KATHERINE HEIGL V. DUANE READE: THE PREDICTED OUTCOME AND INSIGHT INTO NEW YORK PUBLICITY RIGHTS♦

INTRODUCTION

In the summer of 2014, Hollywood actress and well-known celebrity Katherine Heigl filed a six million dollar lawsuit against New

York drugstore chain Duane Reade over a "tweet."[1] The tweet contained an image of Heigl carrying a Duane Reade bag and included a caption reading, "[e]ven @KatieHeigl can't resist shopping #NYC's favorite drugstore."[2] How can one tweet, something so commonplace in today's society, be worth six million dollars? The answer lies in publicity rights law—the right of each person to his or her image.[3] With the growing number of social media platforms and new ways companies have to reach their customers, coupled with New York's vague statutory right to publicity, how can companies interpret the law and use celebrity images while avoiding liability?

Today, twenty-eight states recognize a common law right to publicity and nineteen states enacted statutory laws.[4] New York is one such statutory law state and does not recognize a common-law right to publicity.[5] Section 50 of New York Civil Rights Law creates a misdemeanor for "a person, firm or corporation [to use] for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person."[6] Despite a failed proposal in 1970, New York has made no attempts to change the language of its statute.[7] As a result, a New York plaintiff seeking to bring a publicity rights claim, or companies looking to avoid a lawsuit, can only rely upon the language of the statute.[8]

The language of New York's statute—"for advertising purposes"—is especially vague.[9] When Section 50 was created in the

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[1] Dareh Gregorian, *Katherine Heigl Drops Her $6M Lawsuit Against Duane Reade*, DAILY NEWS, http://www.nydailynews.com/new-york/katherine-heigl-drops-6m-lawsuit-duane-reade-article-1.1919229 (last updated Aug. 27, 2014, 4:54 PM); Eriq Gardner, *Katherine Heigl Ends Lawsuit over Duane Reade Tweet (Exclusive)*, HOLLYWOOD REP., http://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552 (last visited Aug. 27, 2014, 12:20 PM).

[2] Gardner, *supra* note 1.

[3] 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2015).

[4] *Statutes*, RIGHT OF PUBLICITY, http://rightofpublicity.com/statutes (last visited Sept. 22, 2015).

[5] N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015); *see* Novel v. Beacon Operating Corp., 86 A.D.2d 602, 446 N.Y.S.2d 118 (2d Dep't 1982) (Standing for the proposition that there is no common-law right of privacy and the only available remedy is that created by Civil Rights Law §§ 50 and 51.); MCCARTHY, *supra* note 3, at § 6:75.

[6] N.Y. CIV. RIGHTS LAW § 50 (McKinney 2015).

[7] MCCARTHY, *supra* note 3. The proposal would have added "open-ended" language that would allow courts discretion to determine whether a defendant's actions were an unreasonable invasion of privacy; *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, http://rightofpublicity.com/brief-history-of-rop (last visited Sept. 22, 2015) ("New York has been considering amending its position via a bill that has been in front of the New York legislature over the last few legislative sessions" that would have added "open-ended" language that would allow courts discretion to determine whether a defendant's actions were an unreasonable invasion of privacy).

[8] *A Brief History of Right of Publicity*, RIGHT OF PUBLICITY, http://rightofpublicity.com/brief-history-of-rop (last visited Sept. 22, 2015).

[9] N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

early 1900s, advertising was easier to identify—a newspaper, a sign, a magazine.[10] However, advertising has changed with the growth of social media and now there are many different ways to "advertise."[11] The changing nature of advertising sparks an issue with the use of Twitter, which companies can use to tweet references to celebrities or celebrity photographs.[12] Twitter posts are short and fleeting, as opposed to the format of a more typical advertisement, which might appear in a written work or other more permanent publication.[13] As a result, companies may not realize that a post, or tweet, fails to comply with New York's civil rights statute, as was the case in Heigl's lawsuit against Duane Reade.[14] In some cases, even the courts will be confused as to whether a tweet infringes on publicity rights.[15]

Heigl claims that Duane Reade used her image on its Twitter account, without her consent, for the purposes of advertising, contrary to New York's civil rights statute.[16] There is no doubt that Duane Reade used Heigl's image without her consent, but can a tweet really be considered "advertising" and significant enough to be worth six million dollars?[17] Unfortunately, Heigl's case settled, so the opportunity for a New York court to sort out these issues has been lost (for now, at least).[18] However, an analysis over what would have happened had the lawsuit gone to trial can give insight into how companies can protect themselves from being sued for publicity rights claims.

This Note proposes that had Heigl's case gone to trial, Duane Reade likely would have been held liable for infringing on Heigl's publicity rights because the company used clear advertising language in its caption, proscribed by Sections 50 and 51. However, Duane Reade could have been liable even without the use of the caption because a

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[10] Lynn Lauren, *Examples of Traditional Advertising*, HOUS. CHRON., http://smallbusiness.chron.com/examples-traditional-advertising-24312.html (last visited Oct. 5, 2015); *Traditional Marketing*, MKTG. SCH., http://www.marketing-schools.org/types-of-marketing/traditional-marketing.html (last visited Sept. 22, 2015); Mindy Lilyquist, *Types of Marketing: Traditional & Internet*, ABOUT MONEY, http://homebusiness.about.com/od/marketingadvertising/a/Types-Of-Marketing-Traditional-And-Internet.htm (last visited Sept. 22, 2015).

[11] Lilyquist, *supra* note 10; *Types of Internet Advertising*, BOUNDLESS.COM, https://www.boundless.com/marketing/textbooks/boundless-marketing-textbook/social-media-marketing-15/introduction-to-social-media-digital-marketing-98/types-of-internet-advertising-483-10593/ (last visited Sept. 22, 2015); *Different Types of Online Advertising*, FOCUS DESIGNER (Feb. 23, 2015), http://focusdesigner.com/articles/different-types-of-online-advertising/.

[12] *See* Nicholas Carlson, *The Real History of Twitter*, BUS. INSIDER (Apr. 13, 2011, 1:30 PM), http://www.businessinsider.com/how-twitter-was-founded-2011-4.

[13] *See id.*; *see* Lilyquist, *supra* note 10; *Types of Internet Advertising*, *supra* note 11; *Different Types of Online Advertising*, *supra* note 11.

[14] *See infra* Part III.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

photograph of Heigl still has the unique quality of generating commercial profit. In addition, the Twitter account itself is used for advertising, implying that the intent of the photograph was "for advertising purposes." This Note suggests that if companies want to avoid publicity lawsuits, they should avoid tweeting a photo of a celebrity without consent. However, if companies must use a celebrity's photo, they should do so incidentally or have a legitimate newsworthy reason for doing so.

Part I of this Note explores the case law establishing the right to publicity. Mainly, Part I explains the general concepts behind publicity rights and New York's refusal to extend a common law right to publicity. Part II of this Note discusses the growth of social media and its uses as platforms for advertising, which have created problems for celebrities hoping to protect their publicity rights. Part III analyzes the meaning behind the New York statute's phrase "for advertising purposes" and explains the two exceptions to the statute: newsworthiness and incidental use. Part IV applies this analysis to Katherine Heigl's case and also analyzes whether the caption is necessary in order to prove that the tweet was used for advertising purposes. Further, Part IV provides examples of situations where Duane Reade could have used Heigl's image without infringing on her publicity rights. Finally, this Note concludes with a summary of arguments and recommendations for how companies can avoid future publicity rights lawsuits.

I. A BRIEF HISTORY OF THE RIGHT TO PUBLICITY

A. *The Concept Behind the Right to Publicity: From Privacy Rights to a New Cause of Action*

The right to publicity is a state-based right that gives individuals control over the commercial use of their identities.[19] The legal concept spawned from privacy rights and recognizes that one whose name or "likeness" is used for advertising purposes, without his or her consent, has a right to recover for *an invasion of privacy*, either under common law principles or under a state statute.[20] Today, almost every state either has a common-law or statutory right to publicity.[21] However, the right to publicity had a slow and controversial start before states began to recognize the legal concept and expand upon their privacy laws.

The right to privacy is said to have developed in 1890, following a famous law review article written by attorneys Samuel Warren and

[19] *Id.*; N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).
[20] I.J. Schiffres, *Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising*, 23 ALR.3d 865 (1969). *See also* MCCARTHY, *supra* note 3.
[21] *Statutes*, *supra* note 4.

Louis Brandeis.[22] The Warren and Brandeis article argued that the law should recognize a broad right to privacy and prevent truthful but embarrassing information from being published by the press.[23] In 1902, the New York Court of Appeals rejected the Warren and Brandeis theory in *Roberson v. Rochester Folding Box Company*.[24] Justice Parker and the majority criticized the Warren and Brandeis article and argued that a right to privacy would open the door for a "parade of horribles" involving a "vast amount of litigation."[25] The Court instead placed the responsibility in the legislature's hands, arguing that if the legislature wanted to change the law, it could.[26] The New York legislature quickly took Judge Parker's advice and enacted one of the first privacy statutes in the country.[27] Section 50 of New York's Civil Rights Law makes it both a tort and a misdemeanor to use the name, portrait or picture of any person for advertising purposes or for the purposes of trade, without written consent.[28] The statute was upheld by the Supreme Court in 1910 and has remained unchanged ever since.[29]

While the development of the right to privacy was a step forward in protecting individuals' rights to their own images, the right did not extend to individuals in the public eye.[30] State courts reasoned that celebrities and politicians choose a public lifestyle and consequently, the risk of privacy invasion.[31] However, state courts began to apply the right to publicity to public figures in 1953 after Second Circuit Judge Jerome Frank coined the term "right of publicity" in his *Haelan Laboratories* opinion and distinguished the right of publicity from the right to privacy.[32] In *Haelan Laboratories*, plaintiff chewing gum company contracted with a baseball player for exclusive rights over the

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[22] Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1, 6–10 (1991); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 147–59 (1993), Tara B. Mulrooney, Note, *A Critical Examination of New York's Right of Publicity Claim*, 74 ST. JOHN'S L. REV. 1139, 1141–44 (2000).

[23] Singer, *supra* note 22.

[24] Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902) (where plaintiff Abigail Roberson sought damages for a flour company's use of her photo in an advertisement).

[25] *Id.* at 545.

[26] *Id.*

[27] *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2015); MCCARTHY, *supra* note 3, at § 1:15.

[28] N.Y. CIV. RIGHTS LAW § 50 (McKinney 2015).

[29] *Id.*

[30] Thomas Philip Boggess V, *Cause of Action for an Infringement of the Right of Publicity*, 31 CAUSES OF ACTION 2d 121 (2006).

[31] *Id.*; O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) ("Assuming then, what is by no means clear, that an action for right of privacy would lie in Texas at the suit of a private person we think it clear that the action fails; because plaintiff is not such a person and the publicity he got was only that which he had been constantly seeking and receiving . . . ."); Pallas v. Crowley-Milner & Co., 334 Mich. 282 (1952).

[32] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d. 866 (2d Cir. 1953).

baseball player's photo.[33] The plaintiff sued defendant, its rival, for deliberately inducing the baseball player to contract with the defendant to use his picture for advertising purposes.[34] The defendant argued that the plaintiff's contract was only a release of liability from Sections 50 and 51 of New York Civil Rights Law, because a man has no legal interest in the publication of his picture other than his right of privacy.[35] Judge Frank and the majority rejected the defendant's argument and recognized that a man has the right to grant exclusive privilege of the publicity value of his photograph.[36]

With the *Haelan Laboratories* opinion, Judge Frank gave birth to the legal concept of "right of publicity," a new right that is separate and distinct from the right to privacy.[37] Professor Melville Nimmer[38] further developed the right of publicity concept.[39] Nimmer believed the cause of action for right to privacy was inadequately defined as a personal tort and inappropriately focused on embarrassment and humiliation, and therefore failed to apply to the needs of Hollywood at the time.[40] Instead, Nimmer created an alternative cause of action based on the concept of unfair competition and embraced the commercial aspect of publicity claims.[41] The separate common law right to publicity was confirmed in 1977 by the United States Supreme Court ruling in *Zacchini v. Scripps-Howard Broadcasting Company*, where the Court recognized a distinct legal right of a performer to his own image.[42] As a result of Professor Nimmer's work and the *Haelan Laboratories* opinion, the right to publicity developed nationwide.

B. *New York's Publicity Rights: The Statutory Straightjacket*

New developments in society, business, and technology have demanded that states have fluidity in adapting to changing times.[43] However, New York's statute contains most of the original language of the statute from when it was created in the early 1900s.[44] Section 50

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33 *Id.*

34 *Id.*

35 *Id.* at 867.

36 *Id.* at 868 ("We think that, in addition to and independent of that right of privacy (which in New York derives from statute), 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. . . . This right might be called a 'right of publicity.'"); Boggess, *supra* note 30.

37 *Haelan Labs.*, 202 F.2d. at 866.

38 Melville Nimmer is an American Lawyer and Law Professor known to be an authority on entertainment law and an advocate for free speech. Wolfgang Saxon, *Melville Nimmer, 62, Dies; Expert on Law of Copyright*, N. Y. TIMES, Nov. 27, 1985.

39 Boggess, *supra* note 30.

40 *Id.*

41 *Id.*

42 *Id.*; Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

43 MCCARTHY, *supra* note 3, at § 6:4.

44 *See* N.Y. CIV. RIGHTS LAW §§ 50–51.

creates a misdemeanor for "a person, firm or corporation [to use] for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person."[45] Section 51 includes an action for injunction or damages and creates a few exceptions to the statute.[46]

New York refuses to recognize any common law right to publicity and instead relies solely on its statute.[47] In the late 1970s, New York attempted to amend its civil rights statute to correspond with relevant developments in other states.[48] The proposal sought to retain most of the original language but aimed to include "open-ended" language that would allow courts discretion to determine whether a defendant's actions were an unreasonable invasion of privacy.[49] The bills incorporating the proposal were introduced to the legislature in 1976 and 1977 but never gained traction.[50] No further attempts were made to implement these changes.[51] What was once viewed as an innovative step toward affording more rights to citizens became a "straightjacket" keeping New York in the 1900s and unable to keep up with modern developments.[52]

II. TWITTER AS A PLATFORM FOR PUBLICITY RIGHTS INFRINGEMENT

A. *The Growth of Social Media and Creation of Twitter*

While New York's privacy statute remains stagnant, social media has grown rapidly since the World Wide Web went public in 1991.[53] In the mid to late 1990s, a number of different search engines and websites introduced blogs and instant messaging.[54] In 2006, MySpace became a hit social media website where users each had his or her own personal

45 N.Y. CIV. RIGHTS LAW § 50.

46 N.Y. CIV. RIGHTS LAW § 51. Exceptions include "newsworthiness" and "incidental use." *Infra* Parts III.B–C.

47 There is no common-law right of privacy and the only available remedy is that created by Civil Rights Law §§ 50 and 51." Novel v. Beacon Operating Corp., 86 A.D.2d 602, 446 N.Y.S.2d 118 (2d Dep't 1982) (where a tenant sued her landlord when the landlord snuck into her apartment and took a picture of her, the Court ruled that the plaintiff could not recover because there was no evidence of "commercial exploitation").

48 *A Brief History of Rights of Privacy*, *supra* note 8 ("New York has been considering amending its position via a bill that has been in front of the New York legislature over the last few legislative sessions.").

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *See* Shea Bennett, *A Brief History of Social Media (1969–2012)*, SOCIAL TIMES (July 4, 2013, 5:00 PM), http://www.adweek.com/socialtimes/social-media-1969-2012/487353; *see also About CompuServe*, COMPUSERVE, http://webcenters.netscape.compuserve.com/menu/about.jsp (last visited Sept. 22, 2015).

54 *Id.*

profile pages and could connect with friends throughout the world.[55] At its peak in 2008, 75.9 million people in the United States visited MySpace monthly, generating $470 million in advertising sales in 2009.[56] Shortly after MySpace's creation, rival social networking site Facebook garnered 350 million users in 2009.[57]

In 2006, start-up company Odeo created Twitter and by 2011, the website had fifty-six million users.[58] A year later, Twitter surpassed MySpace and generated 500 million users.[59] Today, Twitter is ranked the fourth most popular social media website with 2.64% of all United States social media website visits, ranked only behind Facebook, YouTube, and Google+.[60] The company now has 271 million monthly visitors and is still gaining popularity.[61]

B. *Twitter: From Social Media to Advertising Platform*

Twitter functions both as a social network and as a newly innovative advertising method for companies.[62] Consequently, it also creates a platform to infringe upon celebrities' publicity rights. Twitter is a social media platform where users have 140 characters to share their thoughts, news, pictures, or links to other websites and articles.[63] Twitter profiles are typically public unless the user elects to make it private.[64] Each user's homepage contains tweets[65] that are posted by whoever that user "follows."[66] A user can also view "trending topics" or hashtags[67] to see what people around the world are talking about.[68] For

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[55] *Id.*; Linda Roeder, *What Is MySpace?*, ABOUT TECH., http://personalweb.about.com/od/myspacecom/a/whatismyspace.htm (last visited Sept. 22, 2015).

[56] Felix Gillette, *The Rise and Inglorious Fall of MySpace*, BLOOMBERG BUS. (June 22, 2011) http://www.businessweek.com/magazine/content/11_27/b4235053917570.htm.

[57] *About CompuServe*, *supra* note 53; Bennett, *supra* note 53.

[58] Carlson, *supra* note 12; Bennett, *supra* note 53.

[59] Bennett, *supra* note 53.

[60] *Most Popular Social Media Websites in the United States in June 2015, Based on Share of Visits*, STATISTA, http://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/ (last visited Sept. 28, 2015).

[61] *Id.*

[62] *Compare* Brandon Smith, *The Beginner's Guide to Twitter*, MASHABLE (June 5, 2012), http://mashable.com/2012/06/05/twitter-for-beginners/, *with* Ted Prodromou, *Using Twitter for Sales and Marketing*, ENTREPRENEUR (Mar. 21, 2013), http://www.entrepreneur.com/article/226149, *and* Lee Odden, *Guide to Twitter as a Tool for Marketing and PR*, TOP RANK ONLINE MKTG. BLOG, http://www.toprankblog.com/2007/11/twitter-guide/ (last visited Sept. 28, 2015).

[63] Smith, *supra* note 62. *See* TWITTER, twitter.com (last visited Oct. 5, 2015).

[64] Smith, *supra* note 62.

[65] *Tweet*, DICTIONARY.COM, http://dictionary.reference.com/browse/tweet ("a very short message posted on the Twitter website: the message may include text, keywords, mentions of specific users, links to websites, and links to images or videos on a website") (last visited Sept. 28, 2015).

[66] Smith, *supra* note 62.

[67] *Hashtag*, DICTIONARY.COM, http://dictionary.reference.com/browse/hashtag ("on social-networking websites) a word or phrase preceded by a hash mark (#), used within a message to identify a keyword or topic of interest and facilitate a search for it.") (last visited Sept. 28, 2015).

[68] Smith, *supra* note 62.

example, during the Miss America Pageant, a user could search #MissNewYork and read all public tweets that use this same hashtag.[69] When a user likes another user's tweet, the user can "favorite" the tweet or "retweet" so that the tweet shows up on the user's own personal page.[70]

In addition to the social aspect of Twitter, major companies have created accounts in order to advertise their brand, product, or service.[71] Businesses hire professionals solely to maintain the company's social network sites.[72] The industry is rapidly growing and social media jobs are in high demand.[73] Over 5,000 social media jobs are posted on CareerBuilder and over 3,000 on LinkedIn.[74] In addition, the U.S. Department of Labor expects public relations careers to grow by twelve percent in the next six years.[75] "Multinational corporations, such as Ford Motor Co. and Coca-Cola Co., are beginning to use social media to increase positive sentiment, build customer rapport and correct misinformation," says Adam Brown, Coca-Cola's director of social media.[76]

While Twitter provides a multifunctional platform for both social networking and advertising, its downfall is the potential liability for companies.[77] In some cases, it may be difficult to distinguish between a tweet used for social media purposes and a tweet used for advertising purposes.[78] Because New York's statute is vague and stagnant, it does not allow for an easy interpretation between the two uses.[79] As a result,

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69 *Id.*; *see also* Caitlin Hitt, *Who is Miss New York? Meet Jamie Lynn Macchia, The Staten Island Native Competing for the Miss America 2016 Title*, INT'L BUS. TIMES (Sept. 11, 2015, 11:47 AM), http://www.ibtimes.com/who-miss-new-york-meet-jamie-lynn-macchia-staten-island-native-competing-miss-america-2093253.

70 *Id.*

71 *More Big Businesses Hire Professional Tweeters*, NBC NEWS (Sept. 2, 2009, 5:35 PM), http://www.nbcnews.com/id/32661618/ns/business-careers/t/more-big-businesses-hire-professional-tweeters/; *see also* Joshua Brustein, *Twitter to Advertisers: You* Really *Need Us*, BLOOMBERG BUS. (Aug. 8, 2013), http://www.businessweek.com/articles/2013-08-08/twitter-to-advertisers-you-em-really-em-need-us ("A study released on Thursday—commissioned by Twitter itself from the research firm Datalogix—found that companies busily tweeting end up selling more stuff than those that don't.").

72 *More Big Businesses Hire Professional Tweeters*, *supra* note 71.

73 *Id.*

74 Elizabeth Muckensturm, *The Growth of the Social Media Manager as a Career*, ENVERITASGROUP BLOG (Apr. 14, 2014) http://enveritasgroup.com/2014/04/14/social-media-manager-as-a-career/.

75 *Id.*

76 *More Big Businesses Hire Professional Tweeters*, *supra* note 71.

77 Laura Woods, *How to Avoid Getting Sued for a Tweet*, SOCIAL MEDIA STRATEGIES SUMMIT BLOG (Jun. 27, 2014), http://socialmediastrategiessummit.com/blog/avoid-getting-sued-tweet/; David Griner, *4 Ways to Avoid Being Sued by a Celebrity over a Tweet*, ADWEEK (Apr. 11, 2014, 10:02 AM), http://www.adweek.com/news/advertising-branding/four-ways-avoid-being-sued-celebrity-over-tweet-156963 (exemplifying the fine line between a social media tweet and an advertisement.)

78 *See id.*

79 N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

companies that fail to correctly distinguish between advertising and social networking and fail to interpret the meaning behind "for advertising purposes" can set themselves up for liability.[80] The failure to distinguish between advertising and social networking is the exact issue that led to the lawsuit between Katherine Heigl and Duane Reade.[81]

III. "FOR ADVERTISING PURPOSES" WAS INTENDED TO MEAN SOLICITATION OF PATRONAGE

A. *Interpretation of the Meaning Behind "For Advertising Purposes"*

When the legislature wrote Sections 50 and 51, it likely intended "advertising purposes" to mean solicitation of patronage. "Solicitation of patronage" is the plain meaning of the word "advertise."[82] Merriam-Webster dictionary defines "advertise" as "call[ing] public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize."[83] In comparison, another source defines "advertising" as "the paid, impersonal, one-way marketing of persuasive information from an identified sponsor through channels of mass communication to promote the adoption of goods, services, or ideas."[84]

Various courts have also attempted to define "for advertising purposes" in the context of Sections 50 and 51 and seem to agree that "advertising purposes" means "solicitation of patronage."[85] For example, in *Hill v. Hayes*, plaintiffs sued for use of their name and likeness in defendant Hayes' book.[86] Plaintiffs were held captive in their home by three escaped convicts and received a substantial amount of unwanted media attention and publicity upon escape.[87] A year later, the

[80] *Id.*

[81] Gregorian, *supra* note 1.

[82] *See Advertise*, DICTIONARY.COM, http://www.dictionary.com/browse/advertise (last visited April 21, 2016)(Defining advertise as "to announce or praise (a product, service, etc.) insome public medium of communication in orderto induce people to buy or use it."

[83] *Advertise*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/advertise (last visited Sept. 28, 2015).

[84] Inusah Yakubu, *Integrated Marketing Communication*, BLOGSPOT.COM (Sept. 17, 2013).

[85] *See* Flores v. Mosler Safe Co., 7 N.Y.2d 276, 279 (N.Y. 1959) (defining advertising, stating that "[t]here can be no doubt but that the circular, taken in its entirety, was distributed as a solicitation for patronage"); Kane v. Orange Cty. Publ'ns, 649 N.Y.S.2d 23, 232 A.D.2d 526, 527 (2d Dept 1996) ("'Advertising purposes' has been defined as 'use in, or as part of, an advertisement or solicitation for patronage of a particular product or service.'"); Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988); Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 379, 457 N.Y.S.2d 308 (2d Dep't 1982) ("Section 51 prohibits misappropriation for 'advertising purposes or for the purposes of trade.' Use for 'advertising purposes' is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service."); Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963); Booth v. Curtis Publ'g Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779 (Sup. Ct. 1947), *aff'd*, 272 A.D. 759 (1st Dep't 1947); Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382 (Sup. Ct. 1937).

[86] *Hill*, 18 A.D.2d at 485–90.

[87] *Id.*

defendant wrote a play portraying a similar incident.[88] *Life Magazine* wrote an article on the play using the family's name and expressly stated that the play was based on their story.[89] The family sued and the Second Department of the New York Appellate Division held that the use of the family's names was done to advertise and *attract attention to* the play, and to increase circulation of the magazine.[90]

In *Beverley v. Choices Women's Medical Center*, the Second Department similarly defined "advertise" as "a solicitation of patronage" and provided examples of solicitations of patronage.[91] In *Beverley*, plaintiff doctor sued for an abortion clinic's use of her photo in the clinic's monthly magazine.[92] The court held that the clinic violated the doctor's right to publicity by using her name and image without her consent, for the purposes of advertising, in violation of Sections 50 and 51.[93] The court found that the calendar, "taken in its entirety," was distributed as a solicitation of patronage for collateral services, evidenced by the fact that it was distributed to potential clients, paid for by Choice's advertising funds, and contained Choices' contact information.[94] Between these two cases and a number of other First Department cases, it is clear that courts generally agree that "for purposes of advertising" means a "solicitation of patronage" with a special emphasis on the commercial aspects of the use of another's identity.[95]

While New York Civil Rights Law does not expressly define "for advertising purposes," Section 51 provides examples of uses that are not advertisements, two of which are incidental uses and items of newsworthiness.[96]

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88 *Id.*

89 *Id.*

90 *Id.*

91 Beverley v. Choices Women's Med. Ctr, Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988).

92 *Id.*

93 *Id.*

94 *Id.* at 94.

95 *See* Kane v. Orange County Publications, 649 N.Y.S.2d 23 (2d Dept. *See* Flores v. Mosler Safe Co., 7 N.Y.2d 276, 284 (N.Y. 1959) (defining advertising and stating, "[t]here can be no doubt but that the circular, taken in its entirety, was distributed as a solicitation for patronage."); Kane v. Orange Cnty. Publ'ns, 232 A.D.2d 526, 527, 649 N.Y.S.2d 23 (2d Dep't 1996) ("Advertising purposes" has been defined as "use in, or as part of, an advertisement or solicitation for patronage of a particular product or service"); Booth v. Curtis Pub Co., 223 N.Y.S.2d 737 (1st Dept. 1962) (Defined advertising stating, "[t]here can be no doubt but that the circular, taken in its entirety, was distributed as a solicitation for patronage."); Davis v. High Soc.Soc'y Magazine, Inc., 90 A.D.2d 374, 379, 457 N.Y.S.2d 308 (2d Dept.Dep't 1982) ("Section 51 prohibits misappropriation for "advertising purposes or for the purposes of trade". Use for "advertising purposes" is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service"); FloresBooth v. Mosler SafeCurtis Publ'g Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); Koussevitzky v. Allen, Towne & Heath, 68 N.Y.S.2d 779 (Sup. Ct. 1947); Lahiri v. Daily Mirror, 295 N.Y.S. 382 (Sup. Ct. 1937).

96 N.Y. CIV. RIGHTS LAW § 51.

B. *Incidental Use Exception*

Section 51 of New York Civil Rights Law provides an incidental use exception to the use of a person's image without consent.[97] The statute and New York courts recognize the burden that right of publicity laws puts on publishers to be on guard every time they use a person's name or image; therefore, liability is not imposed under Sections 50 and 51 when the use is incidental.[98] There are two different situations in which the use of a person's image is deemed to be "incidental": (1) when the use is insignificant, and (2) where the news or media reprints or replays a portion of the news and uses the plaintiff's image in order to attract attention to its product.[99] In analyzing the framework of Heigl's case, this Note will focus on the first situation.[100]

A use that is insignificant, and therefore incidental, is one that has a "de minimis" commercial implication.[101] Sections 50 and 51 require a plaintiff to prove that there is more than an incidental connection between the appropriation of that plaintiff's likeness and the main purpose of the work.[102] The use of the plaintiff's name or image must amount to a meaningful and purposeful commercial use.[103] One way to

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97 *Id.*

98 *See id. See also* Netzer v. Continuity Graphic Assocs., Inc., 963 F. Supp. 1308, 1326 (S.D.N.Y. 1997); Groden v. Random House, Inc., No. 94 CIV. 1074 (JSM), 1994 WL 455555 (S.D.N.Y. Aug. 23, 1994), *aff'd*, 61 F.3d 1045 (2d Cir. 1995); Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 379, 457 N.Y.S.2d 308 (2d Dep't 1982) ("It has long been recognized that use of a name or picture by the media in connection with a newsworthy item is protected by the First Amendment and is not considered a use for purposes of trade within the ambit of the Civil Rights Law"); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1st Dep't 1981) ("Where First Amendment guarantees are involved, however, [Section 51's] application has been restricted 'to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest. . . . [F]reedom of speech and the press under the First Amendment transcends the right to privacy.'") (citation omitted).

99 Boggess, *supra* note 30.

100 The second situation is irrelevant to the Katherine Heigl case and the hypothetical cases that will be discussed.

101 *See* Boggess, *supra* note 30.

102 *Groden*, 1994 WL 455555; D'Andrea v. Rafla-Demetrious, 972 F. Supp. 154, 157 (E.D.N.Y. 1997), *aff'd*, 146 F.3d 63 (2d Cir. 1998) ("In order to establish liability, plaintiff must demonstrate a 'direct and substantial connection between the appearance of the plaintiff's name or likeness and the main purpose and subject of the work. In other words, 'isolated' or 'fleeting and incidental' uses of a person's name or image, even if unauthorized, are insufficient to establish an invasion of privacy claim.") (citation omitted); Leary v. Punzi, 687 N.Y.S.2d 551, 553 (Sup. Ct. 1999) ("Even assuming, however, that the web site constitutes advertising or trade purposes within the meaning of the statute, it is well settled that where a reference to an individual is "fleeting and incidental", it will not be actionable under Civil Rights Law § 51.")

103 Arrington v. N.Y. Times Co., 449 N.Y.S.2d 941, 943 (1982) ("[S]ections 50 and 51 . . . were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more."); Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 378, 457 N.Y.S.2d 308 (2d Dep't 1982) ("[O]nly the commercial use of a person's name or likeness without permission is prohibited."); Brinkley v. Casablancas, 80 A.D.2d 428, 440, 438 N.Y.S.2d 1004 (1st Dep't 1981) ("The wrong consists of only two elements: the commercial use of a person's name or photograph and the failure to procure the person's written consent for such use."); Moglen v. Varsity Pajamas, Inc., 13 A.D.2d 114, 213 N.Y.S.2d 999 (1st Dep't 1961).

determine meaningful and purposeful commercial use is to compare the use to the rest of the work as a whole.[104] For example, if the size of a potential plaintiff's image is small in comparison to the image as a whole, a court is likely to find the use insignificant because the commercial use of the image would not be meaningful and purposeful.[105]

However, an Arizona case proves that courts also need to look for other factors to determine if a use is significant.[106] *Pooley v. National Hole-In-One Association* provides an example of a use that seems incidental on its face but was in fact found to be significant.[107] In *Pooley*, the defendants created a video that advertised their upcoming charity event and featured the plaintiff for six seconds.[108] The plaintiff sued for the violation of his publicity rights.[109] The defendants argued that the use of the plaintiff's name and image was incidental because six seconds is a short time period in relation to the full length of the video.[110] The court disagreed and held that while the plaintiff's name and image were used only briefly, the use was significant because it was the highlight of the film and rendered the advertisement more attractive to golfers.[111] In reaching its conclusion, the court considered four factors:

> (1) Whether the use has a unique quality or value that would result in commercial profit to the defendant; (2) whether the use contributes something of significance; (3) the relationship between the reference to the plaintiff and the purpose and subject of the work; and (4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication.[112]

Although *Pooley*, an Arizona case, is not controlling in New York, the factors are helpful for further explaining the definition of "incidental use" and can be persuasive when applied to New York cases.[113]

C. *Newsworthiness Exception*

New York's Civil Rights statute includes a second exception for the use of a person's identity without consent when that use is for an

104 Boggess, *supra* note 30.
105 *Id.*
106 Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108 (D. Ariz. 2000).
107 *Id.*
108 *Id.* at 1108–12.
109 *Id.* at 1112.
110 *Id.*
111 *Id.*
112 *Id.* at 1112.
113 *Id.* at 1108–15.

item of newsworthiness.[114] The First Amendment prohibits any law that impedes on the freedom of speech and the freedom of the press.[115] One of the most common arguments in publicity rights cases is that the defendant has a First Amendment right to publish content containing the plaintiff's name and image.[116]

The Supreme Court first addressed First Amendment issues in publicity rights cases in the *Zacchini* case, mentioned above.[117] Plaintiff Zacchini was a human cannonball whose act was recorded and broadcasted by the defendant television station.[118] The Supreme Court balanced the interests of Zacchini's right to publicity with the television station's First Amendment rights to freedom of speech and freedom of the press, and they found in favor of Zacchini.[119] The Court held that the First Amendment did not give the media the right to broadcast a performer's entire act without his consent and without compensation because doing so would pose a substantial threat to the performer's ability to make a living.[120]

In contrast to *Zacchini*, New York's Civil Rights statute provides a per se rule rather than a balancing test.[121] The statute expressly excludes *items of newsworthiness* from liability for infringement of publicity rights.[122] Items of newsworthiness include descriptions of actual events and articles concerning political happenings, social trends, and any other subject of public interest.[123] Newsworthiness is broadly construed and liberally applied.[124] In addition, the actual motive of the publisher is

114 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).

115 U.S. CONST. amend. I; *see also Freedom of Speech*, DICTIONARY.COM, http://dictionary.reference.com/browse/freedom+of+speech (last visited Sept. 28, 2015) ("[T]he right of people to express their opinions publicly without governmental interference, subject to the laws against libel, incitement to violence or rebellion, etc."); *Freedom of the Press*, DICTIONARY.COM, http://dictionary.reference.com/browse/freedom+of+press (last visited Sept, 28, 2015) ("the right to publish newspapers, magazines, and other printed matter without governmental restriction and subject only to the laws of libel, obscenity, sedition, etc.").

116 *See* James v. Deliah Films, Inc., 544 N.Y.S.2d 447, 451 (Sup. Ct. 1989) ("Defendants assert that the use of the video and photographs of the performers is protected by the First Amendment privilege afforded to 'public interest' and 'newsworthy' items."); Marcinkus v. NAL Publ'g Inc., 522 N.Y.S.2d 1009, 1010 (Sup. Ct. 1982) ([D]efendants contend that even if the Civil Rights Law does apply, since the novel disseminates information and fosters public discussion about Vatican activities, it should be afforded protection under the First Amendment."); Rosemont Enters., Inc. v. Choppy Prods., Inc., 347 N.Y.S.2d 83 (Sup. Ct. 1972) ("[D]efendant's action is protected by the First Amendment to the United States Constitution and Article I, Section 8 of the New York Constitution . . . .).

117 Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

118 *Id.* at 563–65.

119 *Id.* at 573–78.

120 *Id.*

121 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).

122 *Id.*

123 Messenger v. Gruner + Jahr Printing and Publ'g, 94 N.Y.2d 436 (2000).

124 *Messenger*, 94 N.Y.2d at 436; Walter v. NBC Television Network, Inc., 27 A.D.3d 1069, 811 N.Y.S.2d 521 (4th Dep't 2006); *see also* Stephano v. News Group Publ'ns, Inc. 485 N.Y.S.2d 220 (1984); Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d

irrelevant to whether a use is newsworthy, and a court must instead look to the content of the use.[125] However, the use of the plaintiff's name or image must have a real relationship to a newsworthy publication and cannot instead be an advertisement in disguise.[126]

An example of an advertisement in disguise is the promotional calendar in *Beverley*, mentioned above.[127] Here, a family planning medical center used an image of a doctor in a calendar, without her consent, and distributed the calendar to patients, insurance carriers, medical centers, and media centers.[128] The calendar included pictures of people who contributed to the Women's Movement.[129] The doctor sued the medical center, alleging that the medical center used her photo and name without her consent for the purposes of promoting its medical business, contrary to New York's Civil Rights Statute.[130] The medical center argued that the calendar fell under the newsworthiness exception because the calendar's theme was important women and events in the women's movement and the plaintiff's photo was used to depict a crucial event in women's history.[131] The Court of Appeals disagreed and held that the calendar was used as an advertisement for the center's business and the doctor's photo was used in a direct and promotional, commercial manner.[132] While the medical center had an alternative explanation for using the plaintiff's name and image, the court saw through the disguise and held that the use was "for advertising purposes," thereby violating the doctor's publicity rights.[133]

In contrast, *Stephano v. News Group Publications* gives an example of a true item of newsworthiness.[134] Plaintiff, a professional model, agreed to model for the defendant magazine's September article on men's fashion.[135] However, the defendant also used the photo in an August issue with the caption, "'Yes Giorgio—From Giorgio Armani. Based on his now classic turn on the bomber jacket, this cotton-twill version with 'fun fur' collar features the same cut at a far lower price—

Dep't 1988); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1st Dep't 1981); Waters v. Moore, 334 N.Y.S.2d 428 (Sup. Ct. 1972).

125 *Messenger*, 94 N.Y.2d at 436; *Stephano*, 485 N.Y.S.2d at 220.

126 *Messenger*, 94 N.Y.2d at 436; *Stephano*, 485 N.Y.S.2d at 220; Arrington v. N.Y. Times Co., 55 N.Y.2d 433 (1982); Murray v. N.Y. Magazine Co., 27 N.Y.2d 406 (1971); *Beverley*, 141 A.D.2d at 89; Velez v. VV Publ'g Corp., 135 A.D.2d 47, 524 N.Y.S.2d 186 (1st Dep't 1988); Pagan v. N.Y. Herald Tribune, Inc., 32 A.D.2d 341, 301 N.Y.S.2d 120 (1st Dep't 1969); Dallesandro v. Henry Holt & Co., 4 A.D.2d 470, 166 N.Y.S.2d 805 (1st Dep't 1957).

127 *Beverley*, 141 A.D.2d at 89.

128 *Id.* at 89–93.

129 *Id.*

130 *Id.* at 92.

131 *Id.*

132 *Id.* at 99.

133 *Id.*

134 Stephano v. News Grp. Publ'ns, Inc. 64 N.Y.2d 174 (1984).

135 *Id.* at 178–80.

about $225. It'll be available in the stores next week.—Henry Post Bomber Jacket/Barney's, Bergdorf Goodman, Bloomingdale's.'"[136] The plaintiff sued for his publicity rights, stating that he only agreed to the September issue.[137] The defendant argued that the article was a matter of public interest.[138] The Court of Appeals agreed, and held that the defendant's intent to include the item to increase circulation of its magazine did not automatically mean that the defendant used the plaintiff's image for advertising purposes within the meaning of New York's Civil Rights Statute.[139] What mattered was the content of the publication, and the court found that the content of the article was newsworthy.[140]

While the typical newsworthiness examples are printed works, newsworthiness also applies to Internet websites, such as Twitter.[141] In *Stern v. Delphi Internet Services Corporation*, the Supreme Court of New York County analogized an online website to a newsvendor or bookstore, holding that a computerized database was the "functional equivalent" of a traditional newsvendor, and therefore, it would be inconsistent to treat an electronic source differently for the purposes of First Amendment and right to publicity claims.[142] Consequently, newsworthiness applies to Twitter because the social networking site is also a database that provides news in the forms of trends, updates, and posts.[143]

IV. APPLICATION TO TWITTER

A. *Application to Katherine Heigl's Case*

Katherine Heigl likely would have won her case against Duane Reade because she would have been able to show that Duane Reade used her image without her consent for advertising purposes, in violation of New York's Civil Rights Statute.[144] The use of Heigl's name and image in Duane's Reade's tweet was a commercial scheme used to solicit costumers and fits both the plain meaning and common law meaning of the word "advertise."[145] The use does not qualify for either the incidental use or newsworthiness exceptions.[146]

136 *Id.* at 179
137 *Id.* at 180.
138 *Id.* at 184–87.
139 *Id.*
140 *Id.*
141 Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694 (Sup. Ct. 1995).
142 *Id.* at 697.
143 *See* TWITTER, *supra* note 63; Smith, *supra* note 62.
144 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).
145 See Gregorian *supra* note 1; *see also supra* Parts VA.i–ii.
146 *See* N.Y. CIV. RIGHTS LAW § 51.

1. Plain Meaning of "Advertise"

Duane Reade's tweet fits the dictionary definition of "advertise."[147] The most implicating part of the tweet is the language in the caption, "Even @KatieHeigl can't resist shopping #NYC's favorite drugstore."[148] Similar to the dictionary definition of "advertise," the caption's language attempts to draw attention to Duane Reade's franchise by emphasizing desirable qualities in order to arouse desire to patronize.[149] The phrase "even @KatieHeigl" is a common advertising technique called *ethos*, which is used to persuade a reader into buying a product or service because the information comes from a credible source of authority or someone well-liked and respected.[150] The phrase makes Heigl out to be an authority on the subject and essentially implies, "Katherine Heigl shops here, so you should too!"[151] The tweet further employs *ethos* by defining Duane Reade as "NYC's favorite drugstore."[152] Here, the citizens of New York act as authorities on drugstores.[153] The use of *ethos* in Duane Reade's tweet is a major indicator that the tweet was used "for advertising purposes."[154]

Additionally, advertising is also defined as "the paid, impersonal, one-way marketing of persuasive information from an identified sponsor through channels of mass communication to promote the adoption of goods, services, or ideas."[155] Duane Reade likely employs an individual to post tweets in order to promote the company.[156] Twitter, while not a typical advertising platform like a magazine or newspaper, is a form of mass communication and is used to promote goods, services, and ideas.[157] Finally, by using a hashtag in front of "NYC" (i.e. "#NYC"), anyone who searches "NYC" or who clicks on a hashtag that uses "NYC" will be able to see Duane Reade's tweet.[158] Duane Reade also "tagged" Heigl in the post, meaning that the tweet included a direct link to Heigl's page.[159] Due to Heigl's celebrity status, and New York City's reputation as a popular tourist spot, "#NYC" and Heigl's username are likely well-searched terms.[160] Therefore, it is

147 *See Advertise*, *supra* note 82.
148 Gregorian, *supra* note 1.
149 *Advertise*, *supra* note 82.
150 *See* Gregorian *supra* note 1; *Ethos, Pathos, and Logos*, DURHAM TECHNICAL CMTY COLL., http://courses.durhamtech.edu/perkins/aris.html (last visited Sept. 28, 2015).
151 *See* Gregorian, *supra* note 1.
152 *Id.*
153 *Id.*
154 *Id.*
155 Yakubu, *supra* note 84.
156 *More Big Businesses Hire Professional Tweeters*, *supra* note 71; *see also* Brustein, *supra* note 71.
157 TWITTER, *supra* note 63.
158 Smith, *supra* note 62.
159 Gregorian, *supra* note 1.
160 *Id.*; *see also 52 Places to Go in 2015*, N.Y. TIMES, http://www.nytimes.com/interactive/

likely that the post reached far beyond Duane Reade's own followers.[161] The fact that Duane Reade used two different twitter techniques which are commonly used to increase tweet views is evidence that Duane Reade's post was intended to be a promotion.[162]

2. Common Law Definition

Duane Reade's tweet also likely fits the New York common law definition of "for advertising purposes."[163] Under common law, defendants are found to violate New York's Civil Rights statute when a publication, taken in its entirety, is deemed to be a "solicitation of patronage."[164] However, in applying these cases to Heigl, the terms "publication" and "taken in its entirety" become a problem.[165] Does a "publication" consist merely of a single tweet, or rather an entire Twitter account? If the entire Twitter account is a publication, there is no question that the publication is used as a solicitation of patronage, as this is the clear purpose of Duane Reade's Twitter account.[166] In contrast, if a single tweet constitutes a publication, Heigl would have had a greater burden to prove that the single tweet, in its entirety, is a solicitation of patronage.[167]

A court likely would have found that the single tweet, rather than the entire Twitter account, is a publication.[168] Merriam-Webster defines

2015/01/11/travel/52-places-to-go-in-2015.html (last updated July 7, 2015).

161 *See* TWITTER, *supra* note 63; Smith, *supra* note 62; Gregorian, *supra* note 1.

162 Smith, *supra* note 62.

163 *See* Flores v. Mosler Safe Co., 7 N.Y.2d 276, 284 (1959) (defining advertising, stating, "[t]here can be no doubt but that the circular, taken in its entirety, was distributed as a solicitation for patronage"); Kane v. Orange Cty. Publ'ns, 232 A.D.2d 526, 527, 649 N.Y.S.2d 23 (2d Dep't 1996) ("'Advertising purposes' has been defined as 'use in, or as part of, an advertisement or solicitation for patronage of a particular product or service'"); Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988); Davis v. High Soc'y Mag., 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dep't 1982) ("'Section 51 prohibits misappropriation for 'advertising purposes or for the purposes of trade.' Use for 'advertising purposes' is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service'".); Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963); Booth v. Curtis Publ'g Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779 (Sup. Ct. 1947); Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382 (Sup. Ct. 1937).

164 *Flores*, 7 N.Y.2d at 284.

165 *Id.* at 279.

166 *See* Duane Reade (@DuaneReade), TWITTER, Twitter.com (last visited Sept. 28, 2015).

167 *See Flores*, 7 N.Y.2d at 284 (defining advertising, stating, "[t]here can be no doubt but that the circular, taken in its entirety, was distributed as a solicitation for patronage"); *Kane*, 232 A.D.2d at 527 ("'Advertising purposes' has been defined as 'use in, or as part of, an advertisement or solicitation for patronage of a particular product or service'"); *Beverley*, 141 A.D.2d at 89; *Davis*, 90 A.D.2d at 379 ("'Section 51 prohibits misappropriation for 'advertising purposes or for the purposes of trade'. Use for 'advertising purposes' is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service."); *Hill*, 18 A.D.2d at 485; *Booth*, 223 15 A.D.2d at 347; *Koussevitzky*, 68 N.Y.S.2d at 779; *Lahiri*, 295 N.Y.S. at 382.

168 *See Publication*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/

a publication as "the act of printing something (such as an article or photograph) in a magazine, newspaper, etc."[169] Despite the fact that a tweet merely consists of 140 characters of text, it can be analogized to a photo printed in a magazine.[170] A tweet is printed, viewed, and promoted individually, just like a photo or article.[171] In addition, many Twitter users and social media experts have regarded social media posts as publications.[172]

While a single tweet is likely to be deemed a publication, and therefore would have created a higher burden for Heigl, the fact that Duane Reade's Twitter account is used for advertising is evidence of what the tweet itself accomplishes.[173] In addition, Heigl would have been able to overcome the higher burden to show that the tweet itself fit the common law definition of "for advertising purposes" and that her case has factual similarities to right to publicity cases found in favor of the plaintiffs.[174] For example, Heigl's case is factually similar to *Beverley*.[175] Similar to defendant Beverley, Duane Reade's tweet was also marketed to a specific audience.[176] As discussed, the fact that Duane Reade used the hashtag "NYC" and tagged Katherine Heigl in the tweet shows that Duane Reade was marketing both to New Yorkers and to fans of Katherine Heigl, because these groups of people would more easily discover the post.[177] Additionally, similar to *Beverley*, the tweet contained advertising language in the caption and featured Duane Reade's name and logo.[178] Users can also find Duane Reade's contact information on the account itself.[179] Since there are numerous factual similarities between Heigl's case and *Beverley*, the court would have likely followed precedent and found Duane Reade liable.[180]

publication (last visited Sept. 28, 2015); Scott Karp, *Twitter Is a Publication*, PUBLISHING 2.0, (Aug. 2, 2011) http://publishing2.com/2007/08/02/twitter-is-a-publication/; Lisa Ricciuti, *Are Tweets Published?*, AIIM CMTY., (Dec. 1, 2013, 9:38 AM) http://community.aiim.org/blogs/lisa-ricciuti/2013/12/01/are-tweets-published.

169 *Publication*, *supra* note 168.

170 *See* TWITTER, *supra* note 63; Smith, *supra* note 62.

171 Smith, *supra* note 62.

172 Karp, *supra* note 168; Ricciuti, *supra* note 168.

173 *See* Duane Reade *supra* 166; *Supra* IVi-ii.

174 *See* Flores v. Mosler Safe Co., 7 N.Y.2d 276 (1959); Kane v. Orange Cty. Publ'ns, 232 A.D.2d 526, 649 N.Y.S.2d 23 (2d Dep't 1996); Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988); Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dep't 1982); Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963); Booth v. Curtis Publ'g Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779 (Sup. Ct. 1947); Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382 (Sup. Ct. 1937).

175 *Beverley*, 141 A.D.2d at 89.

176 *See id.*; *see also* Gregorian, *supra* note 1.

177 See Smith, *supra* note 62.

178 *See* Gregorian, *supra* note 1.

179 Duane Reade (@DuaneReade), *supra* note 166.

180 *See* Gregorian, *supra* note 1; *Beverley*, 141 A.D.2d at 89.

3. Use Is Not Incidental

A court would likely find that Duane Reade's tweet was a solicitation of patronage and that the post fits both the plain meaning definition of "advertising" and the court's interpretation of the term.[181] However, Duane Reade could have argued that the tweet contained an "incidental use" of Heigl's name and image.[182] Heigl's name and image were used in only one tweet, less than 140 characters long, in comparison to an entire Twitter account containing thousands of tweets.[183] If a court were to look at the Duane Reade Twitter account as a whole and compare it to the single tweet, it could potentially find that that the tweet was incidental.[184] However, Heigl would have been able to show that there is more than an incidental connection between the appropriation of her likeness and the main purpose of the work.[185] The purpose of Duane Reade's Twitter account, and most likely the tweet itself, is to advertise the Duane Reade franchise and to solicit customers.[186] The fact that Heigl is a celebrity aided the advertisement by increasing appeal to readers.[187] As a result, the use of Heigl's name and image amounted to a meaningful and purposeful commercial use: advertising Duane Reade stores.[188]

Additionally, even though Heigl's name and image were only used in a 140-character post, the situation is analogous to *Pooley* where a six-second shot of a plaintiff's hole-in-one amounted to more than an incidental use.[189] *Pooley* applied four factors to determine incidental use.[190] The first factor is whether the use has a unique quality or value

181 *See supra* Parts III.ii–iii.

182 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).

183 *See* Gregorian, *supra* note 1; Duane Reade (@DuaneReade), *supra* note 166.

184 *See* Gregorian, *supra* note 1; Duane Reade (@DuaneReade), *supra* note 166; N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).

185 *See* Groden v. Random House, Inc., No. 94 CIV. 1074 (JSM), 1994 WL 455555 (S.D.N.Y. Aug. 23, 1994), *aff'd*, 61 F.3d 1045 (2d Cir. 1995); D'Andrea v. Rafla-Demetrious, 972 F. Supp. 154, 157 (E.D.N.Y. 1997), *aff'd*, 146 F.3d 63 (2d Cir. 1998) ("In order to establish liability, plaintiff must demonstrate a 'direct and substantial connection between the appearance of the plaintiff's name or likeness and the main purpose and subject of the work.' In other words, 'isolated' or 'fleeting and incidental' uses of a person's name or image, even if unauthorized, are insufficient to establish an invasion of privacy claim."); Leary v. Punzi, 687 N.Y.S.2d 551, 553 (N.Y. Sup. Ct. 1999).

186 *See* Duane Reade (@DuaneReade), *supra* note 166; TWITTER, *supra* note 63.

187 *Ethos, Pathos, and Logos*, *supra* note 150.

188 *See* Arrington v. N.Y. Times Co., 449 N.Y.S.2d 941, 943 (1982) ("[S]ections 50 and 51 . . . were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more."); Moglen v. Varsity Pajamas, Inc., 13 A.D.2d 114, 213 N.Y.S.2d 999 (1st Dep't 1961); Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 378, 457 N.Y.S.2d 308 (2d Dep't 1982) ("[O]nly the commercial use of a person's name or likeness without permission is prohibited."); Brinkley v. Casablancas, 80 A.D.2d 428, 440, 438 N.Y.S.2d 1004 (1st Dep't 1981) ("The wrong consists of only two elements: the commercial use of a person's name or photograph and the failure to procure the person's written consent for such use.").

189 Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108 (D. Ariz. 2000).

190 *Id.*

that would result in a commercial profit to the defendant.[191] Heigl's celebrity status is a unique quality that aided the advertisement aspects of the tweet because it created *ethos*.[192] In addition, similar to the golfer in *Pooley*, not just any person or even any celebrity could have been featured in Duane Reade's tweet. Celebrity status itself is unique. Potential customers could decide to shop at Duane Reade because a celebrity had shopped there—especially potential customers within Heigl's particular fan base, which follow her every move and are inspired by her actions.[193] Duane Reade most likely chose to feature Heigl exclusively and falsely attribute her name to its brand solely because of her celebrity status.[194]

The second *Pooley* factor is whether the use contributes something of significance.[195] As determined, the tweet was likely advertisement and therefore had the potential to result in commercial value to Duane Reade.[196] Advertisements are created to acquire more consumers, and subsequently, more profit.[197] Duane Reade has over two million followers who could potentially see the tweet and choose to shop at a Duane Reade store simply because they believe Heigl endorsed the store.[198]

The third *Pooley* factor is the relationship between the reference to

191 *Id.*

192 *Ethos, Pathos, and Logos*, *supra* note 150.

193 *See* @Katherine Heigl, INSTAGRAM, https://www.instagram.com/katherineheigl/?hl=en (last visited Apr. 21, 2016; @KatieHeigl, TWITTER, https://twitter.com/KatieHeigl?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Apr. 21, 2016); Katherine Heigl Fans (@TeamHeigl), TWITTER, https://twitter.com/teamheigl (last visited Sept. 28, 2015).

194 Katherine Heigl Fans (@TeamHeigl), *supra* note 193; Staruski v. Cont'l Tel. Co. of Vt., 154 Vt. 568, 575 (1990) (An ad featured plaintiff exclusively and falsely attributed defendant's advertising copy to her solely because of who she was. The court found that defendant's use was not incidental and that the plaintiff could recover for wrongful invasion of privacy. "The strategy was to obtain a commercial benefit—and, perhaps, also provide a public service announcement—from the association of the ad's text with the names and photographs of select employees.").

195 *Pooley*, 89 F. Supp. 2d at 1108.

196 *Supra* Parts IV.i–ii.

197 *Advertise*, supra note 82; *See* Flores v. Mosler Safe Co., 7 N.Y.2d 276, 279 (N.Y. 1959) (defining advertising, stating that "[t]here can be no doubt but that the circular, taken in its entirety, was distributed as a solicitation for patronage"); Kane v. Orange Cty. Publ'ns, 649 N.Y.S.2d 23, 232 A.D.2d 526, 527 (2d Dept 1996) ("'Advertising purposes' has been defined as 'use in, or as part of, an advertisement or solicitation for patronage of a particular product or service.'"); Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988); Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 379, 457 N.Y.S.2d 308 (2d Dep't 1982) ("Section 51 prohibits misappropriation for 'advertising purposes or for the purposes of trade.' Use for 'advertising purposes' is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service."); Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963); Booth v. Curtis Publ'g Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382 (Sup. Ct. 1937); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779 (Sup. Ct. 1947), *aff'd*, 272 A.D. 759 (1st Dep't 1947).

198 Duane Reade (@DuaneReade), *supra* note 166.

the plaintiff and the purpose and subject of the work.[199] The picture of Heigl is directly related to the advertising purpose of the caption.[200] Additionally, since the tweet itself is an advertisement, it is directly related to the purpose of the Twitter account: to solicit patronage.[201]

Finally, the fourth *Pooley* factor is the duration, prominence, or repetition of the name or likeness relative to the rest of the publication.[202] This factor sparks the issue of whether a "publication" means a single tweet or an entire Twitter account.[203] If the "publication" is the Twitter account, Katherine Heigl was only mentioned in one tweet out of the thousands of tweets that Duane Reade had accumulated before the summer of 2014, and therefore the prominence of the use of Heigl's likeness is small relative to the entire publication.[204] However, a single tweet is likely regarded as a publication, and therefore the fourth prong is satisfied because the center of the tweet revolves around Heigl.[205] As a result, Duane Reade would not have been able to argue that the use of Heigl's name and image was incidental.[206] The tweet uses Heigl's name and picture because her celebrity status provides a unique quality that could generate profits.[207] The use of Heigl's name and picture is directly related to the advertising purpose of the entire tweet and Twitter account, and her name and image were prominently featured in the tweet.[208]

4. Use is Not Newsworthy

Alternatively, Duane Reade could have argued that the use of Heigl's name and image qualifies for the newsworthiness exception.[209] Duane Reade's argument would characterize Katherine Heigl's whereabouts as a "social trend."[210] Magazines frequently publish articles like this, showing celebrities out in the general public performing mundane tasks.[211] However, due to the promotional language of the caption, the post is most likely, on its face, an advertisement.[212] Similar to the calendar in *Beverley*, the Twitter

199 *Pooley*, 89 F. Supp. 2d at 1108.
200 *See* Gregorian, *supra* note 1; *supra* Parts IV.i–ii.
201 *Pooley*, 89 F. Supp. 2d at 1108.
202 *Id.*
203 *Supra* Part IV.ii.
204 *See* Duane Reade (@DuaneReade), *supra* note 166; Gregorian, *supra* note 1.
205 *See supra* Part IV.ii; *Pooley*, 89 F. Supp. 2d at 1108.
206 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).
207 *See supra* Part IV.ii; *Pooley*, 89 F. Supp. 2d at 1108.
208 *See supra* Part IV.ii; *Pooley*, 89 F. Supp. 2d at 1108.
209 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).
210 *See id.*
211 *See, e.g.*, *Stars—They're Just Like Us!*, US WEEKLY, http://www.usmagazine.com/celebrity-news/pictures/stars----theyre-just-like-us--20131610/33407 (last visited Sept. 22, 2015) (featuring celebrities performing mundane everyday tasks).
212 *See supra* Parts III.i–ii.

account and tweet itself are advertisements only of Duane Reade's business and use Heigl's name and photo "in a direct and promotional, commercial manner."[213] Just as Choices could not hide behind its Women's Movement calendar theme, Duane Reade cannot escape liability by arguing that the Twitter account sometimes contains posts regarding newsworthy events and that Katherine Heigl's whereabouts are of public interest.[214]

Furthermore, Heigl's whereabouts would not even be considered a matter of public interest anyway.[215] In *Hills v. Hayes*, the time lapse between the actual incident involving the plaintiffs and the publication that used their names and images was enough time to dim public interest.[216] The majority held that subsequent events and social happenings had taken precedence and plaintiffs' incident was no longer in "public conscience."[217] This holding is applicable to Heigl's case because Heigl has struggled to maintain her A-list celebrity status in the past few years.[218] In the early 2000s, Heigl starred in several successful romantic comedies, but her career has since taken a dramatic fall.[219] As a result, even though Heigl does still maintain a specific fan base, her whereabouts arguably are no longer a "social trend" and she is no longer in the "public conscience."[220]

In conclusion, Heigl most likely would have won her case. The tweet is an advertisement by both the definitional meaning of the word and by New York's interpretation of the phrase "for advertising purposes."[221] The use does not fall within the incidental or newsworthiness exceptions.[222] Duane Reade used Heigl's name and image, without her consent, for the purposes of advertising, in violation

213 Beverley v. Choices Women's Med. Ctr, Inc., 532 N.Y.S.2d 400, 78 N.Y.2d 745, 752 (1988).
214 *Id.*
215 *See* Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S.2d 286 (2d Dep't 1963).
216 *Id.*
217 *Id.*
218 Kim Masters, *From 'Knocked Up' to Nyquil Ads, Can TV Save Katherine Heigl's Career?*, HOLLYWOOD REP., (Sept. 11, 2013, 11:00 AM) http://www.hollywoodreporter.com/news/katherine-heigl-knocked-up-nyquil-625405; *10 Ways Katherine Heigl Destroyed Her Own Career!*, FAME10, (Apr. 11, 2014, 6:04 PM) http://www.fame10.com/entertainment/10-ways-katherine-heigl-destroyed-her-own-career/; Nico Lang, *One for the Controversy: What the Failure of Katherine Heigl's Career Says About Women in Hollywood*, HUFFINGTON POST, http://www.huffingtonpost.com/nico-lang/katherine-heigl-one-for-the-money_b_1293624.html (last updated Apr. 23, 2012, 5:12 AM); Inkoo Kang, Opinion, *Who Killed Katherine Heigl's Career?*, BOXOFFICE (Jan. 27, 2012), http://pro.boxoffice.com/articles/2012-01-who-killed-katherine-heigls-career.
219 Masters, *supra* note 218.
220 At the time this Note was written, Heigl was cast a new show called "State of Affairs" that has landed her more publicity. *See Katherine Heigl Stars as Charleston Tucker*, NBC NEWS, http://www.nbc.com/state-of-affairs (last visited Sept. 28, 2015).
221 *Supra* Part IV.i–ii.
222 N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

of New York's Civil Rights Statute.[223]

B. *Application If No Caption*

Katherine Heigl likely would have won her case against Duane Reade.[224] However, the best argument in Heigl's favor is the promotional language of the caption.[225] What if Duane Reade omitted the caption and only tweeted the photo of Katherine Heigl carrying the Duane Reade bag? In this hypothetical situation, Duane Reade would still be using Katherine Heigl's image without her consent, but Heigl would have a weaker argument as to whether the use of her likeness was "for advertising purposes."[226] While the results are less predictable, Heigl would likely still win her case.

Without the caption, the publication no longer contains language presented in a "direct and promotional, commercial manner."[227] However, a court would likely find that the photo speaks for itself. The fact that Duane Reade would take the time to tweet this photo would still be, by definition, "direct"[228] and "promotional."[229] Duane Reade would still be calling public attention by emphasizing desirable qualities (the fact that Heigl shops there) in order to arouse a desire to patron the store.[230] Even without the caption, the photo employs *ethos* because it shows an authority figure "endorsing" a brand.[231]

Without the hashtags, it is unclear to whom Duane Reade's tweet is directed. While case law does not explicitly address whether a plaintiff must show that a defendant intended to direct the advertisement toward a specific audience, in the majority of right to publicity cases, defendants direct their advertisements toward a specific audience of people that would benefit from their product or services.[232] However, a court would likely still find in Heigl's favor. Similar to *Beverley*, the

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223 *Id.*

224 *Supra* Part IV.A.

225 *Id.*

226 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).

227 *See* Beverley v. Choices Women's Med. Ctr, Inc., 532 N.Y.S.2d 400, 78 N.Y.2d 745, 752 (1988).

228 *Direct*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/direct (last visited Sept. 28, 2015) ("having no compromising or impairing element").

229 *Promotion*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/promotion (last visited Sept. 28, 2015) ("something (such as advertising) that is done to make people aware of something and increase its sales or popularity").

230 *Advertise*, *supra* note 82.

231 *Ethos, Pathos, and Logos*, *supra* note 186.

232 *See* Flores v. Mosler Safe Co., 7 N.Y.2d 276, 284 (1959); Kane v. Orange Cty. Publ'ns, 232 A.D.2d 526, 649 N.Y.S.2d 23 (2d Dep't 1996); Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988); Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dep't 1982); Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963); Booth v. Curtis Publ'g Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779 (Sup. Ct. 1947); Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382 (Sup. Ct. 1937).

post would still fall under advertising expenses because Duane Reade most likely pays an employee to manage its social media accounts.[233] In addition, the post would still feature Duane Reade's logo, and the Twitter account would contain Duane Reade's contact information.[234]

In addition, a court would find that Duane Reade's post amounts to more than just an incidental use.[235] There is still a unique quality and value in posting a picture of Katherine Heigl carrying a Duane Reade bag, which results in commercial profit.[236] As argued above, Duane Reade could not use a photo of any random shopper, because that would not be an effective marketing strategy.[237] Heigl has a unique celebrity status and appeals to a certain fan base.[238] Presumably, when fans see the photo they will be just as persuaded to shop at Duane Reade, regardless of whether there's an accompanying caption.[239] Therefore, the photograph still contributes something of significance to the advertisement. The relationship between the photo and the advertising purpose of the Twitter account would remain strong. Heigl's celebrity status appeals to consumers and therefore aids the advertisement.[240] Heigl is also still the prominent feature in the photo and tweet.[241] As a result, the photo would not fall under the incidental use exception to New York's Civil Rights Statute.[242]

Finally, the hypothetical post lacking a caption would not qualify for the newsworthiness exception.[243] It is debatable whether Heigl's image could be deemed a matter of public interest, and the tweet would probably be an advertisement in disguise.[244] While the caption containing language used in a "direct and promotional, commercial manner" would be eliminated, the implications discussed above that make the photo an advertisement would override any newsworthiness

233 *Beverley*, 141 A.D.2d at 89; *More Big Businesses Hire Professional Tweeters*, *supra* note 71.
234 Duane Reade (@DuaneReade), *supra* note 166; Gregorian *supra* note 1.
235 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).
236 *See* Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108 (D. Ariz. 2000).
237 *Id.*; *See also supra* Part IV.A.iii.
238 *Supra* Part IV.A.iii.
239 *See @KatherineHeigl*, *supra* note 193; @KatieHeigl, *supra* note 193;
240 *See* Pooley 89 F. Supp. 2d at 1108; *@KatherineHeigl*, *supra* note 193; @KatieHeigl, *supra* note 193;
241 *See* Gregorian, *supra* note 1; *@KatherineHeigl*, *supra* note 193; @KatieHeigl, *supra* note 193;
242 N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).
243 *Id.*
244 *Supra* Part IV.A. *See* Messenger v. Gruner + Jahr Printing and Publ'g, 94 N.Y.2d 436 (2000); Stephano v. News Grp. Publ'ns, Inc. 485 N.Y.S.2d 220 (1984); Arrington v. N.Y. Times Co., 55 N.Y.2d 433 (1982); Murray v. N.Y. Magazine Co., 27 N.Y.2d 406 (1971); Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988); Velez v. VV Publ'g Corp., 135 A.D.2d 47, 524 N.Y.S.2d 186 (1st Dep't 1988); Pagan v. N.Y. Herald Tribune, Inc., 32 A.D.2d 341, 301 N.Y.S.2d 120 (1st Dep't 1969); Dallesandro v. Henry Holt & Co., 4 A.D.2d 470, 166 N.Y.S.2d 805 (1st Dep't 1957).

that the photo could contain.[245] Similar to *Beverley*, the tweet included the offending photo, which *on its face* was an advertisement.[246] The photo would still have no newsworthy purpose, would be paid for by Duane Reade's advertising funds, and would be intended to solicit patronage.[247] The post would still fit the definitional meaning of the word "to advertise" and the facts of cases where the court found a defendant's publication to be a "solicitation of patronage."[248]

In conclusion, even without the caption, Duane Reade's post infers an advertising purpose; therefore, Duane Reade would likely have remained liable for using Heigl's image without her consent for the purposes of advertising, in violation of New York's Civil Rights statute.[249]

C. *Situations in Which Duane Reade Is Free to Use Heigl's Image*

Although Duane Reade would likely have been liable for using Heigl's name and image in its tweet, there are some situations where the company could have used Heigl's likeness without violating her publicity rights. Duane Reade could have used Heigl's name and image without her consent as long as the use was not for advertising purposes.[250] However, due to the commercial nature of Duane Reade's Twitter account, most of the company's posts would amount to a solicitation of services and therefore would be found to violate New York's Civil Rights statute.[251] Situations where Duane Reade could have used Heigl's likeness in a tweet without subjecting itself to liability focus on the incidental use and newsworthiness exceptions to New York's publicity law.[252]

For example, Duane Reade would not be liable under Sections 50 and 51 for posting a photo of shoppers leaving the store if Heigl "just

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245 *Beverley*, 141 A.D.2d at 89.

246 *Id.*

247 *See id.*; *see supra* Part IV.A.

248 *Advertise*, *supra* note 82; *see* Flores v. Mosler Safe Co., 7 N.Y.2d 276, 279 (N.Y. 1959) (defining advertising, stating that "[t]here can be no doubt but that the circular, taken in its entirety, was distributed as a solicitation for patronage"); Kane v. Orange Cty. Publ'ns, 649 N.Y.S.2d 23, 232 A.D.2d 526, 527 (2d Dept 1996) ("'Advertising purposes' has been defined as 'use in, or as part of, an advertisement or solicitation for patronage of a particular product or service.'"); *Beverley*, 141 A.D.2d at 89; Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 379, 457 N.Y.S.2d 308 (2d Dep't 1982) ("Section 51 prohibits misappropriation for 'advertising purposes or for the purposes of trade.' Use for 'advertising purposes' is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service."); Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963); Booth v. Curtis Publ'g Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382 (Sup. Ct. 1937); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779 (Sup. Ct. 1947), *aff'd*, 272 A.D. 759 (1st Dep't 1947).

249 N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

250 *Id.*

251 *See id.*; Duane Reade (@DuaneReade), *supra* note 166; *Supra* Parts IV.A–B.

252 N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

happened" to be one of those shoppers, because the use would be incidental.[253] Lower courts have held that when a picture is part of a series of many and is insignificant to the purpose of selling the product, then the use is incidental.[254] For example, in *Aligo v. Time-Life Books, Inc.*, defendant's four-second use of plaintiff's picture in a twenty-four minute infomercial was found to be incidental because the photo was one of dozens used in the program.[255]

Applying the *Pooley* factors, a crowd photo featuring Heigl does not have a unique quality that could result in profit for Duane Reade.[256] It is too speculative to claim that Duane Reade could profit from someone potentially noticing Heigl in a crowd and consequently being persuaded to shop at Duane Reade.[257] Therefore, Heigl would not be able to establish the second *Pooley* prong: that Duane Reade is achieving something of significance from the use of her likeness.[258] In addition, Heigl's case would fail the third *Pooley* factor.[259] Heigl would have a difficult time convincing a court that the use of her name and image is directly related to the advertising purpose of the photo, because there would be no advertising purpose.[260] Duane Reade could deny any knowledge that Heigl was in the photo.[261] Finally, the fourth *Pooley* factor would fail because Heigl's prominence in the photo would not be as great as it was in *Pooley*,[262] but would be more like a photo in an infomercial[263] or a single mention of a name in a song containing over 100 lines of lyrics.[264] A similar situation occurred where a photograph of a building contained the picture and name of a plaintiff.[265] The court found in favor of the defendant, holding that for plaintiff to prevail, it must appear that the plaintiff's name or picture is itself for the purpose of trade and not just an incidental part of a photograph.[266] Here, Heigl

253 *Id.*; *Supra* Part III.B.

254 Lohan v. Perez, 924 F. Supp. 2d 447 (E.D.N.Y. 2013) (one lyric in an entire song was not actionable); Fignole v. Curtis Publ'g Co., 247 F. Supp. 595 (S.D.N.Y. 1965) (reference to plaintiff in one sentence out of 3.5 pages of print was not actionable under § 50); Merle v. Sociological Film Research Corp., 166 A.D. 376, 152 N.Y.S. 829 (1st Dep't 1915); Damron v. Doubleday, Doran & Co., 231 N.Y.S. 444, 446 (Sup. Ct. 1928) ("The single appearance of plaintiff's name in this book is clearly not a use prohibited by the statute.").

255 Aligo v. Time-Life Books, Inc., 23 Media L. Rep. 1315 (N.D. Cal. 1994).

256 Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108 (D. Ariz. 2000).

257 *See* Delan v. CBS, Inc., 91 A.D.2d 255, 458 N.Y.S.2d 608 (2d Dep't 1983) (potential rewards for using the plaintiff's name were too remote and speculative to sustain her claim).

258 *Pooley*, 89 F. Supp. 2d at 1108.

259 *Id.*

260 *See id.*

261 *See id.*

262 *Id.*

263 Aligo v. Time-Life Books, Inc., 23 Media L. Rep. 1315 (N.D. Cal. 1994).

264 Lohan v. Perez, 924 F. Supp. 2d 447 (E.D.N.Y. 2013).

265 Merle v. Sociological Film Research Corp., 13 A.D.2d 114, 213 N.Y.S.2d 999 (1st Dep't 1915).

266 *Id.*

would only be an incidental part of a photograph of a random scene of customers leaving a Duane Reade store.[267]

Duane Reade could also tweet about truly newsworthy events.[268] Twitter provides a platform for users to communicate, advertise, and relay news items to one another.[269] As a result, it is possible that Duane Reade could use Heigl's name or image in a tweet without violating her right to publicity.[270] For example, Duane Reade could write a public interest article about Heigl that is unrelated to its business, such as a critique of Heigl's latest television series.[271] This use falls within the newsworthiness exception because the publication is an item of public interest.[272] However, Heigl's name and image must have a real relationship to the article and cannot be an advertisement in disguise.[273] Duane Reade cannot use promotional language or anything that would suggest that the purpose of the article was for anything other than the spreading of news.[274] For example, Duane Reade cannot blog about Katherine Heigl's shopping trip to Duane Reade, because this would promote Duane Reade's business in the same way the golf tournament in *Pooley* and the Choices calendar in *Beverley* promoted the defendants' businesses.[275]

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267 Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108 (D. Ariz. 2000). It is important to note that this situation is thought of as a crowd photo where Heigl is coincidentally in the background. If a photo featured Heigl walking out of Duane Reade, either with her friends and bodyguards or as one of the only people in the photo, then the situation would be different because Heigl's image would be more prominent. For this same reason, Duane Reade could not use a caption to point out that Heigl was part of the crowd photo. In these situations, Heigl could successfully argue that the three remaining prongs of the *Pooley* test would come out almost identically to how they would have in her actual case. Similar to the above situation, Heigl's image in this type of photo would substantially contribute to the solicitation of patronage and result in a profit to the defendant.

268 N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015).

269 Smith, *supra* note 62.

270 *See id.*

271 *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2015); Rand v. Hearst Corp., 31 A.D.2d 406, 298 N.Y.S.2d 405 (1st Dep't 1969) (publisher did not violate § 50 when he printed on back cover of book an excerpt from critical review which favorably compared book with work of well-known author without author's consent to use her name on cover).

272 *Compare Rand*, 298 N.Y.S.2d 405, *with* Messenger v. Gruner + Jahr Printing and Publ'g, 94 N.Y.2d 436 (2000), Stephano v. News Group Publ'ns, Inc. 485 N.Y.S.2d 220 (1984), Arrington v. N.Y. Times Co., 55 N.Y.2d 433 (1982), Murray v. N.Y. Magazine Co., 27 N.Y.2d 406 (1971), Beverley v. Choices Women's Med. Ctr., Inc., 141 A.D.2d 89, 532 N.Y.S.2d 400 (2d Dep't 1988), Velez v. VV Publ'g Corp., 135 A.D.2d 47, 524 N.Y.S.2d 186 (1st Dep't 1988), Pagan v. N.Y. Herald Tribune, Inc., 32 A.D.2d 341, 301 N.Y.S.2d 120 (1st Dep't 1969), *and* Dallesandro v. Henry Holt & Co., 4 A.D.2d 470, 166 N.Y.S.2d 805 (1st Dep't 1957).

273 *See Messenger*, N.Y.2d at 436; *Stephano*, 485 N.Y.S.2d at 220; *Arrington*, 55 N.Y.2d at 433; *Murray*, 27 N.Y.2d at 406; *Beverley*, 141 A.D.2d at 89; *Velez*, 135 A.D.2d at 47; *Pagan*, 32 A.D.2d at 341; *Dallesandro*, 4 A.D.2d at 470.

274 *See Messenger*, N.Y.2d at 436; *Stephano*, 485 N.Y.S.2d at 220; *Arrington*, 55 N.Y.2d at 433; *Murray*, 27 N.Y.2d at 406; *Beverley*, 141 A.D.2d at 89; *Velez*, 135 A.D.2d at 47; *Pagan*, 32 A.D.2d at 341; *Dallesandro*, 4 A.D.2d at 470.

275 *See Messenger*, N.Y.2d at 436; *Stephano*, 485 N.Y.S.2d at 220; *Arrington*, 55 N.Y.2d at 433; *Murray*, 27 N.Y.2d at 406; *Beverley*, 141 A.D.2d at 89; *Velez*, 135 A.D.2d at 47; *Pagan*, 32

CONCLUSION & RECOMMENDATIONS FOR COMPANIES

In conclusion, this Note hypothesizes that a court would have found that Duane Reade violated Heigl's publicity rights when it tweeted a photo and caption that featured her name and image without her permission. Heigl would have been able to show that the facts of her case fit within New York's Civil Rights statute because Duane Reade used her photo and image for the purposes of advertising.[276] Heigl would have successfully argued that the photo was an advertisement by analogizing her case to New York case law and by pointing out the commercial nature of Duane Reade's Twitter account and the various advertising techniques it employed when the company used her likeness.[277] In addition, a court would have found that Duane Reade's use of Heigl's name and image was neither incidental nor newsworthy.[278] There would have been no difference even if Duane Reade hadn't used the caption because the tweet would still have a commercial purpose, would result in profit, and would be an advertisement in disguise.[279] Duane Reade could, however, use Heigl's image if it did so incidentally or if it had a legitimate newsworthy reason for doing so.[280]

These problems arise because of New York's vague statutory language.[281] New York's Civil Rights Law provides no definition of "for advertising purposes." When the statute was written in the early 1900s, it could not have possibly taken into account the development of social media and the blurred lines between an advertisement and a social media post.[282] Companies could better understand the statute and avoid lawsuits if New York updated its statute to provide a clearer definition of "for advertising purposes."[283] Alternatively, New York could recognize a common law right to publicity and give broad power to the courts to clearly define violations of publicity rights.[284] In the meantime, however, companies must develop strategies in order to protect themselves from liability.[285]

A.D.2d at 341; *Dallesandro*, 4 A.D.2d at 470.

276 *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

277 *See supra* Parts IV.A–B.

278 *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015). *See also supra* Parts III.A.iii–iv.

279 *Supra* Part III.B.

280 *Supra* Part III.C.

281 *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015); *see also supra* Part I.B.

282 *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

283 *Id.*

284 *Id.*

285 Laura Woods, *How to Avoid Getting Sued for a Tweet*, SOCIAL MEDIA STRATEGIES SUMMIT BLOG (Jun. 27, 2014), http://socialmediastrategiessummit.com/blog/avoid-getting-sued-tweet/; David Griner, *4 Ways to Avoid Being Sued by a Celebrity over a Tweet*, ADWEEK (Apr. 11, 2014, 10:02 AM), http://www.adweek.com/news/advertising-branding/four-ways-avoid-being-sued-celebrity-over-tweet-156963.

There are a number of steps that companies can take in order to avoid liability for infringing on celebrities' publicity rights.[286] First and most importantly, a company can and should obtain permission from a celebrity.[287] A claim under Sections 50 and 51 of New York's Civil Rights Law requires the use of name or image *without consent.*[288] Consent should be specific and in writing.[289] Alternatively, brands could retweet a photo from an original source; however, it is still much safer to get permission.[290] Third, companies should make sure that a post does not create confusion over whether a celebrity endorses a product.[291] Finally, if asked to take a post down, companies should honor the request.[292] A company is better off complying with a celebrity rather than dealing with litigation later on.[293]

The moral of this story is that companies need to be careful about what they tweet. The world of social media makes infringing on publicity rights so simple and mindless that some companies may do so accidentally. In order to avoid lawsuits, companies should always ask for permission before they use a person's name or image and should make sure that their posts do not imply that someone endorses a product when that is not the case.[294] If Duane Reade would have followed these simple steps, it could have avoided what was presumably a multi-million dollar settlement with Katherine Heigl.[295]

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286 Woods, *supra* note 285; Griner, *supra* note 285.

287 Griner, *supra* note 285. (Courtney Barclay, a professor at Syracuse University's Newhouse School of Public Communications and expert in privacy and advertising law, said that she would recommend that businesses get permission before sharing a photo on Twitter or Facebook. "Get consent. If you want to put that image up, try to take social media out of the equation. . . . Whatever you would do to use that photo in a print ad, it's the same process, because at the end of the day, it's the same legal claim.")

288 N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015) (emphasis added).

289 *Id.*; Griner, *supra* note 285.

290 Griner, *supra* note 285.

291 *Id.* ("'Think about how to phrase the tweet or the post in a way that makes it clear that the origin was something else, that this is a candid paparazzi shot, for example—something that makes your distance from the celebrity clear and your distance from staging the photograph clear,' said James Grimmelmann, an expert in digital intellectual property who teaches at Maryland's Francis King Carey School of Law."). *See also* Woods, *supra* note 285.

292 Woods, *supra* note 285.

293 *Id.*

294 *Id.*

295 *Id.*; Gregorian, *supra* note 1.

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