

Thing 001001 (*The Yuppie Campaign*)

In 1958, Bobby Freeman wrote and recorded *Do You Want To Dance*. Many versions of *Do You Want To Dance* were subsequently recorded by artists, such as Cliff Richard and the Shadows, the Beach Boys, the Mamas and Papas, John Lennon, Jan and Dean, etc... In 1973, Bette Midler released the song *Do You Want To Dance* on the album *The Divine Miss M*.

In 1985, Ford Motor Company and its advertising agency, Young & Rubicam, made a series of nineteen television commercials for the Ford Lincoln Mercury car called Sable. The agency called the series *The Yuppie Campaign*. The aim was to make an emotional connection with Yuppies, bringing back memories of when they were in college. Different popular songs of the seventies were sung on each commercial. The agency tried to get the singers, who had popularized the songs, to sing. When the agency failed that endeavor, it had the songs sung by sound alikes.

Young & Rubicam selected for *The Yuppie Campaign* an edited version of Midler version of *Do You Want To Dance*. The agency contacted Bette Midler's manager, Jerry Edelstein. The conversation went as follows: "Hello, I am Craig Hazen from Young and Rubicam. I am calling you to find out if Bette Midler would be interested in doing ...?" Edelstein: "Is it a commercial? We are not interested." Midler had a policy to never authorize the use of her name, likeness, or music for any commercial endorsements in the United States. After Midler declined, Young & Rubicam sought out Ula Hedwig whom was one of the backup singers for Mi-

dlers for ten years. Hedwig was told by Young & Rubicam that "they wanted someone who could sound like Bette Midler's recording of [*Do You Want To Dance*]". She was asked to record a capella demo tape of the song. She sent in a tape and got the job. At the direction of Young & Rubicam, Hedwig then made a recording of *Do You Want To Dance* for the commercial. She was told to "sound as much as possible like the Bette Midler record", leaving out only a few "aahs" for the commercial. Young & Rubicam bought a license from Bobby Freeman the copyright holder to use the song.

In 1986, after the commercial of the Ford Lincoln Mercury car called Sable was aired, Midler was told by a few people that the commercial sounded like her record *Do You Want To Dance*. On April 29, 1986, Bette Midler filed a complaint and started an action against Ford based on unauthorized use of sound alike in the commercial to imitate her voice.

On July 20, 1987, the court case *Midler v. Ford Motor Company* took place at the United States District Court of California. Judge Ferdinand Fernandez held that:

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

The court concluded that there was no legal principle preventing imitation of Mi-

dlar's voice and so gave summary judgment in favor of Ford Motor Company.

Midler appealed this decision. She relied upon a 1984 California statute that protects celebrities. On June 22, 1988, the court case *Midler v. Ford Motor Company* took place at the United States Court of Appeals. Judge Noonan, held that:

"[...] This case centers on the protectibility of the voice of a celebrated chanteuse from commercial exploitation without her consent. [...] Neither the name nor the picture of Midler was used in the commercial. [...] At issue in this case is only the protection of Midler's voice. [...]"

"[...] The First Amendment protects much of what the media do in the reproduction of likenesses or sounds. A primary value is freedom of speech and press. [...] The purpose of the media's use of a person's identity is central. If the purpose is "informative or cultural" the use is immune; "if it serves no such function but merely exploits the individual portrayed, immunity will not be granted". [...]"

"[...] Moreover, federal copyright law preempts much of the area. "Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible". [...] If Midler were claiming a secondary

meaning to Do You Want To Dance or seeking to prevent [Ford] from using that song, she would fail [...]. 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"¹. A voice is not copyrightable. The sounds are not "fixed". What is put forward as protectible here is more personal than any work of authorship. [...]"

"[...] [W]e do not find unfair competition here. One-minute commercials of the sort [Ford] put on would not have saturated Midler's audience and curtailed her market. Midler did not do television commercials. [Ford] were not in competition with her. [...]"

"[...] California Civil Code section 3344 is also of no aid to Midler. The statute affords damages to a person injured by another who uses the person's "name, voice, signature, photograph or likeness, in any manner". [Ford] did not use Midler's name or anything else whose use is prohibited by the statute. The voice they used was Hedwig's, not hers. The term "likeness" refers to a visual image not a vocal imitation. The statute, however, does not preclude Midler from pursuing any cause of action she may

¹17 U.S.C. s 102(a)

have at common law; the statute itself implies that such common law causes of action do exist because it says its remedies are merely "cumulative". [...] The companion statute protecting the use of a deceased person's name, voice, signature, photograph or likeness states that the rights it recognizes are "property rights"². By analogy the common law rights are also property rights. Appropriation of such common law rights is a tort in California. [...] California will recognize an injury from "an appropriation of the attributes of one's identity"³. [...] [Ford] here used an imitation to convey the impression that Midler was singing for them. [...] Why did the [Ford] ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them? What they sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have sung the commercial in person. [...] A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed

that with the sound of a voice, "the other stands before me"⁴. A fortiori, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity⁵.

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 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. Midler has made a showing, sufficient to defeat summary judgment, that [Ford] here for their own profit in selling their product did appropriate part of her identity.

The court concluded that under California law, Midler stated tort cause of action and reversed and remanded for trial. Both Midler and Young & Rubicam brought motions for partial summary judgment. Young & Rubicam claimed that the soundtrack intended to imitate the record for which they had the rights and not her voice.

On September 20, 1991 the court case *Midler v. Young & Rubicam* took place at the United States Court of Appeals. Judge Noonan, held that:

²Id. s 990(b)

³Id. at 824

⁴D. Ihde, *Listening and Voice* 77 (1976)

⁵See W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on Torts* 852 (5th ed. 1984)

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