

# Vanna White v. Samsung Electronics America, Inc., 971 F.2D 1395 (9th Cir. 1992)

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## **Vanna White v. Samsung Electronics America, Inc.,**

971 F.2D 1395 (9TH CIR. 1992).

### *Introduction*

Vanna White, hostess of the famous television game show “Wheel of Fortune”, sued Samsung Electronics America (“Samsung”) and David Deutsch Associates, Inc. (“Deutsch”) for running a particular advertisement that appropriated her identity without her consent. White alleged the ad violated the California Civil Code, the common-law right of publicity, and the Lanham Act. The United States District Court for the Central District of California granted summary judgment in favor of the defendants on each claim. The United States Court of Appeals for the Ninth Circuit held that the ad did not appropriate White’s name or likeness and affirmed the district court’s dismissal of the California Civil Code claim. However, the court also found that issues of material fact existed as to the right of publicity and Lanham Act claims which precluded a grant of summary judgment to defendants. Thus, the court remanded the case for a jury determination of these two issues.

### *Facts*

Vanna White, as a result of the fame the game show “Wheel of Fortune” has bestowed upon her, has been able to capitalize on this fame by marketing her identity to various advertisers. Deutsch prepared a series of product advertisements for Samsung, all of which followed a general theme: a current item from popular culture was depicted with a Samsung product and conveyed the message that the Samsung product would still be in use in the twenty-first century. The series of ads ran in several publications that were widely circulated, in some instances nationally.

The current dispute was prompted by Samsung’s advertisement for its videocassette recorders. The ad at issue portrayed a robot dressed in a blonde wig, long gown, and large jewelry meant to depict White’s appearance. The robot was pictured standing next to a game board identical to that in the “Wheel of Fortune” set, in a pose for which White is famous. The caption in the ad read: “Longest-running game show. 2012 A.D.” Defendants even referred to the ad as the “Vanna White” ad. This advertisement was circulated without Whites’ consent and she was not paid for the use of her likeness as were some other celebrities whose identities were used in other ads in the series. White sued Deutsch and Samsung for violation of section 3344 of the California Civil code, the common-law right of publicity, and section 43(a) of the Lanham Act. The district court granted defendants’ motion for summary judgement on each claim, and this appeal followed.

*Legal Analysis*

The first issue addressed by the Court of Appeals was whether the district court erred in rejecting White's claim that the Samsung ad used her likeness in contravention of section 3344 of the California Civil Code. In *Midler v. Ford Motor Co.*, the court defined the term "likeness" to mean a visual image.<sup>1</sup> Applying this definition to the case at bar, the court concluded that since the robot used by Samsung had mechanical features and was not a replica of White's precise features, it was not White's likeness within the meaning of section 3344. Thus, the district court's dismissal of this claim was affirmed.

The court next addressed the issue of whether the district court erred in granting summary judgment to defendants on White's common-law right of publicity claim. A cause of action for the right of publicity may be pleaded by alleging the following: (1) defendant's use of the plaintiff's identity; (2) appropriation of plaintiff's name or likeness to defendant's advantage; (3) lack of consent; and (4) resulting injury.<sup>2</sup> The district court reasoned since there was no appropriation of White's name or likeness in the robot ad, White failed to satisfy the second prong of the test which warranted dismissal of her claim.

The Court of Appeals disagreed with the district court's view that the right of publicity is limited to the appropriation of name or likeness. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*, a valid right of publicity action existed where defendant used plaintiff's race car in a television commercial, even though plaintiff's features were not visible in the photograph.<sup>3</sup> Also, in *Midler v. Ford Motor Co.*, it was held that defendants appropriated part of plaintiff Bette Midler's identity by using a Midler sound-alike to sing a song which Midler made famous.<sup>4</sup> Finally, in *Carson v. Here's Johnny Portable Toilets*, Johnny Carson's identity was appropriated when defendant used Carson's signature phrase "Here's Johnny" as a brand name under which he marketed his portable toilets.<sup>5</sup> Based on the foregoing cases, the court here concluded that the common-law right of publicity reaches means of appropriation other than name or likeness and that it is not the means of appropriation of a plaintiff's identity that is important, but whether the defendant has appropriated at all. The court also noted that "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."

Moreover, the court recognized that in cases of appropriation of a celebrity plaintiff's identity by means other than name or likeness, those actions directly implicate commercial interests which the right of publicity is designed to protect. The court in *Carson*, explaining the theory of the right of publicity, stated that since a celebrity's identity can be valuable in the promotion of products, the

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1. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

2. *Eastwood v. Superior Court*, 149 Cal.App.3d 198, Cal.Rptr.342 (1983).

3. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

4. *Id.* at 463-64.

5. *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831, 835-37 (6th Cir. 1983).

celebrity has a protectable interest against unauthorized commercial exploitation of his identity.<sup>6</sup> Invasion of the right of publicity occurs when such identity is commercially exploited regardless of whether the celebrity's name or likeness is used.

Applying these principles to the facts of the present case, the court found that viewed together, the aspects of the ad left little doubt as to which celebrity the ad was trying to depict. The female-shaped robot wearing a blonde wig, long gown, large jewelry, turning a block letter on a game board immediately recognizable as the "Wheel of Fortune" game show set resembles only one person: Vanna White. The defendants themselves even referred to the ad as the "Vanna White" ad. Based on these facts, the court concluded that White has shown there was appropriation of her identity and therefore the district court erred in granting summary judgment to defendants on White's right of publicity claim.

Finally, the court addressed the issue of whether White had a valid claim under section 43(a) of the Lanham Act. The relevant portion of this section provides that "any person who shall . . . use, in connection with any goods or services . . . any false description or representation . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or designation."<sup>7</sup> In order to prevail, White must show that in running the robot ad, Samsung and Deutsch created a likelihood of confusion on the part of the public.<sup>8</sup> The test applied by the Court of Appeals in determining whether there was likelihood of confusion was set out in *AMF, Inc. v. Sleekcraft Boats* which listed eight relevant factors to be considered: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product.<sup>9</sup> The court considered White's claim in light of each factor.

In cases concerning confusion over celebrity endorsement, "mark" means the celebrity's persona,<sup>10</sup> and the "strength" of the mark refers to the level of recognition the celebrity enjoys among members of society.<sup>11</sup> If the segment of the population that the ad targets is unfamiliar with White's persona then that segment would not be confused as to whether White was endorsing Samsung's products. However, since White is well-known there is a possibility of a likelihood of confusion among the public, thus White's "mark" is strong.

The next factor, relatedness of the goods, concerns "the reasons for or source of the plaintiff's fame." The court found that White's "goods" were closely related to Samsung's VCR's because her fame was based on her television per-

6. *Id.* at 835.

7. 15 U.S.C. § 1125(a).

8. *Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1454 (9th Cir. 1991).

9. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).

10. *Woody Allen v. National Video, Inc.*, 610 F. Supp. 612, 627 (S.D.N.Y. 1985).

11. *Academy*, 944 F.2d at 1455.

formances. Moreover, this relationship was reinforced by the ad itself, which implied the public would be recording the “longest-running game show” on Samsung’s VCR’s.

The court found the third factor, similarity of the marks, not to be determinative since there was ambiguity as to whether likelihood of confusion existed. Although the robot clearly depicted White, it was still a robot and not a human figure. The fourth factor, evidence of actual confusion, weighed against White because she failed to present any evidence of actual confusion.

The fifth factor, marketing channels used, weighed toward a finding of likelihood of confusion. This conclusion is supported by the fact that White has appeared in numerous magazines and magazine covers pictured in the same stance as the robot in the disputed ad, and Samsung used magazines as its marketing channel.

As to the sixth factor, it was determined that consumers were not likely to exhibit a high degree of purchaser care in determining who endorses VCR’s thus making confusion as to their endorsement more likely.

With regard to the seventh factor, the court was concerned with whether the defendants intended to profit by confusing consumers concerning the endorsement of Samsung products. The court concluded that looking at the series as a whole and the theme embodied in each ad, a jury could reasonably conclude that in addition to creating a spoof of the game show “Wheel of Fortune”, the defendants intended to convince consumers that Vanna White endorsed Samsung products like the celebrities in other Samsung ads.

Finally, the court found the eighth factor, likelihood of expansion of the product, irrelevant in cases involving celebrity endorsement. Based on an application of the *Sleekcraft* factors to White’s Lanham Act claim, the Court of Appeals concluded that the district court erred in granting summary judgment to defendants since White had presented a genuine issue of material fact concerning a likelihood of confusion as to her endorsement of the Samsung ad. The court noted that of particular importance was the fact that the “Vanna White” robot ad was part of a series of ads in which other celebrities participated and were paid for their endorsement of Samsung’s products. The court therefore held that the Lanham Act claim was a matter to be decided by a jury on remand.

### *Conclusion*

White alleged infringement of various intellectual property rights after Samsung ran an ad that appropriated her identity without her consent. The Court of Appeals concluded that since the robot in Samsung’s ad was not a replica of White’s precise features it was not a “likeness” within the meaning of the California statute. However, the common-law right of publicity reaches means of appropriation other than name or likeness, thus a robot that so clearly depicts a particular celebrity has appropriated her identity. Looking at the series of advertisements as a whole, the court concluded that White presented a genuine issue of material fact as to likelihood of confusion. The court thus remanded the case

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for a jury determination of the validity of White's right of publicity and Lanham Act claims.

*Zorka Ristanovic*

