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Celebrities' Expansive "Right of Publicity" Infringes upon Advertisers' First Amendment Rights

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Celebrities' Expansive "Right of Publicity" Infringes upon Advertisers' First Amendment Rights

By: Jonathan Siderits

I. Introduction

In April 2014, television and movie actress Katherine Heigl was photographed by paparazzi as she exited a Duane Reade drugstore in downtown New York, shopping bags in hand.¹ The company seized the opportunity to promote its brand by publishing the photograph on its Twitter and Facebook accounts, each captioned with "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite [most convenient] drugstore."² Heigl responded in a manner that Duane Reade likely did not expect—she sued the company for, among other things, violating her right of publicity under New York state law, seeking damages of no less than \$6 million.³

In her complaint, Heigl expressed her strenuous objection to Duane Reade "exploit[ing] [her] image for commercial gain," claiming that she had suffered "substantial" harm.⁴ In particular, Heigl asserted that her "picture, image, and likeness enjoy wide-spread recognition and monetary value" by virtue of her celebrity status, and that she has carefully protected her name and persona from unauthorized exploitation by advertisers.⁵ As she puts it, "when [she] chooses to endorse a product or service, she is highly selective and well compensated."⁶ Duane

¹ Emily Yahr, *Can Katherine Heigl really sue Duane Reade for tweeting her photo? Yes, and here's why.*, The Washington Post (Apr. 11, 2014), <http://www.washingtonpost.com/blogs/style-blog/wp/2014/04/11/can-katherine-heigl-really-sue-duane-reade-for-tweeting-her-photo-yes-and-heres-why/>.

² *Id.*

³ *Id.*

⁴ Heigl v. Duane Reade, Inc., No. 1:14-cv-02502 (S.D.N.Y. 2014), ECF No. 2, Complaint at 1.

⁵ *Id.* at 4.

⁶ *Id.* at 4.

Reade, however, had not sought or obtained her permission prior to publishing the photograph to promote its stores.⁷

Although *Heigl v. Duane Reade, Inc.* was ultimately settled out of court in August 2014, with Duane Reade allegedly making a sizable contribution to Heigl's charity foundation, the case illustrates the expansive nature of celebrities' so-called "right of publicity" and its impact on the First Amendment rights of advertisers, as well as its effect on the general public.⁸ The right of publicity should not be a viable cause of action against an advertiser who uses a celebrity's name or likeness, or otherwise appropriates the celebrity's identity to promote a product, so long as the advertiser does not falsely imply that the celebrity approves of, or endorses, the product.

II. Background

A. Regulation of Commercial Speech

In 1976, the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* criticized the paternalistic, overprotective nature of the commercial speech doctrine.⁹ Prior to *Virginia State Board*, the commercial speech doctrine had allowed practically unbridled legislative regulation of commercial speech, which was viewed as having little value with little or no recognition of any First Amendment protection, since the days of *Valentine v. Chrestensen*.¹⁰ But now, the Supreme Court has recognized that different people value different speech differently, and that consumers and society in general have a strong interest in the "free

⁷ *Id.* at 10.

⁸ Nate Raymond, *Katherine Heigl, Duane Reade end lawsuit over actress' photo*, Reuters (Aug. 27, 2014), <http://www.reuters.com/article/2014/08/27/us-people-katherineheigl-idUSKBN0GR2BD20140827>.

⁹ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

¹⁰ *See e.g., Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that, while states and municipalities may not unduly burden or proscribe the freedom to communicate information in public thoroughfares, "the Constitution imposes no such restraint on government as respects purely commercial advertising").

flow of commercial information.”¹¹ And, as Justice Blackmun stated in the majority opinion, the right to free speech is just as much about the “listener” as it is about the “speaker.”¹²

Following *Virginia State Board*, in 1980 the Supreme Court decided the landmark commercial speech case *Central Hudson Gas & Electric Corp. v. New York*, which established the modern standard for government regulation of speech in the context of commercial advertising. Finding that commercial speech was valuable as a means of providing information to people to make informed decisions, the Court established a four-step analysis which asks: (1) is the expression protected by the First Amendment (i.e. concerning lawful activity and not misleading); (2) is the asserted governmental interest substantial; (3) does the regulation directly advance the asserted governmental interest; and (4) is the regulation more extensive than necessary to serve that interest?¹³ Essentially, a state can only regulate lawful commercial speech if it has a substantial interest for doing so and the regulation directly advances that interest in a manner no more extensive than necessary.¹⁴ In a concurring opinion, Justice Blackmun disagreed with the last three prongs of the Court’s new test, and instead believed the first prong to be dispositive; in his view, so long as the speech was lawful and not misleading, then the government’s only recourse might be to regulate the advertised product or service itself—not the commercial speech associated therewith.¹⁵

¹¹ *Virginia State Bd.*, 425 U.S. at 763-764.

¹² *Id.* at 757.

¹³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

¹⁴ *Id.*

¹⁵ *See id.* at 579.

B. *Haelan Laboratories*

The right of publicity was first recognized by the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* In *Haelan*, the court decided that “a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture.”¹⁶ According to the *Haelan* court, this “right of publicity” must be separate from the statute-created right of privacy, wherein one has “a personal and non-assignable right not to have his feelings hurt” by a publication of his own picture, because, as the court reasoned, celebrities would otherwise “feel sorely deprived if they no longer received money for authorizing advertisements.”¹⁷ Indeed, the *Haelan* court recognized that this sense of deprivation would be “far from” any sense of bruised feelings on the part of the celebrity.¹⁸ In essence, the *Haelan* court recognized that there is pecuniary value in a person’s (and, in particular, a celebrity’s) endorsement of a product or service, and therefore created a new, common-law, intellectual property right for courts to protect that value. Notably, the emersion of the right of publicity occurred during the reign of the commercial speech doctrine, prior to the Supreme Court’s decision in *Virginia State Board* or its creation of the *Central Hudson* test.

C. Celebrity Impersonators

In the half-century since *Haelan*, the right of publicity has been recognized in the majority of states across the country, either by way of common law or codification in state statute.¹⁹ Moreover, the right has undergone significant expansion in the advertising context,

¹⁶ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Notably, national advertisers must adhere to the strictest of the state laws in which they advertise, such that recognition of the right of publicity in the majority of states has the practical result of affecting advertisers’ decisions even in states where the right is not recognized.

reaching far beyond the use of a celebrity's picture. For example, in *Onassis v. Christian Dior-New York, Inc.*, the court found that the New York right of publicity statute, which prohibited unauthorized appropriation of a person's "portrait or picture" for advertising purposes, was violated by use of a celebrity "look-alike."²⁰ In *Onassis*, an advertiser sought to prepare a number of print ads featuring the famous Jacqueline Kennedy Onassis, but knew that she would likely refuse to appear because she was historically known to never allow her name or image to be used to promote commercial products; the advertiser's solution was to fill her role in the ad with the help of Barbara Reynolds, a celebrity impersonator of Onassis.²¹ The court ruled against the advertiser, holding that the statutory language "portrait or picture" extended beyond actual images of Onassis herself to include "any representation, including the picture of another, which was intended to be, and did, in fact, convey the idea that it was the plaintiff."²² The court concluded that Reynolds may not use her resemblance to Onassis in commercial advertisements, adding that "[n]o one has an inherent or constitutional right to pass himself off for what he is not."²³

Shortly after the New York Supreme Court's decision in *Onassis*, the Southern District of New York decided a similar case involving another celebrity look-alike. In *Allen v. National Video, Inc.*, the court clarified that, in analyzing a right of publicity claim against the use of a celebrity look-alike, "the question before the court is not whether some, or even most, people will be *reminded* of plaintiff when they see this advertisement . . . but whether an undisputed picture of [the look-alike] should be regarded, as a matter of law, to *be* a portrait or picture of

²⁰ *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 257-258, 263 (Sup. Ct. 1984) *aff'd*, 488 N.Y.S.2d 943 (App. Div. 1985).

²¹ *Id.* at 257.

²² *Id.* at 261.

²³ *Id.* at 262.

plaintiff.”²⁴ While it found that the advertisement at issue, which included a photograph of Woody Allen look-alike Phil Boroff, certainly made reference to the celebrity plaintiff, the court identified several factors that weighed against granting summary judgment in his favor.²⁵ These factors included several differing physical characteristics and alternative interpretations for the look-alike’s presence in the advertisement, and so the court declined to conclude that the photograph used in the advertisement was the celebrity’s portrait or picture as a matter of law.²⁶ Therefore, the court resolved the issue in the context of a Lanham Act false endorsement claim instead, ultimately finding in favor of the celebrity plaintiff and granting an injunction against the defendant advertiser.²⁷

Similarly, in *Midler v. Ford Motor Co.*, an advertising agency sought out Grammy Award winner Bette Midler to sing her hit “Do You Want To Dance” for a television commercial promoting the Ford Lincoln Mercury.²⁸ When Midler’s manager refused, the agency found a replacement in Ula Hedwig, a former Midler backup singer.²⁹ After being instructed by the agency to record the song “sound[ing] as much as possible like...Bette Midler,” Hedwig imitated Midler as best she could.³⁰ Ultimately, the Hedwig recording was used in the commercial, and many viewers believed that it “sounded exactly” like Midler’s distinctive recording.³¹ Even though the court found that the agency had not used Midler’s name, voice, likeness, or any other use prohibited by state statute, the court looked to the common law, wherein the state would

²⁴ *Allen v. National Video, Inc.*, 610 F. Supp. 612, 624 (S.D.N.Y. 1985) (emphases in original).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 630.

²⁸ *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 462.

recognize an injury from “an appropriation of the attributes of one’s identity.”³² The court found that using Hedwig as a Midler “sound-alike” constituted such an appropriation, stating that “[t]o impersonate her voice is to pirate her identity.”³³

D. Right of Publicity vs. First Amendment

Celebrities’ right of publicity has occasionally been trumped by the First Amendment. For example, in *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, the court recognized “an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”³⁴ The *C.B.C.* court balanced the competing interests at issue in a non-advertising setting: a fantasy sports game producer’s First Amendment right to use baseball players’ names and playing records versus the baseball players’ right of publicity.³⁵ In conducting its analysis, the court identified each of the potential justifications for enforcing the right of publicity. First, the court noted that, in *Zacchini v. Scripps*, the Supreme Court had found that at least one goal of the right is to “focus [] on the right of the individual to reap the reward of his endeavors,” distinguishing between those cases in which a person’s name is used “for purposes of trade” and those which “go[] to the heart of [a person’s] ability to earn a living” and which involve “the very activity by which the entertainer acquired his reputation in the first place.”³⁶ The *C.B.C.* court found that the game producer’s use of the players’ names and playing

³² *Id.* at 463.

³³ *Id.*

³⁴ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1095 (E.D. Mo. 2006) *aff’d*, 505 F.3d 818 (8th Cir. 2007).

³⁵ *Id.*

³⁶ *Id.* at 1097 (quoting *Zacchini v. Scripps–Howard Broadcasting, Co.*, 433 U.S. 562, 573 (1977)).

records did not interfere with their ability to reap financial rewards from playing baseball and making product endorsements.³⁷

Next, the *C.B.C.* court analyzed the potential economic incentive for enforcing the players' right of publicity. Quoting *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*³⁸, the court found that the economic incentive of inducing achievement was "inconsequential because most celebrities with valuable commercial identities are already handsomely compensated . . . even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than adequate supply of creative effort and achievement."³⁹ Moreover, the court noted that "even in the absence of publicity rights, celebrities would still be able to reap financial reward from authorized appearances and endorsements."⁴⁰ While the *C.B.C.* court clearly was not moved by this economic incentive, it noted that another economic incentive of promoting efficient allocation of resources might be more persuasive in an advertising context, "where repeated use of a celebrity's likeness to sell products may eventually diminish its commercial value."⁴¹

The *C.B.C.* court also identified protection against consumer deception as a justification for the right of publicity, but noted that the Lanham Act already provides such protection.⁴² Other possible justifications cited by the court included allowing the persons to enjoy the fruits of their goodwill and the prevention of unjust enrichment.⁴³ Notably, the court found that the public's countervailing "interest in the dissemination of news and information" outweighed any

³⁷ *Id.*

³⁸ 95 F.3d 959, 968 (10th Cir.1996).

³⁹ *C.B.C.*, 443 F. Supp. 2d 1077, 1097 (internal quotations omitted).

⁴⁰ *Id.*

⁴¹ *Id.* at 1098.

⁴² *Id.*

⁴³ *Id.*

of the baseball players' interests.⁴⁴ Specifically, the court found that the public had a substantial interest in "factual data" concerning baseball players and games.⁴⁵ Therefore, the court held that, even if the players had a valid right of publicity in their names and records and the game producer was infringing that right, the right of publicity "must give way" to the producer's First Amendment right.⁴⁶

E. *White v. Samsung*

1. Panel Decision

Perhaps the most expansive court decision involving a right of publicity was *White v. Samsung Electronics America, Inc.* At issue in *White* was a television commercial by Samsung that was designed to imply that its products would still be in use in the upcoming twenty-first century.⁴⁷ Specifically, the commercial promoted Samsung's video-cassette recorders (VCRs) and depicted a robot dressed similarly to "Wheel of Fortune" co-host Vanna White posing in front of a game board in a manner similar to White.⁴⁸ The game board clearly resembled the "Wheel of Fortune" set, and the commercial's caption read "Longest-running game show. 2012 A.D."⁴⁹ The clear takeaway from the commercial was that, by the year 2012, Vanna White would be replaced by a robot in her role as co-host of the popular game show. White, whose permission was neither sought nor given prior to the commercial's airing, was not amused. After losing to Samsung on summary judgment at the district court, White persuaded the Ninth Circuit

⁴⁴ *Id.*

⁴⁵ *Id.* at 1099.

⁴⁶ *Id.* at 1100.

⁴⁷ *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992), as amended (Aug. 19, 1992).

⁴⁸ *Id.*

⁴⁹ *Id.*

Court of Appeals to allow her to take her common law right of publicity claim to a jury—ultimately receiving a \$403,000 award.⁵⁰

In reversing the district court’s dismissal of White’s right of publicity claim, the Ninth Circuit declared that the common law right of publicity is not confined to appropriation of a person’s “name or likeness.”⁵¹ Rather, the court found that common law right of publicity protects a person’s “identity” in a broad sense, citing *Midler*, among others.⁵² In the court’s view, the only question is *whether* a defendant has appropriated the plaintiff’s identity, not *how* he has done so.⁵³ And, in White’s case, the Samsung commercial left “little doubt about the celebrity the ad is meant to depict.”⁵⁴ For the Ninth Circuit panel, this was enough for White to allege that Samsung had appropriated her identity. Moreover, the majority dismissed Samsung’s parody defense simply because the advertisement’s primary message was commercial in nature.⁵⁵

Notably, Circuit Judge Alarcon dissented from the majority’s conclusion that recovery under right of publicity is allowable merely if there is an appropriation of one’s identity. Specifically, Alarcon found that the authoritative cases all required proof of appropriation of a name or likeness, and that a case may only go to a jury when “identifying characteristics unique to a plaintiff are the only information as to the identity of the person appearing in an ad.”⁵⁶ Alarcon then concluded that “[n]o reasonable juror could confuse a metal robot with Vanna White.”⁵⁷ Moreover, Alarcon pointed out that the “Wheel of Fortune” game board was the only

⁵⁰ See Heberer, William M. III (1994) “The Overprotection of Celebrity: A Comment on White v. Samsung Electronics America, Inc.,” *Hofstra Law Review*: Vol. 22: Iss. 3, Article 10, at 6.

⁵¹ *Id.* at 1397.

⁵² *Id.* at 1398.

⁵³ *Id.*

⁵⁴ *Id.* at 1399.

⁵⁵ *Id.* at 1401.

⁵⁶ *Id.* at 1404.

⁵⁷ *Id.*

part of the commercial that could lead a viewer to think of White, and that courts had never before granted any kind of proprietary interest to a performer in a particular role that he or she had become famous for playing.⁵⁸ Referencing copyright law, Alarcon warned of creating a monopoly that would inhibit the creative expressions of others; as he pointed out, Samsung only copied “the *idea* of a glamorous female game show hostess,” and employed its own unique expression to portray that idea.⁵⁹ Therefore, Alarcon would have affirmed the district court’s judgment, since Samsung did not appropriate either of White’s name or likeness.

2. Kozinski’s Dissent from Refusal to Rehear En Banc

Following the unfavorable decision of the Ninth Circuit panel, Samsung petitioned the court for a rehearing *en banc*. Although the petition was denied, Circuit Judge Kozinski authored a powerful dissent that identified numerous flaws in the panel’s holding.⁶⁰ Among other notable comments, Kozinski admonished:

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.⁶¹

Kozinski also reiterated some of what Alarcon had said in his dissenting opinion. Namely, that the “Wheel of Fortune” set—not the robot’s face, dress, or jewelry—is what evoked White’s image in the commercial.⁶² Therefore, the right granted to White by the Ninth Circuit panel was an exclusive right not in her image or persona, but in “what she does for a

⁵⁸ *Id.* at 1405.

⁵⁹ *Id.* at 1408.

⁶⁰ *White v. Samsung Electronics Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

⁶¹ *Id.* at 1513.

⁶² *Id.* at 1515.

living.”⁶³ Moreover, Kozinski considered the speech restriction imposed on Samsung to be “unparalleled” in First Amendment law, as it disallowed “reminding people of someone”—far beyond merely protecting White’s name or likeness—and he pondered why the court would allow White to “control our thoughts” in this manner.⁶⁴ He warned that giving too much weight to performers’ right of publicity could allow them to veto fair use parodies and derivative works of the shows in which they appear.⁶⁵

Kozinski’s dissent also attacked the panel’s dismissal of the First Amendment simply because Samsung’s speech was commercial. Scolding the panel’s complete failure to even mention, much less address, the Supreme Court’s *Central Hudson* commercial speech test, Kozinski advised that “[c]ommercial speech may be less protected by the First Amendment than noncommercial speech, but less protected means protected nonetheless.”⁶⁶ Moreover, Kozinski pointed out that White, like Samsung, “does whatever she does to make money, too,” and posed the question of why White’s right to use her persona for profit should be superior to Samsung’s right to profit off its products.⁶⁷

III. Discussion

The expansive nature of the right of publicity has resulted in an encroachment upon advertisers’ First Amendment rights. Specifically, advertisers such as Duane Reade are now being sued for simply publishing truthful speech regarding a celebrity who actually uses the advertised product or service, because the celebrity has not given permission and the advertiser

⁶³ *Id.*

⁶⁴ *Id.* at 1519.

⁶⁵ *Id.* at 1518.

⁶⁶ *Id.* at 1519.

⁶⁷ *Id.* at 1517.

has not given payment. However, the “value” associated with a celebrity’s name or reputation, economic or otherwise, should not be enough to outweigh an advertiser’s First Amendment right to truthful speech (as applied to states through the Fourteenth Amendment), or the public’s interest in hearing such speech. Therefore, the right of publicity should not be a viable cause of action against an advertiser who appropriates a celebrity’s identity to promote a product, so long as the advertiser does not falsely imply that the celebrity endorses the product, as similarly required for false endorsement claims under the Lanham Act.

A. Competing Interests

Taken at face value, neither of the competing interests at stake in a celebrity right of publicity action against an advertiser seems particularly compelling. On the one hand, an advertiser such as Duane Reade is typically seeking to capitalize on another’s success to sell a product, and on the other hand, a very wealthy celebrity such as Katherine Heigl is usually seeking an unimaginable sum of money; as Kozinski recognized in his *White* dissent, both are looking to make money. However, the advertiser’s interest should be recognized as the more compelling, even if only by a narrow margin. Specifically, the advertiser’s right to publish truthful information is grounded in the First Amendment of the United States Constitution; as Kozinski also recognized, the mere fact that the advertiser’s speech is for a commercial purpose does not wholly deprive it of all protection—it merely requires application of the *Central Hudson* test. Moreover, a celebrity’s usage of a particular product may be the kind of information that consumers want to know prior to making a purchasing decision, and therefore ought to be part of the “free flow of commercial information” described in *Virginia State Board*. This is evident from the strong influence that paid endorsers can have over audiences, and the

high demand that they are in.⁶⁸ Also, the *C.B.C.* court recognized the public's interest in knowing "factual data." These interests all outweigh the celebrity's right to publicity, which stems from either state statute or state common law and, as seen in *Haelan Laboratories*, essentially exists merely to protect a pecuniary interest. The only "harm" alleged by celebrities like Katherine Heigl is strictly financial.

To properly determine whether a state has the ability to constitutionally regulate an advertiser's commercial speech, such as by enjoining an advertiser from publishing that a celebrity uses its product or service, the regulation must be analyzed under the *Central Hudson* test. As previously stated, this test asks: (1) is the expression protected by the First Amendment; (2) is the asserted governmental interest substantial; (3) does the regulation directly advance the asserted governmental interest; and (4) is the regulation more extensive than necessary to serve that interest?

If the advertiser's speech is truthful and accurately states that a particular celebrity uses its product or service, then the first prong is met. For example, Katherine Heigl did not deny that she actually shopped at Duane Reade, and so the advertisements were presumably entirely truthful (and certainly provided strong evidential support in the form of the photographs themselves). Notably, under Blackmun's concurrence in *Central Hudson*, the analysis would be complete at this step and the issue would be resolved in favor of the advertiser.

⁶⁸ See, e.g., *Kate Middleton Causes Diane Von Furstenberg Wrap Dress To Sell Out In Minutes*, The Huffington Post Canada, http://www.huffingtonpost.ca/2014/04/16/kate-middleton-diane-von-furstenberg_n_5163893.html?just_reloaded=1; and Jamie Feldman, *Rihanna Gets Paid More For Attending A Fashion Show Than You Probably Make In One Year*, The Huffington Post, http://www.huffingtonpost.com/2014/05/21/rihanna-fashion-show-attendance-cost_n_5366775.html.

Nevertheless, moving on to the second prong, it is difficult to identify a government interest in a celebrity's right of publicity action that is "substantial." The *C.B.C.* court provided some guidance for this when it identified various potential justifications for the right of publicity, but none of those that apply to the truthful advertising context satisfy the substantial interest requirement. For example, this is not a case where the celebrity's ability to earn a living might be interfered with; at most, the celebrity may suffer some loss from potential paid endorsements. But such loss would be inconsequential for substantially the same reason that the economic incentive of inducing achievement is irrelevant—because celebrities are already "handsomely compensated." Moreover, truthfully advertising that a celebrity actually uses a product or service certainly does not create a concern of consumer deception (indeed, paid "endorsers" are more likely to cause such deception where they do not actually use the products they are selling). The most applicable justification identified in *C.B.C.* is the efficient allocation of resources to protect the commercial value of the celebrity's likeness. Yet the *C.B.C.* court also recognized that "in the absence of publicity rights, celebrities would still be able to reap financial reward from authorized appearances and endorsements."⁶⁹

Therefore, while a state may still have some "legitimate" interest in providing a celebrity with a right of publicity (under a less stringent standard), it seems highly questionable that this interest might be considered "substantial" enough to pass muster under *Central Hudson*. Without a substantial government interest, the remaining factors of *Central Hudson* cannot be satisfied. Moreover, echoing Justice Blackmun's words in *Virginia State Board*, the "listener" has a strong interest in hearing the advertiser's truthful speech. And, as *C.B.C.* recognized, the public has an

⁶⁹ *C.B.C.*, 443 F. Supp. 2d 1077, 1097 (internal quotations omitted).

interest in the dissemination of “news and information.”⁷⁰ In short, the celebrity’s interest in reaping financial gains for supporting a product or service should not outweigh the advertiser’s First Amendment right to free speech and the public’s interest in hearing it.

B. Right of Publicity Cases More Concerned with False Endorsement

Although characterized by the courts as “right of publicity” cases, many such cases have really turned on whether an advertisement created a false impression that a celebrity actually approved of, or endorsed, a particular product or service. For example, in *Onassis* the court found that the celebrity look-alike was so strikingly similar to Jacqueline Kennedy Onassis that an image of the look-alike legally constituted a “portrait or picture” of Onassis herself. Therefore, the impression created by the advertisement was that Onassis endorsed the advertised product—in fact, that she approved of the product so much that she was willing to lift her self-imposed ban on commercial promotions to appear in an advertisement for it. The court even characterized the advertiser’s look-alike tactic as an attempt to find a loophole “if a person is unwilling to give his or her endorsement to help sell a product.”⁷¹ Similarly, the *Midler* decision turned on the fact that the sound-alike’s performance so closely resembled Bette Midler’s, again creating the impression that Midler herself endorsed the product when she had in fact declined to do so.

The court in *Allen* declined to decide the plaintiff’s right of publicity claim, resolving the issue instead in the context of a Lanham Act false endorsement claim, where the same relief was available under the less stringent standard of a “likelihood” of confusion. But before shifting its

⁷⁰ While Katherine Heigl’s shopping habits may hardly seem to be newsworthy, it should be noted that the photographs posted by Duane Reade were originally published by a celebrity gossip news source. See *Heigl v. Duane Reade, Inc.*, No. 1:14-cv-02502 (S.D.N.Y. 2014), ECF No. 2.

⁷¹ *Onassis*, 472 N.Y.S.2d at 261.

analysis toward the Lanham Act, *Allen* clarified that the question under right of publicity is not whether people will be “reminded” of the celebrity, but whether an image shown in the advertisement should be regarded to “be” an image of the celebrity—in other words, whether viewers will actually believe that the celebrity himself is endorsing the product. This was the standard that the *White* court failed to apply. And, had the Kozinski and Alarcon opinions won the day in *White*, Samsung would have been permitted to continue running its commercial because it did not actually use Vanna White’s name or likeness; rather, it merely reminded viewers of her, devoid of any suggestion that White herself actually endorsed the Samsung products.

C. Comparison to Defamation

It is worth noting the striking incongruity between the legal standards that a celebrity must satisfy when bringing a suit for defamation as opposed to a right of publicity infringement suit. In the defamation context, a celebrity or other public figure may only recover if he can prove that the defendant made a false statement about him, and that the false statement in question was made with “actual malice.”⁷² Historically, this can be a difficult standard to meet, as it requires the plaintiff to prove that the defendant had either actual knowledge of the falsity or a reckless disregard for the truth.⁷³ Notably, part of the reasoning behind applying such a heightened standard to public figures was that they are in a better position than private individuals to correct any falsehoods published about them by virtue of their access to the public forum, and that publishers ought to be protected from the undue fact-checking burden that they might otherwise endure.

⁷² See e.g., *The New York Times Co. v. L.B. Sullivan*, 376 U.S. 254, 280-281 (1964).

⁷³ *Id.*

It seems strange, then, that a celebrity has a much easier case to make when suing someone—an advertiser—for publishing something entirely truthful and not at all defamatory. Suddenly, truthful information finds itself more heavily restricted than false information. And yet, much of the same rationale behind the actual malice standard still applies: the celebrity still has access to the public forum, and can correct, or at least respond to, any attempts by advertisers to use his name or likeness to promote a product. Moreover, the right of publicity would allow anyone else to make the same exact truthful representation about the celebrity in a non-advertising context; it simply targets one particular group of speakers, advertisers, by virtue of the fact that they seek to make a profit—but so does the celebrity. Furthermore, while a celebrity might complain that he did not wish for the public to know of his use of a particular product or service for reasons other than pecuniary interests (perhaps out of fear that such knowledge might damage his reputation), a private individual or news outlet could be completely free to make that knowledge public;⁷⁴ such an issue might be better suited for a right of privacy claim, anyway.

IV. Conclusion

Celebrities like Katherine Heigl should not have a viable cause of action against advertisers like Duane Reade, who simply publicize truthful events to promote their brands. A celebrity's right of publicity should only be considered infringed when an advertiser has misappropriated the celebrity's name or likeness to create a false impression that the celebrity actually "endorses" its product or service. But when a celebrity actually does use a product, he cannot complain over the resulting impression that he approves of that product. And, if he truly wishes to be distanced from that product, he can find redress via his access to the public forum in

⁷⁴ As previously mentioned, the Heigl photographs were already available via a celebrity gossip news source. *See Katherine Heigl Signs with WME After Leaving Creative Artists Agency*, Just Jared, <http://www.justjared.com/photo-gallery/3073133/katherine-heigl-signs-with-wmeleaves-cao/02/>.

the same manner as if he had actually been defamed. Truthful information that consumers may want to know should not be subject to restriction at the will of a celebrity's financial interest; the First Amendment should not give way to Katherine Heigl's hunt for more money.