

United States Court of Appeals,
Ninth Circuit.

Vanna WHITE, Plaintiff-Appellant,
v.

SAMSUNG ELECTRONICS AMERICA, INC., a
New York corporation, and David Deutsch
Associates, Inc., a New York corporation,
Defendants-Appellees.

No. 90-55840.

Argued and Submitted June 7, 1991.
Decided July 29, 1992.
As Amended Aug. 19, 1992.

This case involves a promotional "fame and fortune" dispute. In running a particular advertisement without Vanna White's permission, defendants Samsung Electronics America, Inc. (Samsung) and David Deutsch Associates, Inc. (Deutsch) attempted to capitalize on White's fame to enhance their fortune. White sued, alleging infringement of various intellectual property rights, but the district court granted summary judgment in favor of the defendants. We affirm in part, reverse in part, and remand.

Plaintiff Vanna White is the hostess of "Wheel of Fortune," one of the most popular game shows in television history. An estimated forty million people watch the program daily. Capitalizing on the fame which her participation in the show has bestowed on her, White markets her identity to various advertisers.

The dispute in this case arose out of a series of advertisements prepared for Samsung by Deutsch. The series ran in at least half a dozen publications with widespread, and in some cases national, circulation. Each of the advertisements in the series followed the same theme. Each depicted a current item from popular culture and a Samsung electronic product. Each was set in the twenty-first century and conveyed the message that the Samsung product would still be in use by that time. By hypothesizing outrageous future outcomes for the cultural items, the ads created humorous effects. For example, one lampooned current popular notions of an unhealthy diet by depicting a raw steak with the caption: "Revealed to be health food. 2010 A.D." Another depicted irreverent "news"-show host Morton Downey Jr. in front of an American flag with the caption: "Presidential candidate. 2008 A.D."

The advertisement which prompted the current dispute was for Samsung video-cassette recorders (VCRs). The ad depicted a robot, dressed in a wig, gown, and jewelry which Deutsch consciously selected to resemble White's hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous. The caption of the ad read: "Longest-running game show. 2012 A.D." Defendants referred to the ad as the "Vanna White" ad. Unlike the other celebrities used in the campaign, White neither consented to the ads nor was she paid.

Following the circulation of the robot ad, White sued Samsung and Deutsch in federal district court under: (1) [California Civil Code § 3344](#); (2) the California common law right of publicity; and (3) § 43(a) of the Lanham Act, [15 U.S.C. § 1125\(a\)](#). The district court granted summary judgment *1397 against White on each of her claims. White now appeals.

I. [Section 3344](#)

*** In this case, Samsung and Deutsch used a robot with mechanical features, and not, for example, a manikin molded to White's precise features. Without deciding for all purposes when a caricature or impressionistic resemblance might become a "likeness," we agree with the district court that the robot at issue here was not White's "likeness" within the meaning of [section 3344](#). Accordingly, we affirm the court's dismissal of White's [section 3344](#) claim.

II. *Right of Publicity*

[2] White next argues that the district court erred in granting summary judgment to defendants on White's common law right of publicity claim. In [Eastwood v. Superior Court](#), 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983), the California court of appeal stated that the common law right of publicity cause of action "may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Id. at 417, 198 Cal.Rptr. 342](#) (citing Prosser, Law of Torts (4th ed. 1971) § 117, pp. 804-807). The district court dismissed White's claim for failure to satisfy [Eastwood's](#) second prong, reasoning that defendants had not appropriated White's "name or likeness" with their robot ad. We agree that the robot ad did not make use of White's name or likeness. However, the common law right of publicity is not so confined.

The Eastwood court did not hold that the right of publicity cause of action could be pleaded only by alleging an appropriation of name or likeness. Eastwood involved an unauthorized use of photographs of Clint Eastwood and of his name. Accordingly, the Eastwood court had no occasion to consider the extent beyond the use of name or likeness to which the right of publicity reaches. That court held only that the right of publicity cause of action "may be" pleaded by alleging, *inter alia*, appropriation of name or likeness, not that the action may be pleaded *only* in those terms.

The "name or likeness" formulation referred to in Eastwood originated not as an element of the right of publicity cause of action, but as a description of the types of cases in which the cause of action had been recognized. The source of this formulation is Prosser, *Privacy*, 48 Cal.L.Rev. 383, 401-07 (1960), one of the earliest and most enduring articulations of the common law right of publicity cause of action. In looking at the case law to that point, Prosser recognized that right of publicity cases involved one of two basic factual scenarios: name appropriation, and picture or other likeness appropriation. *Id.* at 401-02, nn. 156-57.

Even though Prosser focused on appropriations of name or likeness in discussing the right of publicity, he noted that "[i]t is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness, and that this would *1398 be an invasion of his right of privacy." *Id.* at 401, n. 155. [FN1] At the time Prosser wrote, he noted however, that "[n]o such case appears to have arisen." *Id.*

[FN1]. Under Professor Prosser's scheme, the right of publicity is the last of the four categories of the right to privacy. Prosser, 48 Cal.L.Rev. at 389.

Since Prosser's early formulation, the case law has borne out his insight that the right of publicity is not limited to the appropriation of name or likeness. In Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir.1974), the defendant had used a photograph of the plaintiff's race car in a television commercial. Although the plaintiff appeared driving the car in the photograph, his features were not visible. Even though the defendant had not appropriated the plaintiff's name or likeness, this

court held that plaintiff's California right of publicity claim should reach the jury.

In Midler, this court held that, even though the defendants had not used Midler's name or likeness, Midler had stated a claim for violation of her California common law right of publicity because "the defendants ... for their own profit in selling their product did appropriate part of her identity" by using a Midler sound-alike. *Id.* at 463-64.

In Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir.1983), the defendant had marketed portable toilets under the brand name "Here's Johnny"--Johnny Carson's signature "Tonight Show" introduction--without Carson's permission. The district court had dismissed Carson's Michigan common law right of publicity claim because the defendants had not used Carson's "name or likeness." *Id.* at 835. In reversing the district court, the sixth circuit found "the district court's conception of the right of publicity ... too narrow" and held that the right was implicated because the defendant had appropriated Carson's identity by using, *inter alia*, the phrase "Here's Johnny." *Id.* at 835-37.

[3] These cases teach not only that the common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable. It is noteworthy that the Midler and Carson defendants not only avoided using the plaintiff's name or likeness, but they also avoided appropriating the celebrity's voice, signature, and photograph. The photograph in Motschenbacher did include the plaintiff, but because the plaintiff was not visible the driver could have been an actor or dummy and the analysis in the case would have been the same.

Although the defendants in these cases avoided the most obvious means of appropriating the plaintiffs' identities, each of their actions directly implicated the commercial interests which the right of publicity is designed to protect. As the Carson court explained:

[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of

that identity.... If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used.

[Carson](#), 698 F.2d at 835. It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so. [Motschenbacher](#), [Midler](#), and [Carson](#) teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

*1399 Indeed, if we treated the means of appropriation as dispositive in our analysis of the right of publicity, we would not only weaken the right but effectively eviscerate it. The right would fail to protect those plaintiffs most in need of its protection. Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.

Consider a hypothetical advertisement which depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not revealing "Bulls" or "Jordan" lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional basketball games. Considered individually, the robot's physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has registered a discernible pulse in the past five years would reach: the ad is about Michael Jordan.

Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict. The female-shaped robot is wearing a long gown, blond wig, and large jewelry. Vanna White dresses exactly like this at times, but so do many other women. The robot is in the process

of turning a block letter on a game-board. Vanna White dresses like this while turning letters on a game-board but perhaps similarly attired Scrabble-playing women do this as well. The robot is standing on what looks to be the Wheel of Fortune game show set. Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one. Indeed, defendants themselves referred to their ad as the "Vanna White" ad. We are not surprised. ***

Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof. We decline Samsung and Deutch's invitation to permit the evisceration of the common law right of publicity through means as facile as those in this case. Because White has alleged facts showing that Samsung and Deutsch had appropriated her identity, the district court erred by rejecting, on summary judgment, White's common law right of publicity claim.

IV. *The Parody Defense*

[7] In defense, defendants cite a number of cases for the proposition that their robot ad constituted protected speech. The only cases they cite which are even remotely relevant to this case are [Hustler Magazine v. Falwell](#), 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) and [L.L. Bean, Inc. v. Drake Publishers, Inc.](#), 811 F.2d 26 (1st Cir.1987). Those cases involved parodies of advertisements run for the purpose of poking fun at Jerry Falwell and L.L. Bean, respectively. This case involves a true advertisement run for the purpose of selling Samsung VCRs. The ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: "buy Samsung VCRs." Defendants' parody arguments are better addressed to non-commercial parodies. [FN3] The difference between a "parody" and a "knock-off" is the difference between fun and profit.

[FN3] In warning of a first amendment chill to expressive conduct, the dissent reads this decision too broadly. See *Dissent* at 1407. This case concerns only the market which

exists in our society for the exploitation of celebrity to sell products, and an attempt to take a free ride on a celebrity's celebrity value. Commercial advertising which relies on celebrity fame is different from other forms of expressive activity in two crucial ways.

First, for celebrity exploitation advertising to be effective, the advertisement must evoke the celebrity's identity. The more effective the evocation, the better the advertisement. If, as Samsung claims, its ad was based on a "generic" game-show hostess and not on Vanna White, the ad would not have violated anyone's right of publicity, but it would also not have been as humorous or as effective.

Second, even if some forms of expressive activity, such as parody, do rely on identity evocation, the first amendment hurdle will bar most right of publicity actions against those activities. Cf. [Falwell, 485 U.S. at 46, 108 S.Ct. at 876](#). In the case of commercial advertising, however, the first amendment hurdle is not so high. [Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 \(1980\)](#).

Realizing this, Samsung attempts to elevate its ad above the status of garden-variety commercial speech by pointing to the ad's parody of Vanna White. Samsung's argument is unavailing. See [Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469, 474-75, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 \(1988\)](#); [Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68, 103 S.Ct. 2875, 2880-81, 77 L.Ed.2d 469 \(1983\)](#).

Unless the first amendment bars all right of publicity actions--and it does not, see [Zachini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 \(1977\)](#)--then it does not bar this case.