another's trademark is considered trademark infringement, and the First Amendment often shields speakers from infringement as long as the use is noncommercial.[105]

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101. *See supra* Part I.

102. Roy H. Williams, *10 Unusual Ways to Advertise*, ENTREPRENEUR (Mar. 13, 2006), http://www.entrepreneur.com/article/83812, *archived at* http://perma.cc/366W-3T7D.

103. *See generally* KEN SACHARIN, ATTENTION! HOW TO INTERRUPT, YELL, WHISPER, AND TOUCH CONSUMERS 3 (Wiley Pub. 2001) (explaining the ever-growing problem of advertiser's inability to reach consumers due to "advertising clutter" and proposing new ways to solve this problem, including taking advantage of word of mouth marketing).

104. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 725 (internal citations omitted).

105. *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 11: 45 (4th ed. 2001) (describing trademark fair as allowing a junior user to use a descriptive term in good faith in its primary descriptive sense other than as a trademark).

However, in a society where trademarks and publicity rights are becoming ever more valuable assets,[106] courts should take ever more care to analyze the unauthorized use of trademarks in speech, and one's publicity rights in endorsements, to ensure that the use is unquestionably noncommercial and does not, instead, add commercial value to the speech at the expense of another.

C. How the Average Consumer Would View the Speech

Recall Jef Richards's quote from the beginning of this Note: "Commercial speech is like obscenity . . . we can't seem to define it, but we know it when we see it." This quote concerns the ambiguity that overwhelms defining both commercial speech and obscenity, especially by courts.

Despite obscenity's ambiguous nature, in the 1957 obscenity case of *Roth v. United States*,[107] Justice Brennan eloquently adopted the following test for determining obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[108] If the average person could reasonably find the speech on a whole to be obscene, this speech would fall outside the protection of the First Amendment. So why not view commercial speech in a similar vein?

While Brennan's test for obscenity was later replaced by the three-part *Miller* test,[109] his "average person view" (which was not completely abandoned in *Miller*) works well within the context of the other proposed factors of this new test. The court, after identifying the speaker and analyzing the content of the speech involved should finally, and perhaps most importantly, look to the way the average consumer in the relevant community, locality, or perhaps cyber-locality would view the speech.

The test includes the "context" of the speech in a broad, rather than narrow, fashion. This means that rather than analyzing how the average consumer would view the speech in isolation, the test would also look to relevant circumstances that could affect how the speech is viewed. While certainly not an exhaustive list, factors such as information on the relevant demographic most likely to view the speech, as well as current events, prior advertising or speech of the speaker, or societal issues, may have an effect on how the speech is interpreted and should

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106. *See* Sean Stonefield, *The 10 Most Valuable Trademarks*, FORBES (June 15, 2011, 11:22 AM), http://www.forbes.com/sites/seanstonefield/2011/06/15/the-10-most-valuable-trademarks/2/, *archived at* http://perma.cc/W33X-R344 (estimating the monetary value of such trademarks as "GOOGLE" and "MICROSOFT" at $44.3 billion and $42.8 billion, respectively).

107. 354 U.S. 476 (1957).

108. *Id.* at 489.

109. Miller v. California, 413 U.S. 15, 24 (1973) (holding the basic guidelines for the trier of fact (in determining obscenity) must be: (a) "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (internal citations omitted)).

not be discounted.

It may be easiest for courts to determine how the average consumer in the relevant community may view the speech if each party to a case were required to bring in consumer surveys depicting whether or not consumers, on average, view the speech as commercial. This would likely give courts and judges a realistic understanding of how the average consumer or reader viewed the speech. However, this is neither efficient nor realistic. Often, consumer surveys are found to be unreliable,[110] and thus courts should evaluate the average consumer viewpoint apart from consumer surveys.

Courts should make this subjective average consumer determination of commercialism by assessing such factors as: would the consumer gain some type of truth or objectively useful information from the speech (if the informative aspect outweighs the commercial aspect this would weigh in favor of classifying the speech as noncommercial, protecting the rights of the listener/average consumer to as much information as possible); is there a trademark or trade name used which would trigger a commercial association in the mind of the consumer, allowing the consumer to believe the speaker is speaking commercially; or possibly would a persuaded reader be more likely to engage in a commercial transaction with the speaker after viewing the speech?

While these factors are certainly not exclusive, they are a starting point for courts in assessing whether or not the average consumer might classify speech as commercial.

CONCLUSION: ASSESSING *JORDAN V. JEWEL* UNDER THE NEW TEST AND MOVING FORWARD

By way of example and conclusion to the current *Jordan v. Jewel* chapter and this Note, an analysis of the speech in question using the newly proposed test is required.

A. Identifying the Speaker and Weighing Motivations

Identifying the speaker is not a difficult task when the speaker's trade name, logo, and slogan are front and center of the page. At this point in the analysis, there is no denying that Jewel is a commercial speaker with an economic motivation behind the speech at issue. The real question is whether Jewel's alternative motivation—namely, congratulating Jordan—outweighs the economic motive. And the real answer is: not likely, friends.

The group of Jewel executives who authorized the page at issue may truly admire Michael Jordan. In fact, they may really, *really* enjoy him. However, if

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110. From January 2006 to June 2011 the National Advertising Division found seventy-one percent of consumer surveys as unreliable based on absence of adequate controls, limited probative value, leading or suggestive questions, the absence of adequate filter questions, or the respondents not actually being shown the actual advertisement or claim. *Not All Surveys Are Created Equal*, LAW360 (Sept. 9, 2011), www.kelleydrye.com/publications/articles/1518/_res/id=Files/index=0/, *archived at* http://perma.cc/338W-NRRD.

they had wanted the page to be all about congratulating Michael, why is the Jewel trade name directly in the middle? Why did the Jewel slogan have to be used in order to congratulate Jordan? The argument that this placement was required to "identify the speaker" is an excellent lawyering tactic, but not necessarily the whole truth. For example, a small footnote at the bottom of the page identifying Jewel (along with the text of the page itself identifying Jewel) would work as well, and not take the limelight from congratulating Jordan.

Absent some information about Jewel which is not discussed in the *Jordan v. Jewel* case, economic motivation is the overwhelming motive in this instance. There is no apparent political, religious, or charitable motivation behind the speech. This factor weighs in favor of Jordan in the rematch. Or, as esteemed sports announcer Gus Johnson would say, "Rise and fire . . . count it!"[111]

B. Analyzing the Speech Itself

In this instance, identifying the speaker and the analysis of the speech itself overlap due to the prominent use of Jewel's trade name, logo, and slogan. Aside from this, the page is in a commemorative issue magazine dedicated entirely to Jordan, presumably placed among many articles and photos about Jordan. In viewing the context of the entire commemorative issue and changes in the type of advertising and promotion seen in society today, there is no reason that Jewel's page would not at least arguably promote Jewel's products and services.

However, even if the promotion of Jewel's products and services could be seen as a draw, the use of Jordan's name and intellectual property rights inevitably weighs in favor of Jordan prevailing. Jordan has owned a U.S. Federal Trademark Registration for MICHAEL JORDAN in relation to promoting the goods and services of others through the issuance of product endorsements since 1988.[112] This means that Jordan often licenses his name for use by others for product endorsements, *with his permission*.

Under this test, a court would need to be *certain* that the use of Jordan's valid trademark (in this instance his own name) by Jewel is absolutely noncommercial (for example, if used in an article writing about Jordan's statistics or in an interview with LeBron James detailing how Jordan has affected James's career). Jordan should have the right to protect his trademark and only allow it to be used in instances he deems proper (presumably where he actually *does* want to endorse a product or service).

So, in this instance, even if the page itself had some commercial and some noncommercial aspects, the test would weigh in favor of Jordan, the valid rights holder, over Jewel, which used the mark without permission. This is not to be taken to imply that trademark rights are more important than free speech rights. But here, where it has been established that Jewel has an underlying economic

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111. David S. Glasier, *Gus Johnson Happy to Be a Part of Sports*, MORNING J. (Mar. 18, 2011, 12:00 AM), http://www.morningjournal.com/general-news/20110318/gus-johnson-happy-to-be-a-part-of-sports.

112. MICHAEL JORDAN, Registration No. 1,487,719.

motivation that outweighs a public informational or truth-revealing motive, Jordan should be able to control how his trademark is used.

C. How Would the Average Consumer View the Page?

Defining the "average consumer" or "average reader" in this instance, or in any litigation using this test, may be a highly debatable issue. Is the average consumer the average person shopping at Jewel with enough sports-related interest to buy a sports magazine? Are young children included in this group? Is the relevant audience male or female and does it matter?

According to Mega Media Marketing's statistics for the average issue of *Sports Illustrated*, the average readers are 4:1 male to female and the median age is approximately thirty-seven years old.[113] In this instance, the male to female ratio is not particularly relevant because both males and females would be considered consumers of Jewel's goods and services (not only one sex goes to the grocery store). For purposes of this analysis, the average reader would be the average middle-aged adult.

Would the average middle-aged adult gain any particularly useful information or truth from Jewel's page? This depends on one's definition of "useful." The only piece of objective information set forth in the page is that Jewel supports Michael Jordan, and this would not have any significant impact on a consumer's life. Arguably, readers and consumers are not better off because they have suddenly become aware, by way of this page, that Jewel grocery store supports Michael Jordan.

Imagine, however, if the page had perhaps congratulated Jordan on making it into the Hall of Fame and congratulated him on his continuous devotion to good health. Perhaps then the page would give information regarding a healthy diet and exercise and the benefits of staying fit. This health information would be valuable to consumers, something that allows them to gather a bit of truth and knowledge from the page. If the page had contained something of this nature, one might argue more strongly for Jewel's First Amendment right to free speech. This average reader, as a middle-aged adult, is also likely to understand general concepts of trademarks and logos and how these things identify and promote businesses. Jewel's logo and slogan on the page could very likely leave a distinct commercial impression on the average reader, as this is the entire concept of marketing and exactly what logos, slogans, and trademarks are meant to do. The average reader, with a median age of thirty-seven, is also seemingly intelligent enough to gather that Jewel has some reasonable interest in linking itself to Jordan in order to promote its own goodwill and bring people into the store.

For these reasons, there is a valid argument that the average reader may, in fact, see Jewel's page as commercial rather than purely congratulatory.

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113. *See* Mega Media Marketing, DEMOGRAPHICS, http://megamediamarketing.net/demographics.html, *archived at* http://perma.cc/C45E-J8RB (last visited May 5, 2014).

D. Conclusion

Free speech is a fundamental right guaranteed to each person in the United States. Our society depends on free speech to continue moving forward and to protect the opinions and ideas of each individual. However, we should not allow the true value of free speech to be diluted by allowing free speech to act as a shield to protect a commercial speaker in the exploitation of another. As the modes and views of commercial speech change, so should the test for distinguishing commercial from noncommercial speech. Free speech is important, but the Supreme Court has acknowledged that so too is the proper regulation of commercial speech.

This is not to say that Jewel could not have published its congratulatory page. It simply would have had to ask Jordan for permission first. And while each individual may have differing views on celebrities being stingy about granting permission for use or requiring unreasonable licensing fees, at the end of the day, it is the celebrity's decision. If Jordan would have denied permission, Jewel could have been quoted in an article detailing the denial and stating its belief that the denial was unreasonable. *That* would be Jewel's free speech right and is clearly different from the speech at issue here.

Critics may submit that the new test proposed in Part IV is as equally unclear as the current "proposal of a commercial transaction" test. They may argue this test is simply substituting a vague test for another vague test. However, with such rampant criticism of the current test, is it not time to try something, perhaps anything, to attempt to shed light on this ambiguous doctrine? The proposed test is not a bright-line rule, nor does it pretend to be. However, as this Note has explained, the proposed test has one vital element that the current test does not: the requirement for courts to at least address how the average consumer or reader would view the speech. After all, it is the consumer who is exposed to this speech and the average consumer who should be protected with proper regulation of commercial speech.

The implementation of this new test by courts may often reach the same result as the old test. However, by analyzing the speech from all of the perspectives in the new test—the speaker and the speaker's motive, the speech itself and context surrounding it, as well as the average consumer—judges may be more inclined to investigate the speech more thoroughly, providing more consistency to opinions and shedding light on an ambiguous doctrine.