The Past, Present and Future of Copyright Protection of Soundalike Recordings

Kent Milunovich

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**Technical Services Librarian, Washoe County Law Library, Reno, Nevada.
The debate regarding whether copyright protection should be granted to soundalike musical recordings, while not new, remains unanswered. The Midler v. Ford Motor Co. decision illustrates this debate. The court decided Midler on a state piracy basis because although copy-

1 Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
right protection protects "original works of authorship fixed in any tangible medium of expression" under §102(a), a voice is not copyrightable outside of when it is fixed.\(^2\)

This article suggests that copyright law can cover soundalike musical recordings. First, the facts and holding of Midler will be discussed as well as the court's motivation for not deciding the case on a copyright infringement basis. Second, an historical background for copyright infringement of music follows. This section involves a discussion of copyright infringement, parody, and fair use as well as a summary of existing case law regarding each topic.

After an illustration of the dilemma of what copyright may protect involving the jazz-rock band Blood, Sweat & Tears, the focus shifts to what could have been done to protect Bette Midler's voice by means of copyright law. This section involves an analysis of why the Midler court declined to regard that case as involving infringement, parody, or fair use issues. Also encompassed within this section is a discussion of why copyright protection is necessary and proper for celebrity soundalike recordings.

The final section extends copyright protection to Midler's voice based on the "look and feel" concept associated with computer programming as well as the principles discussed in the Altai case.\(^3\) The argument in this area suggests that 1) because copyright protects an underlying work, a performance, and a recording, why not the "look and feel" of these elements?; and 2) that the Altai principles of abstraction, filtration, and comparison are applicable to a Midler-type situation.

Finally, a brief note about the scope of this article is in order. The broadcast analysis of soundalike recordings would encompass a discussion of digital sampling. However, because the author's perspective is that of a musician, the focus of the article is primarily on music and only incidentally, technology. Second, a soundalike recording, as defined for the purposes of the following discussion may involve not only a singer's voice, but also production techniques, the original composition and so forth.

II. THE MIDLER CASE: ITS FACTS, HOLDING AND DISCUSSION OF STATE PIRACY LAW

Young and Rubicam Advertising, Inc. (Y&R) was responsible for creating an advertisement for the Ford Motor Company. Y&R chose

“Do You Want to Dance” as a song to be used as background music for a Mercury Sable Commercial. Y&R purchased a copyright license from the copyright holder and paid $45,000 to the writer’s publishing company.4

Y&R intended to hire Bette Midler, an original performer of the song, to sing it for the commercial. Consistent with Midler’s policy never to authorize the use of her name, likeness, or music for any commercial endorsements in the United States, she declined.5

Y&R went ahead with the commercial and hired a singer who very successfully imitated Midler’s voice. Midler then sued Ford Motor Company and Y&R for the unauthorized use of her vocal sound in their commercial. At issue in the case was the protection of Midler’s voice. The district court described the defendants’ conduct as that “of the average thief.”6 The court nonetheless believed that no legal principle existed that prevented imitation of Midler’s voice and so gave summary judgment for the defendants.7 Midler appealed.

The appellate court, in discussing federal copyright law, first noted that “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.”8 Because Midler did not seek damages for Ford’s use of “Do You Want to Dance,” federal copyright law did not preempt her claim.9 Midler’s voice falls within the scope of California piracy law because California recognizes an injury from an appropriation of the attributes of one’s identity.10 In this way, the defendants used an imitation to convey the impression that Midler was singing for 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.11

A voice is something that is distinctive, personal, and is one of the most palpable ways identity is manifested. It is for this reason that the appellate court held that when a distinctive voice of a professional

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4 Midler, at 462.
5 Id. at 461.
6 Id. at 462.
7 Id.
8 Notes of Committee on the Judiciary, 17 U.S.C.A. §114(b) and Id. at 462.
9 Midler, at 462.
10 Id. at 463. California Civil Code §990(b) protects the use of a deceased person’s name, voice, signature, photograph, or likeness and states that it recognizes property rights. By analogy, the common law rights are also property rights. Appropriation of such common law rights is a tort in California.
11 Id.
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.\textsuperscript{12} Midler made a showing, sufficient to defeat summary judgment, that the defendants for their own profit in selling their product appropriated part of her identity.\textsuperscript{13}

III. Historical Background for Copyright Infringement in Music

A. Infringement of copyright for musical compositions

1. Elements of proof

\textit{Fermata International Melodies v. Champions Golf Club}\textsuperscript{14} lists the elements of proof for infringement for musical compositions: originality and authorship of the compositions; compliance with all formalities required to secure copyright; that plaintiffs are proprietors of the copyright; that compositions were performed publicly for profit by defendants; and that defendants did not receive permission from plaintiffs or their representatives, and a certified copy of the composition is prima facie evidence of the first three elements.\textsuperscript{15}

The policy underpinning such a test can be inferred as follows: Until the Copyright Act of 1976, record piracy was a serious problem because the performers and producers had no copyright that was infringed; likewise, the composer only had the right to the statutory roy-

\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{15} Id. Fermata involved the American Society of Composers, Authors, and Publishers (ASCAP) filing a copyright infringement action against Champions Golf Club, Inc. and its president. ASCAP alleged that Champions allowed the unauthorized public performance of ASCAP's copyrighted songs in a restaurant of the Champions Golf Club. Champions did not dispute whether ASCAP were the owners of the valid copyrights in the musical compositions in question. In addition, Champions did not dispute that the compositions were performed or that Champions did not receive permission from ASCAP.

The only issue was whether the compositions were performed "publicly" within §101 of the Copyright Act. A performance is "public" if "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." 17 U.S.C.A. §101.

The court held that the performance of copyrighted musical compositions at a private golf club before 21 members and guests was "public" for purposes of copyright infringement; that no waiver or estoppel existed by reason of the copyright owners' representative to provide a complete list of music that it licensed; that the officer of the club was jointly and severally liable for the copyright violation; and that statutory damages of $8,000 were warranted, together with an injunction and attorney fees.
alty and upon payment, had few other remedies. Along with the Copyright Act, the *Fermata* test serves to protect the creativity of composers and also draws a boundary between permissible and impermissible conduct of would-be infringers. Because the *Fermata* court only intended the test to cover compositions, another court would have to apply the test to cover performances and recordings. In absence of such an existing application, copyright law itself protects performances and recordings.\(^{17}\)

2. *Limitations of copyright protection*

Currently, copyright law protects an artist’s performance, an underlying recording, and a composition. However, copyright infringement can still be achieved because of limitations in the Copyright Act. The most important limitation upon sound recordings aside from the existence of the compulsory license of the composer’s work is the limitation upon exclusive rights.\(^{18}\) Whereas most copyright owners have all of the applicable rights listed in §106, owners of copyrights in sound recordings—that is, producers and performers—do not have the right to exclude others from performing the work (the recording) publicly.\(^{19}\) This means that once a sound recording is produced, purchasers are free to perform the recording without paying the producer or producers any fee (although the composer of the underlying work may have significant rights to royalties for each performance).\(^{20}\)

In addition, §114 limits the other exclusive rights in §106.\(^{21}\) For example, the rights to exclude others from reproducing the work or from preparing derivative works are limited severely in the case of sound recordings to producing actual physical copies. Thus, the owner of a sound recording can prevent others, for instance “pirates,” from actually reproducing a particular phonorecord or from preparing a derivative work by using the actual sounds of its recording in a rearrangement or other derivation using the actual sounds of the phonorecord.\(^{22}\) But the copyright owner cannot prevent others from simulating the re-

\(^{17}\) For example under §115(a)(1), a producer cannot duplicate another’s sound recording without the express consent of the owner of the copyright in the sound recording.
\(^{18}\) Miller & Davis, at 316.
\(^{19}\) Id. and 17 U.S.C.A. §106.
\(^{20}\) Id.
\(^{21}\) Id. and 17 U.S.C.A. §114.
\(^{22}\) Id.
cording or derivations "even though such sounds imitate or simulate those in the copyrighted sound recording." 23

3. Cases regarding infringement of copyright for musical compositions: Substantial similarity/access

Infringement of copyright for musical compositions is evident in cases that involve substantial similarity/access. In Selle v. Gibb 24 the Bee Gees hit "How Deep Is Your Love" was alleged to be an infringement of a song by a song by a Chicago-based composer called "Let it End." There, the court held that in order for the striking similarity between a copyrighted work and an allegedly infringing work to establish a reasonable inference of access to the copyrighted work, it must be shown that the similarity is of a type that will preclude any explanation other than that of copying. 25 In this case, the plaintiff Selle failed to show this. To win based on copyright infringement, Selle needed a great amount of substantial similarity and a good amount of access. Selle had neither.

In a second case, Tin Pan Apple, Inc. v. Miller-Brewing Co., Inc., 26 the rap group the Fat Boys declined to appear in a commercial and advertising campaign for Miller Brewing. Instead, a 30-second commercial featuring Joe Piscopo as the three Fat Boys lookalikes was aired on prime-time national television repeatedly. The Fat Boys then sued Miller Brewing, Piscopo, and Backer & Spielvogel (the advertising agency) for copyright infringement, false designation of origin, unfair competition, and state statutory and common-law claims. The court in this case, unlike in Midler, held that the privacy and publicity statutes prohibiting the use of a person's name, portrait, or picture for advertising or trade purposes without that person's consent does not extend to the use of soundalikes. 27

The Tin Pan court noted that the Midler commercial did not use Midler's name or picture. 28 The court further noted that although the

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24 Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984).
25 Id. See also Repp v. Webber, 947 F.Supp. 105 (S.D.N.Y. 1996), a similar case involving comparison of song structure and melodic content. In Repp, Andrew Lloyd Webber brought a counterclaim against the composer of the allegedly infringing song, "Till You," based on substantial similarity to his own composition, "Close Every Door." While acknowledging similarity in phrasing and melodic pitch in the two songs, the court found no substantial similarity based on harmonies of varying complexity as well as different meter and song structure. Id. at 113.
27 Id. at 827.
28 Id.
defendants were held to have misappropriated Midler's property and thus committed a tort under California law, New York Civil Rights Law does not yet extend to soundalikes.\textsuperscript{29} Therefore, the court granted the defendants' motion to dismiss under Rule 12(b)(6).

In \textit{Gaste v. Kaiserman},\textsuperscript{30} a French composer brought a copyright infringement action against a Brazilian singer/composer and the publisher of the song "‘Feelings.’" The court held that for purposes of the copying claim, sufficient evidence existed to show that the defendants had direct access to the copyrighted song or access could be inferred from the striking similarity between the songs.\textsuperscript{31} Evidence showed that the French composer's former employee responsible for distributing materials to foreign subpublishers testified that, in the 1950s, he gave a recording of the song and sent copies of sheet music to the publisher's owner. This finding undercut the publisher's argument that it was unaware of the existence of the French song. Thus, this case can be distinguished from \textit{Gibb} because here, evidence of access to the song is clearly evident; in \textit{Gibb}, it was not.

Another case in the area of substantial similarity and access is one in which the plaintiff establishes neither of the two elements. In \textit{Black v. Gosdin},\textsuperscript{32} a copyright owner of a song brought an action against alleged infringers under the Copyright Act. The alleged infringers’ motion for summary judgment was granted because the copyright owner failed to establish substantial similarity and access. The two songs had the same idea or theme and that was all. An idea alone is not protected by copyright.\textsuperscript{33} The court further noted that in country music, there exist a finite number of "'stock'" themes, so a certain amount of similarity follows inevitably from the choice of such "'stock'" themes as a jukebox, a bar, a jilted lover, and so forth. This series of cases demonstrates the importance of substantial similarity and access to any possible copyright protection of soundalike recordings.\textsuperscript{34}

\textbf{4. Summary}

The \textit{Fermata} test, the Copyright Act and the limitations regarding production, and the substantial similarity/access cases thus serve as various sources through which copyright infringement in music may be

\textsuperscript{29} Id. at 826.
\textsuperscript{30} Gaste v. Kaiserman, 863 F.2d 1061 (2nd Cir. 1988).
\textsuperscript{31} Id.
\textsuperscript{33} 17 U.S.C.A. §102(b).
\textsuperscript{34} Id. at 1288, 1289.
The decision by a court as to which one is most appropriate depends upon the particular facts of a given case as well as whether a composition (underlying work), performance, or recording is involved.

B. Fair use and the protection of commercial interests in music

1. Fair use and music

The §107 fair use test is useful for the purpose of explaining how commercial interests in music can be protected in general and it involves four factors: 1) the nature of the copyrighted work (creative, imaginative, original, substantial investment of time and labor); 2) the purpose and character of the alleged infringing use (commercial, non-profit); 3) the extent of the copying (measured with respect to the copyrighted work); and 4) the effect of the alleged infringing use on the potential market of the copyrighted work. Where a claim of fair use is made, a balance must be struck between the benefit that the public will derive if the use is permitted and the personal gain that the copyright owner will receive if the use is denied.

When applied to parody and burlesque, the test for fair use emphasizes purpose and intent over proportional, quantitative, or even qualitative measurements. The test is not simply how much was taken but, rather, the purpose served by the taking and the reasonableness of the taking in light of the purpose. The meaning of substantiality as a measure of infringement in parody or burlesque has become equivalent to "excessive." The test of substantiality is whether the taking is substantial in light of all of the circumstances, one of which would be whether the challenged work was a parody. For purposes of this article, parody is "a musical work in which the style of an author or work is closely imitated for comic effect or in ridicule," and burlesque is "a dramatic work that seeks to ridicule by means of grotesque exaggeration or comic imitation."

35 17 U.S.C.A. §107. Under §107, the "fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching...scholarship, or research, is not an infringement of copyright."
37 MILLER & DAVIS, at 361.
38 Id.
39 Id. at 363.
40 Id. at 363.
42 Id. at 189.
2. Musical parody and fair use: Parody cases

In *Fisher v. Dees*, radio personality Rick Dees performed the parody “When Sonny Sniffs Glue,” which was intended to poke fun at “When Sunny Gets Blue” and the unique vocal range of the singer and thus could qualify as parody for purposes of the fair use doctrine. A presumption against the application of the fair use doctrine for a work that is of a commercial nature can be rebutted by showing that the parody does not unfairly diminish the economic value of the original work.

Dees successfully rebutted this presumption because his commercial parody was not primarily an attempt to capitalize financially on the plaintiff’s original work. This case is somewhat unlike *Midler* in that whereas *Midler* involved identical themes, in Dees only 6 of 38 bars were similar. *Dees*, therefore, supports the proposition that soundalike musical recordings can be linked to fair use as outlined in the Copyright Act, and that the potential exists for copyright protection of soundalike musical recordings.

Finally, *Acuff-Rose Music, Inc. v. Campbell*, provides an in-depth discussion of fair use, especially the fourth factor, effect on the market. In *Campbell*, the holder of the copyright of the song “Oh, Pretty Woman” sued 2 Live Crew for copyright infringement. 2 Live Crew’s song “Pretty Woman” was a parody of “Oh, Pretty Woman.” The allegedly infringing version began with the same lyrics as the original, but became a play on words, substituting predictable lyrics with shocking ones, and transforming the physical attributes of the subject woman from a pleasing image of femininity to a woman who was bald-headed, hairy, and generally repugnant. In doing so, 2 Live Crew sought to make a derisive demonstration of how bland and banal the original song was to the parodying group.

The district court held that for purposes of determining fair use, the potential market of the copyrighted song was not affected by the satiric versions, because the markets for the respective versions were different, even though the copyright holder claimed that its ability to produce a satiric version was impeded and that the impact of the crit-

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43 Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).
44 Id. and 17 U.S.C.A. §107(1).
45 Dees, at 433.
46 Id.
48 Id. at 1151.
49 Id.
icism implicit in the satiric version would hurt the original. The court further noted that although the song name was virtually the same and key lyrics were identical, and the same guitar refrain and opening drum beat, melody, and chorus were used, the 2 Live Crew version appropriated no more from the original than was necessary to reasonably accomplish its parodic purpose. Therefore, Campbell and 2 Live Crew engaged in fair use under §107.

The Court of Appeals reversed and remanded, based on finding that 2 Live Crew’s parody was not fair use of the copyrighted song. The Supreme Court reversed and remanded that decision, holding that commercial character of a song parody did not create a presumption against fair use. Justice Souter, writing for the Court, noted that no such evidentiary presumption was available to address the first fair use factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody was a fair one. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Roy Orbison original, considering the parodic purpose of the use.

3. Summary

These two cases underscore the validity of the concepts previously discussed regarding fair use and commercial interests. For example, the courts in the two cases emphasize purpose and intent over proportional, quantitative, and qualitative measurements. In Campbell, although the two songs in question were similar, the extent of the appropriation was reasonable to serve the parodic purpose. Dees and Campbell, thus, support the importance of intent and purpose in cases regarding musical parody.

IV. THE DILEMMA OF COPYRIGHT PROTECTION THE “BLOOD, SWEAT & TEARS” CASE STUDY

The theme of this section might as well be “where do we draw the line” for copyright protection of soundalike recordings and just what exactly should be copyrightable? Voices? Production techniques?
Instrumentation? In the late 1960s and early 1970s jazz-rock invaded popular music with the likes of the Electric Flag, Chicago, and Blood, Sweat & Tears as well as their more bombastic and derivative descendants, Ides of March and Chase. The music of Blood, Sweat & Tears can be used as a model to analyze the various problems in protecting different musical elements.

Example 1: Protection of the Song as a Whole

On the first Blood, Sweat & Tears (BS&T) album is a song penned by Harry Nilsson called "Without Her." The BS&T version was a jazz-tinged, nightclub-style number with the trumpeter and saxophonist trading four-bar solos. The Herb Alpert version released a year later in 1969 had no solos and added an orchestral arrangement, but otherwise had the same tempo, the same restrained lead vocal, and was approximately the same length. Was there copyright infringement? No, because the two versions were not substantially similar, the BS&T version was not an original song, and the singers' voices lacked the same timbre, unlike in Midler.

A more challenging and intriguing example is England Dan & John Ford Coley's version of Todd Rundgren's "Love Is the Answer" in the late 1970s. Except for a saxophone part, the arrangement is the same, the instrumentation is the same, the tempo is the same and Dan Seals' phrasing and delivery closely emulates that of Todd Rundgren's original, note for note. Copyright infringement? Here, we may be in Midler territory.

In Rundgren's original, with his band Utopia, the sounds are fixed in a tangible medium of expression. Rundgren wrote the song and but for Rundgren's own vocal, Seals might not have independently chosen to phrase the vocal in the manner that he did. Further, unlike in Gibb, both substantial similarity and access can be shown. Rundgren could argue that the derivative version was not at all an "original, work of authorship fixed in a tangible medium of expression." Or Rundgren could do what he apparently did; collect songwriter's royalties from the newer version, a Top 10 hit. Protection of the song as a whole, then,
requires an examination of the individual creative and artistic elements in each song and an analysis of similarity and access.

Example 2: Protection of the Artist's Voice

For their second album, big-voiced lead singer David Clayton-Thomas joined BS&T. Though reviled by The Rolling Stone Album Guide as a "scenery-chewer of a singer," at the time, his distinctive vocal style fit the music and was often emulated by other artists for better or worse. When Jeff Beck was in his fusion mode, he brought in Bob Tench, a similar-styled lead singer. With Jim Peterik, another such vocalist singing lead, his band Ides of March made "Vehicle" a number two hit in 1970 Copyright infringement? No. Although access may be shown, the comparisons collapse at the substantial similarity stage. A vocal style may be appropriated as one's own. Tony Bennett and countless other vocalists have used Frank Sinatra's vocal style. Jason Scheff's ballad phrasing is eerily similar to that of the man he replaced with Chicago, Peter Cetera. In addition, infinite examples of such vocal similarities exist in popular music. To allow a voice to be protected demands a case-by-case analysis and a point-by-point examination of the facts as they relate to the Fermata test.

Example 3: The David Clayton-Thomas Lawsuit

In 1989, Milli Vanilli released a song called "All or Nothing," which has a melody that is almost identical to BS&T's "Spinning Wheel." Not surprisingly, about six months later, David Clayton-Thomas sued Milli Vanilli for infringing use of his composition. In the absence of an out-of-court settlement, there is no published record of the case.

What argument does Clayton-Thomas have? The tempo, meter, structure, style, composition, and presentation are sufficiently similar to support a finding of copyright infringement. An argument against substantial similarity would be based on the songs' lyrics being dissimilar as well as the Milli Vanilli version lacking a horn arrangement. Access would have to be proved in absence of an overwhelming amount of substantial similarity.

A §107 fair use argument operates against Milli Vanilli. First, the original version was creative, imaginative, and represented a substantial investment of time and labor made in anticipation of a financial return. Second, the purpose and character of the alleged infringing use is commercial in motivation. Third, the copying or paraphrasing use is commercial in motivation. Third, the copying or paraphrasing of melody is extensive in terms of quality and should, therefore, not be considered reasonable. The weakest argument for the plaintiff is the fourth factor; Milli Vanilli’s song never hurt the market of the copyrighted song, because each group’s music catered to different musical tastes.

To synthesize the points made in this section, the question of “where to draw the line” requires an answer that addresses what is being copied, how much of it is copied, how similar are the recordings, and does the alleged infringing party have access? Based on these examples, a plaintiff will most likely win if the song is appropriated by an artist who releases an unrelated but substantially similar-sounding recording and if access may be shown with no fair use. Protection of an artist’s vocal style will not be protected. But what was at issue in Midler was not Midler’s vocal style, but the instantly recognizable timbre of her voice. Whether vocal timbre should be protected merits further discussion.

V. THE EXTENSION OF COPYRIGHT PROTECTION TO A MIDLER-TYPE SITUATION

A. Why Midler is not currently covered by copyright law

The court in Midler did not discuss copyright issues beyond noting that voice is not a tangible medium of expression. However, inferences can be drawn that the court did not find the facts to fall within the scope of copyright infringement issues, fair use, and parody. To understand how copyright law can cover a Midler-type situation, an examination of why the Midler court ruled as it did is necessary.

1. Infringement of copyright for musical compositions

The Fermata test does not apply to the protection of a voice because Fermata addresses copyright of musical composition—the appropriation of an artist’s work—whereas in Midler the focus was on appropriation of an artist’s identity or voice. Regarding the relevant

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63 Id.
64 Midler, at 462.
case law, the court in Tin Pan Apple explained that the privacy and publicity issues do not relate to soundalikes. Rather, only a person's name, portrait, or picture is covered. The substantial similarity/access cases generally discuss what is appropriated rather than how; that is, something tangible is involved to show whether a defendant appropriated an original artist's work. A tape or piece of sheet music can help illustrate what has been taken. This is difficult to demonstrate in Midler. How can someone prove direct access to a voice for example? The problem to date in Midler has been that a voice is not copyrightable.

2. Fair use and parody

Fair use cases regarding music involve parody as suggested earlier. Midler involved using an artist's identity in a commercial context to promote a particular product. The advertising agency tried to use and take advantage of Bette Midler's existing popularity. However, this is not what parody is about. Parody involves an artist using a new work to make fun of an existing work. Thus, Midler does not fall within the scope of commercial parody.

B. Why copyright protection is necessary and proper for celebrity soundalike recordings

1. Secondary meaning

The concept of secondary meaning is rooted in trademark law, not copyright law. A descriptive term is ineligible for trademark protection unless it acquires secondary meaning. That is, a descriptive word such as "green" is not subject to trademark protection unless it acquires secondary meaning. That is, a descriptive word such as "green" is not subject to trademark protection if used in the phrase "green onions." However, if a company named "Green" sells onions as "Green onions," people who purchase the product may, over time, associate the words together. This association on the part of buyers is an indicator of secondary meaning and loss of descriptiveness. Such

65 See footnotes 26 through 29 and related text.
66 See section IIIA3.
67 Id. at 461.
68 Id.
69 MILLER & DAVIS, at 163.
70 Id. at 164.
71 Id.
72 Id.
73 Id.
association is not obtained immediately, but rather evolves over time as the product is used and as the investment and effort regarding the making and selling of the product takes place.\textsuperscript{74}

The problem of protecting an artist’s voice has been that it is not fixed and in a tangible medium of expression under copyright law. Now, however, the concept of secondary meaning should protect Bette Midler’s voice in a copyright context. A distinctive celebrity’s voice, such as that of Bette Midler becomes instantly recognized over time because of the time and effort put into the recording process by the artist. As with the “Green onions” example, a distinctive voice can be easily associated with particular songs by the record-buying public.

Under the Lanham Act, it is not important that a mark be descriptive as well as distinctive.\textsuperscript{75} The only requirement is that a mark be primarily distinctive rather than primarily descriptive.\textsuperscript{76} A voice can become primarily distinctive to an audience that regularly listens to songs that are regularly released by the artist and that are often played by a radio station. A distinctive voice can become fixed over time because of secondary meaning. The distinctiveness of the artist’s voice and the subsequent audience association should fall within the scope of copyright law to protect an artist’s creativity and to guard against misappropriation of that artist’s work and labor.

2. Why protection of a celebrity soundalike recording is particularly compelling

Not every singer’s voice is worthy of copyright protection. The protection of a voice that is not familiar to the public is not as worthy of protection as one that is, such as that of Bette Midler. Several reasons exist for protection of a distinctive, recognizable voice: First, the Copyright Act exists to reward creativity, not to punish a commercially successful vocalist by allowing others to appropriate her sound against her will and for their own commercial use. Second, to use a celebrity voice in a context (a commercial) other than that originally intended by the artist (an album, a song) raises moral issues. The alleged infringer’s conduct risks prejudice of the original artist’s honor and reputation. Just as colorization may distort an original director’s work against his will, so too can a celebrity’s voice, taken out of the original intended medium potentially distort the audience’s view of that artist’s work. Third, the

\textsuperscript{74} Id. at 165.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 166.
media or another such entity should not be permitted to exploit an individual's identity, but merely should use an identity for informative or cultural reasons. These three reasons apply to a celebrity performer because she can potentially suffer economic loss and damage to her reputation. These factors are less likely to be evident with an unknown vocalist because the public is less likely to establish secondary meaning with that artist's voice. Therefore, protection of an original celebrity artist's voice and work should be protected by copyright law.

3. When is protection appropriate?

Protection is appropriate when 1) enough of the artist's past work is in the public domain such that a sufficient audience exists to recognize that artist's voice and work; 2) when "celebrity" has been established (Through album and concert sales, television appearances), copyright protection of a voice should exist at the time any new single or album is released; and 3) the time at which secondary meaning can be ascertained. Billy Ray Cyrus is an example in which this process was accelerated because his fame and fortune arrived seemingly overnight.\(^7\) Cyrus's voice and "Achy Breaky Heart" song are now instantly recognizable.\(^8\) If a commercial were to have been shown on television involving the song and a Cyrus soundalike two weeks after the original release date of the song, infringement would exist under these three factors.\(^9\) The conditions were satisfied that soon. The timing of copyright protection by a court or jury would depend upon the particular facts of the case and an analysis of the voice, celebrity status, and audience association issue regarding a given artist's voice and work.

4. Factors that help make copyright infringement actionable

A related question is what factors assist in making copyright infringement actionable? One way to examine this question is to look at the granting of permission and the resulting consequences. If Ford Motor would have asked for Bette Midler's permission and she had granted it, then no copyright infringement problem would have been present. If, on the other hand, Midler had refused, Ford's subsequent commercial would have constituted willful infringement. If Ford did not ask for permission at all, as happened here, and then Ford made the commercial, this is not willful infringement but rather is regular infringe-
The second scenario (permission requested/refused) is the most egregious conduct of the three and would result in the greatest monetary award for Bette Midler. The reason, in part, is that in the third scenario, Midler did not manifest her disapproval of the appropriation of her voice so the wrong is not as great as if she had refused and Ford had gone ahead with the ad anyway. Although intent of the alleged infringer is not a primary consideration in a fact-finder’s determination of infringement (because the primary focus is on the works themselves), the permission and willfulness analysis is relevant in establishing levels of severity of infringing conduct that can impact monetary awards and trigger the application of an amended §114.

5. The proposed §114 amendment: The protection of an artist’s voice through the Copyright Act itself

The purpose of §114 is to limit the scope of exclusive rights of the owner of a copyright in a sound recording.\(^8\) The most applicable section for the purpose of this discussion is clause (2) of §106, which grants the owner of a copyright the exclusive right “to prepare derivative works based on the copyrighted work.”\(^8\) §114(b) limits this right to “prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence and quality.”\(^8\)

“Actual sounds” should be further explained by adding “distinctive voices and unique sounds that may become distinctly associated with a particular artist.”\(^8\) This language suggests a secondary meaning component and provides a means through which the Copyright Act can protect voices. “Unique sounds” is substituted for “sounds” because some sounds, such as production techniques and instrumentation, may not be copyrightable. “Uniqueness” increases the potential of protection of a sound through suggesting a particular, special source of that sound.

The “rearranged, remixed, or otherwise altered in sequence and quality” language is inadequate because it fails to address exact copying without alteration, which was what was at issue in Midler.\(^8\) After “...quality;” should be the following: “or copied exactly from their original form.” This language is more inclusive yet is not overbroad.

\(^8\) 17 U.S.C.A. §106(2).
\(^8\) 17 U.S.C.A. §114(b).
\(^8\) Id.
\(^8\) Id.
The term “derivative work,” as defined within §101 is extremely comprehensive and, therefore, should be left as it is.85

Should “voices and unique sounds” be protected from commercial use or imitation or both? §114(b) includes the language “the exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 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.”86 To rectify this language to encompass voices, an affirmative version of the above sentence would have to be made or in the alternative, an exception should be made for “distinctive voices and unique sounds.” This is specific language that would allow a fact-finder to determine what is unique or distinctive based on the particular circumstances of a given case. In sum, such revisions would enhance the possibility of Midler-type cases to be protected by federal copyright law instead of state tort law.

C. Why Altai can and should be extended to cover a Midler-type case

1. Application of Altai to soundalike musical recording context

Altai87 involves an action by Computer Associates against Altai for copyright infringement and misappropriation of trade secrets.88 Although the case is based on infringement of a computer program, the test regarding substantial similarity/access applies to soundalike musical recording.89 In Altai, Computer Associates (CA) and Altai were companies in the computer software industry—designing, developing and marketing various types of computer programs.90 One of CA’s marketed programs entitled CA-SCHEDULER contained a sub-program entitled ADAPTER91. ADAPTER has no independent use but plays an extremely important role by translating the language of a given program into the

85 17 U.S.C.A. §101. “A ‘derivative work’ is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” Because this language is so broad, the Ford commercial is within its scope.
86 17 U.S.C.A. §114(b).
87 Altai, at 1241.
88 Id. at 1244.
89 Id.
90 Id. at 1246.
91 Id.
particular language that the computer’s own operating system can understand. ADAPTER saves the user costs, both in time and money, that otherwise would be expended in purchasing new programs, modifying existing systems to run them, and gaining familiarity with their operation.

In 1982, Altai began marketing its own job-scheduling program entitled ZEKE. An Altai employee approached a computer programmer at CA to assist in the design. When the CA programmer joined Altai, he brought some knowledge of ADAPTER with him and integrated it into Altai’s new program, OSCAR. This was done without the knowledge of any other Altai employee. In 1988, upon learning that Altai may have appropriated parts of ADAPTER, CA brought a copyright and trade secret misappropriation action against Altai.

The district court held that Altai’s OSCAR computer program had infringed CA’s program and thus awarded $364,444 in actual damages and apportioned profits; that Altai’s OSCAR program was not substantially similar to a portion of CA-SCHEDULER called ADAPTER and thus denied relief; and that CA’s state law trade secret misappropriation claim against Altai had been preempted by the federal copyright act. The appellate court affirmed the judgment of the district court in its entirety.

The appellate court, in its discussion of copyright protection for the nonliteral elements of computer programs, noted that §102(a) defines “literary works.” Nonliteral components of computer programs, such as general flow charts, organization of inter-modular relationships, parameters, and “macros,” are protected by copyright, since nonliteral structures of literary works are protected, and since computer programs, although not specifically listed in §102, are considered literary works.

Phonorecords, conversely, are listed as literary works in §102(a). By analogy, Bette Midler’s voice, as a nonliteral component of the “Do You Want to Dance” phonorecord should be protected by copyright, because nonliteral structures (voices) within literary works (phonorecords) are protected, and because phonorecords are literary works.

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92 Id.
93 Id. at 1247.
94 Id.
95 Id.
96 Id. at 1245.
97 Id.
98 Id. at 1249 and 17 U.S.C.A. §102(a).
99 Altai, at 1241.
100 Id. at 1249 and 17 U.S.C.A. §102(a).
a. Abstractions

Substantial similarity in *Altai* involves a three-part test. The “abstractions” test comprises the first step in the examination of computer programs for substantial similarity. It involves dissecting the alleged copied program’s structure and isolating each level of abstraction contained within it, beginning with the code and ending with an articulation of the program’s ultimate function. This process requires retracing each of the program designer’s steps in the opposite order in which they were taken during the program’s creation.

As applied to *Midler*, this process would involve breaking down the original phonorecord record’s master tape to its components and retracing each of the steps from the last production layer added backward to the first; that is vocals, nonrhythm tracks, rhythm tracks. This order is the reverse of the manner in which it was recorded.

b. Filtration

The second step in the examination of computer programs for substantial similarity is the “successive filtering” method, in which each structural component at each level of abstraction in the allegedly copied program is examined to determine whether its inclusion at that level was an “idea” or was dictated by considerations of efficiency so as to be necessarily incidental to such an idea. To be determined at this step is whether the inclusion was required by factors external to the component itself, or whether the component was taken from the public domain and hence is nonprotectable expression; such “filtration” serves the purpose of defining the scope of the plaintiff’s copyright, and may ultimately leave behind a core of protectable material.

When applied to *Midler*, this second step entails discovering whether each recording track is an idea or necessarily incidental to an idea. Also, the issue of whether the track contents are taken from the public domain must be explored. The concept of the “merger” doctrine is relevant to this discussion because it is applicable by analogy to literary devices, including computer programs. In *Midler*, the exact

101 Altai, at 1241.
102 Id.
103 Id.
104 Id.
105 Id. Regrettably, this language is not explained further in the court’s opinion.
106 Id.
107 The “merger” doctrine, which precludes a finding of copyright infringement if the copied expression is inseparable from the idea expressed, applies to allegedly infringed computer programs. A court must inquire whether the use of this particular set of modules is necessary to
vocal phrasing, instrumentation, arrangement, and production used were not necessary to make the record. More than one means to express the ideas existed. Different production techniques could have been used; for example a Phil Spector “wall of sound” approach. Alter...
viding copyright protection to state piracy cases in this context.\textsuperscript{114} Expert testimony may be used to assist the fact-finder in determining whether the defendant copied any part of the plaintiff’s copyrighted work. This method, by carefully distinguishing idea from expression, will likely narrow copyright protection for soundalike musical recordings, comports with and advances constitutional policies underlying the Copyright Act.\textsuperscript{115} Its purpose is not to reward the labor of authors, but rather to advance the public welfare through the rewarding of artistic creativity in a manner that permits free use of nonprotectable ideas and processes.\textsuperscript{116}

2. \textit{The \$114 amendment as a means to protect the ‘golden nugget’}

Altai’s purpose of breaking down a recording into its components can facilitate the application of the \$114 amendment. Through the isolation of a distinctive voice or unique sound, the fact-finder can more easily determine whether it is sufficiently distinctive so as to be a “golden nugget.” Such a process can be much more difficult if a fact-finder were to hear a recording in which the vocals are buried in the mix or if the production process is so hurried such that the recording becomes a pollution of a mix.\textsuperscript{117}

Altai, then, can most appropriately be applied to discover whether a voice is distinctive or a sound is unique.\textsuperscript{118} If it is not, then the amended \$114 will not apply.\textsuperscript{119} If after abstraction, filtration, and comparison, a fact-finder deems the voice or sound to be sufficiently distinctive so as to be associated only with that particular artist, then copyright protection through the new \$114 will more likely be possible.\textsuperscript{120}

3. Application of Altai to fair use context

Given that \textit{Altai} pertains to Bette Midler’s voice, fair use can be used to solidify copyright protection.\textsuperscript{121} The second fair use factor, that

\begin{itemize}
\item \textsuperscript{114} Access can be more easily established; the defendants used the same song with a similar vocalist.
\item \textsuperscript{115} Altai, at 1242.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} A good example: Graham Parker’s \textit{Stick to Me}, Mercury 3706. Producer Nick Lowe’s original master tapes were somehow “eaten” by a machine so that, to meet the scheduled release date, the album was re-recorded in two weeks. The result was lead vocals that were at times almost inaudible as well as a clash of muddled instrumentation.
\item \textsuperscript{118} Review concepts in section VB5.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} See section IIIA1.
\end{itemize}
the use of her voice was for commercial, not nonprofit purposes already works in her favor. The third factor concerns the extent of the copying. The court in Whelan Associates v. Jaslow Dental Laboratory suggested that for literary works, "extent" should mean "quality" because it is often impossible to speak of "most of the work." Novels, movies, or plays cannot simply be quantified in such instances. Thus, the court should make a qualitative, not quantitative, judgment about the character of the work. In Midler, then, Ford and the ad agency appropriated the quality or timbre of Midler's voice. Because of the extensive copying and the substantial similarity of the voices, such use is not reasonable. The fourth factor, effect on the market, is, as previously discussed, debatable.

Where Altai is of assistance is with regard to the first factor, the nature of the copyrighted work. Altai, through its abstraction, filtration, and comparison steps, can show how a record is created and therefore, how a vocal can be creative, imaginative, original, and involve a substantial investment of time and labor (through a great number of takes, for instance). Altai can remove the roadblock of the first factor not being able to pertain to vocal recordings and thus enhance the likelihood of fair use applying to a distinctive vocalist context.

D. The "look and feel" test as a tool to protect soundalike musical recordings

1. Description of the test

The court in Arnstein v. Porter suggested a bifurcated substantial similarity test whereby a finder of fact makes two findings of substantial similarity to support a copyright violation. First, the fact-finder must decide whether sufficient similarity exists between the two works in question to conclude that the alleged infringer used the copyrighted work in making his own. On this issue, expert testimony may be used to aid the trier of fact. This is the "extrinsic" test of substantial simi-

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122 Id.
123 Id.
124 Whelan Associates v. Jaslow Dental Laboratory, 797 F.2d 1245 (3rd Cir. 1986).
125 Id.
126 Id.
127 Id.
128 See section IIIB1.
129 Id. and Altai, at 1253 and 1256.
131 Id.
132 Id.
larity. Second, if the answer to the first question is in the affirmative, the fact-finder must decide without the aid of expert testimony, but with the perspective of the "lay observer," whether the copying was "illicit," or "an unlawful appropriation" of the copyrighted work. This has been termed an "intrinsic" test of substantial similarity. This "intrinsic" test, also called the ordinary observer test, was developed in cases involving novels, plays, and paintings.

2. Application of test to Midler

Such a test is applicable to soundalike recordings. In the context of Midler, the "intrinsic" test is sufficient because the debate in that case regarded the timbre, distinctiveness, and instant recognition of Bette Midler's voice by the general public. This is not a scientific analysis. Analysis of instrumentation, production, and engineered recordings do not come into play. Unlike in Gibb, an expert determination of the number of measures that are similar is not necessary. To establish infringement through appropriation of Bette Midler's voice, an ordinary observer or listener should find 1) that Ford and the ad agency had access to the recording (the answer is in the affirmative here because Bette Midler's albums remained in the marketplace and were readily obtainable by anyone); and 2) that as lay observers and listeners, the voice in the Ford ad sounds substantially similar to that of Bette Midler. Given that Midler's original and imitated voices are easily audible in both the recording and the commercial, a lay jury is an appropriate unit to make a determination.

3. Application of test to other soundalike musical recording contexts

What if, however, there exist situations with vocals that involve technical knowledge of music? Would expert testimony be appropriate in such a context? Yes. Recently, a former vocalist with the Mary Jane Girls, Yvette Marine either sued or threatened to sue Paula Abdul after alleging that she and Abdul created a composite vocal on a song on Abdul's first album called "Opposites Attract." In other words, Marine alleged that the vocal on the recording was not exclusively that of Abdul. This tactic of composite vocals is not uncommon in popular music. Patrick Leonard created composite vocals when producing Ma-

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133 Id.
134 Altai, at 1258, 1259.
136 Id.
donna’s albums in the late 1980s.¹³⁷ Usually such a process is utilized when the primary vocalist is thin-voiced, has intonation problems, or has limited range.

Unlike in Midler, then, the full Arnstein test should be used. The composite vocal concept is not intuitively obvious to a casual listener of music; expert testimony is necessary to explain what is a composite vocal, how it is achieved, and why it is significant in establishing copyright infringement. Once such expert testimony is used to aid the trier of fact, then the jury can decide whether Paula Abdul unlawfully appropriated Marine’s voice. Under this test, however, Marine is unlikely to win because the jury is unlikely to link Abdul’s voice to the original recordings on which Marine sang lead with the Mary Jane Girls (of which there were few). Thus, any suit would collapse, particularly in the access analysis. Similarity, let alone substantial similarity would be hard to establish. Marine’s voice is not distinctive like Bette Midler’s, so the jury is less likely to find the need for copyright protection to be as compelling.

4. Exceptions to the application of the ‘‘look and feel’’ test

The “look and feel” test would not apply to a recording in which the vocalist imitates an original vocalist’s style instead of timbre. For example, John Cafferty imitated Bruce Springsteen’s echoed rock vocal sound in his song “On the Dark Side.”¹³⁸ Likewise, his band imitated the hard-hitting, basement sound of the E-Street Band most commonly heard on “Glory Days” and other such Springsteen songs of the period.¹³⁹

The alleged infringing use, then, can determine the applicability of the “look and feel” test. If the use of the original voice is for another artist’s song, a court or jury may view such a use to be less likely an infringing use than if the original voice was used in a commercial or another such purpose to which the artist might not want to lend his voice and name.

Distinctive characteristics of a vocalist’s style will not be protected through a “look and feel” analysis. Buddy Holly’s “hiccup” and James Brown’s scream have been appropriated by other vocalists without the filing of a suit. In fact, James Brown’s scream has been copied so often by other soul, and rhythm and blues artists so as to possibly fall within the scope of scenes a faire for being so common.

¹³⁷ Example: Madonna, True Blue, Sire 25442.
Commercial pop vocalists that coincidentally sound alike will not be able to file claims against one another. To an ordinary radio listener, Kim Carnes sounds a lot like Rod Stewart. Yet, Rod Stewart could not sue Kim Carnes for having appropriated the timbre of his voice on "Bette Davis Eyes."

Finally, production techniques such as looping and forms of instrumentation will not be protected by "look and feel" concepts. The Phil Spector "wall of sound," for instance, is not something that a lay listener would identify with Phil Spector. An average listener who is familiar with the music of the Ronettes or George Harrison may never have heard of Phil Spector. Given the common use of such techniques and instrumentation and the idea that protecting the appropriation of the identity of a behind-the-scenes figure is not as compelling as protecting that of a famous singer, copyright infringement will not exist in this situation.

5. "Look and feel" analysis: Conclusion

The court in Whelan Associates noted that the ordinary observer test is of doubtful value in cases involving computer programs on account of the programs' complexity and unfamiliarity to most members of the public. Similarly, the more technical the subject matter (production techniques, etc.), the more expert testimony is needed and the more desirable the application of the full Arnstein test. The court's determination of whether both expert and lay analysis is to be used or merely lay analysis will depend on the technicality of the subject matter.

VI. CONCLUSION

The application of the Altai and "look and feel" concepts will expand the scope of protection for soundalike musical recordings in general and celebrity soundalike recordings in particular. No longer should protection of a distinctive voice be limited to a state piracy tort case. Since Congress intended copyright protection of literal elements, including phonograph records, so too should the Copyright Act protect the nonliteral elements that phonograph records encompass. Such a measure will advance the public welfare through the protection and rewarding of artistic creativity.

140 Kim Carnes, "Bette Davis Eyes," on Gypsy Honeymoon: The Best of Kim Carnes, EIA 98223
141 Whelan, at 1232.