The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes

Leonard A. Wohl
INTRODUCTION

"A voice is as distinctive and personal as a face." Nevertheless, under a doctrine called the right of publicity, states that permit a celebrity to recover against an advertiser who imitates her appearance do not always extend the same protection to the imitation of her voice.

The right of publicity is a person's right to control the commercial exploitation of his or her identity. As such, the right allows its holder to create an endorsement "by fusing the celebrity's identity with [a] product and thereby siphoning some of the publicity value or good will in the celebrity's persona into the product." This fusion is accomplished by associating the product with the celebrity's name, likeness or other personal attribute; however, the particular trait used is only a symbol of the real source of publicity value—the celebrity's persona in its entirety.
Therefore, infringements of the right should not hinge upon the attribute used but upon whether the use evoked the "endorser's" identity.\textsuperscript{11} Despite the right's broad characterization, it has traditionally been limited to protect solely against appropriations of name or visual image.\textsuperscript{12} Nonetheless, courts in some jurisdictions have skirted tradition to prevent the theft of other personal traits.\textsuperscript{13} Most recently, the right has been used to redress the appropriation of the voice of a popular singer.\textsuperscript{14}

In a typical case of vocal appropriation, an advertiser bypasses a celebrity's refusal to endorse its product by employing a sound-alike to create the false impression of the celebrity's aural presence.\textsuperscript{15} The deceptive aspect of this conduct has spurred plaintiffs to rely upon unfair competition and trademark law\textsuperscript{16} for relief, but without success.\textsuperscript{17} The right of publicity goes beyond these remedies, especially with respect to vocal ap-

\textsuperscript{11} See McCarthy, supra note 5, at 1709 ("Merely drawing attention to a product or its advertisement through identifiable use of a person's identity is an infringement of the right of publicity."); see also infra note 133 and accompanying text.

This is not to say, however, that every identifiable use of a person's identity is actionable. The first amendment grants to entertainers the freedom to parody without restraint from the right of publicity. See Estate of Presley v. Russen, 513 F. Supp. 1339, 1358 (D.N.J. 1981); Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 Yale L.J. 1577, 1605 (1979). This Note addresses commercial speech, which enjoys some privilege, but not to the same degree. See Central Hudson Gas \\& Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-563 (1980); S.E.C. v. American Bd. of Trade, Inc., 830 F.2d 431, 442 (2d Cir. 1987), cert. denied, Economou v. S.E.C., 108 S. Ct. 1118 (1988).

\textsuperscript{12} See infra note 47 and accompanying text.

\textsuperscript{13} See infra note 48 and accompanying text.

\textsuperscript{14} See Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). Appropriation of a person's voice, for the purpose of this Note, is imitation of her voice. Appropriation by using a tape recording of a person's actual voice is more properly considered under copyright law. Mere imitation of a person's voice is not actionable under copyright law because a person's voice is generally not fixed in a tangible medium of expression and the Copyright Act of 1976 grants protection only to works that are fixed. See 17 U.S.C. § 102(a) (1982); infra notes 101-08 and accompanying text. Moreover, the legislative history of the Copyright Act expressly intended to immunize the imitation of a voice which is fixed in a sound recording from copyright liability. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 106 (1976).

\textsuperscript{15} See, e.g., Midler, 849 F.2d at 461, 463; Sinatra v. Goodyear Tire \\& Rubber Co., 435 F.2d 711, 712 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971).

\textsuperscript{16} The Lanham Act encompasses both unfair competition and trademark claims. See 15 U.S.C. § 1125(a) (1982); see, e.g., SK&F, Co. v. Premo Pharmaceutical Labs., Inc., 625 F.2d 1055, 1065 (3d Cir. 1980); see also infra note 65.

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proprietion, and has provided relief where deception-based claims have failed. In 1988, the Court of Appeals for the Ninth Circuit set precedent in *Midler v. Ford Motor Co.* by holding that the right of publicity may be infringed by the appropriation of a person's voice. *Midler* acknowledged that modern advertising techniques can suggest an endorsement by imitating a celebrity's unique vocal character and then followed established right of publicity principles by preserving Midler's right to control the exploitation of her identity. In doing so, *Midler* represents the most recent of a line of cases that manifest a deeper understanding of the right of publicity and apply it expansively to counter contemporary methods of appropriation.

In sharp contrast to these cases are those that adhere to the narrow name or likeness precedent. The reluctance of these jurisdictions to embrace an expansive view of the right reduces its effectiveness against modern advertising practices and divorces enforcement of the right from its purpose and underlying policies.

This Note proposes that the right of publicity should be extended to protect against appropriations of voice. Part I summarizes the development of the right of publicity. Part II draws support from statutes and common law for the recognition of vocal appropriation as an infringement of the right of publicity. Part III advocates that the right of publicity must encompass voice in order to preserve the celebrity's ability to control the use of her persona in today's technologically sophisticated market.

I. HISTORY OF THE RIGHT OF PUBLICITY

The right of publicity developed from, and remains inexorably intertwined with, the right of privacy. This nexus probably exists because


One plaintiff succeeded under an unfair competition theory. See *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); see also infra notes 65, 67 and accompanying text.

18. See infra note 67.

19. 849 F.2d 460 (9th Cir. 1988). *Midler* was the first case to recognize that the right of publicity may be infringed by the appropriation of a person's voice.

20. See id. at 463.

21. See infra notes 122-28 and accompanying text.

22. See *Midler*, 849 F.2d at 463-64.

23. See infra notes 88-121 and accompanying text.

24. See, e.g., cases cited supra note 17; infra note 47.


the same conduct—appropriation of an attribute of the plaintiff—infinges both rights.29 Publicity plaintiffs, however, seek to protect an interest distinct from that of privacy plaintiffs.30 Privacy plaintiffs do not want their names or likenesses published at all because of the hurt feelings and embarrassment resulting from the public exposure of what was once private.31 In contrast, publicity plaintiffs do not object to the publication in and of itself. Rather, they seek to regulate the commercial exploitation of their already public identities in order to protect an economic interest.32 The Supreme Court concisely summarized the difference between the two rights by noting that privacy plaintiffs seek to "minimize publication of . . . damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing."33

In 1953, the right of publicity was expressly recognized in Haelan Lab-

193 (1890). Their characterization of the right can be encapsulated as "the right to be let alone." Id. at 193. As it developed, the right was used to remedy several different types of invasions into personal solitude. See infra note 38. The right of publicity is an offshoot of the type of privacy invasion that later became known as "appropriation, for the defendant's advantage, of the plaintiff's name or likeness." See infra note 37 and accompanying text. This aspect of the right of privacy was first recognized at the turn of the century.

In 1902, an invasion of privacy action was brought against the Rochester Folding Box Company for placing the plaintiff's picture on a box of flour without her consent. See Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The court held that a lack of precedent prevented it from finding for the plaintiff. See id. at 543, 64 N.E. at 443. In 1903, in response to public disapproval of the decision, see, e.g., Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 778, 295 N.Y.S. 382, 384 (Sup. Ct. 1937), the New York legislature enacted a statute to address the type of harm experienced by Roberson. See infra notes 55, 66 and accompanying text. The statute is still in force today. See N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976 & Supp. 1989). The right of privacy was first recognized at common law when, in a scathing opinion, the Supreme Court of Georgia criticized Roberson and recognized a common law right of privacy under similar facts. See Pavesich v. New England Life Ins. Co., 122 Ga. 190, 211-20, 50 S.E. 68, 77-81 (1905).


Although the right has economic underpinnings, it also allows a celebrity to maintain her reputation and credibility by safeguarding her from unwilling associations with inferior or otherwise undesirable products. See Treece, supra note 6, at 642.

oratories, Inc. v. Topps Chewing Gum, Inc.\textsuperscript{34} The court in \textit{Haelan} acknowledged the unique interest of public figures and distinguished the right of publicity from the right of privacy by differentiating the economic harm from the emotional.\textsuperscript{35} Seven years after \textit{Haelan}, Dean Prosser published an influential law review article\textsuperscript{36} that included "appropriation, for the defendant's advantage, of the plaintiff's name or likeness"\textsuperscript{37} as one of the four torts constituting invasions of privacy.\textsuperscript{38} Unfortunately, Prosser's classification describes an infringement of the right of publicity as well as an invasion of privacy. The confusion caused by his failure to clearly establish the conceptual distinction between the two\textsuperscript{39} has been exacerbated by the adoption of his privacy formulation by the Restatement (Second) of Torts,\textsuperscript{40} and by statute\textsuperscript{41} or common law\textsuperscript{42} in many states. As a result, many courts remain misguided as to the differences between the two actions.\textsuperscript{43}

Currently, twelve states have statutes that encompass an aspect of the right of publicity by defining the act of appropriation as actionable.\textsuperscript{44} Only four states have expressly rejected a common law right of publicity,

\begin{itemize}
\item \textsuperscript{34} 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953).
\item \textsuperscript{35} See id.; see also infra notes 31-32 and accompanying text.
\item \textsuperscript{36} See Prosser, \textit{Privacy}, 48 Calif. L. Rev. 383 (1960).
\item \textsuperscript{37} Id. at 389.
\item \textsuperscript{38} Prosser's vision of the right to privacy encompasses four separate torts that share the common feature of invading the right to be let alone. See id. at 383-89.
\item \textsuperscript{39} See J. McCarthy, supra note 29, § 1.5[D], at 1-26. Compare Prosser, supra note 36, at 406 ("The interest protected is not so much a mental as a proprietary one . . . . Its proprietary nature is clearly indicated by \textit{[Haelan]}") with id. at 408 ("As to any of the four [types of privacy], it is agreed that the plaintiff's right is a personal one . . . .")
\item \textsuperscript{40} See Restatement (Second) of Torts, § 652C, at 380 (1977) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.")
\item \textsuperscript{43} See supra note 27 and accompanying text. The failure to discriminate between the rights of privacy and publicity may have been partially responsible for the New York Court of Appeals' decision to snuff out the right of publicity at common law. See Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 183, 474 N.E.2d 580, 584, 485 N.Y.S.2d 220, 224 (1984). For a more complete analysis of Stephano, see infra notes 59-75 and accompanying text.
\end{itemize}
but these states have recognized the right statutorily. Despite the sweeping acceptance of the right of publicity by those states that have considered it, only one court has held that the imitation of a person’s voice constitutes an infringement of the right.

II. THE CURRENT STATE OF RIGHT OF PUBLICITY LAW

Right of publicity law has developed along two lines. The first retains the traditional notion of the right as limited to appropriations of name or likeness and is thus an exclusive and narrow view. The second view discards the name or likeness standard in favor of an expansive conception of the persona in toto.

The name or likeness traditionalists approach the right illogically. Instead of looking to the interest that the right protects—the celebrity’s control of her identity—they define the right by the manner in which it was first infringed. In doing so, the traditionalists adopt Prosser’s privacy doctrine as the source of publicity law.

Under the second view, which is broad and inclusive, an advertiser’s use of anything that identifies a particular plaintiff infringes her right of publicity. This expansive “identification” approach remains faithful to the wisdom of Nimmer and McCarthy, the seminal publicity authorities. Moreover, because it premises liability upon whether the alleged appropriator suggested or identified the plaintiff, it serves the interest that the right protects.

A comparison of analyses under both the traditional and expansive views confirms the soundness of the latter and justifies a uniform expansion of the scope of the right of publicity.
A. Name or Likeness—New York's Traditional View

Statutory protection for the right of publicity in New York\(^\text{54}\) is found in New York Civil Rights Law sections 50 and 51.\(^\text{55}\) The statute addresses the act of appropriation under the privacy rubric and limits claims to appropriations of "name, portrait or picture."\(^\text{56}\) Therefore, the statute typifies the restrictive name or likeness approach because even the most liberal reading of "name, portrait or picture" would not likely in-

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\(^\text{54}\) New York is an important jurisdiction in right of publicity litigation. It was the first state to enact an applicable statute, see supra note 28, and was the first state to hear an appropriation case. See id. In addition, it has reported a large number of privacy/publicity cases.

\(^\text{55}\) New York Civil Rights Law §§ 50-51 (McKinney 1976 & Supp. 1989). The statute provides that "[a]ny person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained... may... restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use." Id. § 51. Section 50 is the criminal counterpart of § 51. Both are components of Article 5 of the Civil Rights Law, which is entitled "Right of Privacy." N.Y. Civ. Rights Law Art. 5 (McKinney 1976).

\(^\text{56}\) See supra note 55.
Despite the narrow wording of the statute, an expansive right of publicity began to develop under a line of federal cases that perceived an independent, common law right of publicity in New York. However, in 1984, the New York Court of Appeals, in *Stephano v. News Group Publications, Inc.*, rejected the reasoning of these cases and apparently extinguished the right at common law. Moreover, any hope for a liberal construction of the statute was dashed by *Stephano*'s decidedly strict emphasis on statutory language, a message which has been received by courts and litigants alike. Consequently, publicity plaintiffs must

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60. See id. at 183, 474 N.E.2d at 584, 485 N.Y.S.2d at 224 ("Since the 'right of publicity' is . . . exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity."). This case concerned the complaint of a model whose picture was used in *New York* magazine without his permission. The dispute was resolved in favor of the magazine on constitutional grounds, the court finding that the first amendment requires that newsworthy publications be exempt from application of § 51. See id. at 184, 474 N.E.2d at 584-85, 485 N.Y.S.2d at 224-25.

61. See id. at 183, 474 N.E.2d at 584, 485 N.Y.S.2d at 224 ("By its terms the statute applies to any use of a person's picture or portrait . . . ").


63. Most post-*Stephano* cases have focused on the § 51 "newsworthy" exception, see, e.g., Titan Sports, Inc. v. Comics World Corp., 690 F. Supp. 1315, 1319-22 (S.D.N.Y. 1988), rev'd, No. 88-7734 (2d Cir. March 14, 1989); Bytner v. Capital Newspapers, 67 N.Y.2d 914, 916, 492 N.E.2d 1228, 1228, 501 N.Y.S.2d 812, 812 (1986), presumably because *Stephano* slammed the door on litigation seeking a broad reading of the statutory identification parameters.

64. The *Stephano* decision, as judicial ratification of the statute's traditional approach, seems particularly distressing in light of prior cases that attempted to broaden the statute by recognizing claims for the use of attributes which did not fit the literal definition of "name, portrait or picture." See, e.g., Ali v. Playgirl, Inc., 447 F. Supp. 723, 726-27 (S.D.N.Y. 1978) (nickname and artist's rendering of plaintiff); Negri v. Schering
either frame their complaints in other theories or shoehorn them into the antiquated confines of the New York Civil Rights Law. These alternatives provide small consolation to victims of vocal piracy. Unfair competition, trademark and anti-dilution law offer sporadic relief at best, and the statute excludes voice by conspicuous omission.

For voice plaintiffs, however, Stephano may have a silver lining. The

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65. Plaintiffs may find relief in unfair competition, see, e.g., Lahr v. Adell Chem. Co., 300 F.2d 256, 259 (1st Cir. 1962); Waring v. WDAS, 327 Pa. 433, 455-56, 194 A. 631, 641-42 (1937), or trademark law, see generally Allen v. National Video, Inc., 610 F. Supp. 612, 624-30 (S.D.N.Y. 1985) (possible recovery under § 51 denied in favor of easier remedy under trademark). It has been suggested that anti-dilution law would be receptive to publicity claims. See N.Y.L.J., Oct. 5, 1988, at 1, col. 1, at 7, col. 2. Dilution is the "blurring" or "tarnishing" of the goodwill associated with a producer's trademark. See Sally Gee, Inc. v. Myra Hogan, Inc., 699 F.2d 621, 625 (2d Cir. 1983); see also N.Y. Gen. Bus. Law § 368-d (McKinney 1984). However, all of these remedies are incomplete. See infra note 67.


67. See supra note 17 and accompanying text. The alternative remedies of unfair competition and trademark are not adequate substitutes because they require a likelihood of public confusion as to the plaintiff's association with the defendant's goods. See J. McCarthy, 2 Trademarks and Unfair Competition § 23:1 (1973). A right of publicity claim would lie even if there were no confusion. See University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372, 1376 (D.C. Cir. 1983). To wit, a disclaimer will eliminate confusion, and thus nullify the unfair competition and trademark claims, but will fuel the publicity action by calling attention to the plaintiff, thereby trading on his identity. See Allen v. National Video, Inc., 610 F. Supp. 612, 629 (S.D.N.Y. 1985); Halpern, supra note 3, at 1246 & n.268.

Furthermore, some states require that the defendant's spurious conduct result in direct competition to the plaintiff before granting relief under an unfair competition theory. See, e.g., Halicki v. United Artists Communications, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987). Since the defendant, an advertiser or manufacturer, does not compete directly with the plaintiff, a celebrity, see, e.g., Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 714 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 348 (S.D.N.Y 1973), unfair competition would be inadequate in those jurisdictions. Moreover, although trademark law does not preclude a distinctive sound from functioning as a trademark, see In re General Elec. Broadcasting Co., 199 U.S.P.Q. 560, 563 (T.T.A.B. 1978), it is doubtful that the bare sound of a voice would qualify as a mark. See Booth, 362 F. Supp. at 348. Anti-dilution law is also a dubious remedy if the claim is essentially to vindicate plaintiff's right of publicity. See Allen v. Men's World Outlet, Inc., 679 F. Supp. 360, 367 (S.D.N.Y. 1988) (§ 368-d claim was equivalent to right of publicity claim and cognizable only under Civil Rights Law).

68. See supra notes 55-57 and accompanying text.
court adopted the traditional view of the right of publicity by defining it with respect to "name, portrait or picture." It then held that, "in this respect," the statute is exclusive and preempts common law publicity rights. Implicitly, *Stephano* left open the possibility that claims which are not contemplated by the statute, such as vocal appropriation, may survive at common law. Indeed, one month after *Stephano*, New York's highest court, in *Southeast Bank, N.A. v. Lawrence*, explicitly reserved judgment "upon the question of whether a common-law . . . right of publicity exists in this State." The Court of Appeals' refusal to address the lower court's affirmative answer to that "question" is controversial in light of its decision one month before in *Stephano*. The facial inconsistency of *Southeast Bank* and *Stephano* may presage the survival of publicity rights beyond the statute.

*Stephano* notwithstanding, commentators have criticized the statute for providing inadequate protection to plaintiffs seeking to vindicate privacy or publicity rights. Because New York Civil Rights Law section 51 was enacted at the turn of the century and in response to the appropriation of a visual likeness, it reflects neither the present concerns of pub-

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70. See id.
73. Id. at 912, 489 N.E.2d at 745, 498 N.Y.S.2d at 776.
75. This interpretation of *Stephano* is further supported in *Freihofer* v. *Hearst Corp.*, 65 N.Y.2d 135, 480 N.E.2d 349, 490 N.Y.S.2d 735 (1985). In *Freihofer*, the court limited application of the statute to those appropriations to which it expressly applies. See id. at 140, 480 N.E.2d at 353, 490 N.Y.S.2d at 739; see also *Dukas* v. *D.H. Sawyer & Associates*, Ltd., 137 Misc. 2d 218, 220 & n.2, 520 N.Y.S.2d 306, 307-08 & n.2 (Sup. Ct. 1987) ( tacitly acknowledged survival of common law right of publicity with respect to voice by ignoring *Stephano* and implying that, but for the newsworthy exemption, claim for vocal appropriation might have been colorable).
76. See Greenawalt, *New York's Right of Privacy: The Need for Change*, 42 Brooklyn L. Rev. 159, 162 n.13 (1975) ("[T]he legislative response to [Roberson] was not intended to foreclose other claims . . . and . . . that response should not be interpreted as 'preempting' the field."); see also J. McCarthy, supra note 29, § 6.9[A], at 6-56 (quoting S. Hotstadter & G. Horowitz, The Right of Privacy 29 (1964)); infra notes 77-80 and accompanying text. Courts and commentators have argued for a liberal construction of the statute. For example, a New York court stated:

While the statute may not, by its terms, cover voice or movement, characteristics or style, it is intended to protect the essence of the person, his or her identity or persona . . . .

. . . A person may be known not only by objective indicia . . . but by other characteristics as well—voice, movement, style, coiffure, [and] typical phrases.

77. See supra note 66 and accompanying text.
lic figures nor current methods of exploitation. Clearly, lawmakers in 1903 could not foresee methods of appropriation that would arise half a century later. Now, corrective legislation is long overdue.

B. Identification—The Expansive View

1. California

California is the only state that grants express statutory protection to a person's voice. However, the statute has been interpreted to prohibit only the appropriation of a person's actual voice, not its imitation. Nevertheless, because the term "likeness" has been construed elsewhere to include visual impersonations, the argument could be made that the statutory parameters of "likeness" and "voice" should be read together to include vocal impersonations. Although the court in Midler could have reached this conclusion, it chose instead to rely on common law grounds.

The common law of California has generally been receptive to right of

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78. See infra notes 122-28 and accompanying text.
79. See Onassis, 122 Misc. 2d at 609, 472 N.Y.S.2d at 259 ("[T]he possibility of reproducing and disseminating the sound of a voice was not contemplated in 1903 when sections 50 and 51 of the Civil Rights Law were first enacted."); Gordon, supra note 66, at 554 (early drafters and old decisions were unable to foresee the advance of media and the marketability of personality).
80. See Allen v. National Video, Inc., 610 F. Supp. 612, 624 n.5 (S.D.N.Y. 1985). New York State Senator Emanuel Gold is preparing to introduce an amendment to the Civil Rights Law. See FAX Transmittal from Senator Gold's office (March 15, 1989) (available in the files of the Fordham Law Review). The amendment proposes to modernize the right of publicity in New York, with respect to its descendibility, by updating the statutory parameters to "voice, signature, photograph or likeness [and the] imitation, simulation or impersonation thereof, even if a disclaimer is used." If passed, this law would enable the successors-in-interest of deceased celebrities whose voices were appropriated to recover. See id.
81. California, home of many celebrity plaintiffs, is an important jurisdiction because it has been a fertile source of right of publicity litigation. See, e.g., Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).
82. See Cal. Civ. Code § 3344(a) (West Supp. 1989) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . without such person's prior consent . . . shall be liable for any damages sustained by the person . . . ").
83. See Midler, 849 F.2d at 463; supra note 14.
86. Unlike other statutes, see supra note 53, § 3344 is expressly in addition to rights at common law. See Cal. Civ. Code § 3344(g) (West Supp. 1989). Possibly because its rights are cumulative and plaintiffs can do better at common law, § 3344 has not frequently been used. See J. McCarthy, supra note 29, § 6.4[A], at 6-16.
publicity claims. In Motschenbacher v. R.J. Reynolds Tobacco Co., the defendant attempted to convey the impression that famous race car driver Lothar Motschenbacher endorsed Winston cigarettes by using pictures of his car in its commercial. Although Motschenbacher was not visible in the ad, the Court of Appeals for the Ninth Circuit held that the image of his car had the same legal consequence as would an image of Motschenbacher himself because viewers would believe that he was at the wheel. The car, as suggestive of Motschenbacher himself, carried with it the power to convey his endorsement. In looking to whether the commercial suggested Motschenbacher, rather than whether his name or likeness was used, the court implicitly established "identification" of the plaintiff, irrespective of the means used to identify, as the threshold of liability. Thus, the court adopted an expansive interpretation of the right of publicity.

In Midler v. Ford Motor Co., the defendant asked actress and singer Bette Midler to re-record the song "Do You Wanna Dance" for musical accompaniment to its commercial. When she refused, the defendant instructed a Midler sound-alike to mimic her performance of the song, and thereby misled listeners into believing that they were actually hearing Midler. The Ninth Circuit drew upon Motschenbacher to explain how Midler's proprietary interest was invaded by the appropriation of an attribute of her identity, namely, her voice. Common to both cases was the significance each placed on the stolen attribute's ability to identify the respective plaintiffs and extract their endorsement value. Notwithstanding that link, Midler easily remained within the far reaching implications of Motschenbacher because a car is not a personal characteristic but the "human voice is one of the most palpable ways identity is manifested."
Midler is important for several reasons. In holding that the right of publicity may be infringed by the appropriation of a voice, it set valuable precedent for voice plaintiffs. In addition, it fortified the notion that identification of the plaintiff by any means is the key to right of publicity infringements. Finally, Midler dispensed with the copyright preemption defense, which had previously proved fatal to publicity claims in sing-alike cases. In doing so, the court emphasized that Midler claimed rights in her persona, not in her song. Framed this way, the state claim did not clash with federal copyright law and,

99. See id.
100. See id.
101. Simply put, state claims that are equivalent to and deal with the same subject matter as copyright are preempted by federal law. See 17 U.S.C. § 301(a) (1982).
102. The defense proceeds on the allegation that the plaintiff was identified not from an imitation of her non-distinctive voice, but from a song which the public associates with her. See Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 716 & n.12 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971). Because copyright law controls the rights surrounding musical works, see 17 U.S.C. § 102(a) (1982), the song must be severed, thus leaving the right of publicity claim vacuous without the song's context to establish identification of the plaintiff. See Sinatra, 435 F.2d at 716; Motown Record Corp. v. George A. Hormel & Co., 657 F. Supp. 1236, 1240-41 (C.D. Cal. 1987).
103. It has been suggested that an advertiser can avoid the publicity claim by securing a license to use the plaintiff's recording of the song from the record company. See Ent. L. & Fin., Dec. 1988, at 5, cols. 2-3. This type of license was granted to Nike when it used The Beatles' song "Revolution" to advertise its running shoe. See Capitol Industries-EMI, Inc., Press Release (July 28, 1987). Arguably, the license is paramount and the artist's exercise of publicity rights would clash with the advertiser's exercise of copyrights in the sound recording. Cf. Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 678 n.26 (7th Cir. 1986) (plaintiff's right of publicity claim is preempted because it conflicts with defendant's copyright in videotape of baseball game), cert. denied, 480 U.S. 941 (1987). But see infra note 107 (discussing possibility of valid publicity claim despite defendant's copyright in sound recording).

However, the situation is different when the advertiser only has a license to use the underlying song, not the sound recording, and attempts to re-create the recorded version by using a sound-alike. See Miller, Gonna Hawk Around the Clock Tonight, Mother Jones, Nov. 1988, at 39, 41 (adapted from M. Miller, Boxed In: The Culture of TV (1988)). In these instances, the advertiser is seeking to capitalize on the version of the song with which the public is familiar without paying the record company or artist for its use. Here, the artist's remedy is the right of publicity.

104. See, e.g., Sinatra, 435 F.2d at 716; Motown, 657 F. Supp. at 1238-41.
105. See Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).
106. The plaintiff only seeks to enjoin the one particular use of the song that imitates her own rendition. See id. at 462.
107. In this application, the right of publicity is not equivalent to a right of copyright, see 17 U.S.C. § 106 (1982); 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.01[B][1], at 1-12 (1988), because the right of publicity involves an extra element: If under state law the act of reproduction, performance; distribution or display . . . will in itself infringe the state created right, then such right is preempted. But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie 'within the general scope of copyright', and there is no preemption.
therefore, escaped preemption.\textsuperscript{108}

2. Other Jurisdictions

Although right of publicity litigation occurs mainly in New York and California, where celebrities and advertisers are concentrated, the law is also developing in other states. Some of the strongest support for the expansive view can be found between the two coasts.

In \textit{Hirsch v. S.C. Johnson & Son, Inc.},\textsuperscript{109} ex-football player Elroy "Crazylegs" Hirsch sued the defendant for marketing pantyhose under the name "Crazylegs."\textsuperscript{110} The defendant’s promotions were set in an athletic context,\textsuperscript{111} thus confirming that identification with Hirsch was intended. The court, construing Wisconsin law, held that the combination of the nickname and the athletic flavor of the ads identified Hirsch even though his real name was not used.\textsuperscript{112} Despite the court’s reliance on the athletic context to identify the plaintiff, \textit{Hirsch} represents only a gradual abandonment of name or likeness tradition because liability still derived primarily from the use of a name by which the plaintiff was known. The ad’s athletic setting merely confirmed the defendant’s refer-

must be qualitatively different from a copyright to survive preemption). It is not the defendant’s mere performance of the song, but rather its performance in a manner intended to simulate the plaintiff that infringes her right of publicity. Restricting only the imitation of an aspect of a performance which is fixed and copyrighted does not conflict with the broader right of the copyright holder to perform the work in non-imitative ways. \textit{See Midler, 849 F.2d at 462; J. McCarthy, supra note 29, § 4.14[E][3], at 4-94; Comment, supra note 32, at 141.}


There is also a more basic, yet untried, argument against preemption. Publicity claims should be actionable regardless of the exclusive, but limited, rights of the copyright holder. \textit{See generally Abrams, Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection, 1983 Sup. Ct. Rev. 509, 566-75 (discussing cases that allowed state laws to limit the exercise of valid copyrights). In Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090 (S.D.N.Y. 1980), rev’d on other grounds, 652 F.2d 278 (1981), cert. denied, 456 U.S. 927 (1982), the court held that publicity rights “cannot be defeated by the defendants’ attempt to copyright individual items.” \textit{Id.} at 1100. Under Factors, a publicity claim could trump a defendant’s valid copyright in a sound recording. While this conclusion is inconsistent with \textit{Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n}, 805 F.2d 663 (7th Cir. 1986), \textit{cert. denied}, 480 U.S. 941 (1987) (discussed \textit{supra} note 103), Nimmer believes \textit{Baltimore Orioles} was wrongly decided. \textit{See 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.01[B], at 1-22.3 to 1-22.4; id. § 2.09[F], at 2-138.1 to 2-138.2. Moreover, if the Factors reasoning is incorrect, any state law that provides a cause of action for the unpermitted use of a person’s photograph, \textit{see, e.g.}, Cal. Civ. Code § 3344(a) (West Supp. 1989), is threatened with preemption because that photograph may also be copyrighted.}

\textsuperscript{108} \textit{See Midler, 849 F.2d at 462.}

\textsuperscript{109} 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

\textsuperscript{110} \textit{See id.} at 382, 280 N.W.2d at 130.

\textsuperscript{111} \textit{See id.} at 398, 280 N.W.2d at 138.

\textsuperscript{112} \textit{See id.} at 397-98, 280 N.W.2d at 137-38.
ence to Hirsch. However, in extending “name” to “nickname” and looking to external contextual elements, Hirsch underscored the importance of identification and departed from traditional precedent.

In *Carson v. Here’s Johnny Portable Toilets, Inc.*, the defendant marketed his portable toilet with the phrase “Here’s Johnny” followed by the slogan “The World’s Foremost Commodian,” hoping that the clever puns would generate interest and attract customers. *Tonight Show* host Johnny Carson based his right of publicity claim on the defendant’s unauthorized use of the phrase “Here’s Johnny,” which the public commonly associates with him. The court, applying Michigan law, determined that the crux of the claim was appropriation of Carson’s persona, rather than his name or likeness, and held for the plaintiff. Moreover, *Carson* explicitly rejected the obsolete name or likeness criteria by dismissing those traditional methods of appropriation as irrelevant. The court’s shift in emphasis from the particular manner of appropriation to the more straightforward determination of whether the plaintiff was identified typifies the expansive view.

III. MODERNIZING THE RIGHT OF PUBLICITY

Despite the progress thus far, the interests of publicity plaintiffs are still not completely protected. Advertising has evolved from the visual and print emphasis predominant at *Haelan’s* time to its present electronic incarnation, which is directed toward the ears as well as the

113. See id. at 398, 280 N.W.2d at 137.
115. See *Hirsch*, 90 Wis. 2d at 398, 280 N.W.2d at 137-38.
116. 698 F.2d 831 (6th Cir. 1983).
117. See id. at 833.
118. See id. at 832-33.
119. See id. at 835.
120. See id. at 836.
121. See id. at 835 (“If the celebrity’s identity is commercially exploited, there has been an invasion of his right [of publicity] whether or not his ‘name or likeness’ is used. [Plaintiff’s] identity may be exploited even if his name, John W. Carson, or his picture is not used.”).

Celebrity voiceovers in television commercials have become commonplace. As an example, note recently how the voice of Jimmy Stewart was invoked to extol the virtues of Campbell’s soup. See *USA Today*, Oct. 14, 1988, at 9B, cols. 2-5. Mr. Stewart is never seen in the ad, yet his voice gives the undeniable imprimatur of approval to the soup’s cure-all capabilities. *See id.* The use of popular songs has also proven to be an effective way to connect with a young demographic. *See Miller, supra* note 103, at 40-42.
But while the popularity of aural endorsements by voiceover and song grows, courts, for the most part, remain mired in name or likeness tradition. The resulting immunity in most jurisdictions renders the use of sound-alikes a lawful, and profitable, alternative to engaging the actual celebrity. In *Midler v. Ford Motor Co.*, however, the court acknowledged the impact of aural advertising upon vocally recognizable celebrities. It brought them under the publicity umbrella by expanding the right's scope without straying from the right's principles.

The absorption of advertising developments into the right of publicity's contours logically follows the right's purported goal—protection of the celebrity's economic interest in her own exploitation. Since this economic interest can now be thwarted by appropriating a celebrity's voice, the right of publicity should subsume the attribute of voice in order to provide a remedy to victims of vocal larceny.

Most courts and state legislatures, however, have failed to acknowledge the relevance of advertisers' sonic sales pitches even though the same purpose and policies that prompted adoption of the right to protect name and likeness now justify its application to vocal appropriation. The right's goal of placing the celebrity in control of the commercial use of her persona is couched not in terms of name and likeness, but includes those terms by referring broadly to identity. Therefore, clarification of what is meant by identity should sharpen the frontiers of the right of publicity.

Although intangible in nature, identity should encompass any trait or

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124. See *supra* note 47 and accompanying text; cases cited *supra* note 17.
125. See *infra* note 139.
126. 849 F.2d 460 (9th Cir. 1988).
127. See *id.* at 463.
128. See *id.* at 463-64.
129. Celebrity plaintiffs have been demanding protection for their vocal identities ever since the advent of voice-associative marketing, but courts have been grudgingly slow in complying. See cases cited *supra* note 17.
133. Since infringements of the right turn upon whether the plaintiff's identity was invoked, see, e.g., *Carson*, 698 F.2d at 835; *Uhlaender v. Henricksen*, 316 F. Supp. 1277,
characteristic that identifies a person. Such a definition provides three benefits. First, it acknowledges that identity may be conveyed in a number of ways, as opposed to the shortsighted limitations of name and visual likeness. Second, it uncouples the right of publicity from unnecessarily restrictive precedent by making non-qualified identification of the plaintiff the key to infringement. Third, it accords with the purpose behind the right. Once the plaintiff is identified, she has lost control of the commercial use of her identity. Thus, fixing liability upon the appropriator's identification of the plaintiff by any means enables the celebrity to better control the exploitation of her persona. Since people may be recognized by their voices as readily as by their faces, no reason exists to confine the legal definition of identity to name and visual image. Finally, the policies behind the right—preventing unjust enrichment and freeing the public from deceptive business practices—are universal legal goals that do not discriminate among name, likeness and voice.

CONCLUSION

Motschenbacher, Midler, Hirsch and Carson form the vanguard of right of publicity law because they emphasize that publicity rights flow from the entire persona and not simply from name or likeness. Those traits are merely the obvious aspects of identity that advertisers have traditionally used to exploit a celebrity's endorsement value. The added dimension of sound in the media of radio and television provides a new way to convey the impression of celebrity endorsement. By linking a celebrity's voice or song with a product, an advertiser can create an en-
endorsement without the visual presence of the endorser. However, the advent of voice-associative marketing has exposed an aural loophole in the traditional name and likeness precedent. By exploiting the law's inadequacy, clever advertisers are able to steal the identities of vocally recognizable celebrities. Therefore, states should adopt a right of publicity that embraces the attribute of voice in order to conform the right to the realities of modern advertising and to respond to the harm the right was created to prevent. Otherwise, a valuable endorsement may be had for a song.

Leonard A. Wohl

140. See Sim, 1 W.L.R. at 317 (It would "be a grave defect in the law if it were possible . . . to make use of the voice of another . . . without his consent.").

141. See Midler, 849 F.2d at 463 ("The singer manifests herself in the song. To impersonate her voice is to pirate her identity.").