
Ain't Nothin' Like the Real Thing, Baby: The Right of Publicity and the Singing Voice

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[Introduction](#)

[I. Protection Under the Right of Publicity](#)

[A. Name](#)

[B. Likeness](#)

[C. Identity](#)

[II. The Most Litigious Form of Flattery](#)

[A. The Quarrelsome Miss M.](#)

[B. "Step Right Up" to the Bar](#)

[III. The Thing Protected](#)

[IV. A Right Without a Wrong](#)

[Conclusion](#)

[Table of Contents](#) for No. 46, Volume 2
[FCLJ Cover Page](#)

Introduction

Being famous is big business.

Controlling the use of that fame is big business as well. If, as Andy Warhol claimed, each of us will experience fifteen minutes of fame,[\(note 1\)](#) the entertainment industry seems intent on making money from every second of exposure. Celebrity faces and names adorn gym shoes, computer games, children's toys, salad dressing, weight-loss products, lunch boxes, and any number of other items. Commercial endorsements are a huge industry.

Originally treated as a branch of the right of privacy, the right of publicity has grown in breadth and subtlety as it has established its own independent life.[\(note 2\)](#) The right of publicity helps protect the commercial interests the well-known have in being well-known. The value of such rights has grown as technology and markets present new possibilities for exploiting aspects of personality.

The right of publicity protects property rights in one's name, image, or likeness.[\(note 3\)](#) This right encompasses not only obvious depiction through renderings,[\(note 4\)](#) but also anything that suggests a celebrity, such as an automobile,[\(note 5\)](#) fictional character,[\(note 6\)](#) phrase,[\(note 7\)](#) or physical movement.[\(note 8\)](#)

While courts have generally supported the efforts of celebrities to prevent the unauthorized commercial exploitation of their physical appearance, names, or personal statistics, the courts had turned a "tin ear" to the idea that the voice can be as significant an identifier as name or likeness.[\(note 9\)](#)

However, this changed with the landmark decision of *Midler v. Ford Motor Co.*[\(note 10\)](#) In *Midler*, the Ninth Circuit Court of Appeals recognized a common law right of publicity in the voice.[\(note 11\)](#) A jury awarded Midler \$400,000 in October 1989.[\(note 12\)](#)

The facts in *Midler* provided a compelling argument for the plaintiff. Ford admitted hiring one of Midler's former backup singers and directing her to sound as much like Midler as possible.[\(note 13\)](#) Midler, who had a long history of avoiding commercial endorsements,[\(note 14\)](#) had refused the company's offer to do the ad herself. When the backup singer produced an uncannily Midler-like performance that even fooled Midler's friends, the wounded chanteuse sued.[\(note 15\)](#) The appellate court held that Ford and its advertising agency had "misappropriated" Midler's voice, plundering for itself an aspect of the singer's personality that was hers to control and not Ford's to make use of without authorization.[\(note 16\)](#)

On the heels of the *Midler* decision, singer Tom Waits sued Frito-Lay for a Doritos radio commercial that featured a vocalist singing in a style that many people thought suggested Waits.[\(note 17\)](#) Although the commercial used an original tune never associated with Waits, the Ninth Circuit reaffirmed *Midler* and a trial court award that included \$2 million in punitive damages for voice misappropriation.[\(note 18\)](#) The Supreme Court denied certiorari in both *Midler*[\(note 19\)](#) and *Waits*.[\(note 20\)](#)

The *Waits* decision represents a dramatic expansion of the publicity right defined in *Midler*. In the *Midler* case, Ford's advertising agency admitted trying to imitate Midler in a version of a song she made a hit.[\(note 21\)](#) In *Waits*, Frito-Lay, like Ford, could not use the singer who had inspired the commercial idea.[\(note 22\)](#) Unlike Ford, however, Frito-Lay's sound-alike was given an original tune to sing, a tune never associated with the plaintiff. The court expanded the publicity right in voice beyond association with a particular song to a point not easily determinable.

Both on their facts and reasoning, *Midler* and *Waits* should be seen as exploring the right of publicity in the singing voice. Further, *Midler* and *Waits* and the tort of voice misappropriation do not stand for protection against digital sampling or some other use of the singer's actual voice, but for the principle that some stylistic aspects of the voice are definable, extractible, and defensible against unauthorized use under a right of publicity theory.

This Note argues against such a principle. First, *Midler* and *Waits* only vaguely define the publicity right they intend to protect, arguably because the right of publicity in the singing voice is probably undefinable, particularly through the courts. This is especially true when such a right is used to block the commercial use of unidentified, sound-alike singers. Second, even if the publicity right can be defined, and *Midler* and *Waits* do so, the public policies underlying the right of publicity do not support extending that right to the singing voice in order to protect against the use of sound-alikes in commercials.

This Note argues that *Waits* represents an unwarranted expansion of *Midler*, which is itself a questionably legitimate growth of the right of publicity. While these decisions seem to represent a victory for artists over commercial interests, protection of the singing voice from imitation under a right of publicity theory actually ignores long-established musical values, misinterprets the purposes of the right of publicity, and provides a windfall to celebrity singers.

Part I of this Note looks at the aspects of individual identity protected under the right of publicity and prior case law regarding a right of publicity in vocal style. Part II looks at the definition of identity protected in *Midler* and *Waits* and the way in which that identity is demonstrated. Part III explores the policy arguments underlying the right of publicity in general and the protection of personality through the voice in particular. This Note concludes that extending the right to include subtle aspects of singing style would strangle creativity and unjustly reward a handful of well-known

celebrity singers.

I. Protection Under the Right of Publicity

The right of publicity is really a creature born of modern mass media. [\(note 23\)](#) While its origins are clearly found within the right to privacy outlined in the seminal 1890 article by Samuel Warren and Louis Brandeis, [\(note 24\)](#) mass media and the emergence of modern celebrity showed that the "right to be let alone" did not address the concerns of people who *desired* the intrusive light of public attention. "In reality the injury to sensibilities concept does not normally meaningfully apply when a person routinely permits advertising uses of his name or picture. . . . The harm resides not in the use of his likeness but in the user's failure to pay." [\(note 25\)](#)

The first case expressly recognizing a right of publicity was *Haelen Laboratories v. Topps Chewing Gum, Inc.* [\(note 26\)](#) *Haelen Laboratories* concerned the unauthorized use of a baseball player's photo by the defendant after the player had signed a contract conveying to the plaintiff the exclusive right to use the photo. While the defendant claimed that the only right invaded was the baseball player's personal right of privacy, which is not alienable, the court established the property right in the right of publicity, which it said was conveyed by a contract. [\(note 27\)](#)

Although courts have mixed the attributes of the right of privacy and the right of publicity, the trend has been toward a recognition of a right of publicity independent from the right of privacy. [\(note 28\)](#) The scope of the right of publicity has traditionally been defined as encompassing name and likeness. [\(note 29\)](#) The scope of rights protected is greater than that. [\(note 30\)](#)

Several policies underlying the right of publicity help describe the particular contents of the right as well. The right of publicity, like the right of privacy, protects the use of one's identity. It protects against a defendant's "getting free some aspect of the plaintiff that would have market value and for which defendant would normally have to pay." [\(note 31\)](#) The right of publicity is also said to encourage creative activity, and so protects those things that a person has acquired through long practice, skill, and achievement. [\(note 32\)](#)

A. Name

The right of publicity, as well as the right of privacy, protects against the unauthorized commercial use of celebrity names. [\(note 33\)](#) Name has a wide definition. A group name, [\(note 34\)](#) a stage name, [\(note 35\)](#) and the legal name of a personality [\(note 36\)](#) are all protected from unauthorized commercial use.

Infringement of the right of publicity, however, requires more than the simple coincidence of sameness. [\(note 37\)](#) There must be "some `plus factors'-- other elements of similarity of context between the plaintiff and the use by the defendant." [\(note 38\)](#)

B. Likeness

A celebrity's right of publicity encompasses not only photographs, but practically any recognizable visual rendering. This right protects against the use of look-alike models in still photography, motion pictures, television, and live performance. [\(note 39\)](#) As with name and other aspects of identity under the right of publicity, surrounding cues that might suggest a celebrity connection are also factored into the equation to determine whether the use is infringement. [\(note 40\)](#)

The outer limits of the protection of likeness were reached recently in *White v. Samsung*. [\(note 41\)](#) There, Vanna White, the letter-turning hostess of the game show *Wheel of Fortune*, successfully sued Samsung for infringing her right of publicity in a television commercial. The commercial showed a letter-turning robot wearing a blond wig, and White successfully claimed that Samsung was trying to trade on her well-known identity. [\(note 42\)](#)

C. Identity

While "identity" is the third portion of the classic right of privacy, its precise content and parameters are less well defined than name and likeness. At its essence, the right of publicity is intended to control the use of "identity," and the right seems bound only by the ingenuity of lawyers and the indulgence of the courts.

In a case significant to the right of publicity in general, and the *Waits* and *Midler* decisions in particular, use of a photograph of a famous race car driver's car was found to infringe on the driver's "proprietary interest in his own identity." [\(note 43\)](#) There, the defendant, a cigarette manufacturer, used a photograph of several race cars that included the plaintiff's car. Although the plaintiff was not identifiable, the number on the car was changed, and a spoiler with the cigarette's name was added to the car, [\(note 44\)](#) the plaintiff successfully argued that his race car design was distinctive and well-known. [\(note 45\)](#) Although the plaintiff was not visible, the car's distinctive markings "caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff." [\(note 46\)](#)

Phrases can be persona signifiers as well. In one memorable case, entertainer Johnny Carson prevailed against a Michigan portable toilet business that identified its product as "Here's Johnny," the phrase associated with Carson during his decades as king of late-night television. [\(note 47\)](#)

The protection of performance style has been a much discussed avenue for the expansion of the right of publicity. Some commentators have suggested a "why not?" justification for inclusion of performance style. [\(note 48\)](#) Courts have had a more difficult time with the issue.

In *Groucho Marx Productions, Inc. v. Day & Night Co.*, [\(note 49\)](#) producers of a play featuring performers "simulating the unique appearance, style and mannerisms of the Marx Brothers" [\(note 50\)](#) were found liable for the unauthorized use of the names and likenesses of the deceased stars. [\(note 51\)](#) *Estate of Presley v. Russen* [\(note 52\)](#) follows closely the facts of *Groucho Marx Productions*. Entertainer Larry Seth imitated a late-period Elvis in a production called THE BIG EL SHOW, which opened with the famous Strauss music used in the film *2001: A Space Odyssey*. The performer attempted a full-scale imitation of the King. He wore jewelry and clothing in Presley's style, tossed scarves to swooning audience members as Presley did, sang Elvis tunes, and "imitated the singing voice, distinctive pose and body movements made famous by Presley." [\(note 53\)](#) The court did not grant the plaintiff the injunction it sought because the defendant's performance would not have any adverse affect on the plaintiff's economic interest. [\(note 54\)](#) The court recognized, however, that the plaintiff's right of publicity was implicated by the performance. [\(note 55\)](#)

Both these cases, and others similar to them, treat performance style as a kind of animate likeness, with a great deal of emphasis on the physical resemblances between the original and the alleged imitators. Case law upholding a right of publicity in abstractible personality qualities--such as sneezing comically or dancing like Fred Astaire--has yet to surface to support advocates for a right of publicity in performance style.

II. The Most Litigious Form of Flattery

As Professor McCarthy has pointed out, some courts have generally been hostile to the idea that vocal style can be protected under a right of publicity theory. [\(note 56\)](#) A small handful of reported cases on point provide the backdrop against which *Midler* and *Waits* were decided.

In *Lahr v. Adell Chemical Co.*, [\(note 57\)](#) comedian and actor Bert Lahr, famous as the Cowardly Lion in the *Wizard of Oz*, sued after a Lestoil commercial used an animated duck with the voice of a mimic who Lahr argued was imitating him. [\(note 58\)](#) Lahr argued under a number of theories, including violation of New York's statutory privacy protection of "name, portrait and picture," unfair competition, and defamation. [\(note 59\)](#) The First Circuit Court of Appeals vacated a trial court dismissal and remanded. [\(note 60\)](#) The appellate court found plausible the argument that the commercial imitated the actor's "vocal comic delivery," which was distinctive in pitch, accent, inflection, and sounds. [\(note 61\)](#)

Nancy Sinatra found no help from *Lahr* when she sued the Goodyear Tire Company for a commercial featuring four

women in high boots dancing to "These Boots Are Made for Walkin'." [\(note 62\)](#) Goodyear, which was using the song to promote a new car tire, admitted to hiring a female singer to sound as much like Sinatra as possible. [\(note 63\)](#) The company had purchased the requisite rights to use the song, [\(note 64\)](#) which Sinatra had turned into a minor hit.

Sinatra sued under a "passing off" theory, which the court denied since the vocalist and the tire company were not in competition with each other. [\(note 65\)](#) *Lahr* was distinguished as a case where the actor himself claimed a distinctive voice unassociated with a single work, while the court construed Nancy Sinatra as making a claim to her own association with a particular song. [\(note 66\)](#) The court made much of Goodyear's proper purchase of rights in the music, lyrics, and arrangement of the original song. [\(note 67\)](#) Consequently, *Sinatra* has been construed to say that the court would consider only "the vocalist's style apart from any particular song." [\(note 68\)](#)

This skepticism regarding protection of vocal style when the rights to the underlying work are properly licensed was continued in *Booth v. Colgate-Palmolive Co.* [\(note 69\)](#) In that case, the defendant, Colgate- Palmolive, had properly licensed the use of the cartoon character "Hazel" from its creator, and used a voice identifying herself as the character Hazel in a series of advertisements for a laundry detergent. [\(note 70\)](#) The cartoon character had been used as the basis for a television comedy called *Hazel*, which ran from 1961 to 1966 and starred plaintiff Shirley Booth as the title character. [\(note 71\)](#) Booth claimed that the voice used in the detergent commercial was an imitation of the voice she used when playing Hazel, and the defendant admitted that it indeed imitated Booth's style. [\(note 72\)](#) The court, citing *Sinatra*, [\(note 73\)](#) dismissed the plaintiff's claims. [\(note 74\)](#)

A. The Quarrelsome Miss M.

It was 1985 when advertising agency Young & Rubicam (Y & R) contacted Ula Hedwig, a former member of Bette Midler's saucily named backup group, the Harlettes. [\(note 75\)](#) Young & Rubicam needed a vocal stand-in after Bette Midler's manager had summarily refused Ford's request for Midler to sing her popular 1970s version of "Do You Want to Dance." Although Midler had done at least one commercial in the past, she had developed a strong policy against such endorsements. Y & R wanted to include Midler's version of her hit--or a Midler-esque performance--with the other nineteen or so popular tunes from the '60s and '70s that it had lined up for an advertising blitz titled the "Yuppie Campaign" for the Ford Lincoln Mercury. Many of the original stars who made those songs famous had signed on for the commercials. The songs and arrangements had been properly licensed for use in the television spots. After Midler's refusal, the Y & R people told Hedwig to sound as much like Midler as possible. Hedwig's version was similar enough to convince many of Midler's friends that she had given up her stand against doing commercial endorsements. [\(note 76\)](#)

Midler then brought suit in federal court for \$10 million against Y & R and Ford for the unauthorized use of her vocal style in the commercial. [\(note 77\)](#) Her claim was based on California Civil Code Section 3344, which provides damages to a party whose "name, voice, signature, photograph or likeness" [\(note 78\)](#) has been used without authorization. The only issue before the district court was whether Midler could claim protection for her voice. The trial judge, despite some disparaging remarks regarding Ford and Y & R's behavior, determined that there was no legal prohibition against vocal imitation. [\(note 79\)](#)

The Ninth Circuit Court of Appeals disagreed, stating that when "a distinctive voice of a professional singer is widely known and deliberately imitated in order to sell a product, the sellers . . . have committed a tort in California." [\(note 80\)](#) The court distinguished *Sinatra* on grounds that it was based on an unfair competition theory, while Midler was making a claim that her voice had been misappropriated. [\(note 81\)](#) The case was remanded to the district court for trial. The jury found in favor of Midler and awarded her \$400,000 in damages. [\(note 82\)](#)

The court's approving references to *Lahr* [\(note 83\)](#) indicated the potential for expanding the new right of publicity in the singing voice. *Lahr* protected the sound of the voice when used in a context not associated with the celebrity voice. *Midler* was an easy case, then, since the court protected the singer's voice from imitation in a song directly associated with her. The *Midler* court's reasoning suggested that singers might enjoy voice protection in other contexts as well.

B. "Step Right Up" to the Bar

Waits v. Frito-Lay, Inc. (note 84) offered a chance to test the outer limits suggested by the *Midler* court's embrace of *Lahr*. In *Waits*, Frito-Lay commissioned a tune inspired by the 1976 Waits song, "Step Right Up," a snappy patter song that bopped through an animated parody of trite phrases used for peddling commercial products. (note 85) Frito-Lay's advertising agency, Tracy-Locke, hired Stephen Carter, a Dallas-based musician who had done a Tom Waits impersonation as part of his live act for several years. Tracy-Locke prepared one version of the ad with Carter and a second version with another performer. (note 86)

Waits, like *Midler*, had first been approached by the advertiser to sing for a commercial. Waits had a long-standing and public policy against doing endorsements and a scorn for the artistic standards of those performers who did not share his view. The trial record showed a number of discussions with Tracy-Locke attorneys warning all the parties involved of the potential for suit before Frito-Lay proceeded. Waits heard the commercials and sued. (note 87)

In addition to the voice misappropriation claim, Waits sued for false endorsement under the 1988 revision of the Lanham Act, claiming the vocal imitation amounted to an attempt to "pass off" the imitator as himself in connection with the sale of goods. (note 88) While finding part of the Lanham Act award duplicative of the \$375,000 the jury had given Waits in compensatory damages, the Ninth Circuit let stand the jury's award of \$2 million in punitive damages. Waits also received an award of attorney fees under a Lanham Act provision, (note 89) further sweetening the victory.

III. The Thing Protected

As the Ninth Circuit stated in *Waits*, "[i]dentifiability . . . is a central element of a right of publicity claim." (note 90) An even more essential element, however, is defining what may or may not be identifiable in the first place. In other words, what is it that the plaintiff contends--or the court says--was misused by the defendant?

The *Midler* and *Waits* decisions are alternately clear and confused as to what precisely is protected under a theory of voice misappropriation under the right of publicity.

The *Midler* court noted that "[t]his case centers on the protectability of the voice of a celebrated chanteuse from commercial exploitation without her consent." (note 91) But while "at issue in this case is only the protection of *Midler's* voice," (note 92) the court admits that the real activity the plaintiff complains about is "imitation" (note 93) of her voice, since *Midler's* voice, either live or recorded, was left untouched by Ford's commercial.

The *Midler* court clearly embraces the idea that the voice can be singular enough to enjoy protection under a right of publicity theory. The voice is "as distinctive and personal as a face" and "one of the most palpable ways identity is manifested." (note 94) The court found this distinctiveness increased when the voice came from the throat of a well-known singer and used in the context of a song, for "[t]he singer manifests herself in the song." (note 95)

These statements shed little light, however, on what aspect of "herself" *Midler*, her friends, and the jury heard. The *Midler* court does not indicate what a jury must hear to determine whether a voice on a commercial has used something that belongs to a protected celebrity.

In *Motschenbacher*, the styling of a race car associated with the plaintiff was sufficient to tie into the driver's fame and trigger the right of publicity. (note 96) Similarly, in *Allen v. Men's World Outlet, Inc.*, (note 97) the presence of a clarinet along with a short, sheepish-looking, bespectacled man with thinning hair was sufficient to make the connection that the ad was trying to imitate Woody Allen. However, the *Midler* court supplies no list of possible connections between the imitation and *Midler* that would help decide whether imitation had been accomplished or not.

Waits contains a far more specific list of vocal attributes allegedly belonging to the singer than did *Midler*. The court quoted a fan who said the singer had a voice "like how you'd sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades. . . . Late at night. After not sleeping for three days." (note 98) The defendant hired a vocalist who could sing in what the court called Waits's "gravelly style." (note 99) Another vocalist who auditioned for the defendant's commercial did not sound like Waits and was therefore rejected for the part: he sang "with a deep bluesy voice." (note 100) Waits's voice was, therefore, "gravelly" but not "bluesy."

Frito-Lay argued that the trial court had protected Waits's vocal style, while *Midler* stood for protection of the voice. The *Waits* court, however, turned aside the distinction between voice and style, and squarely insisted that "Waits' voice" was protected. [\(note 101\)](#)

This still leaves one with the question, what aspect of a voice is protected?

It is possible that the *Waits* court's embrace of the argument in *Lahr* [\(note 102\)](#) might offer guidance in defining the elements protected under a right of publicity in the voice. In *Lahr*, the court determined that the actor's "vocal delivery" had been used to create the voice that came from the bill of the animated duck. That vocal delivery was a "distinctive and original combination of pitch, accent, inflection and sounds." [\(note 103\)](#)

One wonders, is it practically possible for *Midler* and *Waits* to stand for the protection of voice but not style?

Interpreting *Midler* and *Waits* from the standpoint of musical practice, the courts' definition of "voice" does not make much sense. *Lahr*'s term, "vocal comic delivery," sounds a lot like style, which the *Waits* court specifically said was not protected under *Midler*. Style results from use, either through playing or singing, rather than a simple unchanging tone.

Since inflection, in the musical context, results only from the execution of music over time, not from something that resides in a single use of the voice, "inflection" is a style term, and therefore not something protected under *Waits* and *Midler*. "Accent" is a similar term that refers to the emphasis given certain material, which requires, by definition, more than a single tone.

"Pitch" is a technical term referring to the acoustical properties of a tone, something the courts could have meant by "voice." However, the courts could not possibly mean that the right of publicity is infringed by every singer who sings a middle C or other musical scale tone, since this is the general substance of all musical composition.

In short, the courts offer no minimum number or type of elements necessary to correlate between a complaining celebrity and the alleged imitator of a singing voice in an advertisement that contains no visual clues to the voice's origin.

The difficulty of judicially determining the infringement of vocal style was just what concerned the court in *Booth* when it referred to the likelihood of problems of a potential licensee who "would have to gain permission from each of the possibly many performers who might have rights in the underlying work." [\(note 104\)](#) This difficulty is only compounded in the musical context, where the court or the jury must extricate the distinctive aspects of some ill-defined concept of "voice" from the tangled web of musical elements that result in a song. The *Midler* court ignores that difficulty, despite its statement that "[T]he singer manifests herself in the song." [\(note 105\)](#) If the *Midler* and *Waits* courts were capable of detailing those aspects of voice that are severable from the musical context and assignable to the performer alone, in a manner that is consistent and objectifiable, they failed to demonstrate a way to do so.

Professor McCarthy, an enthusiastic supporter of the right of publicity in vocal style, states flatly that complaints of policing such a right have no place in cases where an advertiser hires someone to imitate intentionally a well-known performer. According to McCarthy, "If the imitation is not designed to attract attention to the ad by making listeners think they are hearing the original person, or at least raises serious questions to that effect in their minds, then what is the point in hiring an imitator?" [\(note 106\)](#)

There are two answers to these common sense points, which effectively capture the spirit and reasoning of both *Waits* and *Midler*.

First, the wise advertiser can avoid a right of publicity claim by simply saying that it wanted to hire someone who sang in a popular musical style, with the kind of tone, color, style, and verve appropriate for the musical composition. Popular music styles are too narrowly defined to admit much variation. If Tom Waits can sue everyone who sings in a "gravelly style," [\(note 107\)](#) can the singer rejected by Frito-Lay sue Waits if Waits sings with the "bluesy voice" [\(note 108\)](#) the court defined for the lesser-known performer?

Further, what happens to the truly creative and flexible singers who use musical approaches that vary with the requirement of the musical material? Waits has recorded a number of songs that are, harmonically, blues. What if he chooses a more elegant but raspy vocal quality for a ballad and not the "gravelly style," [\(note 109\)](#) that the court has said is his and his alone? Waits might be restrained from any experimentation with his style in order to remain under the court's protection.

McCarthy's second point, that confusion over the singer's identity is sufficient to constitute infringement, is also problematic. Popular music is marked not by tremendous stylistic diversity but by its sameness. Further, it is the rare entertainer who makes a mark with her voice alone. The difference between Debbie Gibson's and Madonna's relative commercial success could hardly be traced to Madonna's superior vocal abilities. It is likely, however, that non-musicians differentiate between popular artists based on the songs associated with that artist, and a whole raft of extramusical factors. The success of MTV and the overwhelming necessity of having a popular video to push an artist are evidence that the singer's voice is simply one element used to identify a popular artist.

In addition, in both *Midler* and *Waits* the juries heard both the alleged infringing recordings and the plaintiffs' recordings. The juries therefore heard each voice in conjunction with numerous musical elements and not in the abstract. Were they identifying the voice? Were they identifying the similar feelings each performance evoked? Even the most carefully drafted jury instructions would do little or nothing to help juries make these subtle and difficult distinctions. The "confusion" standard does nothing to identify the aspect of persona that the tort of voice misappropriation is intended to protect.

In short, the *Midler* and *Waits* courts fail to identify with any certainty the aspect of a celebrity persona that has been infringed when another vocalist sings in a style that reminds a number of people of the celebrity. Both cases, and the critical support for their decisions, appear to rest on a shaky chain of reasoning. In essence, if a commercial interest such as Ford admits to "stealing" something, and a celebrity such as Bette Midler feels aggrieved, then the courts can find for the plaintiff without clearly deciding the presumably crucial issue of what has been "stolen."

IV. A Right Without a Wrong

Perhaps, however, extension of the right of publicity to protect vocal style, and more specifically in *Midler* and *Waits*, singing style, is simply a natural growth of a right that seeks to protect the value contained in persona.

If a robot with a wig uses someone's persona, [\(note 110\)](#) and if calling a portable toilet company "Here's Johnny" infringes on a comedian's personality, [\(note 111\)](#) why should the sound of a "famous" singer not be protected? According to McCarthy, "A skeptic would say that so far judges seem to have a 'tin ear' and need to have their hearing checked. . . . There is no inherent reason why the public cannot identify the persona of a person with the ears as well as the eyes." [\(note 112\)](#) Indeed, the *Midler* court echoed that sentiment, for it said, "We are all aware that a friend is at once known by a few words on the phone." [\(note 113\)](#)

As outlined above, however, defining the scope of the aspect of persona protected in a definite manner has not been done in any of these cases. This is not necessarily the fault of the court. Music critics, whose job is to convey musical content and experience, often remark on the difficulty or even impossibility of using the printed word to reflect an aural experience.

In other aspects of persona protected under the right of publicity, a connection between the alleged infringement and the original is reviewable in a static form and adequately describable through words. In the case of visual infringement, such as in *Ali v. Playgirl, Inc.*, [\(note 114\)](#) the court offered a number of corresponding traits between a photographed model resembling Muhammad Ali and Ali himself by pointing to "the cheekbones, broad nose and wide-set brown eyes, together with the distinctive smile and close cropped black hair." [\(note 115\)](#) In *Motschenbacher*, the court could demonstrate the connection between a car and the famous race car driver associated with it. [\(note 116\)](#) The portable toilet company that used "Here's Johnny" as its corporate name lost because the phrase was indelibly associated with a comedian. [\(note 117\)](#) Vanna White could point to visual clues such as a spinning wheel and a letter board to convince the court that the blond-wigged robot was an attempt to trade on her personality. [\(note 118\)](#)

The courts in *Lahr*, *Midler*, and *Waits* were reduced to using adjectives to describe the plaintiff's "property." Whatever the theoretical possibility of identifying persona through sound may be, a practicable manner for doing so through the courts has yet to be shown. The indefinite nature of the right is borne out by the reaction of the commercial producers to *Waits* and *Midler*.

According to one industry insider, the verdicts in *Midler* and especially *Waits* will discourage advertisers from using a previously common promotional tool.[\(note 119\)](#) "The chill began to exist with *Midler*, but it got colder [after *Waits*]," said David Versfelt, a lawyer for the American Association of Advertisers.[\(note 120\)](#) A number of lawsuits have been launched in the wake of *Midler* and *Waits*.[\(note 121\)](#)

Following *Midler* and *Waits*, however, even the tactic of using a male singer if the song were originally sung by a female, and vice-versa, may prove fruitless. Style is not dependent on sex but on execution. If, for instance, *Midler* and *Waits* stand for the protection of vocal style, particularly singing style, then a male singer is just as capable as a woman of swiping Midler's style.

The size of Waits's judgment and the surprising development of the protection in vocal style justifies the caution of commercial producers.

Even if a judicially determinable definition for singing style can be developed, and even if *Waits* and *Midler* stand for such a definition, there are a number of other reasons such protection should not be extended under a right of publicity theory.

One often-mentioned policy underpinning the right of publicity is the incentive it offers people to invest time and energy in developing their talents.[\(note 122\)](#) The rationale for the protection offered to a performer under the right of publicity is similar to copyright protection, in that "the protection provides an economic incentive [for an artist] to make the investment required to produce a performance of interest to the public."[\(note 123\)](#)

The protection developed in *Midler* and *Waits* could offer incentive to vocalists to develop their talents, but it would only reward those voices that are "distinctive." Without guidelines up front, there is no way to determine when a voice is distinctive. The court determines the distinctiveness of a voice by examining the confusion caused by the alleged infringement of that voice.

Copyright requires originality.[\(note 124\)](#) The right of publicity is willing to protect a voice simply because it is well-known; the standard for being well-known is being well-known. *Midler* and *Waits* only reward distinctiveness, not distinction.

Thus, Imelda Marcos, a dilettante diva, could conceivably protect her singing style while a highly innovative singer with no commercial fame would enjoy no protection. In fact, if Imelda Marcos heard such a singer and decided to work that singer's innovations into her own performances, she could exclude the actual developer of the techniques from using them for commercial purposes. A lay jury, comparing Marcos's recordings with the sound of the innovative but unknown singer would be even likelier to recognize Marcos than the juries in *Midler* and *Waits* were to recognize their "celebrity" voices. In those cases, the singers were only two voices from the pop mainstream. In the Marcos case, the former dictator's wife would be the only "famous" person using the distinctive style.

There is another side to the incentive argument. Both Bette Midler and Tom Waits were atypical in their refusal to exploit their voices for use with commercial products. The great majority of popular artists, however, are not so reticent. Commercial endorsement contracts can involve tens of millions of dollars and represent a reward far beyond that earned through performing. One commentator suggested that "rewards accruing from collateral uses of [celebrities'] names and likenesses may be more like the proverbial icing on the cake than a necessary inducement."[\(note 125\)](#)

It is reasonable to suppose that recording companies and agents would at least consider the economic incentive of such potential commercial possibilities when deciding which artists to hire and promote. If Bette Midler has the sole right to sound like a saucy soprano on pop ballads, or if Tom Waits were given the exclusive right to use a "gravelly

style" ([note 126](#)) when singing the blues, it seems likely that agents and producers would avoid bringing artists into territory already staked out by a celebrity rather than run the risk of a lawsuit. Thus, there would be fewer opportunities for vocalists whose styles are reminiscent of anyone famous.

The incentive argument is even less persuasive when one considers that vocalists such as Waits and Midler will not necessarily be the plaintiffs in future suits over voice misappropriation. The right of publicity is a severable property right, both alienable and inheritable if it has been exploited during the celebrity's lifetime. ([note 127](#)) Agents, producers, and recording companies are likely to license such rights from every artist possible as a hedge against future fame and "distinctiveness." One could foresee a case where an artist could not sing in a commercial because her right to use her own style had been signed away while she was a struggling artist willing to do anything for a shot at fame. Descendibility presents problems as well. There seems to be little justice in allowing the undistinguished descendants of a "famous" voice to silence a living artist who sounds like a past vocalist.

In fact, a publicity right in the singing voice would seem to convey little else other than the right to exclude. As experience has already shown, advertisers who want to use a song, or even a style of music, have two choices: hire the most famous or distinctive singer they think might own the "right," or get someone completely different--either by sex or talent--in order to do the spot.

In contrast, publicity rights in name and likeness encompass comparatively "real" property. The name of a celebrity can be printed on a jar of spaghetti sauce, or her face can be used in print or television ads. The right of publicity in the singing voice seems almost worthless by comparison. An advertiser must still secure copyright from a composer or engage one for an original work, contract with arrangers and producers, and then find a vocalist who the advertiser thinks will remind people of a famous singer. The advertiser cannot include a visual clue to associate the "imitation" singer with the "real" article; that involves another right entirely. Showing a disclaimer, such as "This is Ula Hedwig singing like Bette Midler for Ford," would defeat the purpose of purchasing the right in the first place: the advertiser wants the public to think the celebrity herself likes the proffered product. Securing the "voice" right from a celebrity does not make it easier to find someone whose own talents are sufficiently similar to the celebrity's that consumers would be fooled.

Unlike the "bundle of sticks" usually contained in a property right, the right of publicity in the singing voice seems to include a single twig. It is the threat of lawsuits from celebrities, not any positive rights, that prospective advertisers would license from celebrities.

In addition, it seems unlikely that a celebrity willing to sell a license for someone to imitate him would be unwilling to do the singing himself. The risk of bad imitators, or worse, no-name performers who demonstrate that they can do everything the famous celebrities can do, would seem to outweigh the convenience of the license. If a celebrity is unwilling to sing, he is probably unwilling to license. The right in the singing voice, then, is only a club.

Conclusion

Finally, there is a note of artistic outrage from the plaintiffs in both *Midler* and *Waits* that is shared by the court, or at least treated sympathetically. Midler was not interested in doing a commercial for Ford. ([note 128](#)) The district court joined the singer's sense of outrage, describing Ford's conduct as that of an "average thief." ([note 129](#)) Waits had composed a song lampooning the vacuousness of sales pitches and attacking those artists who lent their names to such efforts. His stand against commercials was well-known and judicially noticed. ([note 130](#)) The focus should not be, however, on Ford's and Frito-Lay's behavior, but on the justness of Midler's and Waits's claims.

Underlying both *Midler* and *Waits* is the idea that these "artists" had been used by "commercial interests," and were thereby sullied. However, the right of publicity protects the commercial interests of celebrities, not artistic egos. Both Midler and Waits are squarely in the center of the commercial entertainment industry. These are not practitioners of some ancient art toiling in monastic solitude. These are musicians who have spent long years chasing fame in the most commercial sense of the word. The right of publicity does not care about their artistic pretensions, only about their claims that someone made a buck where they themselves could have profited. The competition in these cases, then, is not between a pristine artist and a megabuck corporation but between two commercial entities battling over the

profitable use of a resource.

All artists are, in a sense, thieves. Each musician inherits a body of practices and examples from which he fashions his own style and voice, but that voice obviously does not come from a void. Some creators are humbled by their debts to the past: Brahms waited until late in life to compose his first symphony because he was daunted by Beethoven's example. Some artists seem to forget that they have borrowed from a rich vein of collective experience: could Waits actually claim he has a voice more "distinctive" than Leadbelly or Muddy Waters? Music is communication in its purest form, and it is never a one-way exchange. Hedwig was a backup singer for Midler. It is just as possible that Midler learned musically from Hedwig as vice versa. Midler was simply rewarded for being famous, while Hedwig no longer has the right to use her own talents.

Denying a right of publicity in the singing voice would not leave artists vulnerable to exploitation. The right should be denied in the very narrow circumstances where a commercial advertiser uses no other "trick" to fool consumers. Using a properly licensed tune made famous by a celebrity, but sung by another musician, is no trick unless some other aspect of the celebrity's persona is used to create a false impression that the celebrity is associated with the product. Adding a visual clue, such as a look-alike actor, should still infringe a celebrity's publicity rights. Using a phrase, printing a name, or otherwise indicating a celebrity's involvement should still constitute infringement.

Should the courts help singers carve out inviolable areas of expression that are indelibly theirs? Can the courts actually accomplish such a goal? Talent can certainly do this--no one with any musical sense would mistake Luciano Pavarotti and Placido Domingo, both of whom are accomplished and distinctive artists.

Legal intrusion into the world of pure sound, however, is simply unworkable. The courts in *Midler* and *Waits* were unable to adequately define the contours of the property they intended to protect, and the fallout has been confusion among commercial interests that want clear-cut guidance from the courts. Perhaps most significantly, these decisions represent the triumph of a small number of famous people at the expense of everyday musicians. With the help of the courts, a handful of celebrity personalities of minimal musical originality can now claim for themselves artistic territory that was previously the birthright of every artist.

Notes

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1. [John Bartlett, Familiar Quotations](#) 908 (Emily Morison Beck et al. eds., 15th ed. 1980). [Return to text](#)
2. [J. Thomas McCarthy, The Rights of Publicity and Privacy](#) sec. 1.1[B][2] (1993). [Return to text](#)
3. [2 Thomas D. Selz et al., Entertainment Law](#) sec. 19.04, at 19-4 (2d ed. 1992) (citing *Hogan v. A.S. Barnes Co.*, 114 U.S.P.Q. (BNA) 314 (Pa. Ct. C.P. 1957)). [Return to text](#)
4. [2 id.](#) sec. 19.13, at 19-29 n.7. [Return to text](#)
5. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974). [Return to text](#)
6. *See, e.g., 2 Selz et al., supra* note 3, sec. 18.07. [Return to text](#)
7. *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987). [Return to text](#)

8. *See, e.g.*, 2 Selz et al., *supra* note 3, sec. 18.15. [Return to text](#)
9. *See* McCarthy, *supra* note 2, sec. 4.14[A]. [Return to text](#)
10. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), *appeal after remand sub nom.* Midler v. Young & Rubicam, Inc., 944 F.2d 909 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1513, and *cert. denied*, 112 S. Ct. 1514 (1992). [Return to text](#)
11. *Id.* at 463. [Return to text](#)
12. McCarthy, *supra* note 2, sec. 4.14[C][2]. [Return to text](#)
13. *Midler*, 849 F.2d at 461. [Return to text](#)
14. *Id.* at 461-62. [Return to text](#)
15. *Id.* at 462. [Return to text](#)
16. *Id.* at 463. [Return to text](#)
17. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993). [Return to text](#)
18. *Id.* at 1104. [Return to text](#)
19. *Midler v. Young & Rubicam, Inc.*, 112 S. Ct. 1513, 112 S. Ct. 1514 (1992). [Return to text](#)
20. *Waits*, 113 S. Ct. 1047 (1993). [Return to text](#)
21. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988), *appeal after remand sub nom.* *Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1513, and *cert denied*, 112 S. Ct. 1514 (1992). [Return to text](#)
22. *Waits*, 978 F.2d at 1097. [Return to text](#)
23. *See* Christopher Pesce, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. Rev. 782, 790 (1990). [Return to text](#)
24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); *see also* Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 203-04 (1954). [Return to text](#)
25. James M. Treece, *Commercial Exploitation of Name, Likenesses, and Personal Histories*, 51 Tex. L. Rev. 637, 641 (1973). [Return to text](#)
26. *Haelen Lab.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). [Return to text](#)
27. *Id.* at 868. [Return to text](#)
28. *See, e.g.*, McCarthy, *supra* note 2, sec. 1.10[A], at 1-40. [Return to text](#)
29. *Id.* sec. 4.9, at 4-49. [Return to text](#)
30. *Id.* [Return to text](#)
31. *See id.* sec. 2.3. [Return to text](#)
32. *See* *Zacchini v. Scripps Howard Brdcst. Co.*, 433 U.S. 562 (1977). [Return to text](#)

33. See 2 Selz et al., *supra* note 3, sec. 19.07. [Return to text](#)
34. 2 *id.* sec. 19.10. [Return to text](#)
35. 2 *id.* sec. 19.09. [Return to text](#)
36. 2 *id.* sec. 19.08. [Return to text](#)
37. McCarthy, *supra* note 2, sec. 4.10[B]. [Return to text](#)
38. *Id.* [Return to text](#)
39. See, e.g., 2 Selz et al., *supra* note 3, sec. 19.14. [Return to text](#)
40. See, e.g., McCarthy, *supra* note 2, sec. 4.15[A]. [Return to text](#)
41. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993). [Return to text](#)
42. *Id.* at 1399. A Los Angeles federal jury awarded White \$403,000 in damages. Shauna Snow, *Morning Report*, L.A. Times, Jan. 21, 1994, at 2F. [Return to text](#)
43. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 (9th Cir. 1974). [Return to text](#)
44. *Id.* at 822. [Return to text](#)
45. *Id.* at 827. [Return to text](#)
46. *Id.* [Return to text](#)
47. *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104, 105 (6th Cir. 1987). [Return to text](#)
48. See McCarthy, *supra* note 2, sec. 8.14[A]. [Return to text](#)
49. *Groucho Marx Prods.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982); *see infra* note 51. [Return to text](#)
50. *Id.* at 486. [Return to text](#)
51. *Id.* at 494. The Court of Appeals for the Second Circuit later reversed the district court's grant of partial summary judgment. While recognizing the legitimacy of the doctrine of right of publicity, the court of appeals held that there was no descendible right of publicity that protected plaintiff's interest under California law. *Groucho Marx Prods.*, 689 F.2d at 323. [Return to text](#)
52. *Presley*, 513 F. Supp. 1339 (D.N.J. 1981). [Return to text](#)
53. *Id.* at 1348. [Return to text](#)
54. *Id.* at 1379. [Return to text](#)
55. *Id.* at 1378. [Return to text](#)
56. McCarthy, *supra* note 2, sec. 4.14[C], at 4-85. [Return to text](#)
57. *Lahr*, 300 F.2d 256 (1st Cir. 1962). [Return to text](#)

58. *Id.* at 259. [Return to text](#)
59. *Id.* at 258. [Return to text](#)
60. *Id.* at 260. [Return to text](#)
61. *Id.* at 257. [Return to text](#)
62. *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971). [Return to text](#)
63. *Id.* at 713. [Return to text](#)
64. *Id.* [Return to text](#)
65. *Id.* at 714. [Return to text](#)
66. *Id.* at 716. [Return to text](#)
67. *See, e.g., id.* [Return to text](#)
68. *McCarthy*, *supra* note 2, sec. 4.14[C][1], at 4-88. [Return to text](#)
69. *Booth*, 362 F. Supp. 343 (S.D.N.Y. 1973). [Return to text](#)
70. *Id.* at 345. [Return to text](#)
71. *Id.* at 344. [Return to text](#)
72. *Id.* at 345. [Return to text](#)
73. *Id.* at 346-47 (citing *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971)). [Return to text](#)
74. *Id.* at 349. [Return to text](#)
75. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988), *appeal after remand sub nom. Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1513, *and cert. denied*, 112 S. Ct. 1514 (1992). [Return to text](#)
76. *Id.* [Return to text](#)
77. *Week in Review Desk*, *N.Y. Times*, Nov. 5, 1989, sec. 4, at 7. [Return to text](#)
78. *Cal. Civ. Code* sec. 3344 (West Supp. 1984). [Return to text](#)
79. *Midler*, 849 F.2d at 462. [Return to text](#)
80. *Id.* at 463. [Return to text](#)
81. *Id.* at 462. [Return to text](#)
82. *McCarthy*, *supra* note 2, sec. 4.14[C][2]. [Return to text](#)
83. *See Midler*, 849 F.2d at 462 (discussing *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962)). [Return to text](#)

84. *Waits*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993). [Return to text](#)
85. *Id.* at 1097. [Return to text](#)
86. *Id.* [Return to text](#)
87. *Id.* at 1097-98. [Return to text](#)
88. *Id.* at 1106; Lanham Trade-Mark Act sec. 43(a), 15 U.S.C. sec. 1125(a) (1988). [Return to text](#)
89. *Waits*, 978 F.2d at 1111-12; Lanham Trade-Mark Act sec. 35, 15 U.S.C. sec. 1117 (1988). [Return to text](#)
90. *Waits*, 978 F.2d at 1102. [Return to text](#)
91. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988), *appeal after remand sub nom. Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1513, *and cert. denied*, 112 S. Ct. 1514 (1992). [Return to text](#)
92. *Id.* at 462. [Return to text](#)
93. *Id.* at 463. [Return to text](#)
94. *Id.* [Return to text](#)
95. *Id.* [Return to text](#)
96. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974). [Return to text](#)
97. *Allen*, 679 F. Supp. 360 (S.D.N.Y. 1988). [Return to text](#)
98. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993). [Return to text](#)
99. *Id.* [Return to text](#)
100. *Id.* [Return to text](#)
101. *Id.* at 1101. [Return to text](#)
102. *Id.* at 1106. [Return to text](#)
103. *Lahr v. Adell Chemical Co.*, 300 F.2d 256, 257 (1st Cir. 1962). [Return to text](#)
104. *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973). [Return to text](#)
105. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), *appeal after remand sub nom. Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1513, *and cert. denied*, 112 S. Ct. 1514 (1992). [Return to text](#)
106. *McCarthy*, *supra* note 2, sec. 4.14[D], at 4-92. [Return to text](#)
107. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993). [Return to text](#)
108. *Id.* [Return to text](#)
109. *Id.* [Return to text](#)

110. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993). [Return to text](#)
111. *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987). [Return to text](#)
112. *McCarthy*, *supra* note 2, sec. 4.41[D], at 4-93. [Return to text](#)
113. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), *appeal after remand sub nom. Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1513, *and cert denied*, 112 S. Ct. 1514 (1992). [Return to text](#)
114. *Ali*, 447 F. Supp. 723 (S.D.N.Y. 1978). [Return to text](#)
115. *Id.* at 726. [Return to text](#)
116. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974). [Return to text](#)
117. *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987). [Return to text](#)
118. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993). [Return to text](#)
119. Suzan Bibisi, *Vocal Theft Leaves Ad World Speechless*, San Diego Union-Trib., Jan. 27, 1993, at E-8. [Return to text](#)
120. *Id.* [Return to text](#)
121. Patti Page, Bobby Darin, and Carlos Santana are among those well-known musicians who have attempted to capitalize on these developments. Sharon Chester-Taxin, *Will the Real Bette Midler Please Stand Up? The Future of Celebrity Sound-Alike Recordings*, 9 U. Miami Ent. & Sports L. Rev. 165, 169-73 (1992). An unsuccessful sound-alike suit brought in *Levise v. Lintas*, No. 90 CV 70407 (E.D. Mich. Nov. 8 1990), suggests there is not uniform support for protecting a publicity right in the singing voice. See Felix H. Kent, *Roundup of 1990*, N.Y. L.J., Dec. 28, 1992, at 3. This was a case brought in Michigan, however, while *Midler* and *Waits* are good law in California, a center of the entertainment industry. *Id.* [Return to text](#)
122. See, e.g., *Zacchini v. Scripps Howard Brdcast. Co.*, 433 U.S. 562, 576 (1977). [Return to text](#)
123. *Id.* at 576. [Return to text](#)
124. 17 U.S.C. sec. 102 (1988); see also Marshall Leaffer, Understanding Copyright Law 35 (1989). [Return to text](#)
125. Stephen J. Hoffman, *Limitations on the Right of Publicity*, 28 Bull. Copyright Soc'y. USA 111, 120 (1980). [Return to text](#)
126. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993). [Return to text](#)
127. See, e.g., 2 Selz et al., *supra* note 3, sec. 19.03. [Return to text](#)
128. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988), *appeal after remand sub nom. Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1513, *and cert. denied*, 112 S. Ct. 1514 (1992). [Return to text](#)
129. *Id.* at 462. [Return to text](#)
130. *Waits*, 978 F.2d at 1097. [Return to text](#)