

Midler v. Ford Motor Co.

549 F. 2d 460 (9th Cir. 1988)

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Ford Motor Company and its advertising agency made a television commercial to advertise the Ford Lincoln Mercury, in which they imitated world-renowned singer Bette Midler's voice. After Midler declined to participate in creating the commercial, the advertising agency used a former Midler back-up singer to imitate Midler's voice. After the commercial aired, others told Midler that the commercial sounded exactly like her record of "Do you want to Dance". Midler sued, claiming a protectable property right of publicity in her voice. The advertising agency obtained a copyright license from the publisher to use the chosen song in the commercial. Additionally, Bette Midler's name and picture were not in the commercial. Thus, the issue is whether Midler's voice is protected as a property right.

The United States Court of Appeals for the Ninth Circuit ("Court") evaluated Midler's claim in the context of the First Amendment, Federal copyright law, and a state tort action.

The Court found that in the media context, the First Amendment protects reproduction of likeness and sound. When reproducing a person's identity, the use will be immune from First Amendment claims if the purpose is informative or cultural. However, if the purpose of reproducing is only to exploit the individual portrayed, then immunity from First Amendment claims will not be granted. The Court determined that television commercials have become a primary source for advertising in society and thus a main part of American culture. Therefore, the Court found a First Amendment claim was not applicable to Midler's situation because Ford's use in reproducing her identity was cultural in nature.

The Court next applied pre-emption under Federal copyright law, stating that the imitation of a recorded performance does not constitute a copyright infringement even where one performer deliberately sets out to imitate another's performance. Ford set out to imitate Midler's performance of her song and succeeded as the evidence showed that the singer in the commercial sounded exactly like her. However, under Federal copyright law, the Court found no copyright infringement on the part of Ford for simply imitating her voice.

The Court, under California law, found that an injury may exist from appropriating attributes of a person's identity. Although an individual's voice is not copyrightable, the Court determined that a person's voice is as distinctive and personal as their face. Additionally, the Court reasoned that the human voice is also one of the most blatant ways of observing identity. The Court therefore found that Ford's act of impersonating Midler's voice was the equivalent of taking her identity. Further, the Court held that when a widely-known singer's voice is deliberately replicated for commercial use, the imitators are liable under tort law.

After the appellate decision to remand the case, Midler won \$400,000 in damages on her tort claim.