Loyola of Los Angeles
Entertainment Law Review

Volume 9 | Number 1 Article 3

1-1-1989

Advertisers Beware: Bette Midler Doesn't Want to Dance

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CASENOTES

ADVERTISERS BEWARE: BETTE MIDLER DOESN'T WANT TO DANCE

I. INTRODUCTION

Celebrity product endorsements have gained enormous economic value in the modern commercial market.[1] Many celebrities cash-in on their fame by appearing in advertisements endorsing products. For instance, Michael Jackson received an estimated fifty million dollars for his appearance in a series of Pepsi Cola commercials and allowed Pepsi to sponsor the Jacksons' 1984 "Victory Tour."[2]

In contrast, other well-known celebrities disdain such commercial exploitation thereby foregoing any income or public exposure product endorsements generate. Bruce Springsteen, who consistently spurns endorsement offers, allegedly refused Chrysler Motor Corporation's 1986 offer of twelve million dollars to perform a revised version of his hit song "Born in the U.S.A." in a television commercial advertising Chrysler's automobiles.[3] Bette Midler, also known for her active stance against commercial endorsements, refused a similar offer from Ford Motor Co.[4]

When such individuals attain fame and notoriety, the law protects certain aspects of their talent from unauthorized appropriation in various ways. For example, California recognizes the common law tort of misappropriation when a third party commercially exploits an attribute of a celebrity's identity without consent. A recent example was *Midler v. Ford Motor Co.*,[5] where the Ninth Circuit Court of Appeals clarified the attributes of an individual's identity which are entitled to legal protection. The court held that under California law, singer/actress Bette Midler[6] stated a tort claim based on Ford Motor Company's unauthorized

1. "Commercial market" is a term used to describe the use of advertising in various media forms to sell products.

2. McDougal, *Michael Jackson In a Thriller of a Contract,* L.A. Times, May 5, 1986, Part VI (Calendar) at 1.

3. Horovitz, *Reebok Walks Marketing Tightrope With Human Rights Concert Tour,* L.A. Times, July 26, 1988, Part IV (Business) at 6.

4. Schmitt, *Singers Get Green Light to Sue Imitators: Court Rules Sound-Alike Ad May Be Theft,* Wall St. J., August 19, 1988, § 2 at 19.

5. 849 F.2d 460 (9th Cir. 1988).

6. Appellant's Opening Brief at 3, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). Bette Midler is a well-known recording artist, concert performer, author, comedienne

use of a voice which sounded like Midler's in one of its commercials.[7]

A. Statement of the Case

In 1985, Ford and its advertising agency, Young and Rubicam, Inc. ("Young"), created a television commercial campaign targeting the "Yuppie"[8] car buyer. They used popular songs from the 1970s, reminiscent of the Yuppie generation's college years. In their efforts to use the original singers in the commercials, Young contacted Midler's manager, Gerald Edelstein, to inquire whether Midler would sing her hit version of "Do You Want To Dance?" in a commercial advertising Ford's Mercury Sable.[9] The request was flatly refused.[10]

Based on this refusal, Young contacted Ula Hedwig ("Hedwig"), a former member of Midler's backup group, the "Harlettes." Hedwig was hired and instructed to imitate Midler's singing style and "to sound as much as possible like the Midler record."[11] Once the commercial aired, friends told both Hedwig and Midler that they believed Midler had performed in the commercial. Others in the entertainment industry thought so as well, despite the fact that neither Midler's name, picture nor endorsement were used.[12] Although Young obtained a license from the song's copyright owner for the use of the song, Young did not ask Midler or Edelstein for permission to imitate Midler's vocal style or voice.[13]

Midler sued Ford and Young for the misappropriation of her voice by imitation without consent after the commercial aired. The district court in Los Angeles granted Ford's motion for summary judgment holding that Midler failed to state a claim.[14] Although the district court found the defendant's conduct comparable to that of an "average thief," the court found no basis to prevent the imitation of Midler's voice or grant compensation for its use.[15]

The court of appeals reversed the district court's ruling and held that Midler had made a sufficient showing to defeat summary judg-

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and motion picture actress. She has recorded more than ten albums, sold millions of records and received platinum and gold record awards. In addition, Midler received two Grammys, a Tony and was nominated for an Academy Award for her role in the motion picture *The Rose.*

7. *Midler,* 849 F.2d at 461.
8. "Yuppie" is a term describing young urban professionals.
9. *Midler,* 849 F.2d at 461.
10. *Id.*
11. *Id.*
12. *Id.* at 462.
13. *Id.*
14. *Midler,* 849 F.2d at 461.
15. *Id.*

ment.[16] The court concluded that Midler had a tort claim under California law for Ford's commercial misappropriation of Midler's voice and remanded the case for trial.[17]

B. Reasoning of the Court

The Ninth Circuit Court of Appeals set out guidelines for the trial court by discussing the possible remedies available to Midler at law. First, the court dismissed Ford's argument that the first amendment[18] protected Ford's use of "Midler's" voice. The court reasoned that Ford's use of Midler's voice was for mere exploitation and in the absence of any "informative or cultural" purpose, the first amendment immunity will not protect Ford's use of Midler's identity.[19]

Second, the court found that Midler's claim was not preempted by federal copyright law as Ford and Young argued. Ford defended its actions by emphasizing that its use of a copyrighted work to which it held a license permitted commercial use of the song in this manner. However, the court reasoned that since Midler was not claiming a protected interest in her rendition of the song nor trying to enjoin Ford's use of the copyrighted song itself, her suit was not based on copyright.[20] Rather, Midler was contesting the use of an imitation of her voice and her singing style which was not preempted by federal copyright law.[21]

The *Midler* court distinguished the case of *Sinatra v. Goodyear Tire and Rubber Co.*,[22] on the above grounds. Nancy Sinatra claimed that because she had popularized a rendition of the song, "These Boots Are Made For Walkin'," [23] it became identified with her name and was therefore protected under copyright law, even though she did not own a license or any other right to use the song. The Ninth Circuit rejected Sinatra's argument, stating that finding a protected interest under the Copyright Act in that case would contravene the policy which encourages and protects original works of authorship.[24]

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16. *Id.* at 463.

17. *Id.* at 463-64.

18. The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

19. *Midler*, 849 F.2d at 462.

20. *Id.*

21. *Id.*

22. 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

23. Criterion Music is the copyright owner of this popular tune from the late 1960s.

24. *Midler*, 849 F.2d 460, 462 (citing 17 U.S.C. § 102(a) (1988)).

The court discussed another method to challenge an imitation of one's voice and cited *Lahr v. Adell Chemical Co.*[25] as an example. In *Lahr,* Bert Lahr, an actor famous for his portrayal of the cowardly lion in *The Wizard of Oz,*[26] successfully challenged the use of an imitation of his voice in conjunction with a duck cartoon in a television commercial. Lahr claimed that the unauthorized imitation of his "style of vocal delivery [which] was distinctive in pitch, accent, inflection and sounds"[27] constituted unfair competition because the "defendant's conduct saturated the plaintiff's audience, curtailing his market."[28]

The *Midler* court recognized the similarity of the *Lahr* facts to the facts before it, but distinguished *Lahr.* Although both plaintiffs challenged the use of imitations of their voices, Lahr's claim was based on unfair competition, whereas Midler was precluded from such recovery because she was not in the commercial market.[29] The *Midler* court found that Ford's "one minute commercials"[30] would not "steal [her] thunder"[31] as in *Lahr.*

The court also held that California Civil Code section 3344 was inapplicable to Midler's claim.[32] The court found that although the statute provides a remedy when a person's name, voice or likeness is used, neither Midler's name, likeness, nor voice, as defined by the statute, were used by Ford. The court explained that "likeness" refers to a "visual image not a vocal imitation."[33] The court found that Midler's voice must have been used by Ford to allow recovery under the statute.[34] However, the court found that the statute did not bar Midler from use of the common law tort of misappropriation since the "statute itself implies that such common law causes of action do exist because it says its remedies

25. *Midler,* 849 F.2d at 462 (citing Lahr v. Adell Chemical Co., 300 F.2d 256, 259 (1st Cir. 1962)).

26. Metro-Goldwyn-Mayer 1939.

27. *Midler,* 849 F.2d at 462.

28. Lahr v. Adell Chemical Co., 300 F.2d 256, 259 (1st Cir. 1962).

29. *Midler,* 849 F.2d at 463.

30. *Id.* at 462.

31. *Lahr,* 300 F.2d at 259.

32. *Midler,* 849 F.2d at 463. Section 3344 of the Cal. Civil Code provides in pertinent part:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods or services . . . without such person's prior consent . . . shall be liable for any damages . . . .
> (g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

CAL. CIV. CODE § 3344 (1988).

33. *Midler,* 849 F.2d 460, 463.

34. *Id.*

are merely cumulative."[35]

The court explained that California courts have recognized that an individual has a proprietary interest in his identity which is protected under the common law tort of misappropriation. For example, in *Motschenbacher v. R. J. Reynolds Tobacco, Co.*,[36] Reynolds, a cigarette manufacturer, used a photograph of Lothar Motschenbacher, a famous racecar driver, and his racecar in a nationally televised commercial endorsing their product, Winston cigarettes, without his permission.[37]

Although Motschenbacher was driving the car depicted, he was not visible in the photograph. Reynolds altered the photograph by changing the car's number from "11" to "71" and added a "spoiler"[38] with the Winston insignia.[39] However, the court found that Reynolds did not change the distinctive color, pinstriping and oval medallion representing the "sign and symbols" by which Motschenbacher and his cars are known.[40] The court concluded that those viewing the commercial believed Motschenbacher was in fact endorsing Winston cigarettes, by the use of "uniquely distinctive features"[41] identified with Motschenbacher. Therefore, the Ninth Circuit held that the defendant had invaded a "proprietary interest" of Motschenbacher in his own identity protected under California law.[42]

The *Midler* court found its case distinguishable from *Motschenbacher,* because unlike Midler's persona and voice, Motschenbacher and his vehicle were actually used in the commercial, and Motschenbacher derived a significant part of his income from such product endorsements whereas Midler did not. As a result, the court found it irrelevant that Motschenbacher could not be seen. By using the "signs" and "symbols" associated with Motschenbacher, the defendants had appropriated his identity as an endorser.[43]

The *Midler* court analogized Ford's use of an imitation of Midler's voice to the *Motschenbacher* facts. The court found Midler's distinctive vocal style to be the symbols and signs associated with her. Therefore, the use of an imitation of Midler's voice was as if she endorsed Ford's product, even though Ford used an imitation. The court emphasized

35. *Id.*
36. 498 F.2d 821, 825 (9th Cir. 1974).
37. *Id.* at 822.
38. *Id.*
39. *Midler,* 849 F.2d at 463.
40. *Id.*
41. *Motschenbacher,* 498 F.2d at 822.
42. *Id.* at 825.
43. *Id.*

that Midler's voice was the attribute that Ford sought to use in endorsing their product. Furthermore, the court recognized that the value of Midler's voice to the advertisement was such that Ford engaged a soundalike, Hedwig, to make the endorsement when Midler refused to do so.[44]

The court found that Midler and Ford both recognized the commercial value of using Midler's distinctive voice in the Ford commercials.[45] For this reason, the court concluded that Midler, as a well-known and distinctive "chanteuse,"[46] had acquired a proprietary interest in her voice and "to impersonate her voice is to pirate her identity."[47] The commercial value "was what the market would have paid for Midler to have sung the commercial in person."[48]

The court emphasized that "[a] voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested."[49] Although the court remanded the case for trial, it limited such protections to "distinctive" and "well-known" voices which are deliberately imitated for commercial exploitation.[50]

II. HISTORICAL PERSPECTIVE

A. Right of Privacy and Appropriation

The doctrine of appropriation is one of the four categories of the common law right of privacy.[51] In 1960, Dean William Prosser[52] succinctly described the four recognized categories constituting the right of privacy. The categories are: 1) the right against intrusion into personal areas; 2) public disclosure of private facts; 3) false light in the public eye; and 4) appropriation: the "exploitation of the attributes of the plaintiff's identity."[53]

However, many courts and commentators have distinguished appropriation from the other three categories of the right to privacy.[54] Appropriation not only focuses on the protection of one's identity from commercial exploitation, but also one's privacy in his identity, rather

44. *Midler,* 849 F.2d at 463.
45. *Id.*
46. *Id.* Chanteuse is another term for a woman singer.
47. *Midler,* 849 F.2d 460, 463.
48. *Id.*
49. *Id.*
50. *Id.*
51. W. Prosser, *Privacy,* 48 CAL. L. REV. 383, 401 (1960).
52. *Id.*
53. *Id.*
54. *Id.*

than from public humiliation or embarrassment.[55] California courts have used the appropriation doctrine to prevent third parties from profiting from the misuse of a plaintiff's identity.[56]

B. Right of Publicity

Although courts have used the doctrine of appropriation to protect the same rights or similar rights afforded by the right of publicity, the two actions are distinct. The right of publicity, although similar to the appropriation doctrine, is narrower in scope and application.[57] For example, the right of publicity is generally applicable to celebrities or those individuals who have acquired commercial value in their name and image, and protects them from unauthorized exploitation.[58] Another distinction is that the tort of misappropriation protects a person's dignity and the unpermitted use of his identity from exploitation. By contrast, the right of publicity protects an individual's proprietary interest and insures that he may control and benefit from the exploitation. Although these distinctions are recognized, the two rights are often mistakenly interchanged.[59]

Under either the right of publicity or appropriation, a plaintiff must be able to prove both identifiability and that the defendant used the appropriated "thing" for his pecuniary advantage.[60] The right of publicity additionally requires the plaintiff with a proprietary interest to show that the personal attribute is identifiable with that celebrity, and it must be a creation of the celebrity's labors, skills or talents.[61]

III. ANALYSIS OF THE OPINION

A. Appropriation Claim

The *Midler* court's decision extends the scope of the appropriation doctrine to allow recovery for the misappropriation of attributes of an individual's identity such as one's voice. However, the holding is limited to distinctive voices which are so identifiable and widely known that the individual can be recognized without being present.[62] Generally, the

55. *Id.*
56. R. Hoffman, *The Right of Publicity: An Analytical Update,* 14 INTELL. PROP. L. REV. 1, 11 (1982).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. Hoffman, *supra* note 56, at 11.
62. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

right of recovery is equated with celebrity status although the degree of identifiability may be difficult to measure. The court's ability to identify the imitated party is essential to prove the claim, yet the unauthorized exploitation of his identity is the tort.[63]

The *Motschenbacher* court's use of the privacy-based right against commercial appropriation exemplified the tort's flexibility and broad application in protecting intangible attributes such as signs and symbols of an individual's persona or uniqueness.[64] However, the *Motschenbacher* court refused to specify whether its ruling was based on the common law doctrine of appropriation or the right of publicity, both of which are recognized in California.[65]

The *Motschenbacher* court's rationale was based on this quote from Prosser who synthesizes the two approaches:

> Although the element of protection of the plaintiff's personal feelings is obviously not to be ignored in such a case, the effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness. It seems quite pointless to dispute over whether such a right is to be classified as 'property'; it is at least clearly proprietary in its nature. Once protected by the law, it is a right of value upon which the plaintiff can capitalize by selling licenses.[66]

Applying the *Motschenbacher* analysis to *Midler,* Midler would have a common law right in the attributes of her voice and vocal style which is equal to a "trademark"[67] in her likeness. The court found that the value of Midler's trademark to Ford was obvious by the great lengths Ford exercised to find an imitator to create the impression that Midler in fact was singing in Ford's commercial. In other words, if Midler's voice had no commercial value to Ford, then it would not have gone to the trouble and expense of imitating it when Midler refused to sing in its commercial. Ford set the stage to misappropriate Midler's trademark at great cost to Midler.[68]

In this case, Ford acted as other commercial advertisers who commonly buy a license to use a popular song and hire less expensive imitators or studio musicians to duplicate popular renditions. The practice

63. Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974).
64. *Id.*
65. *Id.* at 826.
66. *Id.* at 825.
67. *Motschenbacher,* 498 F.2d at 827.
68. Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988).

has long been defended and upheld under copyright law which allows duplication of live performances.[69] If Ford had not acted in such an overzealous and deliberate manner in acquiring a Midler imitation, the court may not have looked beyond copyright law to grant relief.

B. Right of Publicity Claim

Even under the narrower right of publicity, Midler has a claim. For example, in *Carson v. Here's Johnny Portable Toilets, Inc.*,[70] the Sixth Circuit protected Johnny Carson's right of publicity in the phrase "Here's Johnny"[71] and its use by the defendant in the naming of its product.[72] In *Carson,* the court concluded that the corporation intentionally used the phrase "Here's Johnny" in its corporate name and in naming and endorsing its product, a portable toilet. Furthermore, the defendant described its product as the "World's Foremost Commodian" to associate with Johnny Carson's fame.

The Sixth Circuit stated that Prosser's fourth category of right to privacy, or appropriation, was in fact the modern right of publicity. The *Carson* court relied on *Motschenbacher* in coming to its conclusion and held that "if the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his likeness is used. Carson's identity may be exploited even if his name, John W. Carson or his picture is not used."[73]

In contrast, the dissent in *Carson* argued that the common law right of publicity should not and does not include "phrases or other things merely associated with the individual as the phrase, 'Here's Johnny' "[74] as in the tort of appropriation. If expanded under the right of publicity, the effect would be to remove these phrases from the 'public domain' contravening both first amendment rights and copyright law.[75]

The dissent reasoned that the policy behind the right of publicity is not effectuated by the majority's broad application of the right of publicity in the *Carson* case. The "strong federal policy permits the free use of intellectual property, words and ideas that are in general circulation and not protected by a valid copyright patent or trademark."[76] The dissent

69. Wall St. J., August 19, 1988, § 2 at 19.

70. 698 F.2d 831 (6th Cir. 1983).

71. *Id.* at 832. The phrase "Here's Johnny" has been used to introduce Johnny Carson, a well-known commedian, since his first television show in 1957.

72. *Id.*

73. *Id.* at 835.

74. *Id.* at 837.

75. *Carson,* 698 F.2d at 841.

76. *Id.*

explained that the policy considerations of the right to publicity are to: 1) protect the celebrity's economic interest in his fame and identity; 2) promote intellectual and creative works by protecting financial incentives; 3) prevent unjust enrichment by those not producing the property interest and 4) protect the public from unfair trade practices.[77]

The above policy considerations are supported by the *Midler* court's decision and should be applied by the trial court as guidelines for its decision on remand, because the court need not apply the doctrine so broadly. As the dissent in *Carson* points out, an "individual's name, likeness, achievements, identifying characteristics or actual performances"[78] are protected by the right of publicity. Therefore, the facts in *Midler* illustrate that Midler's property interest in her voice and vocal style, as an "identifying characteristic,"[79] should be protected under either the right of publicity or the appropriation doctrine.

The *Midler* court's analysis suggested that California Civil Code section 3344 swallowed up the common law right of publicity.[80] However, the court pointed out that section 3344 is cumulative and therefore supplements rather than subverts common law rights such as right of publicity and appropriation. In effect, the *Midler* court treated appropriation and right of publicity as a single tort remedy.

C. *An Additional Claim Under the Federal Lanham Trademark Act*

An additional remedy available to Midler which was not analyzed by the court is the protection provided by the federal Lanham Trademark Act, (the "Act")[81] which prohibits the false descriptions of products or their origins. For example, in *Allen v. National Video, Inc.*,[82] a video company used a Woody Allen look-alike in a national advertising campaign. The district court held that the impersonator created a likelihood of consumer confusion over the celebrity endorsement which violated the Act.[83]

The *Allen* court explained that to fall within the protection of the Act, a plaintiff must show an "involvement of goods or services, . . . effect on interstate commerce, and . . . false designation of origin or false de-

77. *Id.* at 838.
78. *Id.* at 837.
79. *Id.*
80. *Midler,* 849 F.2d at 463.
81. 15 U.S.C. § 1125(a) (1988).
82. 610 F. Supp. 612 (S.D.N.Y. 1985).
83. *Id.* at 632.

scription of the goods or services."[84] The *Allen* court broadly construed the Act and reasoned that the Act had been applied to instances of unfair competition outside the traditional parameters of trademark infringement.[85] The purpose behind the Act was to protect the public from harmful deception through reliance on a celebrity's identity in his or her endorsement of a product.[86]

The *Allen* court recognized the value of Allen's reputation as an internationally recognized director and actor serving as his protectible mark. The court found that Allen's fame and notoriety, based on his "reputation for artistic integrity, have significant, exploitable, commercial value."[87] The framers of the Act recognized the "psychological value of symbols"[88] and their tendency to deceive the public.

In finding in favor of Woody Allen, the court held that the potential rather than actual consumer deception caused by the endorsement was the key factor. In addition, the Act does not require Allen, who is not in the commercial market, to be in competition with the defendant in order to receive protection under the Act.[89]

The court explained that Boroff, the impersonator, could continue his services as a look-alike in "any setting where the overall context makes it completely clear that he is a look-alike and that plaintiff has nothing to do with the project. . . . "[90] The *Allen* court required "bold and unequivocal disclaimer[s]."[91] In addition, the court required that the setting or context of the designation should have little or no probability of creating public confusion.[92]

The *Midler* facts support the use of the Lanham Act as an additional claim available to protect Midler's interests.[93] Federal law is applicable to Midler's claim because Ford's product was distributed nationally, the advertising campaign was national and the goods were within the stream of interstate commerce.[94] Midler has standing to sue because, similar to *Allen,* Midler's mark is her unique voice and vocal

84. *Id.* at 625.
85. *Id.*
86. *Id.*
87. *Allen,* 610 F. Supp. at 617.
88. *Id.* at 625.
89. *Id.* at 620.
90. *Id.* at 630.
91. *Id.*
92. *Allen,* 610 F. Supp. at 630.
93. 15 U.S.C. § 1125 (1988). The court denied the plaintiff's motion to amend her complaint to include a Lanham Act claim.
94. Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988).

qualities which are nationally recognized in her profession as a singer, actress and comedienne.[95]

The Lanham Act claim does not require that Midler be in competition with Ford or that she had previously exploited her identity commercially. The *Midler* court found that the value of Midler's voice as an endorsement for Ford was significant and that the deceptive nature of the Ford campaign created a false impression that Midler endorsed Ford's product.[96] The court found that the value of Midler's voice and talents are internationally recognized, and Ford's exploitation of those attributes by imitation created consumer deception, which appear to be in direct violation of the letter and intent of the Lanham Act.

IV. CONCLUSION

The effect of the *Midler* ruling on advertisers, imitators and sound-alikes will be minimal if proper steps are taken to identify the performing artist apart from the celebrity impersonated. The *Midler* case prevents the unauthorized use of a celebrity's identifiable attribute such as a voice or vocal style made without identification of the imitated celebrity. Identifying the impersonation alleviates liability and reduces the public deception when a celebrity's identity is imitated by another. An impersonator or celebrity look-alike who does not identify himself apart from the celebrity or the celebrity's well-known vocal act can, in fact, be enjoined under the right of publicity.[97]

The court's application of the appropriation doctrine and the ruling in favor of Midler appears reasonable because her voice is distinguishable and recognizable to world-wide audiences.[98] In addition, Ford's appropriation of Midler's stylistic vocal characteristics by imitation are tantamount to thievery. The *Midler* ruling attempts to address the circumstance where a "sound-alike" purports to be the celebrity imitated which results in an appropriation of the celebrity's identity. The court attempts to limit its ruling to distinguishable voices. Inherent in such a ruling is the extreme difficulty of applying the rule and in its enforcement where the voice of the plaintiff is not as distinctive as Midler's. The court did not explain how distinguishable or well-known the voice must be to be deemed identifiable.

Remember, a state cause of action for misappropriation may be pre-

95. *Id.*
96. *Id.* at 462.
97. Estate of Presley v. Russen, 513 F. Supp. 1339, 1361 (D.N.J. 1981).
98. *Midler*, 849 F.2d at 461.

empted by federal copyright law in circumstances where the imitation is challenged on the basis of the copyrighted work and not primarily on the misappropriation of the artist's voice. As a result, the chance of an overbroad application of the appropriation doctrine is decreased while preserving the intent and protection of original works of authorship under copyright law.[99]

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99. Motown Record Corp. v. Hormel & Co., 657 F. Supp. 1236 (C.D. Cal. 1987).