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VOICE MISAPPROPRIATION IN CALIFORNIA—BETTE MIDLER, TOM WAITS, AND GRANDMA BURGER

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On October 4, 2001, the California Court of Appeal, for the first time, acknowledged, defined, explained, and confirmed the common law of voice misappropriation in California. Unfortunately, only one justice on the three justice panel saw fit to tell the legal world the status of the law before the parties had to go through the expense and uncertainty of a trial. The case is *Priority Records v. Superior Court (Geneva Burger).*[1] As it turns out, the case was settled during trial, for an undisclosed sum of money, and the California Court of Appeal still has yet to make its voice officially heard.

When *Priority* was decided, the only common law voice misappropriation cases in California were Federal cases, both decided by the Ninth Circuit Court of Appeals, and both involving celebrity recording artists. On October 4, 2001, the California courts finally interpreted their own law. The interpretation is entirely consistent with the Ninth Circuit's interpretation. Unfortunately, that interpretation will never be cited; in fact, but for this article, it would never even be discussed.

The History Of Voice Misappropriation

MIDLER V. FORD MOTOR CO.

A claim for voice misappropriation was recognized for the first time in California in *Midler v. Ford Motor Co.*[2] Prior to *Midler*, an individual was limited to recovering only for the misappropriation of his or her *name* or *likeness*. In fact, the trial court in *Midler* granted summary judgment to the defendants, indicating that "there was no legal principle preventing imitation of Midler's voice . . . ."[3] *Midler* was the first case that held that the

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1 Priority Records v. Superior Court, Priority Records v. Los Angeles County Superior Court, 2001 Cal. LEXIS 8092 (Cal. Nov. 20, 2001).

Case No. B15251; Geneva Burger v. Priority Records, et al., Los Angeles Superior Court (Pomona) Case No. KC 027 869 (Hon. R. Bruce Minto, Judge).

2 849 F.2d 460 (9th Cir. 1988) (holding that California law recognizes a tort of appropriation of a professional singer's voice where the singer was widely known and where the use was to sell a product).

3 *Id.* at 462.

misappropriation of an individual's *voice* could, in certain instances, constitute an actionable violation of the common law right of publicity.

Bette Midler, a celebrated singer, dancer, actress, and comedienne, sued an automobile company and an advertising agency for airing a commercial that used a "sound-alike" of Midler singing a song from her album entitled, "The Divine Miss M." Midler, when asked by the advertising agency to do so, had expressly refused to sing the song in the commercial and, in fact, (like many film stars) did not want to be involved or associated with *any* commercial for *any* product.[4] The company then hired one of Midler's former backup singers specifically and expressly to mimic Midler's very distinctive voice. As a result, Midler was highly identifiable in the commercial, even though neither her name nor a photograph of her had been used.[5]

The court determined that Midler should be compensated for the misappropriation of her voice, holding 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."[6] The court stated that the great value of Midler's distinctive voice to the advertisers was demonstrated by their diligent efforts to ensure that the soundalike precisely imitated Midler's voice, and was therefore widely recognizable as Midler. The court further stated that, "when a voice is a sufficient amount of a *celebrity's identity*, the right of publicity protects it."[7]

The *Midler* court made it quite clear that, in order to recovery for *voice* misappropriation, it is not even enough that the aggrieved party is a *celebrity*; even *celebrity* plaintiffs may not recover for voice misappropriation unless their voice is "a sufficient amount of [their] identity."[8]

WAITS V. FRITO LAY, INC.

The court's decision in *Midler* was further explained in *Waits v. Frito Lay, Inc.*[9] In *Waits*, the court reaffirmed the discussion in *Midler*, and further explained the requirements set forth in *Midler* under which a celebrity can successfully recover for the misappropriation of his or her voice.

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4 *Id.* at 461.

5 *Id.*

6 *Id.* at 463 (emphasis added).

7 *Id.*

8 *Id.*

9 978 F.2d 1093 (9th Cir. 1992).

In that case, Tom Waits, a well-known (celebrity) singer/songwriter/actor, sued Frito-Lay for airing a radio commercial for Salsa Rio Doritos, which featured a vocal performance imitating Waits. The court found that Frito Lay had been very determined to use the specific sound of Waits'extremely distinctive, raspy voice. However, because Waits had been extremely outspoken publicly about musicians not doing commercials (because it "detracts from their artistic integrity"), Frito Lay used a soundalike whose voice was (by design) virtually indistinguishable from Waits', and who was recommended to the advertising agency as "someone who did a good Tom Waits imitation" and had performed "Waits songs as part of his band's repertoire" for over ten years.[10]

In fact, an executive producer with the advertising agency "became concerned about the legal implications of [the singer's] skill in imitating Waits, and attempted to get [him] to "back off" his Waits imitation." The same executive producer admittedly had previously approached Waits to do a Diet Coke commercial and "you never heard anybody say no so fast in your life."[11]

The *Waits* court reiterated in *Midler* "that when voice is sufficient indicia of a celebrity's identity, the right of publicity protects against its imitation for commercial purposes without the celebrity's consent."[12] The court held that in order for Waits to recover under a right of publicity, he must satisfy the deliberate voice misappropriation elements listed in the *Midler* case. for which the *Waits* court identified as the "Midler tort." These elements include (1) a voice; (2) that is distinctive; and (3) is also widely-known.[13] The court found that "[a] professional singer's voice is widely known [for purposes of voice appropriation, if the voice]... is *known to a large number of people throughout a large geographic area.*"[14] In so determining, the court stated that "identifiability is properly considered in evaluating distinctiveness."[15] The court affirmed the judgment for Waits.

Once again, the *Waits* case makes it clear that just being a professional singer does not give one the right to recover for voice misappropriation; the voice also has to be known to a large number of people throughout a large geographic area.

In *Priority*, Burger was not a professional singer; she was not a celebrity; nobody other than her own grandsons and three other family members were

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10 *Id.* at 1097.

11 *Id.* at 1098.

12 *Id.* citing *Midler*, 849 F.2d at 463.

13 978 F.2d *Id.* at 1100at 1102..

14 *Id.* at 1102.

15 *Id.* at 1101.

able to identify her in the Song. She certainly could not demonstrate that her voice was *distinctive* or that her voice was *widely known* to a large number of people throughout a large geographic area. In fact, as discussed above, the trial court in *Burger* made a specific finding that Burger's voice is not distinctive, that is not widely known, and that it has no commercial value whatsoever.

That Burger's voice was not sufficiently identifiable to maintain a cause of action for voice misappropriation was further demonstrated by additional language in *Waits*:

> Finally, we are unpersuaded by the defendants' argument that the court's instruction would have allowed the jury to hold them liable for imitation of a voice that was *identifiable by only a small number of people*, in as much as *Midler* also requires that the plaintiff's voice be "widely known."[16]

PRIORITY RECORDS V. SUPERIOR COURT (GENEVA BURGER)

The *Priority* case was filed 11 years after *Midler* was decided and 7 years after *Waits*. The case involved a 78-year-old grandmother, whose 30 year old grandson's friend engaged her in a telephone conversation about marijuana, taped that conversation, and gave an excerpt of that tape to a rap music producer because he thought that the grandmother's words were funny. The exact words used by Burger were: "When people are hooked on pot, can they be sick if they don't get it?" (the "Excerpt"). The Excerpt was exactly 4 seconds long.

The grandson's friend was named Johnny Lupo. Lupo, who was an amateur musician, compiled tapes of various people speaking, including Burger, and brought the tapes to a rap music producer named Mark D'Andrea to experiment on some new equipment that D'Andrea had recently acquired. D'Andrea and Lupo decided to use the Excerpt in order to create an original musical "beat."[17]

D'Andrea thereafter played the musical beat (with the Excerpt) for Snoop Dogg (formerly "Snoop Doggy Dogg" -- real name: Calvin Broadus) and C-Murder (real name: Corey Miller). D'Andrea thereafter produced the Album, and included the Excerpt with this musical beat. Priority argued that the Excerpt of Burger's conversation was obviously included in the song

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[16] *Id.* at 1102.

[17] A "beat" in rap music is a composition of music, without the rap or lyrics which comprise the completed song.

for its *content*, and not for the uniqueness, distinctiveness, or identifiability of Burger's *voice*.

Thereafter, a rap music recording artist named "Magic" (real name: Atwood Johnson) released an album entitled "Skys The Limit." The Excerpt was used at the beginning of the thirteenth song on the album, entitled "No Limit," which is about marijuana, among other things.

The Song was composed of original music, which was created by D'Andrea, and original rap lyrics by three artists: Snoop Dogg, C-Murder, and Magic. The album was released by No Limit Records, which is owned by the rap artist Master P (real name: Percy Miller), and distributed by Priority Records.

Priority distributed the album in accordance with a "furnishing" agreement with No Limit. Because this agreement was only for *distribution* of the Album, Priority had no right to control the content of the music. Priority claimed that its sole function was essentially to manufacture the plastic compact discs on which the music was recorded and to deliver those discs to record stores.

At some point after the release of the album, Burger's grandson, William Burger, informed Burger that her voice had been used on the Album. Priority claimed (and Burger submitted no contrary evidence) that no other individual in the world, other than four of Burger's own family members, was able to identify Burger's voice on the Album, and the only reason even they could identify her voice was because Lupo *told* them that her voice was on the album.

In June of 1999, Burger filed a Complaint for invasion of privacy in the Los Angeles Superior Court in Pomona, California. Nineteen months later, after Burger's counsel associated in co-counsel, Burger filed a First Amended Complaint, asserting causes of action for invasion of privacy, intrusion, appropriation, use of wiretapped content, and intentional infliction of emotional distress. The only cause of action that was alleged against Priority was for "invasion of privacy - misappropriation," which was later clarified by Burger's attorneys to mean common law voice misappropriation.[18]

Interestingly, Burger never sued Lupo, the individual who illegally taped her telephone conversation with him. In fact, she never even sued D'Andrea, the producer of the Album, who was actually responsible for including the Excerpt on the Album. Although she did sue Johnson, the

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[18] Burger could not claim *statutory* misappropriation pursuant to California Civil Code Section 3344 because that cause of action requires proof of "knowledge," and Burger could not prove that Priority had any knowledge that Burger's voice had been misappropriated, or that Priority had any knowledge whatsoever concerning the origin of the 4-second Excerpt.

artist (who had nothing to do with the inclusion of the Excerpt on the Album), but she never pursued him. She did pursue Snoop Dogg (who merely rapped on the song), C-Murder (who merely wrote some of the rap lyrics), Master P (who merely owned the record company that released the album), No Limit Records (the record company), and Priority Records (which merely distributed the Album).

The case proceeded for over two years, with a considerable amount of discovery. Immediately prior to trial, Priority filed a Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues. In that Motion, Priority sought to adjudicate that Burger could not maintain a cause of action for voice misappropriation because she was unable to prove that her voice was "distinctive" and "widely known."

Burger, in her Opposition papers, quoted extensively from J. McCarthy, *The Rights of Publicity and Privacy*, and certain cases, none of which even remotely had discussed *voice* misappropriation. Those cases and treatise discussed the fact that, in *name and likeness* cases only, one need not be a celebrity to recover damages for another's use of that person's name and likeness.[19]

Priority's analysis was twofold: First, there is a separate tort in California called "voice misappropriation." Although it may be a subset of statutory misappropriation and/or common law right of publicity, Priority argued that there are separate pleading and proof requirements for the more specific *voice* misappropriation. The second part of Priority's argument was that, even if voice misappropriation is not to be construed as a separate tort, the "identifiability" element of common law right of publicity and statutory misappropriation would nevertheless preclude Burger's claim against Priority.

Priority argued that *Midler* and *Waits* established the tort of voice misappropriation, and that those cases govern all voice misappropriation cases in California. Priority further argued that not one case from any state (and certainly none cited by Burger) held (or even *suggested*) that a *non-*

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[19] However, even in *name and likeness* cases (as opposed to *voice* misappropriation cases), the plaintiff must be sufficiently "identifiable" to sustain a cause of action. Waits v. Frito Lay, Inc., 978 F.2d 1093, 11020 (9th Cir. 1992) ("Identifiability . . . is a central element of a right of publicity claimase"). There is an absolute requirement that a "significant" number of people be able to identify the plaintiff. As discussed in J. McCarthy, *Rights of Publicity and Privacy*, which was extensively cited by Burger, the author made it very clear that "the test of liability (as opposed to the scope of remedy) is whether a 'significant' or more than de minimis number of persons can reasonably identify plaintiff from the total context of defendant's use." *Id.* at §3.4[D]. Three or four of Burger's family members (who already knew her voice was on the Song), being the only ones who could identify her voice, is certainly "de minimis," and clearly, as a matter of law, renders the voice not sufficiently identifiable to maintain a cause of action for voice misappropriation (or any form of right of publicity).

celebrity with a *non*-distinctive, *not widely known* voice, particularly one with no commercial value, can sue for *voice* misappropriation.

Burger admitted, on the one hand, that "[i]n California, *Midler* and *Waits* establish that the misappropriation of one's voice is compensable", but claimed that "*Midler* and *Waits* are completely inapplicable to the facts at hand."[20] Priority argued that Burger could not have it both ways. It definitely *was Midler* that established voice misappropriation as a compensable tort. In fact, that is the reason for which the *Waits* court refers to voice misappropriation as the "*Midler* tort." There was no recovery whatsoever for the use of one's voice before *Midler*, and it is clear that *Midler* and *Waits* are the last (and exclusive) word on the required elements of the "*Midler* tort."

However, an argument that Burger made, seemingly almost "tongue in cheek," was ultimately adopted by the trial court, to wit: that *Midler* and *Waits* only apply to *soundalike* cases, and not to cases in which a plaintiff's *actual* voice is used. However, there was nothing in *Midler* or *Waits* that even remotely suggested that the rules set forth in those cases do not apply if the case involves an *actual* voice as opposed to a "soundalike." Burger claimed that "the 'analysis' is not whether a plaintiff can show that the voice is widely known or distinctive, but only that the voice used is in fact the plaintiff's voice - which here there is no dispute that it is her voice."[21]

However, in *Midler* and *Waits*, there was similarly no dispute as to whom the voices were imitating, and the court still required that the "professional singer's" voice be "widely known" and "distinctive." In fact, language from those cases makes it clear that the court was not limiting its holding (and the requisite elements for a voice misappropriation cause of action) to "soundalike" cases. "This case centers on the predictability of the voice of a celebrated chanteuse from commercial exploitation without her consent."[22] "At issue in this case is only the protection of Midler's voice."[23] The court did not say that the "case centers on the predictability of the voice of a celebrated chanteuse from '*soundalikes*' without her consent"; it said that the heart of the *Midler* case was the protection of a "celebrated" singer from any "commercial exploitation without her consent."[24]

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[20] Priority Records v. Superior Court, Priority Records v. Los Angeles County Superior Court, 2001 Cal. LEXIS 8092 (Cal. Nov. 20, 2001).(citing Opposition Papers filed in the case and referenced at 11:2 and 3:3).

[21] *Id.* citing Opposition Papers at 3:10-12.

[22] *See supra* note 12.

[23] *Id.* at 462.

[24] *Id.*

Clearly, neither the holdings of *Midler* and *Waits*, nor the requirements identified therein, are limited to cases in which a soundalike was used, as opposed to a plaintiff's *actual* voice. If a plaintiff's voice is not distinctive and widely known to a large number of people throughout a large geographical area, then that plaintiff simply cannot maintain a cause of action for common law voice misappropriation, whether the defendants used a soundalike or the plaintiff's actual voice.

The motion was ultimately heard by the trial court, which specifically held that Burger's voice (1) was not *distinctive*; (2) was not *widely known to a large number of people throughout a large geographical area*; and (3) had *no commercial value*. The court further held, however, that, contrary to *Midler* and *Waits*, Burger was nevertheless entitled to maintain her cause of action for common law voice misappropriation because the requirements identified in *Midler* and *Waits* only apply to *soundalikes*, and not to an *actual* voice.

At the end of the hearing, Priority made an oral Motion to Stay all proceedings pending Appellate review, which it intended to seek on the following week in light of the fact that the issue was solely one of law (and because trial was imminent). Burger's counsel argued vehemently (if not fatuously) that there was no question whatsoever that the Court of Appeal would deny a petition for writ of mandate within two days of receiving it, and that "justice delayed is justice denied." The trial court decided not to rule on the oral motion to stay, and set the motion for hearing on the date set for trial.

The next day, Priority filed a Petition for Writ of Mandate with the Court of Appeal, requesting an immediate stay of all proceedings, including the trial, which was set for three weeks later. The issue presented in the Petition was "whether an individual whose voice is not distinctive, is not widely known to a large number of people throughout a large geographical area, and has no commercial value can maintain a cause of action for common law voice misappropriation?"

Four days before trial was to commence, the Second District Court of Appeal, Division One, issued an Order staying all proceedings including trial, and requiring Burger to file an Opposition Brief within 15 days thereafter. Burger filed her Opposition brief, and Priority filed its Reply thereto.

Two days after the filing of Priority's Reply brief, the Court of Appeal issued an Order, stating very simply: "The petition is denied. The stay previously issued by this court is dissolved." The Order was signed by Justices Ortega and Mallano. The interesting part of the Order, however, was what amounted to, in essence, a dissenting opinion, which essentially said that Priority is correct on the law; why make the company go through a lengthy and expensive trial when there is only one cause of action against

it, and we all know that any judgment on that cause of action will be reversed.

Justice Miriam A. Vogel indicated the following:

> "I would issue an order to show cause.
> Priority Records, Inc. is named in only one cause of action (for Right to Privacy -- Appropriation"). In that cause of action, Geneva Burger ("an elderly widow") alleges that three other defendants (Corey Miller, Percy Miller, and Calvin Broadus) used Burger's voice (recorded during Burger's telephone conversations with her grandsons) on their commercial compact disc ("Skys the Limit"), that Burger's voice was identifiable (although she doesn't say by whom), and that from this use, Burger sustained damage to her peace of mind and dignity, as well as physical and emotional distress. In my view, Priority Records' motion for summary judgment should have been granted. As Burger concedes, her voice is neither widely known nor distinctive. It is undisputed that she is not a celebrity. For these reasons, she has no cause of action against Priority Records.[25]

From these and other cases, it is clear that a plaintiff must be some sort of celebrity or at least claim some degree of notoriety. For this reason, I would issue an order to show cause and consider the issue now so that Priority Records, a minimally involved defendant, is not dragged through a lengthy trial with its attendant expense—particularly since no other causes of action are alleged against this particular defendant.

Because it was clear to Priority that even the Court of Appeal agreed with its position on the law of voice misappropriation, but did not want to grant immediate, emergency relief pursuant to a writ of mandate, Priority filed a Petition for Review with the California Supreme Court. The Petition was ultimately denied by the Supreme Court, once again with a lone dissenter, who "would grant review."

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[25] *See* Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001)) 25 Cal.4th 387, 405 [celebrity]; Lugosi v. Universal Pictures (1979) 25 Cal.3d 813, 818 [the "tie-up" of a name to a saleable product]; Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463 [distinctive voice of a professional singer]; Motschenbacher v. R.J. Reynolds Tobacco Company (9th Cir. 1974) 498 F2d 821, 825, fn. 11 [the greater the fame or notoriety of the identity appropriated, the greater the economic injury, but there must be some proprietary interest to protect]; Waits v. Frito-Lay, Inc. (1992) 978 F.2d 1093, 1102 ["superstardom" not required to be "widely known"].)

As discussed above, the case proceeded to trial. Snoop Dogg settled out before trial. The jury found in favor of Master P, but rendered a verdict against Corey Miller and No Limit Records. Priority decided to settle the case in the middle of trial for a substantial sum of money. The judge later overturned the defense verdict in favor of Master P, after piercing P's corporate veil, and entered a Judgment against P for $25,000 in compensatory damages and $75,000 in punitive damages.

This case clearly proves the wisdom of Burger's counsel's earlier statement: "justice delayed" is, most definitely, "justice denied."[26]

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[26] *See supra* note 20.