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Will the Real Bette Midler Please Stand Up? The Future of Celebrity Sound-Alike Recordings

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WILL THE REAL BETTE MIDLER PLEASE STAND UP? THE FUTURE OF CELEBRITY SOUND-ALIKE RECORDINGS

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I. INTRODUCTION

Some say that imitation is the sincerest form of flattery. The creative directors of Young and Rubicam Advertising, Inc., however, will likely disagree. In 1985, Young and Rubicam (Y&R) launched a successful advertising campaign for the Ford Motor Company's new Mercury Sable. Referred to as "The Yuppie Campaign," Y&R produced nineteen television commercials aimed at the "thirtysomething" audience.¹ These commercials were designed to provoke a bit of nostalgia in viewers by using popular music of the 1960's and 1970's, music this target audience had listened to while in college.²

To Y&R's surprise, this campaign reached much further than simply the targeted television audience. In *Bette Midler v. Ford Motor Co.*,³ the campaign reached a courtroom jury whose verdict dictated the future ramifications of using sound-alike recordings in advertising. The resultant decision created a restraint of advertisers' creative freedom. Many ad agencies are justifiably concerned with the ruling. The use of talent to imitate celebrity voices is no longer within their creative realm and such limitation arguably violates their First Amendment right to freedom of speech.⁴ This Ar-

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1. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). The aim was to make an emotional connection with Yuppies by playing different popular songs of the seventies with each commercial, in an effort to bring back memories of when these people were in college. *Id.* at 461.

2. *Id.*

3. *Id.*

4. U.S. CONST. amend I. "Congress shall make no law . . . abridging the freedom of

title will discuss the impact of the *Bette Midler* case on the advertising industry and will examine the significant changes advertisers will have to make in the way they conduct their business.

II. BETTE MIDLER V. FORD MOTOR CO.

For years, advertisers have used well known music to reach consumers. Advertisers have utilized popular tunes, for instance, to attract and retain an audience's attention during a sales pitch. Y&R invoked this technique in the 1988 Ford Motor Company advertising campaign. Prior to commencing its automobile campaign, Y&R purchased a copyright license from the copyright holder for each song it intended to use. Y&R chose *Do You Want to Dance?*⁵ as one of the songs to be used for the Mercury Sable commercials. This song was written, copyrighted, and recorded by Bobby Freeman. Freeman's record was a hit, and many versions were subsequently recorded by several artists, such as the Mamas and Papas, John Lennon, Jan and Dean, and Bette Midler.⁶ Y&R paid Freeman's publishing company \$45,000 for the rights to use the song as a background track to its commercial.⁷

In ten of the nineteen commercials, the advertising agency was unable to retain the original performers who popularized the songs, and instead had the songs sung by sound-alikes. Y&R attempted to secure the services of Bette Midler, one of the original performers of the song, to sing her rendition of *Do You Want to Dance?*⁸ Consistent with Midler's policy never to authorize the use of her name, likeness, or music for any commercial endorsements in the United States, Midler's agent declined Y&R's offer.⁹

After Midler declined, Y&R hired Ula Hedwig, a singer in Midler's former back-up group, The Harlettes, to sing for the commercial. Hedwig was instructed to "sound as much as possible like the Bette Midler record."¹⁰ Once the commercial aired, Midler and Hedwig were each told by a number of people that the voice sounded exactly like Midler's; in fact, they thought Midler was

speech." *Id.*

5. BOBBY FREEMAN, *Do You Want To Dance?, on DO YOU WANNA DANCE* (Jubilee, 1958).

6. Robert Callagy, *Bette Whose Song Is it Anyway*, ADWEEK, Nov. 13, 1989, at 33.

7. *Id.*

8. Midler's version rose to number seventeen on the Billboard charts on Jan. 20, 1973. JOEL WHITBURN, *THE BILLBOARD BOOK OF TOP 40 187* (1983).

9. Scott Martin, *How to Steer Clear of Sound Alikes*, ELEC. MEDIA, June 18, 1990, at 30.

10. *Midler*, 849 F.2d at 461.

singing on the commercial.¹¹

Midler brought a \$10 million lawsuit against both the Ford Motor Company and Y&R for the unauthorized use of her vocal style in their commercial.¹² Midler relied upon a 1984 California statute¹³ that “extended the protection of celebrities’ names and images to their voices.”¹⁴ The only issue before the court was the protection of Midler’s voice.¹⁵

The district court judge found no legal principle prohibiting the imitation of an original performer’s voice and granted summary judgment in favor of Ford and Y&R.¹⁶ On appeal, the appellate court noted that much of the media’s reproductions of likenesses or sounds is protected by the First Amendment.¹⁷ Therefore, if the media’s use of a person’s identity is for “informative or cultural” reasons, that use will be considered valid.¹⁸ If, however, the purpose is solely to “exploit the individual portrayed,” then such use is prohibited.¹⁹

The court further noted that sound-alikes are permissible and even encouraged in copyright law:

The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, *even though such sounds imitate or simulate those in the copyrighted sound recording.*²⁰

The United States Court of Appeals for the Ninth Circuit distinguished the *Midler* case from a similar case brought against another Y&R client several years earlier by Nancy Sinatra, in *Sina-*

11. *Id.* at 461-62.

12. Randall Rothenberg, *The Media Business; Suit Deters Ad Jingles that Mimic Singers*, N.Y. TIMES, Sept. 12, 1988, at D6.

13. CAL. CIV. CODE § 3344(g) (West 1984).

14. Rothenberg, *supra* note 12, at D6.

15. Bette Midler had very few causes of action. First, the case did not involve copyright infringement. Copyright law protects the parts of the composition that can be reduced to sheet music, such as the words, melody and chord, and the original sound recording. Second, Midler had no claim for unfair competition since she does not do commercials. Third, she could not sue for misappropriation of her likeness because the commercial did not use Midler’s name or picture. Had either been used, the use would have been clearly illegal without her consent. *See* Cohen v. Herbal Concepts, Inc., 472 N.E.2d 307 (N.Y. 1984).

16. *Midler*, 849 F.2d at 462. Even though summary judgment was granted, the district court judge described the agency’s conduct as that of “the average thief.” *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. 17 U.S.C. § 114(b) (1988) (emphasis added).

*tra v. Goodyear Tire & Rubber Co.*²¹ Sinatra sued the Goodyear Tire and Rubber Company for an advertising campaign that used her hit song *These Boots Are Made For Walkin'*.²² Sinatra alleged that the female vocalists in the commercial imitated her voice and style and were dressed up to look like her.²³

Sinatra based her complaint on unfair competition, asserting that the song and arrangement had acquired a secondary meaning that was protectable. The court stated that the defendants "[h]ad paid a very substantial sum to the copyright proprietor to obtain the license for the use of the song and all of its arrangements."²⁴ To grant Sinatra damages for their use of it, the court reasoned, would clash with federal copyright law.²⁵ Because Midler did not seek damages for Ford's use of her song, her claim was not preempted by federal copyright law.²⁶

The court found the *Midler* case to be more analogous to *Lahr v. Adell Chemical Company*,²⁷ wherein comedic actor Burt Lahr sued the manufacturer of Lestoil for using the voice of an animated duck which he had made famous. The *Lahr* court stated:

[The] plaintiff . . . is not complaining of imitation in the sense of simply copying his material or his ideas, but of causing a mistake in identity. Such passing off is the basic offense . . . Plaintiff's complaint is that defendant is 'stealing his thunder' in the direct sense; that defendant's commercial had greater value because its audience believed it was listening to him.²⁸

Although not every imitation of a voice for commercial use is actionable, the *Midler* court concluded that "[w]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort. . . ."²⁹

The Ninth Circuit further noted that "[a] voice is as distinctive and personal as a face"³⁰ and "[t]o impersonate her voice is to

21. 435 F.2d 711 (5th Cir. 1970).

22. NANCY SINATRA, *These Boots Are Made for Walkin', on Boots* (Reprise, 1966).

23. *Sinatra*, 435 F.2d at 712.

24. *Id.* at 717.

25. *Id.*

26. "Copyright protects original works of authorship fixed in any tangible medium of expression." *Midler*, 849 F.2d at 462 (quoting 17 U.S.C. § 102(a) (1988)). A voice is not copyrightable. The sounds are not fixed. What [Midler] put forward as protectable here is more personal than any work of authorship. *Id.*

27. 300 F.2d 256 (1st Cir. 1962).

28. *Id.* at 259.

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

30. *Id.*

pirate her identity."³¹ Over the years, Midler had developed a distinctive style and valuable image. Moreover, had her voice not been of some value to Y&R, the agency would not have tried to copy it.

The case was remanded for a jury determination of whether Y&R had deliberately intended to imitate Midler's voice in producing Ford's television commercial, and, if so, a determination of the fair market value of her voice.³²

On remand, the trial judge instructed the jury as follows:

In deciding whether or not Young and Rubicam deliberately imitated Better Midler's voice, you must keep in mind that Y&R had the right to use the song . . . [and] that mere imitation of a performance contained in a recording is not a violation of the copyright law. Thus, the issue is whether or not Bette Midler's voice was deliberately imitated.³³

The charge to the jury made it necessary for the jurors to differentiate Midler's voice from Midler's record. In a precedent setting decision, the jury found in favor of Midler to the tune of \$400,000 in damages. The decision stated that Bette Midler's vocal quality and style of singing were entitled to the same protection that her image was afforded.³⁴ Bette Midler, it appeared, had the last word.

III. THE MIDLER DECISION AND ITS RAMIFICATIONS

Midler's victory started a parade of similar suits alleging the unauthorized use of sound-alikes. Several celebrities³⁵ have put forth claims arguing that a carefully created public image may not be appropriated for unapproved purposes.

In one recent case, singer Tom Waits sued the Frito-Lay Corporation and the Dallas advertising agency of Tracy-Locke in federal district court seeking \$2.3 million in compensatory damages.³⁶ Waits claimed that a radio spot that ran in September 1988 for Doritos Salsa Rio flavored tortilla chips imitated his distinctive gravelly voice and his blues enhanced singing style.³⁷

31. *Id.*

32. Callagy, *supra*, note 6, at 35.

33. *Id.*

34. *Id.*

35. These celebrities include Tom Waits, Patti Page, Rodney Dangerfield, and Robin Leach.

36. *Waits v. Frito-Lay Inc.*, No. 88-06478 (C.D. Ca. May 9, 1990).

37. Waits said they imitated his voice so well that "I thought it was me." *Patent on Famous Voices*, U.S. NEWS & WORLD REP., Nov. 13, 1989, at 19.

The *Waits* jury found that while the song Tracy-Locke used was not part of Waits' repertoire, the singer had a distinctive style and that Tracy-Locke had appropriated it to sell Frito-Lay's corn chips.³⁸ The jury awarded Waits \$2.475 million, over and above the amount he originally sought. Unlike Midler's award, Waits' included punitive damages.³⁹

The above decisions raise the interesting question as to how long a celebrity can prevent an imitation of his or her voice to promote a product,⁴⁰ and what objective standards can be used to describe a distinctive voice? Is it an instinctive feeling or should it be subject to scientific tests of vibration, tone, intonation, and voice quality?⁴¹ Should celebrities be protected for as long as they maintain their celebrity status, or, is sound-alike, as well as look-alike protection, unlimited? Potential consequences to unlimited protection include the creation of monopolies over certain sounds. Under these circumstances, celebrity status could continue for the duration of a performer's life, or even continue after death.

The issue of protection after death could have arisen in a suit filed by the son of the late singer Bobby Darin. Darin had filed a lawsuit against the McDonald's Corporation and the advertising agency of Davis, Ball, and Colombatto.⁴² The suit alleged that McDonald's commercial *Mac Tonight* used Darin's 1959 version of *Mack the Knife*⁴³ to sell hamburgers.⁴⁴ However, the Darin estate dropped the suit.⁴⁵ Another sound-alike suit that never made it to court was brought by singer Patti Page.

Page sued the Asher-Gould agency and the California Savings and Loan Association for a television commercial aired in 1988 that included her rendition of the song "Old Cape Cod."⁴⁶ Asher-

38. Gail Diane Cox, *Beyond Bette Midler*, NAT'L L.J., May 21, 1990, at 6.

39. *Id.* Midler's attorney filed an appeal which questioned the lower court's ruling that Midler could not seek punitive damages. Y&R filed a cross appeal in an effort to overturn the award. The U.S. Supreme Court, without comment, refused to review the matter and let stand the lower court's ruling that awarded Midler \$400,000. *High Court Allows Award to Singer Bette Midler*, REUTERS, Mar. 23, 1992 (BC cycle).

40. For a full discussion regarding how long a celebrity can prevent an imitation of his or her voice to promote a product, see Leonard Marks, *Granting Publicity Rights to Heirs Protects Performers' Privacy Rights*, MANHATTAN LAW., Apr. 12, 1988, at 13.

41. Alan J. Hartwick, *Is Soundalike Protection Unnecessarily Unlimited?*, N.Y.L.J., June 15, 1990, at 5.

42. *Singers Howl Over Copycat Ads*, NEWSDAY, Oct. 15, 1989, at 56; Martin, *supra* note 9, at 30.

43. BOBBY DARIN, *Mack the Knife*, on BEST OF BOBBY DARIN (Capitol, 1959).

44. *Patent on Famous Voices*, *supra* note 37.

45. Pamela Young, *Trouble For Copycats*, MACLEAN'S, Nov. 20, 1989, at 92.

46. Shapiro, *If You Want To Copy, You May Have To Pay The Piper*, TEXAS LAW.,

Gould settled the case out of court.⁴⁷

These suits are not just being brought by singers. Rodney Dangerfield sued Park Inns International for what he claimed was an imitation of his voice. The ad ran with the disclaimer "celebrity voice impersonated."⁴⁸ That suit ended in pretrial settlement.⁴⁹

More recently, Robin Leach of *Lifestyles of the Rich and Famous* fame filed a \$350,000 lawsuit against the Niagara Frontier Homebuilders Association and a Buffalo, New York radio station for the use of an unauthorized sound-alike.⁵⁰ The suit involved a commercial that Niagara aired for a home show which used a raspy, British voice very similar to Leach's.⁵¹ The president of the radio station stated that the commercial was just a "harmless parody."⁵² But, Leach's attorney alleged that listeners may have believed Leach was promoting the home show. Leach's attorney stated, "Robin Leach's voice is his trademark. It's the way he earns his living."⁵³

Mario Aieta worked as part of Y&R's litigation team on the *Midler* case. Aieta believes the Ninth Circuit's holding will lead to problems for advertisers. "Disclaimers won't work because consumer confusion isn't an element [to be considered]," Aieta explains. "In fact, there was no evidence presented at trial that there were any consumers that were misled into believing that Bette Midler was endorsing the product."⁵⁴

The *Midler* case did not involve unfair competition and Mid-

Feb. 19, 1990, at 30.

47. John P. Cortez, *Sound Alikes Get Court Win*, ADVERTISING AGE, Nov. 11, 1990, at 51.

48. Shapiro, *supra* note 46, at 30.

49. Martin, *supra* note 9, at 30.

50. *TV Host Sues Over Radio Sound Alike*, NEWSDAY, Dec. 3, 1990, at 8.

51. *Id.*

52. *Id.*

53. *Id.*

54. Telephone Interview with Mario Aieta, attorney at Satterlee, Stephens, Burke & Burke (Nov. 13, 1990) [hereinafter Aieta]. Under section 43(a) of the Federal Lanham Act, false descriptions of products are prohibited. The Act's purpose is to protect "consumers and competitors from [a wide variety of] misrepresentations of products and services in commerce." *Johanna Farms, Inc. v. Citrus Bowl, Inc.*, 468 F. Supp 866, 873 (E.D.N.Y. 1978). Section 43(a) has broad applicability. It includes claims of "passing off" . . . false advertising, and virtually any case in which there is a potential for confusion as to source, origin, sponsorship, endorsement or approval, or involves false descriptions and representations affecting a consumer's decision to purchase goods or services. . . ." Gerald Singleton, *Commercial Defamation: Disparaging Remarks Actionable Under Lanham Act*, N.Y.L.J., July 25, 1991, at 1. Therefore, under this section, advertisers have an obligation to "give credit or compensation to the actual performers and to employ appropriate disclaimers to avoid confusion." NAT'L L.J., Feb. 20, 1989, at 20 (quoting IV ENT. L. & FIN. 9, 5 (1988)).

ler did not ask for an injunction against the commercial. Midler had not heard the commercial until her deposition—one year after the commercial aired. The only issue the Ninth Circuit considered was whether there was intent to imitate a celebrity to sell a product. According to Aieta, that meant that even if one did a poor job of imitating a celebrity's voice, one could still get sued if the court thought there was an intent to imitate the voice.⁵⁵

The attorneys for Y&R proceeded with the strategy that the soundtrack to the commercial and the soundtrack to Midler's record sounded exactly the same, and that the defendant's intended to imitate the record, not her. The court in *Midler* stated that the "mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible."⁵⁶

Robert Callagy, another of Y&R's attorneys stated that these types of cases may have a "chilling effect" on an advertising agency's use of popular music.⁵⁷ "The immediate effect on ad agencies and clients is that they won't want to deal with popular music done by one or more popular stars."⁵⁸ Additionally, *Advertising Age*, a leading trade publication for the advertising industry, sees the *Midler* decision as a problem for advertisers stating that "now the advertising community . . . must separate distinctive sounds from ordinary music" without guidance from the court as to how such a distinction should be made.⁵⁹ Aieta also feels that the *Waits* case was a poor case which made bad law. "Tom Waits is a professional performer. He can relate and communicate with an audience. Tom is nicer than Frito-Lay," Aieta notes. "He's an inherently appealing plaintiff. It's not surprising that the jury found in his favor."⁶⁰

In *Mitch Ryder v. Lintas*,⁶¹ the district court seemingly rejected the California court's ruling in *Midler*. The lawsuit was filed by singer Mitch Ryder against Molson Breweries of Canada and MacLaren:Lintas/Toronto for using a sound-alike version of his

55. Aieta, *supra* note 54.

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

57. Kevin McCormack & Robyn Griggs, *Midler Decision May Have Agencies Dancing to a New Tune*, *ADWEEK*, Nov. 6, 1989, at 67.

58. *Id.*

59. Leonard Marks, *An End to Judicial Resistance Toward Vocal Imitation Claim?*, *NAT'L L.J.*, Feb. 20, 1989, at 20 (quoting Kent, *A New Tune in Using Sound-alikes*, *N.Y.L.J.*, July 22, 1988, at 3).

60. Aieta, *supra* note 54.

61. William Levis, Jr., a/k/a/ Mitch Ryder v. Lintas: New York, Martlett Importing Co., & Molson, Inc., NO. 90 CV 70407.

Devil with a Blue Dress On.⁶² Ryder argued that he should be protected by the precedent set forth in *Midler*, but the federal court judge refused to accept its ruling and dismissed the case.⁶³ Although this case illustrates a different interpretation of state law, advertisers should remain wary of airing their sound-alike spots in California. Given the inconsistencies of the decisions, the final outcome of the legal boundaries for use of sound-alikes in advertising campaigns may well be a decision which will need to be addressed by the United States Supreme Court.⁶⁴

IV. THE FUTURE OF CELEBRITY SOUND-ALIKE RECORDINGS

It remains unclear whether the recent surge of lawsuits mean that the use of sound-alikes is prohibited. The appellate court in *Midler* specifically refrained from holding that every imitation of a voice to advertise a product is actionable.⁶⁵ The *Ryder* case is proof of this holding. The *Midler* court further stated that they "hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."⁶⁶ Under *Midler*, if an advertising agency deliberately imitates a distinctive, well known voice for the purpose of selling products, and in the process creates the false impression that the celebrity is endorsing the product, the agency may get sued.⁶⁷ Since the law remains unclear, it may be safer for agencies to advise their clients to avoid using sound-alike recordings in their advertising. Fortunately for advertisers, there is a chance that the *Ryder* decision may deter some performers from bringing similar suits.

Gina Lennon, manager of ILLUSIONS, a celebrity look-alike/sound-alike agency in New York, takes the outcome of the *Midler*

62. MITCH RYDER, *Devil with a Blue Dress On*, on BIG WHEELS (Pair, 1966).

63. Robyn Griggs, *Soundalike Court Ruling Clouds Issue*, ADWEEK, Nov. 25, 1990, at 2.

64. Attorney Douglas J. Wood of the law firm of Hall, Dickler, Lawler, Kent, and Friedman believes Supreme Court review is inevitable. He notes, "[T]he [C]ourt will have a very real impact on [the advertising] business in the future. [Chief Justice] Rehnquist is no fan of commercial free speech." Diana Minardi, *Courts Get Tougher In Ad Rulings*, ADWEEK, Dec. 11, 1990, at 58.

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

66. *Id.*

67. But what objective standards are there to describe who constitutes a distinctive voice. Based upon their lawsuits, Nancy Sinatra's voice was not distinctive enough but Burt Lahr's voice was. Alan J. Hartwick, *Is Soundalike Protection Unnecessarily Unlimited?*, N.Y.L.J., June 15, 1990, at 5. See also *supra* notes 26 & 32.

case seriously. She believes the ruling has "hurt the industry."⁶⁸ Most of her talent is now used purely for entertainment purposes. "If it's done for fun, like a Rich Little, [then that's usually] no problem," she says.⁶⁹ When Lennon has a request for a "celebrity" endorsement for radio, television, or print advertising, she advises the clients to have their legal staff look over the entire deal.⁷⁰ Lennon states that her business contracts require that prominent disclaimers be provided in all sound-alike radio advertisements.⁷¹ Additionally, the contracts state that clients must procure the proper copyright licenses for any works used in the commercials. Her contracts also contain an indemnity clause to free her and her talent from the liability of any law suit arising from any improper use of an impersonator's work.⁷²

Keith Martin, Director of Operations at Ron Smith Celebrity Look-Alikes in California, believes it is the lawyers who are the most nervous when it comes to using sound-alike talent.⁷³ [It's easier for them to just say] 'you can't do something.' We have a contractual obligation with our clients that they use . . . disclaimers. The acid test has always been 'if the average Joe on the street believes it is that person [you're impersonating], you've crossed over the line.'"⁷⁴

One advertising agency source thinks agencies will keep a safe distance from sound-alike advertising.⁷⁵ "We wouldn't be so quick to recommend it to a client. However, if a client was forceful in his desire to use that kind of a creative angle, we would do it with a much cautious eye and we would try to discourage it."⁷⁶ Media attorney Suzanne Warshavsky of Warshavsky, Hoffman and Cohen says, "When agencies see \$400,000.00, I think they may very definitely curb look-alikes and sound-alikes You'll see more disclaimers and more thought given to it."⁷⁷

Now, more than ever, advertisers have to watch what they say.

68. Telephone Interview with Gina Lennon, Manager, ILLUSIONS (Nov. 11, 1990).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Telephone Interview with Keith Martin, Director of Operations, Ron Smith Celebrity Look-Alikes (Jan. 14, 1991).

74. *Id.*

75. Telephone Interview with Advertising Agency Source, Media Specialist, Young & Rubicam Advertising, Inc. (Nov. 21, 1990).

76. *Id.*

77. *All Bettes Off*, ADWEEK, Nov. 6, 1989.

It used to be that under section 43(a) of the Lanham Act⁷⁸ an advertiser only had to defend claims it made about its product. But in November 1989 the statute became more restrictive with the Trademark Law Revision Act.⁷⁹ Now, advertisers and their advertising agencies are responsible for what their advertisements claim or imply about the product being endorsed. The recent amendment to the Lanham Act was created "to reach false statements made by a defendant not only about the defendant's own products or services, but also about the plaintiff's products or services, in the context of commercial advertising or promotion."⁸⁰

Currently, a plaintiff suing under section 43(a) must satisfy a four part test:

- 1) The plaintiff must demonstrate that the defendant made false or misleading factual representations of the nature, characteristics, or qualities of the plaintiff's goods or services;
- 2) that the defendant used the false or misleading representations in commerce;
- 3) that the defendant made the false or misleading representations in the context of commercial advertising or commercial promotion; and
- 4) that the defendant's actions caused the plaintiff to believe that it was likely to be damaged by such false or misleading representations.⁸¹

This change involves the issue of comparative advertising where advertisers compare their product to the competition's product. Also, in the area of products liability, an advertisement's content can be construed as an implied warranty.⁸²

The New York State Legislature recently considered a bill that granted performers protection of their voices as well as their likenesses.⁸³ Every state has some form of an unfair competition law. A performer could use these statutes in some cases to prohibit

78. 15 U.S.C § 1051 (1988).

79. Pub. L. No. 100-667, 102 Stat. 3395 (codified as amended at 15 U.S.C. §§ 1051-1127 (1988)).

80. Paul Batista, *Lanham Act Revision May Spur Commercial Defamation Claims*, NAT'L L.J., Sept. 30, 1991, at 40.

81. *Id.*

82. Minardi, *supra* note 64, at 58.

83. Celebrity Rights Act Bill No. 6843-B introduced by State Sen. Emanuel R. Gold (D-Queens) on Feb. 1, 1988. No action was taken of the bill, and it died in the Rules committee. New York's right of privacy statute, §§ 50 - 51 of the New York Civil Rights Law is similar to the California statute insofar as it prohibits unauthorized use of a persons "name, portrait, or picture"; but unlike the California statute does not . . . include the terms "voice and likeness." Marks, *supra* note 59.

the use of a sound-alike in a commercial. This was the rationale the court used in the *Lahr* case.⁸⁴

Advertisers and their agencies can protect themselves from sound-alike liability in several ways. Agencies could hire the original artist, for example, to perform the song. If that is impossible, they could get someone else to do a *different* rendition of the song, or use a different song entirely, in order to avoid copying a celebrity's song or style.⁸⁵ However, the boundaries are not clear: How original a voice would you need to use? Performers borrow vocal styles from other artists all the time. "A rock style that becomes popular usually creates a slew of imitators" . . . [I]s there a female jazz singer who doesn't have a hint of Billie Holiday and Dinah Washington, or a decent country singer who doesn't imitate Hank Williams?"⁸⁶ The current trend in the law may force advertising directors to write more creative advertisements. Now they may have to think of new and inventive ways to promote a product and "sing its praises."

If an impersonator is used, advertisers must make sure their audiences know it. Advertisers must provide a clear disclaimer in the advertisement.⁸⁷ Unfortunately, such disclaimers may do no good if there exists an intent to impersonate. However, despite a finding of intent, the court could view the disclaimer as a good faith action on behalf of the advertiser. The goal should be that the audience does not walk away from the advertisement thinking they have heard the original artist.

On the other hand, the area of celebrity rights, such as the right of publicity rather than privacy, should be grounded in explicit or implicit endorsements of a product by them.⁸⁸ If it were, no persons viewing the Mercury Sable commercial could mistakenly believe that Midler was backing the product. Another option for advertisers if they want to imitate a celebrity is to do a parody of that person. Parodies are considered fair use and are permissible under copyright law.⁸⁹ Furthermore, you do not need the celebrity's permission to do a parody of that celebrity.

Advertisers could avoid any similarity of their advertisement

84. *Lahr*, 300 F.2d at 258.

85. Martin, *supra* note 9, at 30.

86. Jon Pareles, *Her Style Is Imitable, but It's Her Own*, N.Y. TIMES, Nov. 12, 1989, § 2, at 30.

87. Martin, *supra* note 9, at 30.

88. Harold W. Suckehik, *Midler Case Teaches PR Image Lesson*, P.R. SERV., Mar. 1990, at 40.

89. 17 U.S.C. § 107 (1988).

with performers who have taken a strong stand against commercialization of their music.⁹⁰ It most probably helped Midler's case that she had never done any kind of commercial endorsement. Singer Neil Young does not do endorsements either. In fact, one of his most commercially successful songs attacked rock star product endorsements. Judging from such lyrics as "Ain't singing for Pepsi/Ain't singing for Coke/I don't sing for nobody/ Makes me look like a joke. . . ."⁹¹ in his song entitled *This Note's for You*,⁹² it would be wise for advertisers to stay away from imitating him in any of their commercials.

Advertising agencies could consult counsel before launching new advertising campaigns. The same type of legal vetting that is done on book manuscripts to highlight potential legal problems should be done on advertising copy. Before an advertising campaign is presented to the client, an attorney could peruse it to isolate any legal problems which may result from the use of the campaign. The client should be informed of the possibility and probability of lawsuits arising out of launching certain campaigns. This may take some of the fun out of brainstorming creative ideas, but in the long run it will keep advertising agencies on their toes. This may possibly save both themselves and their clients a lot of money in litigation fees and judgments against them.

V. CONCLUSION

The *Midler* case has had significant impact on the advertising industry. The use of sound-alikes used to be a form of good, basic advertising until *Midler* held that it was a tortious offense.⁹³ Although celebrities should justifiably be able to protect their image, having a monopoly on vocal or instrumental sounds may be carrying things a bit too far. "Picture this: Bob Dylan . . . filing suit against Bruce Springsteen, John Cougar Mellencamp, Lou Reed, Roger McGuinn, Elvis Costello, Graham Parker, Steve Forbert, and Elliott Murphy . . . [and] winning a huge settlement—and then being forced to hand it over to the estates of Hank Williams, Blind Lemon Jefferson, Buddy Holly, Woody Guthrie, Elvis Presley and half a dozen obscure blues singers for imitating *their* vocal

90. Martin, *supra* note 9, at 30.

91. NEIL YOUNG & THE BLUENOTES, *This Note's For You*, on *THIS NOTE'S FOR YOU* (Warner Bros. Records, 1988).

92. Jon Pareles, *Young vs. MTV: A Case of Modest Revenge*, N.Y. TIMES, Aug. 14, 1988, § 2, at 26.

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

and musical sounds. . . .”⁹⁴ Advertising is protected under the First Amendment and sound-alike commercials should be afforded similar protection. That fact that the court in *Ryder* refused to accept the ruling in *Midler* indicates that sound-alike recordings may still have a future. Now that is something for advertisers to sing about!

94. Pareles, *supra* note 86, at 30.