TROUBLES OF STARDOM: THE RIGHT OF PUBLICITY EXAMINED IN THE LIGHT OF MIDLER'S CASE

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"To control the commercial use of his or her identity is the inherent right of every human being."[1]

– Bruce P. Keller (Assistant U.S. Attorney)

INTRODUCTION

Among the newest prowess of Generative AI is its capacity to recreate any voice for any purpose its user demands. Be it producing the latest song in the voice of a deceased crowd favourite singer or just plain old good morning voice notes. However, the issue of "stealing" someone's voice isn't restricted to AI platforms. The case of *Midler v. Ford Motor Co*[2]. examines the possibility of preventing the unauthorised exploitation of an individual's voice. However, it's not just a person's voice that has the potential to take away their sense of identity. For example, Section 3344 of the California Civil Code protects the unauthorised use of name, voice, signature, photograph, or likeness, all of which are considered attributes of one's identity. The right of publicity has been at the center of controversies in legal jurisprudence around the world. "The Legendary Miss M's" case thrusts open the scope of these rights paving the way to further developments, not just in the US, but also in other countries.

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RIGHT OF PUBLICITY – THE LEGAL BACKDROP OF MIDLER'S CASE

Personality rights, the Right to Privacy, and the Right to Publicity together constitute a genus of rights called *Celebrity's rights.* It becomes imperative to understand that a celebrity isn't just a famous actor or sportsperson as popular Parlance as would have us believe. Rather, when

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[1] Keller Bruce P, CONDEMNED TO REPEAT THE PAST: THE REEMERGENCE OF MISAPPROPRIATION AND OTHER COMMON LAW THEORIES OF PROTECTION FOR INTELLECTUAL PROPERTY,(1998) 11 (2) 401 Harvard Journal of Law & Technology <http://jolt.law.harvard.edu/articles/pdf/v11/11HarvJLTech401.pdf > accessed on17th August 2023

[2] Midler v. Ford Motor Co 849 F.2d 460

a person's identity has been appropriated without his consent or authorisation, for the purposes of publicity rights, he is qualified as a celebrity.[3] Celebrity rights have three facets[4] :

The Right of Personality – The perception that an individual has evolved for himself in society. Thus, it also extends to embrace the conduct that society expects of him based on his persona.[5]

Right to Privacy – This right isn't new to India. In fact, its supremacy as a fundamental right has been clearly laid down by the Judiciary at various points.[6] Simply put, "the right to be let alone".[7] The inevitable need for continued strengthening of this right will become evident if one takes a minute to remember Princess Diana.

Finally, **the Right of Publicity -** The elixir of Midler's case. Despite being considered a subset of celebrity rights, this right essentially resembles all the three types of rights that fall under the genus in consideration. It is an economic right that equips and individual to commercially exploit the publicity associated with the name of herself or an associated entity. Despite lacunae in existing intellectual property laws, publicity rights are taken to be a subset of intellectual property rights.[8]

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THE FACTS

The crux of the case as elaborated by Justice John T. Noonan in his opinion before the United States Court of Appeal for the Ninth Circuit is as follows. As a part of the 1985 "Yuppie Campaign", an advertising campaign directed by Young & Rubicam Inc., (henceforth referred to as Y&R advertising agency), for Ford Motor Company's Mercury Sable.

With the intention of targeting a particular group, the yuppies (young urban professionals) who were in college in the 70s, the Y&R advertising agency had popular songs from that period as a major part of their commercials. The agency made it a point to get a license to use the songs

[3] Martin Luther King Jr. Center for Social Change v. American Heritage Products Inc., 694 F.2d 674 (11th Cir 1983)
[4] Tabrez Ahmad, Satya Ranjan Swain, Celebrity Rights: Protection under IP Laws, (2011),Vol 16, pp 7-16, Journal of Intellectual Property Rights, < https://docs.manupatra.in/newsline/articles/Upload/78DD5FE8-5C07-4075-934D-6917CD6BE868.pdf> accessed on 12th August 2023
[5] Ibid.
[6] Right to Privacy Verdict - Justice K. S. Puttaswamy (Retd.) & Anr. Vs. Union Of India & Ors. AIR 2017 SC 4161
[7] Louis Brandeis D & Warren Samuel D, The Right to Privacy, (1890) 4(5), Havard Law Review, < http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy /Privacy_brand_warr2.html> accessed on 18th August 2023
[8] ibid (n – 4)

and their arrangements from the copyright proprietor to avoid falling on the wrong end of the US Federal Copyright statute. As a next step, they tried to have the actual performers rejuvenate the songs, despite which in ten of their nineteen commercials, the agency resorted to seeking the help of soundalikes. One such was the commercial featuring the song "Do You Want to Dance", originally sung by the celebrated chanteuse, Bette Midler. However, she wasn't going to let this unauthorised imitation slide by.

Bette was not welcoming to the idea of performing for commercials and when her manager conveyed the same, the persistent agency hired Ula Hedwig to fill up Miss Midler's spot. Hedwig had been a part of Miss Midler's backup group, the Harlettes for 10 years.

Once she was hired, the directors of the agency made it a point to instruct Miss Hedwig to "sound as much as possible like the Bette Midler record,". It is noteworthy that even at the stage of Miss Hedwig's audition the primary objective of the agency was to hire someone who could sound very much like, "The Divine Miss M" (the name of Miss Midler's album of which the song in question was a part). When the "Times hailed the singer" Miss Midler started hearing from those who heard the commercial that they thought it was definitely her doing the singing, so she reached out to the Court.

It's puzzling yet vital to understand that at this point, Miss Medler had not seen or heard the commercial herself. In fact, she would do so only at the time of her deposition, a year after the commercial was aired on television.[9] Miss 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.

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ISSUES

In a case as intricate as this, simultaneously brushing past multiple dimensions of the law, there was only one primary issue.

- The scope for protecting Miss Midler's voice from commercial exploitation without her consent.

Thus, Miss Midler did not seek to prevent the use of her song, nor did she claim damages for the same. The agency had already obtained the license by paying Bobby Freeman's publishing

[9] Sharon Chester-Taxin, Will the Real Bette Midler Please Stand Up? The Future of Celebrity Sound-Alike Recordings, (1992) 165, U. Miami Ent. & Sports L. Rev. <http://repository.law.miami.edu/umeslr/vol9/iss1/5> accessed on 10th August 2023

company $45,000 for said rights. Thus, federal copyright laws would have preempted her from making a claim.[10]

Similarly, Miss Midler could not claim a copyright violation. In the US, copyright protects "original works of authorship fixed in any tangible medium of expression".[11] Voice, as is common ideology, isn't an intellectual creation. Despite being more intimate than any creative work could be, voice just isn't the subject matter of Copyright. Sounds are not "fixed" within the meaning of the US statute.[12] The legal battalion of the legendary singer placed sole reliance on California Civil Code section 3344[13]. The essence of this section is that it provides for damages when the name, voice, signature, photograph, or likeness, of a person has in any manner been injured by another.

DECISION OF THE DISTRICT COURT

The district court expressed its discontent towards the activities of the defendants when it stated that they had taken what they couldn't buy and drew their comparison with an average thief. However, it found its opinion at crossroads with the law, when it held for a summary judgement in favour of the defendants, citing that there were no legal principles that could prohibit the imitation of Miss Midler's voice.

The legal standing behind the court's decision could be as follows:

- The precedent at that time was that attributes of personality, (voice, likeness or other identifiers) were not copyright protected.[14]
- According to section 114 B of the US Copyright Act, 1976, even when a performer tries to simulate the performance of another, the mere imitation of a recorded performance can't amount to the infringement of copyright[15] (The particular sounds of a recording may be protected by law but the creation of a separate recording with imitations not a matter of dispute).
- The California Civil Code would not support Miss Midler's case. The reason for this is, the agency had not used the image of the singer. The voice in the background of the

[10] ibid
[11] 17 U.S. Code § 102
[12] Midler, 849 F.2d 460
[13] CAL. CIV. CODE § 3344(g)
[14] Sim v H. J. Heinz Company Ltd [1959] EWCA Civ J0206-1
[15] Notes of Committee on the Judiciary, 17 U.S.C.A. ß 114(b)

commercial belonged to Miss Hedwig and not the plaintiff. "Likeness" within the meaning of the statute referred to visual image and not vocal imitation.

However, Miss Midler had not run out of legal backing and made an appeal rightly so.

THE 9TH CIRCUIT COURT

The Circuit court analysed two previous cases to identify the landscape within which Miss Midler's case fell to be able to deliver a proper judgement.

First was the case of *Sinatra v. Goodyear Tire & Rubber Co.*[16] In the instant case, whose facts are bizarrely identical to that of Miss Midler, Sinatra claimed that the same Y&R advertising agency had orchestrated a commercial for Goodyear Tire and Rubber Company where the female singers had imitated, not just the singing style of Miss Sinatra, but even her looks. In fact, the advertising agency admitted to taking on a singer who could best imitate Miss Sinatra. Talk about not learning your lesson! Miss Sinatra put forth two allegations. The agency had paved the way for unfair competition. The Court denied said contention reasoning that the singer has no competition with the tire company. Sinatra proceeded to claim that the song in its entirety had claimed a "secondary meaning" (a term that otherwise describes a product has become so affiliated with a specific product's maker that it has taken on a second meaning.[17] Say for example how the greeting "Have a Good Day!" reminds people of a certain biscuit product). However, copyright law was only concerned with the copyright proprietors' rights and the company had purchased the requisite rights.

Despite the eerie similarity in the facts of the 2 cases, they differed in what mattered, the issues raised. While Sinatra sought to illegalise the use of the song in question, Miss M sufficed in questioning the imitation of her style of singing. It was precisely this similarity that drove the courts to draw inferences from the case of *Lahr v. Adell Chemical Co.*[18] In this case, comedian and actor Bert Lahr contended that a mimic had impersonated his vocal comic delivery while voicing for an animated duck in a commercial for Lestoil. When the actor contended unfair competition citing the distinctive nature of his vocal delivery, his "pitch, accent, inflection, and sounds", the Court recognised the same.

[16] Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 717-718 (9th Cir. 1970)
[17] Time, Inc. v. Petersen Publ'g Co., 173 F.3d 113 (2d Cir. 1999)
[18] Lahr v. Adell Chemical Co. 300 F.2d 256, 259 (1st Cir. 1962)

While Sinatra had as much a valid case as Mr. Lahr did the essence of her case had been raised on the basis of her association with the song used in the commercial, "These Boots Are Made for Walkin"[19], Mr. Lahr had urged the courts to consider the distinct character of his vocal style without drawing links with any particular work.

In the instant case, the Court would have dismissed Miss M's claims if they were identical to that of Miss Sinatra. Similarly, given the singer's disinterest in performing in commercials, the court couldn't recognise any unfair competition as it had done in Mr. Lahr's case. However, the key issue here is the protection of Miss Midler's identity, the precedent in the aforementioned case could aid her.

In fact, the California statute did not take away the common law remedies available to Miss Midler. Moreover, the First Amendment which inter alia protects the freedom of expression and prohibits Congress from restricting said freedom of the press or an individual, doesn't protect an act of misappropriation. The media's use of a person's identity (likeness/sounds) would be permissible only for informative and cultural purposes, and not where the exploitation of such person's identity is as sole reason for the venture.[20]

Thus, the Court remanded the case for a jury determination, while remarking that the advertising agency had *misappropriated* what was not theirs when they purposively mimicked the voice of a well-known, established singer to help market their product. The imitation of voice in the instant case was nothing short of identity theft. The basis for such remand is that misappropriation isn't restricted to application in cases of copyright violation alone. Even in cases where the rights under copyright have not been violated, the allegation of misappropriation cannot be preempted.[21]

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THE DISTRICT COURT DURING THE REMAND TRIAL

Thus, the only question under consideration was to determine whether the impersonation of Miss Midler's voice was deliberate. The Court of Appeal had already answered it when it stated the agency wouldn't have asked Miss Hedwig to sound as much as possible as Miss Midler if it didn't attach considerable value to her voice.

[19] Sinatra, 435 F.2d 711
[20] Midler, 849 F.2d 460
[21] NBA v. Sports Team Analysis & Tracking Sys., Inc., 931 F. Supp. 1124 (S.D.N.Y. 1996)

Secondly, the jury had to determine what would be the fair value for Miss Midler's voice in the then market conditions, if at all the jury should be convinced that the imitation was wanton in nature. Despite getting $400,000, an amount nowhere near the 10 million that Miss Midler had claimed, the very award of damages was groundbreaking.

LEGAL IMPLICATIONS

The case has been rightly described as precedent-setting. The murky waters of identity-related rights were distilled to some extent from the findings in this case:

- A voice is as intimate and unique as a face. A singer "manifests" herself through her song and to impersonate her voice would therefore amount to pirating her identity. [22]
- Not every act of mimicking a song would be a violation of an individual's publicity rights. The singer/performer has to be well known, and the unconsented mimicking itself – deliberate and for commercial gains.
- The right of publicity of a living individual is associated with her right to property.[23] Every public figure has an exclusive right to commercialise the attributes of their personality, be it its name, likeness, or otherwise.[24]

Miss Midler's case encouraged many litigations with identical facts to approach the courts. The case of Tom Waits[25], wherein a similar allegation of voice imitation was made by Mr. Waits, he was awarded 2.475 million in damages, more than the 2.3 million he had originally claimed. From a legal standpoint, this case is important because, unlike the case of Milder, the commercial used an original tune that was never linked with Mr. Waits to begin with.[26]

Another such, expansion in the scope of publicity rights is the case of White v. Samsung.[27] In one of its commercials, Samsung one of the world's largest producers of electronic devices, had, in one of its commercials, featured a robot wearing a blonde wig, long gown and jewellery, all of which resembled Miss White. In addition, the setup was such that the robot was hosting

[22] Midler, 849 F.2d 460
[23]Hegel – An individual's property is the extension of his personality, Ahmad and Swain, (n – 4)
[24] Ahmad and Swain (n – 4)
[25] Waits v. Frito-Lay Inc., No. 88-06478 (C.D. Ca. May 9, 1990).
[26] Stamets, Russell A., Ain't Nothin' Like the Real Thing, Baby : The Right of Publicity and the Singing Voice, (1994), Vol. 46: Iss. 2, Article 7., Federal Communications Law <https://www.repository.law.indiana.edu/fclj/vol46/iss2/7 > accessed on 4th August 2023
[27] White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992)

a show similar to "Wheel of Fortune", the job Miss White was famous for. In fact, the defendants had referred to the commercial as a "Vanna White" ad.

In this case, despite there being no scope for the viewers to mistake the robot to be Miss White and the acts of the defendants not constituting a violation of Sec 3344 of the California Civil Code (no appropriation of name or identity), the court ruled in her favour, awarding a $403,000 in damages. This was because the entire series of advertisements when viewed together revealed that each advertisement was targeted to remind of a different celebrity. Thus there was a likelihood of confusion. Most importantly, the purpose of the advertisements was not parody, but to push the sales of the tech company's VCRs.

The fact remains that the rule in Midler's case has NOT been uniformly accepted as the US Supreme Court is yet to decide on the same. It's perhaps this departure in decisions[28] that is serving as a check against unfair litigation which may otherwise hinder every act of impersonation, no matter its cause.

VOICE HOW PROTECTED

A brief summary of how voice may be protected, attaching reference to the legal framework in the UK and US where so specified is depicted in the following table[29] :

Sno.	Tangibility	Relevant Right	Test for Application
1.	Recorded (or Captured Voice)	Copyright	It's the fact that the voice is fixed that gives it protection, NOT the distinctive nature of the voice.
2.	Uncaptured Voice (Either Live Mimicry / Digital spoofing as in the instant case)	(a) Passing – Off	Must not just remind of the person whose voice is being mimicked. The level of accuracy has to be such that the majority of those listening to it are "fooled".

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

[29] Dominic Watt, Peter S. Harrison and Lily Cabot-King, Who owns your voice? Linguistic and legal Perspectives on the relationship between vocal distinctiveness and the rights of the Individual speaker,(2020), Pp. 137-180., International Journal of Speech, Language and the Law, < https://journal.equinoxpub.com/IJSLL/article/view/17248 >, accessed on 14th August 2023

		(b) Right of Publicity	It is enough if the performance or spoof in question reminds one of the original performer. Causing an element of reasonable doubt unnecessary.
		(c)Fraudulent Misrepresentation	A party has been "tricked" into entering a contract due to the voice in question. A test of a distinctive nature may be necessary.

Table 1.

WHERE INDIA STANDS?

Similar to other nations, there are no specific statutes to protect these rights. However, the Indian Judiciary has not completely abandoned these rights. In the precedent-setting case of *ICC Development International Ltd v. Arvee Enterprises Ltd,*[30] the Court held the following major guidelines:

- An attempt to take away the right of publicity from the concerned individual to a non-human factor or a coordinator for example would be a violation of articles 19 & 21 of the Indian Constitution. (Right to Privacy)
- Such rights are vested in the people (individuals) and only they can benefit from it.

In the US, as early as 1953, Judge Frank had developed the right of publicity as a separate doctrine from the right against invasion of privacy. The same cannot be said about India where the former is said to stem from the latter. Given that the right of publicity is restricted to celebrities in India, the fact that it is based on privacy and not as a part of commercial property rights is a major setback.[31]

Legal Sources for Right of Publicity

Sno.	Law acting as Source	Provision affording protection

[30] ICC Development (International) .v. Arvee Enterprises & Anr, 2003 VIIAD Delhi 405
[31] Bhumika Indulia, A Cause Célébre : Publicity Rights in India, (2021) Vol. 6 Part 1 BLOG, <https://www.scconline.com/blog/post/2021/10/07/2021-scc-vol-6-part-1/amp/>, accessed on 19th August 2023

1. The Indian Constitution	Articles 19 & 21 (Right to Privacy)
2. The Trademarks Act 1999	Section 14 (Requirement of consent for using trademarks suggesting a connection to a celebrity)
3. The Copyrights Act, 1957	Not yet fully developed. But protection may be availed under Performer's rights and Moral rights (sections 38 & 57)
4. The Emblems and Names (Prevention of Improper Use) Act, 1950	Prevents the unauthorised use of names of national dignitaries and institutions.
5. The Competition Act 2002	Restricts untrue/misleading associations with individuals
6. The Advertising Standards Council of India	Not binding in nature. Provide self-regulatory standards.

Table 2.

Thus, in India, even though the right is still in its embryonic stage, the act of exploiting an individual's stardom for one's commercial gain could be illegal under one of these three heads, misappropriation of intellectual property, unfair trade practice or passing off.[32]

BOTTOM LINE

If one were to imagine herself in the shoes of a celebrity, whose name is being used without any barrier whatsoever as the title of a movie, which is, for the purpose of this illustration, a distasteful movie, the need to strengthen the right of publicity becomes crystallized.[33]

However, it's also imperative to remember that for the entirety of its life, the entertainment industry has seen many a number of talents mimicking the voices of numerous celebrities, some of them becoming celebrities themselves in the process. There are entire agencies dedicated to helping look-alikes and sound-alikes in every major city in the world. Thus, with hopes of protecting the rights of an individual, it also becomes important to avoid overprotecting them at the cost of the livelihood of many hopelessly dependent on it. This is probably what Justice Alex Kozinski, the circuit judge in the case of White[34], meant in his dissenting opinion when he said, "*Overprotecting intellectual property is as harmful as under protecting it".* He also

[32] Ahmad and Swain (n – 4)
[33] Inspired from the facts of Shivaji Rao Gaikwad v. Varsha Productions Civil Suit No.598 of 2014
[34] White, 971 F.2d 1395

stated that it's not just livelihoods, but also the very vibrancy of our culture that depends on creative freedom.

This is exactly why, it's now time to develop the scope of clearly laid down statutory laws to protect the interest of all the parties involved instead of continuing to place reliance on common law theories to solve every legal issue that technology births.[35]

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[35] P. Keller (n – 1)