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Misappropriation of an Instrumental Musician's Identity

Peter Pawelczyk

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ABSTRACT

In some cases, singers have been able to vindicate property rights in their identities when advertisers have featured sound-alike singers in commercials. However, there is no case law to support that an instrumental musician can protect herself from an advertiser imitating the characteristic sound of her playing. This Comment will explore whether and how the law should protect “musical identities,” particularly when the plaintiff is an instrumental musician rather than a singer.

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I. INTRODUCTION

Suppose a major music store, Guitarz,¹ advertises its Independence Day sale on television. The commercial shows a woman walking into a Guitarz store, picking a guitar off the rack, plugging it into an amplifier, and playing the “Star Spangled Banner” with sounds that are deliberately imitative of Jimi Hendrix’s famous Woodstock performance.² She skillfully captures the distinctive tone of Hendrix’s delivery of the first few bars of the Anthem and then begins to imitate Hendrix’s dive-bomber sounds with stunning accuracy. The commercial gives viewers a front-row seat, showing the unknown guitarist actually creating these sounds with her fingers on the guitar.

By featuring a guitarist imitating Hendrix’s sound in its commercial, has Guitarz misappropriated Jimi Hendrix’s identity? *Midler v. Ford Motor Co.*³ offers some support for such a theory.⁴ In *Midler*, the Ninth Circuit held that plaintiff Bette Midler made a showing, sufficient to defeat summary judgment, that the defendants had appropriated part of Midler’s identity by using another singer to imitate Midler’s voice for the soundtrack to a television commercial.⁵ The court qualified its holding, stating,

“We need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable. We hold only that

¹ Guitarz is a fictional store.

² See JIMI HENDRIX, *Star Spangled Banner*, on WOODSTOCK: MUSIC FROM THE ORIGINAL SOUNDTRACK AND MORE (Cotillion/Atlantic Records 1970). Jimi Hendrix’s instrumental rendition of the “Star Spangled Banner” at Woodstock was particularly notable at the time because of its controversial use of unusual sounds.

³ *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

⁴ Not all states recognize postmortem rights in a person’s identity. See, e.g., *Experience Hendrix LLC v. James Marshall Hendrix Found.*, 240 F. App’x 739, 740 (9th Cir. 2007) (holding for limited purpose of appeal that “no posthumous right of publicity existed in New York at the time of Jimi Hendrix’s death”). Jimi Hendrix is featured in the Guitarz hypothetical purely as an example of a musician with a particularly identifiable musical sound.

⁵ *Midler*, 849 F.2d at 463–64. Midler had turned down the defendants’ offer to sing for the commercial. *Id.* at 461. The song used in the commercial was “Do You Want to Dance?” written by Robert Freeman, which Bette Midler had sung on her 1973 album, “The Divine Miss M.” *Id.* The defendants had a license from the copyright holder to use the song. *Id.*

when a distinctive voice of a professional singer is widely known and deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”⁶

This Comment argues that an instrumental musician's personally identifiable sound, like a singer's unique voice, deserves protection from imitation by advertisers.

But is Jimi Hendrix's distinctive guitar sound, for example, comparable to a singer's voice? In *Midler*, the court relied heavily upon the relationship between identity and the human voice, stating, “A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. . . . The singer manifests herself in the song. To impersonate her voice is to pirate her identity.”⁷ Based on the court's reasoning, an instrumental musician's “sound” could be something entirely different from a singer's voice. A singing voice is closely related to an individual's speaking voice because the sound emanates from the person's unique vocal equipment, but sounds emanating from a musical instrument are related to the musician's identity in a more abstract way because the musical instrument is not part of the musician's body. Furthermore, almost all people are experienced at identifying other people by voice in everyday social interactions.⁸ However, identifying a musical soloist by sound is confined to the realm of musical appreciation, which, even for music enthusiasts, is a more limited aspect of daily life. Granted, many people can easily identify a musical group or a singer upon hearing a familiar recording. Yet, it is far more difficult to identify accurately a single instrumentalist on an unfamiliar recording, simply by the sound of her playing, without additional cues, such as a signature song or known associations with accompanying band members.

Despite the inherent difficulty in identifying a musician by the sound of her playing, a musician with a *particularly* identifiable sound should have a right to protect her “musical identity” from imitation by advertisers. For example, innovative musicians, such as Jimi Hendrix,

⁶ *Id.* at 463.

⁷ *Id.*

⁸ *See id.* (“We are all aware that a friend is at once known by a few words on the phone.”).

Eddie Van Halen, and John Popper,⁹ have devoted tremendous time and energy into developing unique musical personalities.¹⁰ It is unfair for advertisers to exploit their creative efforts.¹¹

Part II of this Comment evaluates the pros and cons of protecting musical identities and discusses the background of voice imitation cases. Part III examines the causes of action that could protect against imitation of musical identities and discusses the limits of protection. Finally, Part IV concludes that public policy supports protection of musical identities and that, in most cases, the plaintiff should assert claims for false endorsement, misappropriation, and the right of publicity.

II. BACKGROUND

Why should musical identities be protected from imitation by advertisers? Additionally, if musical identities should be protected, how can the law achieve this? This Part explores the policy reasons and the legal foundations for recognizing this type of protection.

A. Protecting Musical Identities

If a musician can create a personally identifiable sound, that musician should have some degree of control over her creation. However, in many cases it might be very difficult to recognize a sound as belonging solely to one musician. This section considers these competing problems and weighs the pros and cons of protecting musical identities.

1. Arguments in Favor of Protecting Musical Identities

A musician develops a distinctive sound through talent, creativity, and innovation. The law should reward creativity and innovation in the arts in order to promote the growth of artistic expression.¹² One way to reward creativity and innovation is to allow an artistic creator to

⁹ Eddie Van Halen is the influential guitarist for the rock band Van Halen. John Popper is the harmonica player and lead singer for the rock band Blues Traveler.

¹⁰ See Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333, 346 (1996).

¹¹ See Seth E. Bloom, *Preventing the Misappropriation of Identity: Beyond the "Right of Publicity,"* 13 HASTINGS COMM. & ENT. L.J. 489, 523–24 (1991).

¹² See Saadi, *supra* note 10, at 335.

control the use of her creations.¹³ When an artist has control of her work, she has a better chance to make a living in the arts.¹⁴ The law should reward a musician who creates a unique musical identity—i.e., characteristic “sound”—by allowing her to control the use of that creation.

The law should not permit advertisers to profit unfairly from the innovative efforts of musicians.¹⁵ An advertiser imitates a musician's sound because that sound in some way enhances the effectiveness of a particular advertisement.¹⁶ The advertiser benefits by using something that it took no part in creating.¹⁷ A musician who creates something original should be the one to control how it is used.¹⁸ Moreover, if the musician decides that the artistic value of the sound exceeds the present commercial value, the musician should be able to protect her sound from commercial exploitation.¹⁹

2. Arguments Against Protecting Musical Identities

Although protecting creative rights is a good thing, it must be recognized that musical creations are never one hundred percent original.²⁰ A musician creates her sound out of countless musical influences.²¹ Granting exclusive rights to a particular style of playing may give a musician more control than she has earned.²² For example, a famous musician who models her sound after the playing of a lesser-known musician perhaps does not deserve the right to claim ownership of a particular sound.²³ If the same famous musician were to sue an

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See Bloom, supra* note 11, at 523–24.

¹⁶ *See Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

¹⁷ *See Bloom, supra* note 11, at 524.

¹⁸ *See* J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5:50 (2d ed. 2007).

¹⁹ *Cf. Midler*, 849 F.2d at 462–63. As the court stated, “Midler did not do television commercials.” *Id.* at 462.

²⁰ *See* Jill A. Phillips, Note, *Performance Rights: Protecting a Performer's Style*, 37 WAYNE L. REV. 1683, 1694 (1991).

²¹ *See* Russell A. Stamets, *Ain't Nothin' Like the Real Thing, Baby: The Right of Publicity and the Singing Voice*, 46 FED. COMM. L.J. 347, 371 (1993).

²² *See id.*

²³ *See id.*

advertiser successfully for imitation of the musician's sound, the famous musician would receive a windfall, whereas the lesser-known influence would receive nothing.

Additionally, recognizing "musical identities" is problematic because they are difficult to identify with any significant degree of accuracy.²⁴ If a musician imitates the sound of another musician, listeners are likely to disagree as to whose sound is being imitated because musical identities are necessarily fluid, changeable, and imprecise.²⁵ Thus, some would argue that musical identities are unworkable from a legal standpoint because the law needs certainty;²⁶ otherwise, one cannot know what conduct is prohibited.

Further, some would argue that a prohibition against musical imitation would punish creativity in advertising.²⁷ Advertising certainly is an important form of communication. Thus, the law should give advertisers freedom to experiment with ideas in order to compete in the marketplace.²⁸ If one subscribes to the notion that "unfixed" musical sounds²⁹ defy the concept of ownership, then it would be unfair to deny advertisers the right to make use of such sounds.³⁰ It is possible, for example, for an advertiser to use a sound more creatively than the musician who inspired the advertisement.³¹ If the advertiser can show that it has used certain sounds in a truly artistic way, the First Amendment offers a valid defense and an appropriate safeguard.³²

²⁴ *See id.* at 372.

²⁵ *Cf. MCCARTHY*, *supra* note 18, at § 4:75 ("The crucial factual issue is whether the [playing] style is so distinctive that more than just a few aficionados could identify that sound as always linked with the plaintiff.").

²⁶ *See Stamets*, *supra* note 21, at 372.

²⁷ *See Bloom*, *supra* note 11, at 526.

²⁸ *See id.* at 527.

²⁹ *Cf. Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) ("A voice is not copyrightable. The sounds are not 'fixed.'").

³⁰ *See Stamets*, *supra* note 21, at 372.

³¹ *See Bloom*, *supra* note 11, at 526.

³² *See MCCARTHY*, *supra* note 18, at §§ 8:72, 8:121.

3. The Benefits of Protecting Musical Identities Outweigh the Costs

Despite the fact that musical sounds are often difficult to identify, the law should not permit advertisers to exploit musicians who succeed in creating sounds that are personally identifiable. Granted, musicians will always borrow from other musicians; this practice promotes the growth of musical expression. Musician 2 borrows from Musician 1; in turn, Musician 3 borrows from Musicians 2 and 1.³³ The chain of inspiration is endless. However, advertisers do not contribute greatly to this process.³⁴ When an advertiser borrows sounds from a musician, other musicians are far less likely to be inspired to expand upon the advertiser's statement because the advertiser's message is typically a commercial statement—"buy this product"—as opposed to an artistic statement. Thus, the advertiser does not hold a comparable place in the chain of shared musical expression. The creative musician inevitably replenishes the musical garden,³⁵ but only occasionally does the advertiser return what it borrowed from the musician.³⁶

Granted, a creative musician might incorporate sounds from a commercial into a new artistic work. However, preventing advertisers from exploiting the identities of musical performers does not endanger the overall landscape of musical expression; it only forces a slightly higher standard of originality on advertisers, thus appropriately limiting exploitation without interfering with the ability of musical artists to imitate sounds and influence one another in the name of artistic expression.

It is reasonable to incentivize musical creation at the expense of advertising. Artistic expression is inherently more valuable to society than commercial speech.³⁷ Musicians use sounds to communicate ideas that are capable of profound meaning, whereas merchants primarily use advertisements to propose a commercial transaction.³⁸ A

³³ See Phillips, *supra* note 20, at 1694.

³⁴ See Bloom, *supra* note 11, at 524.

³⁵ Cf. MCCARTHY, *supra* note 18, at § 5:50.

³⁶ See Bloom, *supra* note 11, at 524.

³⁷ See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (recognizing that commercial speech occupies a "subordinate position in the scale of First Amendment values").

³⁸ See *id.*

merchant does not lose its voice in the marketplace if prohibited from imitating musicians.³⁹ However, a musician's reputational value, like a singer's, may be damaged by having her sound used in an advertisement.⁴⁰ The law should protect musicians from commercial exploitation.

B. Voice Imitation Case Law

Because there is no case law for protection of instrumental musical identities, an instrumental musician suing an advertiser would have to rely on the cases involving "sound-alike" singers for support.⁴¹

1. Bert Lahr

One of the earliest voice imitation cases was the 1962 case of *Lahr v. Adell Chemical Co.*⁴² Bert Lahr was a professional entertainer, well known for his comedic voice.⁴³ The First Circuit Court stated, "According to the complaint the plaintiff . . . has achieved stardom—with commensurate financial success—on the legitimate stage, in motion pictures, on radio, television and other entertainment media throughout the United States, Canada and elsewhere."⁴⁴ The court seemed to acknowledge that Lahr had achieved substantial success in the entertainment field "because his 'style of vocal comic delivery which, by reason of its distinctive and original combination of pitch, inflection, accent and comic sounds,' has caused him to become

³⁹ The merchant's competitors are similarly limited. *Cf.* *Coca-Cola Co. v. Proctor & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) (recognizing that public policy is "well served" by allowing competitors to enforce false advertising claims). Additionally, freedom of speech ensures that an advertiser has a valid defense if it can show artistic value. *See supra* note 32 and accompanying text.

⁴⁰ *Cf.* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103–06 (9th Cir. 1992) (affirming damages award for injury to plaintiff's peace, happiness, and feelings and for injury to his goodwill, professional standing, and future publicity value).

⁴¹ *See generally* *Waits*, 978 F.2d 1093; *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000).

⁴² *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); *see* MCCARTHY, *supra* note 18, at § 4:77.

⁴³ *Lahr*, 300 F.2d at 257.

⁴⁴ *Id.*

‘widely known and readily recognized as a unique and extraordinary comic character.’⁴⁵

Lahr alleged that the defendants hired an actor to imitate Lahr’s voice in a television commercial for Lestoil household cleaner.⁴⁶ The commercial featured a cartoon duck with a comedic voice.⁴⁷ Lahr brought three causes of action—unfair competition, invasion of privacy, and defamation—alleging that “the ‘vast public television audience and the entertainment industry’ throughout the United States, Canada and elsewhere believed that the words spoken and the comic sounds made by the cartoon duck were supplied and made by the plaintiff.”⁴⁸ Lahr’s complaint alleged further “that this was misappropriation of the plaintiff’s ‘creative talent, voice, vocal sounds and vocal comic delivery’ and a ‘trading upon his fame and renown.’”⁴⁹ In addition, Lahr claimed that the defendants’ commercial injured his “reputation in the entertainment field, both because it cheapened plaintiff to indicate that he was reduced to giving anonymous television commercials and because the imitation, although recognizable, was inferior in quality and suggested that his abilities had deteriorated.”⁵⁰

The trial court had dismissed the complaint for failure to state a cause of action.⁵¹ On appeal, the First Circuit analyzed each of Lahr’s three claims individually to determine whether the case could continue on remand.⁵² First, the court determined that the trial court was correct to dismiss the invasion of privacy claim.⁵³ The court applied Massachusetts law and New York law, Lahr having agreed that the court need not consider the laws of any but those two states regarding his claims.⁵⁴ The court determined that Lahr did not have a claim for invasion of privacy under Massachusetts law because, at that time,

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting the complaint).

⁴⁹ *Id.* at 257–58.

⁵⁰ *Id.* at 258.

⁵¹ *Id.* at 257.

⁵² *Id.* at 258–59.

⁵³ *Id.* at 258.

⁵⁴ *Id.*

Massachusetts did not recognize invasion of privacy as a tort.⁵⁵ Additionally, the court determined that Lahr did not have a claim for invasion of privacy under New York law because the New York “right of privacy statute” covered commercial uses “of a party’s ‘name, portrait or picture.’”⁵⁶ The court was not willing to extend “name, portrait, or picture” to include “voice.”⁵⁷

Next, regarding Lahr’s defamation claim, the court took issue with Lahr’s “assertion that an inferior imitation damaged his reputation,” stating that it raised a “doubtful question.”⁵⁸ The court stated,

If every time one can allege, “Your (anonymous) commercial sounded like me, but not so good,” and contend the public believed, in spite of the variance, that it was he, and at the same time believed, because of the variance, that his abilities had declined, the consequences would be too great to contemplate. Occasional disparagement of public entertainers is the commonly accepted lot. Furthermore, there is no absolute test of excellence in dramatic performance. If what was attributed to the plaintiff was so manifestly inferior as to constitute actionable defamation, we hold he must be able to point to some identification with himself more specific than the remaining similarities. We know of no case which gives a plaintiff such liberty to put a cap on and at the same time say it does not fit.⁵⁹

Nevertheless, the court ultimately found Lahr’s defamation claim to be meritorious, stating, “A charge that an entertainer has stooped to perform below his class may be found to damage his reputation. Plaintiff’s allegations in this respect are not insufficient.”⁶⁰

Because the court held that Lahr had stated a cause of action for defamation, the court vacated the judgment of the trial court and remanded the case for further proceedings.⁶¹ However, the court also saw fit to “briefly” discuss the merits of Lahr’s unfair competition

⁵⁵ *Id.*

⁵⁶ *Id.* (quoting N.Y. CIV. RIGHTS LAW § 50 (McKinney 2012)).

⁵⁷ *Id.*

⁵⁸ *Id.* at 259.

⁵⁹ *Id.* (citation omitted).

⁶⁰ *Id.* at 258–59 (citation omitted). Lahr alleged that the defendant’s commercial injured his “reputation in the entertainment field . . . because it cheapened plaintiff to indicate that he was reduced to giving anonymous television commercials.” *Id.* at 258.

⁶¹ *Id.* at 258–60.

claim.⁶² The court conceded that “imitation is not unfair competition . . . if there is no confusion of source,” but where Lahr alleged that the defendants’ commercial caused a “mistake in identity,” the court was receptive to Lahr’s argument that the defendants were “stealing his thunder” by “copying his material” in such a way that viewers of the commercial believed they were “listening to him.”⁶³ The court went on to say,

Furthermore, we can hardly agree with defendant that “there is no competitive interest or purpose served and no real confusion of product which would lead to the appellant’s loss of opportunity in the entertainment field.” It could well be found that defendant’s conduct saturated plaintiff’s audience to the point of curtailing his market. No performer has an unlimited demand. . . . [W]e might hesitate to say that an ordinary singer whose voice, deliberately or otherwise, sounded sufficiently like another to cause confusion was not free to do so. [However,] Plaintiff here alleges a peculiar style and type of performance, unique in a far broader sense.⁶⁴

Thus, the court found that Lahr had stated a cause of action for unfair competition.⁶⁵

2. Nancy Sinatra

Eight years after *Lahr*, in *Sinatra v. Goodyear Tire & Rubber Co.*, the Ninth Circuit decided a voice imitation case where the plaintiff claimed unfair competition. The Ninth Circuit distinguished *Lahr* and affirmed summary judgment in favor of the defendants.⁶⁶ The plaintiff was singer Nancy Sinatra, who had become popular with her recording of the song, “These Boots Are Made for Walkin’,” which was written and copyrighted by singer-songwriter Lee Hazelwood.⁶⁷ The defendants, having first acquired a license from the copyright holder, used a recording of “These Boots Are Made for Walkin’,” sung by an unidentified female singer, as part of a “wide boots”-themed

⁶² *Id.* at 259.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 713, 715–16 (9th Cir. 1970).

⁶⁷ *Id.* at 712–13.

advertising campaign for Goodyear tires.⁶⁸ The defendants' television commercials featured "four girls dressed in high boots," along with footage of rolling tires, while the song "These Boots" played in the background.⁶⁹

Sinatra alleged that she had "so popularized" the song that her name was "identified with it" and that she was "best known by her connection with the song."⁷⁰ According to Sinatra's complaint, after an unsuccessful attempt to employ her for the Goodyear campaign, the defendants instead "selected a singer whose voice and style was deliberately intended to imitate" her voice and style.⁷¹ Sinatra alleged that the defendants used the imitative version of the song, while showing "fleeting views" of girls utilizing Sinatra's "mannerisms and dress," in order to "deceiv[e] the public into believing that [Sinatra] was a participant in the commercials."⁷²

The Ninth Circuit agreed with the trial court that there was "no audio or visual representation, holding out, or inference that any of the commercials embody the performance or voice of any particular individual or individuals" and therefore the defendants "did not mislead the public into thinking their commercials were the product of plaintiff or anyone else."⁷³

Sinatra argued that her claim ought to be decided based on the reasoning in *Lahr v. Adell Chemical Co.*, where the First Circuit found unfair competition based on confusion over the source of the singing voice and interference with the plaintiff's market.⁷⁴ However, the Ninth Circuit was not persuaded by Sinatra's reliance on *Lahr*.⁷⁵ The court stated, "There is no competition between Nancy Sinatra and Goodyear Tire Company. Appellant is not in the tire business and Goodyear is not selling phonograph records."⁷⁶ Additionally, the court found Sinatra's unfair competition claim to be factually different from

⁶⁸ *Id.*

⁶⁹ *Id.* at 712.

⁷⁰ *Id.*

⁷¹ *Id.* at 712–13.

⁷² *Id.* at 712.

⁷³ *Id.* at 713 (quoting trial court).

⁷⁴ *Id.* at 715–16; *see Lahr v. Adell Chem. Co.*, 300 F.2d 256, 259 (1st Cir. 1962).

⁷⁵ *See Sinatra*, 435 F.2d at 716.

⁷⁶ *Id.* at 714.

Lahr's claim for two reasons.⁷⁷ First, whereas "*Lahr* was decided on the basis of a singular uniqueness of quality of voice," Sinatra did not allege that "her sound was uniquely personal."⁷⁸

Second, whereas the defendants in *Lahr* "were not dealing in materials in which the defendants had a copyright," the sounds sought to be protected by Sinatra—"the music, lyrics and arrangement, which made her the subject of popular identification"—were licensed to the defendants for use in the tire commercials.⁷⁹ The court seized upon this second distinction as further justification for affirming summary judgment, stating that a state may not enforce its unfair competition laws when enforcement would "clash" with federal copyright.⁸⁰ The court added,

Here, the defendants had paid a very substantial sum to the copyright proprietor to obtain the license for the use of the song and all of its arrangements. The plaintiff had not sought or obtained [the right to control the use of the song]. The resulting clash with federal law seems inevitable if damages or injunctive remedies are available under state laws. Moreover, the inherent difficulty of protecting or policing a "performance" or the creation of a performer in handling copyrighted material licensed to another imposes problems of supervision that are almost impossible for a court of equity.

An added clash with the copyright laws is the potential restriction . . . upon the potential market of the copyright proprietor. If a proposed licensee must pay each artist who has played or sung the composition and who might therefore claim unfair competition-performer's protection, the licensee may well be discouraged to the point of complete loss of interest.⁸¹

Thus, at the time, the Ninth Circuit showed a profound reluctance to interfere with the domain of federal copyright law.⁸²

⁷⁷ *See id.* at 716.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 717 (citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231-33 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964)).

⁸¹ *Id.* at 717-18 (footnote omitted).

⁸² *See id.*

3. Bette Midler

Eighteen years after *Sinatra*, in *Midler v. Ford Motor Co.*, the Ninth Circuit held that Midler's claim against the defendant for imitating her voice was distinguishable from Sinatra's claim.⁸³ The court stated,

If Midler were claiming a secondary meaning to "Do You Want To Dance" or seeking to prevent the defendants from using that song, she would fail like Sinatra. But that is not this case. Midler does not seek damages for Ford's use of "Do You Want To Dance," and thus her claim is not preempted by federal copyright law. Copyright protects "original works of authorship fixed in any tangible medium of expression." A voice is not copyrightable. The sounds are not "fixed." What is put forward as protectible [sic] here is more personal than any work of authorship.⁸⁴

Unlike Sinatra, Midler was able to show that her voice was unique.⁸⁵ Thus, the court found Midler's claim to be more like Lahr's claim.⁸⁶ However, the court did not find unfair competition, stating, "One-minute commercials of the sort the defendants put on would not have saturated Midler's audience and curtailed her market. Midler did not do television commercials. The defendants were not in competition with her."⁸⁷

Midler marked a significant turning point.⁸⁸ The Ninth Circuit reversed the trial court's summary judgment ruling, allowing Midler to pursue her claim against the defendants for impersonating the sound of her voice in a commercial.⁸⁹ The court found that imitation for advertising purposes of a widely known singer's distinctive voice interferes with the singer's "proprietary interest" in her own identity.⁹⁰ The court's ruling signaled that a plaintiff suing over the use of a

⁸³ *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

⁸⁴ *Id.* (citation omitted) (quoting 17 U.S.C. § 102(a) (2012)).

⁸⁵ *See id.* at 463–64; *Sinatra*, 435 F.2d at 716.

⁸⁶ *Midler*, 849 F.2d at 462 ("Lahr alleged that his style of vocal delivery was distinctive in pitch, accent, inflection, and sounds."); *see Lahr v. Adell Chem. Co.*, 300 F.2d 256, 257, 259 (1st Cir. 1962).

⁸⁷ *Midler*, 849 F.2d at 462–63 (citing *Halicki v. United Artists Commc'ns, Inc.*, 812 F.2d 1213 (9th Cir. 1987)).

⁸⁸ *See MCCARTHY*, *supra* note 18, at § 4:78.

⁸⁹ *Midler*, 849 F.2d at 463–64.

⁹⁰ *See id.*

sound-alike singer in an advertisement might find broader protection than similar plaintiffs had found in the past when those plaintiffs had relied on such theories as unfair competition, invasion of privacy, and defamation.⁹¹ Starting with *Midler*, and continuing soon afterwards with *Waits v. Frito-Lay, Inc.*, and more recently with *Prima v. Darden Restaurants, Inc.*, singer-plaintiffs have instead sought protection under such theories as misappropriation, right of publicity, and false endorsement.⁹² However, despite the fact that some courts have recognized a unique singer's right to be protected from imitations by advertisers, it remains to be seen whether instrumental musicians can find similar protection.⁹³

III. THEORIES AND LIMITATIONS OF RECOVERY

The *Midler* case was a step in the right direction. This Part examines what causes of action might be available in a case against an advertiser for imitation of a musician's "sound."

A. False Endorsement—The Lanham Act

False endorsement under section 43(a) of the Lanham Act would be an appropriate way to protect against misuse of a musician's unique sound if an advertiser uses a sound-alike musician to deceive consumers into thinking that the musician endorses the product.⁹⁴ Not long after *Midler*, singer Tom Waits sued Frito-Lay for voice misappropriation and false endorsement.⁹⁵ Frito-Lay had advertised SalsaRio Doritos in a radio commercial, using a song written for the commercial, which "echoed the rhyming word play" of Tom Waits's song "Step Right Up," sung in the commercial by a singer imitating

⁹¹ Cf. MCCARTHY, *supra* note 18, at §§ 4:77, 4:78. In *Lahr*, the court reversed dismissal of Lahr's unfair competition claim. *Lahr*, 300 F.2d at 260. However, *Midler* shows that unfair competition offers limited protection if the singer is an artist who does not do commercials. See *Midler*, 849 F.2d at 462–63.

⁹² See discussion *infra* Part III. See generally *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler*, 849 F.2d at 460; *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000).

⁹³ See MCCARTHY, *supra* note 18, at § 4:75.

⁹⁴ Cf. *Waits*, 978 F.2d at 1106–11 (affirming that imitation of singer's voice was actionable under § 43(a) of the Lanham Act).

⁹⁵ *Id.* at 1097.

Tom Waits's distinctive vocal delivery.⁹⁶ The jury awarded Waits over two million dollars in damages, which the Ninth Circuit largely affirmed.⁹⁷ Waits's Lanham Act claim was premised on the theory that people hearing the commercial would think that he endorsed the defendant's product.⁹⁸ Although *Waits* involved a singing voice, distinctive instrumental sounds in a commercial might also mislead people to believe that a particular musician endorsed the advertised product.

1. Policy Behind Enforcement of False Endorsement Claims

The policy behind enforcement of false endorsement claims is to prevent unfair competition in order to protect consumers from inferior products.⁹⁹ If the law did not protect consumers from misleading endorsements, a company selling an inferior product could potentially gain an unfair advantage in the marketplace by tricking consumers into trusting an endorsement that does not exist.¹⁰⁰ The result then would be an increase in consumers receiving inferior goods. To avoid this result, the law allows a competitor to sue the false endorser.¹⁰¹ Thus, enforcement of false endorsement claims under the Lanham Act serves the policy of protecting consumers by deterring merchants from using false endorsements.

2. Protection of Musical Identities Under the Lanham Act

Section 43(a) of the Lanham Act “permits celebrities to vindicate property rights in their identities against allegedly misleading commercial use by others.”¹⁰² Does it follow therefore that the Lanham Act protects musical identities? *Waits* seems to suggest that

⁹⁶ *Id.* at 1097–98.

⁹⁷ *Id.* at 1098, 1112. The court vacated a portion of the Lanham Act damages as duplicative. *Id.* at 1112.

⁹⁸ *Id.* at 1106.

⁹⁹ See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:23 (4th ed. 2009).

¹⁰⁰ See *id.*

¹⁰¹ See *Waits*, 978 F.2d at 1110 (recognizing plaintiff's standing as a competitor because plaintiff and defendant “compete with respect to the use of the celebrity's name or identity”).

¹⁰² MCCARTHY, *supra* note 99, at § 28:15 (quoting *Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003)).

the answer is yes.¹⁰³ However, in *Waits*, Frito-Lay misled consumers by imitating Waits's singing voice.¹⁰⁴ It remains an open question whether use of "unfixed" instrumental sounds¹⁰⁵ could amount to false endorsement.

In order to find that a defendant has infringed upon a celebrity's identity by way of false endorsement under section 43(a) of the Lanham Act, most courts require a likelihood of deception regarding the celebrity's association with the defendant's product.¹⁰⁶ For example, in *Waits*, the trial court had instructed the jury to consider "whether 'ordinary consumers . . . would be confused as to whether Tom Waits sang on the commercial . . . and whether he sponsors or endorses SalsaRio Doritos.'"¹⁰⁷ The same instruction would be appropriate where a commercial features an imitation of an instrumentalist rather than a singer. However, because it is perhaps more difficult to link instrumental sounds to a particular musician than to link vocal sounds to a particular singer,¹⁰⁸ the instrumentalist might be hard-pressed to establish a likelihood of deception.

3. Likelihood of Deception

On the issue of whether Frito-Lay's commercial caused a likelihood of deception regarding Waits's endorsement, the trial court instructed the jury to "consider the totality of the evidence, including the distinctiveness of Waits' voice and style, the evidence of actual confusion as to whether Waits actually sang on the commercial, and

¹⁰³ See *Waits*, 978 F.2d at 1111 (holding that plaintiff's "evidence was sufficient to support the jury's finding that consumers were likely to be misled by the commercial into believing that Waits endorsed SalsaRio Doritos").

¹⁰⁴ *Id.* at 1106.

¹⁰⁵ Cf. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (describing a singing voice as not "fixed"). *Midler* did not include a Lanham Act claim.

¹⁰⁶ See MCCARTHY, *supra* note 99, at § 28:15. Section 43(a)(1)(A) of the Lanham Act prohibits a false representation which is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U.S.C. § 1125 (2012).

¹⁰⁷ *Waits*, 978 F.2d at 1110–11 (quoting trial court).

¹⁰⁸ See Stamets, *supra* note 21, at 372 ("Legal intrusion into the world of pure sound . . . is simply unworkable.").

the defendants' intent to imitate Waits' voice."¹⁰⁹ Consideration of these same factors would be necessary to determine whether use of instrumental sounds could cause a likelihood of deception. First, the musician must have a distinctive sound; otherwise, people would not be deceived.¹¹⁰ Second, evidence of people *actually* deceived certainly would tend to show a likelihood of deception.¹¹¹ Third, evidence of the defendant's intent to imitate the musician's sound would tend to implicate the defendant in an act of falsity.¹¹²

In the Jimi Hendrix hypothetical presented earlier, a false endorsement claim would differ from the false endorsement claim in *Waits*.¹¹³ In the hypothetical, Guitarz attempted to disclaim the element of falsity by clearly showing the woman creating the sounds on the guitar.¹¹⁴ Thus, despite the close imitation of Hendrix's distinctive sound, perhaps viewers would not be deceived into thinking that the commercial actually featured Hendrix's guitar playing. However, the plaintiff could still establish a false endorsement claim by showing that viewers would likely be deceived into thinking that the defendant had obtained a license to imitate Hendrix's sound, but this could be a difficult argument to prove because viewers may not think that an advertiser needs a license to imitate instrumental sounds.¹¹⁵

Overall, a false endorsement claim under section 43(a) of the Lanham Act could be an effective way for a musician to protect against misuse of her unique instrumental sound. Enforcement of such claims comports with the policy of deterring unfair competition by subjecting false endorsers to lawsuits.¹¹⁶ At the same time, because a

¹⁰⁹ *Waits*, 978 F.2d at 1111.

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See* MCCARTHY, *supra* note 18, at § 3:10.

¹¹³ *See Waits*, 978 F.2d at 1111 (affirming the jury's finding that the defendants actively deceived consumers).

¹¹⁴ *See supra* Part I.

¹¹⁵ *Cf. Fifty-Six Hope Road Music, Ltd., v. A.V.E.L.A., Inc.*, 688 F. Supp. 2d 1148, 1170 (D. Nev. 2010) (discussing the value of surveys, such as one that asked people whether a "t-shirt maker received permission from someone to put out [a] t-shirt" featuring Bob Marley's likeness).

¹¹⁶ *See* discussion *supra* Part III.A.1.

musician must prove a likelihood of deception,¹¹⁷ successful suits would be limited to situations where an advertiser imitates a musician with a particularly unique instrumental sound.

B. The Misappropriation Doctrine

In *Midler*, the court held that Midler could show that the defendants had misappropriated her identity by imitating her singing voice in a commercial.¹¹⁸ In *Waits*, the court affirmed the defendants' liability under the same theory.¹¹⁹ Perhaps an instrumental musician could rely on the misappropriation doctrine to protect against misuse of her musical identity. The biggest question is whether instrumental sounds can truly evoke the musician's identity.¹²⁰

1. Value Protected by the Misappropriation Doctrine

According to Professor J. Thomas McCarthy, the misappropriation doctrine "is usually invoked by a plaintiff who has what he considers a valuable commercial 'thing' which he sees another has taken or appropriated at little cost."¹²¹ McCarthy described the misappropriation doctrine as "a kind of residual legal theory which may prevail where the taking by defendant is egregiously 'unfair.'"¹²² The defendant's taking is unfair because the plaintiff has made a "substantial investment of time, effort and money into creating the thing misappropriated such that the court can characterize that 'thing' as a kind of property right."¹²³

2. Misappropriation—Singing Voices and Beyond

In *Midler*, the court reasoned that, by imitating Midler's singing voice, the defendants had potentially interfered with Midler's proprietary interest in her own identity.¹²⁴ The court established the

¹¹⁷ See *supra* note 106 and accompanying text.

¹¹⁸ *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988).

¹¹⁹ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1112 (9th Cir. 1992).

¹²⁰ See MCCARTHY, *supra* note 18, at § 4:75 ("The crucial factual issue is whether the [playing] style is so distinctive that more than just a few aficionados could identify that sound as always linked with the plaintiff.").

¹²¹ See *id.* at § 5:50.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988).

following elements for voice misappropriation: (1) the singer's voice is distinctive; (2) the singer is widely known; and (3) the defendant deliberately imitated the singer's voice to sell a product.¹²⁵ However, because the court relied so heavily upon the identifiable aspects of the human voice,¹²⁶ it is unclear whether the same elements would apply where a defendant imitates an instrumental musician.

A musician who works hard to create a uniquely innovative instrumental sound no doubt considers her sound to be a "valuable commercial 'thing.'"¹²⁷ Thus, some might consider it unfair for an advertiser to imitate the musician's sound. However, the misappropriation doctrine would fail to protect the musician-plaintiff if a court determines that a performer does not have a proprietary interest in "unfixed" instrumental sounds.¹²⁸ Potentially, a court could reason that imitation of a widely known musician's distinctive instrumental sound is not actionable because such sounds, unlike the human voice,¹²⁹ do not truly represent the musician's identity.

In the Jimi Hendrix hypothetical, Guitarz deliberately imitated Hendrix's distinctive guitar sound.¹³⁰ Hendrix certainly developed his sound through creative innovation. Thus, it may be unfair for Guitarz to use the sound of Jimi Hendrix without permission. The misappropriation doctrine applies if the "Jimi Hendrix sound" is a representation of Hendrix's identity and is therefore "a kind of property right."¹³¹ In the hypothetical, the woman closely imitated sounds from a very notable moment in twentieth century popular culture—Hendrix's controversial rendition of the national anthem.¹³² As a result, those sounds evoke an unmistakable image of Jimi

¹²⁵ *Id.* Although the *Midler* court did not use the term "voice misappropriation," the term appears prominently in *Waits*. See generally *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

¹²⁶ See *Midler*, 849 F.2d at 463.

¹²⁷ See MCCARTHY, *supra* note 18, at § 5:50.

¹²⁸ *But cf. Waits*, 978 F.2d at 1103–06 (holding that defendants, who had imitated Waits's voice and compositional style, had misappropriated the singer's proprietary interest in the sound of his voice).

¹²⁹ *Cf. Midler*, 849 F.2d at 463 (relying on the particularly identifiable aspects of the human voice).

¹³⁰ See *supra* Part I.

¹³¹ See MCCARTHY, *supra* note 18, at § 5:50.

¹³² See *supra* note 2 and accompanying text.

Hendrix. In such a case, the law should protect the musician's right to control the commercial use of his identity.¹³³ The misappropriation doctrine would be an appropriate way for a court to protect that right.

C. The Right of Publicity

In *Waits*, the court referred to voice misappropriation as “a species of violation of the ‘right of publicity,’ the right of a person whose identity has commercial value—most often a celebrity—to control the commercial use of that identity.”¹³⁴ However, right-of-publicity cases do not necessarily depend on the misappropriation doctrine.¹³⁵ For example, in *Prima v. Darden Restaurants, Inc.*, singer Louis Prima's widow sued Darden Restaurants for imitating Prima's singing voice in a television commercial.¹³⁶ The court held that Prima's widow had established a prima facie case of violation of her right of publicity in her late husband's identity.¹³⁷ Thus, it seems the right of publicity could potentially protect an instrumental musician's personally identifiable sound without depending on the misappropriation doctrine.

1. Policies Supporting the Right of Publicity

The right of publicity is considered a “natural right of property.”¹³⁸ A person shapes her own identity by the choices she makes in life. Thus, it is only fair that she be the one to control the commercial use of her identity.¹³⁹ Moreover, if she chooses to be a part of public life in some way, such as through the arts, the law should promote her contribution to society.¹⁴⁰ By protecting a person's commercial interest in her identity, the right of publicity provides incentive to those who contribute to public life.¹⁴¹

¹³³ *But see supra* note 4.

¹³⁴ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992).

¹³⁵ *See MCCARTHY, supra* note 18, at § 5:48 (“The right of publicity can now stand on its own feet, independent of its early legal origins.”).

¹³⁶ *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337, 341 (D.N.J. 2000).

¹³⁷ *Id.* at 350.

¹³⁸ *See MCCARTHY, supra* note 18, at § 2:1.

¹³⁹ *See id.*

¹⁴⁰ *See id.* at § 2:6.

¹⁴¹ *See id.*

2. The Issue of “Identification”

According to Professor McCarthy, the prima facie case for a right of publicity claim involves the following two elements: (1) validity—plaintiff owns an enforceable right in a person’s identity; and (2) infringement—defendant used some aspect of that identity without permission.¹⁴² McCarthy wrote, “To trigger liability for infringement of the right of publicity, the plaintiff must be ‘identifiable’ from defendant’s usage. . . . [However, t]he law has yet to define clearly the line between infringing ‘identification’ on the one hand and noninfringing ‘reminders’ and ‘hints’ on the other hand.”¹⁴³

In *Midler* and in *Waits*, the Ninth Circuit enforced the right of publicity through application of the misappropriation doctrine. However, in *Prima*, the district court instead simply applied the two “McCarthy elements” directly.¹⁴⁴ With either approach, identification will likely be the central issue in cases involving infringement via sounds.¹⁴⁵ In *Midler*, the court alluded to the issue of identification, referring to the fact that many people who heard the defendants’ commercial thought that Midler’s was the voice on the soundtrack.¹⁴⁶ However, in *Waits*, the court declined to express an opinion on whether it was essential that listeners believed Waits actually sang on the commercial.¹⁴⁷

In *Prima*, the plaintiff alleged that the voice on the commercial sounded like Louis Prima and that the defendant had imitated Prima’s voice.¹⁴⁸ If the *Prima* case had gone to trial, the court would have had to consider whether the sounds in the commercial truly evoked the identity of Louis Prima. If the plaintiff could have shown that Prima’s voice had distinctive qualities sufficient to distinguish his voice from

¹⁴² *Id.* at § 3:2.

¹⁴³ *Id.* at § 3:7.

¹⁴⁴ *See Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337, 349 (D.N.J. 2000) (citing McCarthy’s treatise).

¹⁴⁵ *Cf. Stamets*, *supra* note 21, at 372 (positing that identity through sound is an unworkable concept).

¹⁴⁶ *See Midler v. Ford Motor Co.*, 849 F.2d 460, 461–62 (9th Cir. 1988).

¹⁴⁷ *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1101 & n.3 (9th Cir. 1992).

¹⁴⁸ *See Prima*, 78 F. Supp. 2d at 350.

that of all other singers¹⁴⁹ and that defendant's commercial imitated those qualities, the plaintiff could have proven a violation of the right of publicity, assuming she owned that right.¹⁵⁰

Similarly, in the Jimi Hendrix hypothetical, whether the plaintiff asserts misappropriation or the right of publicity, the plaintiff would have to prove that Hendrix's persona was identifiable from the defendant's usage. Certainly, Hendrix had a distinctive guitar sound. Arguably, his sound was sufficiently distinctive as to distinguish him from all other guitar players.¹⁵¹ Yet, very few musicians are likely to have such a distinctive sound.¹⁵² Nevertheless, the law should recognize musical identities under the right of publicity where the musician has chosen to contribute to the arts by inventing a sound that people can recognize as personally identifiable.¹⁵³

D. Limitations on What Constitutes a Personally Identifiable Sound

If the law is to recognize musical identities, there must be some way of differentiating between sounds that are capable of identifying a particular person and sounds that are too abstract to warrant protection from unauthorized use.¹⁵⁴ This section examines the limits of protection for musical identities.

¹⁴⁹ Courts have yet to establish whether identification requires the plaintiff to be distinguished from *all* others. See MCCARTHY, *supra* note 18, at § 3:7.

¹⁵⁰ See MCCARTHY, *supra* note 18, at § 3:2.

¹⁵¹ *Cf. id.* at § 3:7 (“[A]ttributes of plaintiff such as a unique vocal style, a distinguishing setting, appearance and mannerisms, or a distinctive introduction by another may all, alone or in combination, serve to identify and distinguish the plaintiff from all others.”).

¹⁵² See *id.* at § 4:75 (suggesting that a plaintiff may find that “just a few aficionados” are able to identify instrumental sounds “as always linked with the plaintiff”).

¹⁵³ See discussion *supra* Part III.C.1.

¹⁵⁴ See Kathleen Birkel Dangelo, Note, *How Much of You Do You Really Own? A Property Right in Identity*, 37 CLEV. ST. L. REV. 499, 522 (1989).

1. A Performer's Musical "Style"

In *Waits*, the court indicated, in *dicta*, that imitation of Waits's "style" would not have been sufficient to infringe upon his identity.¹⁵⁵ A musician's "style" of singing or playing develops in part through inspiration from countless musical influences; thus, a musician's style of singing or playing is not likely to identify her to the exclusion of all other musicians.¹⁵⁶ However, "style" is a broad term, which inadequately describes what a performer with a particularly unique "sound" communicates through her instrument.¹⁵⁷ For example, an innovative lead guitarist develops a personally identifiable sound by having a distinctive tone and great dexterity, by using unique phrasing and unusual combinations of musical scales, and by integrating diverse musical influences. The more innovative the musician, the more her sound is personally identifiable. A personally identifiable "sound" is something more than mere "style" of playing.

2. Exclusive Rights to Musical Sounds

The Ninth Circuit recognized that Tom Waits effectively owned the right to exclude advertisers from imitating the sound of his unique voice.¹⁵⁸ However, some other courts have been reluctant to recognize exclusive rights to musical sounds.¹⁵⁹ In *Miller v. Universal Pictures*

¹⁵⁵ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100–01 (9th Cir. 1992). In closing arguments at trial, even Waits's attorney agreed that style was not protected. See *id.*

¹⁵⁶ See Phillips, *supra* note 20, at 1694.

¹⁵⁷ Cf. *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 257, 259 (1st Cir. 1962) (holding that the plaintiff had stated a cause of action for unfair competition by alleging that the defendants imitated the plaintiff's unique style of vocal comic delivery in a commercial featuring a cartoon duck with a comedic voice). The *Lahr* court used the term "style," perhaps for lack of a more precise word, to refer to a collection of very specific attributes of the plaintiff's voice; the court referred to Lahr's style of vocal comic delivery as a "distinctive and original combination of pitch, inflection, accent and comic sounds." *Id.* at 257 (quoting Lahr's complaint).

¹⁵⁸ See *Waits*, 978 F.2d at 1100, 1112. The court stated, "Waits' voice misappropriation claim is one for invasion of a personal property right: his right of publicity to control the use of his identity as embodied in his voice." *Id.* at 1100 (citing *Midler v. Ford Motor Co.*, 849 F.2d 460, 462–63 (9th Cir. 1988)).

¹⁵⁹ See, e.g., *Miller v. Universal Pictures Co.*, 201 N.Y.S.2d 632, 634 (1st Dep't 1960), *aff'd*, 180 N.E.2d 248, 248 (N.Y. 1961); *Shaw v. Time-Life Records*, 341 N.E.2d 817, 820 (N.Y. 1975) (citing *Miller*, 201 N.Y.S. at 634, *aff'd*, 180

Co., the Court of Appeals of New York affirmed the ruling of the Appellate Division that the defendant had not interfered with a property interest by imitating the sound of the Glenn Miller orchestra on records from the soundtrack to a film.¹⁶⁰ The Appellate Division stated, "Plaintiff never had, and certainly does not now have, any property interests in the Glenn Miller 'sound'. Indeed, in the absence of palming off or confusion, even while Glenn Miller was alive, others might have meticulously duplicated or imitated his renditions."¹⁶¹ Similarly, in *Shaw v. Time-Life Records*, the Court of Appeals of New York stated that bandleader Artie Shaw did not have a property interest in the "Artie Shaw 'sound.'"¹⁶²

Aside from the statutory issues in *Miller* and in *Shaw*,¹⁶³ a bandleader's distinctive sound is fundamentally different from the musical identity of a lead singer or featured soloist. A bandleader achieves a unique sound by combining different instruments and different players. Thus, the listener hears much more than the sound of the bandleader's artistry; the listener hears a sound comprised of the personal talents of each band member. Although the bandleader has directive control, the individual band musicians nevertheless control the physical act of producing sounds from their instruments.

By contrast, a lead vocal performance or featured solo stands out above the accompanying music. The lead singer's role, as well as the

N.E.2d at 248); see also MCCARTHY, *supra* note 18, at § 4:75 (stating that the New York cases, such as *Miller* and *Shaw*, are "complicated by the narrow definitions of the New York privacy statute and the general, but not uniform, unwillingness of New York state courts to venture beyond the statute."). The New York privacy statute prohibits the unauthorized commercial use of a living person's name, portrait, or picture. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 2012). However, the statute contains several exclusions, such as when an artist has conveyed certain rights to a work. See CIV. RIGHTS LAW § 51 ("[N]othing contained in this article shall be so construed as to prevent any person, firm or corporation . . . from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith.").

¹⁶⁰ See *Miller*, 201 N.Y.S.2d at 634, *aff'd*, 180 N.E.2d at 248.

¹⁶¹ *Miller*, 201 N.Y.S.2d at 634; see also MCCARTHY, *supra* note 18, at § 4:75 (quoting *Miller*, 201 N.Y.S.2d at 634).

¹⁶² *Shaw*, 341 N.E.2d at 820 (citing *Miller*, 201 N.Y.S. at 634, *aff'd*, 180 N.E.2d at 248).

¹⁶³ See *supra* note 159.

soloist's, is to invite the listener to hear a personal message which the performer communicates directly through her voice or instrument to the listener. Therefore, a featured soloist, more so than a bandleader, exhibits her identity through musical performance. The ever-looming question—in a case against an advertiser that used a “sound-alike” musician—is whether the plaintiff's instrumental sound can be perceived as something uniquely personal to the plaintiff, such that the law would recognize the plaintiff's right to claim that sound as her own.¹⁶⁴ Considering the difficulties in identifying an instrumental soloist by sound, it is likely that very few musicians could be successful in claiming such a right. Nevertheless, a musician with a particularly identifiable sound should be able to vindicate her rights against an advertiser who imitates her sound.

IV. CONCLUSION

The law should recognize that an instrumental musician with a uniquely identifiable sound has a proprietary interest in that sound as an aspect of the musician's identity.¹⁶⁵ By imitating the musician's sound, an advertiser infringes upon the musician's right to control the commercial use of the musician's identity.¹⁶⁶ Where the advertiser's use is deceptive, a claim for false endorsement could be appropriate.¹⁶⁷ In the Jimi Hendrix hypothetical, the element of deception is questionable.¹⁶⁸ Nevertheless, in light of such cases as *Midler*, *Waits*, and *Prima*, a plaintiff suing an advertiser that imitated the plaintiff's instrumental sound would want to assert a claim for false endorsement, as well as claims for misappropriation and violation of the right of publicity.

¹⁶⁴ See MCCARTHY, *supra* note 18, at § 4:75; see also Dangelo, *supra* note 154, at 522.

¹⁶⁵ Cf. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988) (recognizing misappropriation through imitation of a singer's voice).

¹⁶⁶ See MCCARTHY, *supra* note 18, at § 2:1.

¹⁶⁷ Cf. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106–11 (9th Cir. 1992) (affirming that imitation of a singing voice was actionable under § 43(a) of the Lanham Act).

¹⁶⁸ See discussion *supra* Part III.A.3.