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## **ALL THE WORLD'S A STAGE: PROTECTING PERFORMERS' RIGHTS IN A BORDERLESS ENTERTAINMENT BUSINESS**

### **Abstract:**

In the 21st century of sweeping and effortless consumer access to artist performances -- via YouTube, social media, and other digital dissemination methods -- the goal of protecting performers has become both more crucial than in the past and considerably more difficult. The digital landscape has plunged us into an essentially borderless world, where someone in Italy can download a YouTube performance from Japan and do what they wish with it -- without the performer's knowledge. While there are myriad legal schemes addressing this phenomenon both on the international and domestic levels -- for instance, the Rome Convention and the US Copyright Law's music video anti-trafficking provision -- this paper will examine whether such legal protections should be reinforced or perhaps relaxed, based on the notion that current laws have failed to keep pace with the vigorous and rapid expansion of consumer access via digital means.

### **Keywords:**

Copyright, Berne Convention, Rome Convention, Trademark, Publicity, Brand, Bootlegging, Performers

## I. INTRODUCTION

*I think that there is a sort of spiritual power that is translating into our bodies as we perform. Performers give, and giving is so important. It can heal. That is my experience, anyway.* -- Yoko Ono (The Observer, 2013)

When discussing legal protections for artists, the conversation usually revolves around the creative individuals who forge the original works that we listen to, read, watch, and observe: composers, novelists, playwrights, filmmakers, painters, sculptors. The above quote by Yoko Ono, however, hopefully emphasizes what the thrust of this paper is about -- the folks who actually bring to life the creative works that enjoy the legal protections afforded to them by the world's myriad copyright schemes. "Riffing" on Ms. Ono's words, this paper highlights the *performing* part of performing arts -- specifically, the rights that individuals have as *performers* as opposed to *creators* of copyrighted works. For several centuries<sup>1</sup> the latter have been entitled to and protected by refuge of the world's myriad national copyright laws and international treaties devoted to those protections -- such as, respectively, the US Copyright Law (17 U.S.C. §101 et seq) and the Berne Convention for the Protection of Literary and Artistic Works of 1886 (commonly referred to as the "Berne Convention").<sup>2</sup> The former, by contrast, while also protected by certain national laws and international treaties (discussed *infra*), is an area that is perhaps is still in its nascent stages arguably due to one main reason: the Internet.

This ubiquitous implement -- well, the digital age as a whole, really -- that contemporary humanity seems woefully unable to function without has thrown an illegal ember that once was the province of fringe elements -- a music fan recording his favorite band's concert, or an individual stealthily videotaping a first run movie -- into the blazes of mainstream activity, fires that are eminently accessible by the virtually anyone, and supremely easy to stoke. I refer to, of course, the practice of bootlegging, which the U.S. Courts (United States v. Moghadam, 1999) have defined as the making of "an unauthorized copy of a commercially unreleased performance." (1272).

Bootlegging is perceived as, and has been for many decades, big business. Whether it be the latest Kanye album or Marvel superhero blockbuster, the unauthorized copying and distribution of copyrighted materials and live performances brings in substantial sums to

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<sup>1</sup> The Statute of Anne (also known as the Copyright Act 1710) was enacted by the British Parliament in 1710, and is regarded as the first statute to provide for [copyright](#) regulated by the government and courts, rather than by private parties.

<sup>2</sup> The Berne Convention was the first attempt at international coordination of copyright laws, and has since spawned numerous other treaties that fall under its umbrella -- including the ones discussed herein. There are currently 176 signatory nations to the Convention.

the perpetrators -- although just how much is difficult to ascertain because, as stated in *The effects of piracy upon the music industry* (Marshall, 2004):

The effects of piracy are, however, more difficult to ascertain. This is for three reasons. First, the word 'piracy' is a blanket term covering a wide variety of activities, including counterfeiting, pirating, bootlegging, home taping, tape trading and online file sharing. All of these areas of piracy have individual characteristics that make any attempt at synthesis a hazardous and, some might say, misleading venture. Second, the world of illegal recordings is not the easiest from which to gather data.... Piracy figures are often used for their rhetorical impact rather than as a reflection of reality.(163-164)

Be that as it may, unauthorized copying of creative works is still considered a threat to the artistic and commercial interests of authors. However, because of this wide berth of legal issues, this paper's scope will be confined primarily to bootlegging activities involving music videos and phonograms (vinyl records, CDs, and other media in which music can be permanently fixed) regarding -- to clarify once again -- the rights of the individuals *performing* on those media, not the rights that attach to the musical compositions and other creative works that may be embodied in those media. That said, it cannot be denied that there is copyright component to this endeavor, as the performers may be performing protected works. It is for this reason why performers' rights are often referred to as *neighboring rights* or *related rights*, simply because they are seen as *adjacent* to the copyrights that exist on the record or in the video. One might say that performers' rights are somewhat akin to personal property rights as opposed to copyrights -- such as rights of publicity (to be discussed *infra*) -- and that performers' rights exist in a sort of nether world between these two areas of law. That said, it is vital for the reader to understand that performers' rights may attach *regardless* of whether or not the performer is performing *copyrighted* works or works in the *public domain* (works that are no longer, or never had been protected by copyright). To clarify one last time, this paper will consider the performance as separate from the work being performed.

Notwithstanding the above, one need not rule out intellectual property rights altogether in this amalgam of rights, laws, and treaties. As this paper will hopefully demonstrate, there is another perspective that courts -- at least in the US -- have at times adopted: that an artist's performance, while perhaps not entitled to copyright protection, may be eligible for another haven of intellectual property: trademark. The proposition I will put forth, then, is

whether a performance can, or should be, considered a *brand* that assigns a specific quality to a specific product or service -- which is essentially the definition of trademark law.

That said, this discussion must begin by outlining essential aspects of the principal laws and treaties that impact the topic of this paper, of which the latter have been implemented and are overseen by the World Intellectual Property Organization. WIPO, as it is commonly called, was established in 1967, and is the global forum for intellectual property services, policy, information and cooperation. It currently has 191 member states.

The reader should note, however, that this list is by no means exhaustive and is thus unavoidably cursory, as each and every legal framework and remedy involved in these matters would require its own dedicated paper in order to draw complete pictures of the respective and relevant legal landscapes. For instance, there will be little mention, except in passing, of the Berne Convention and its progeny. Thus, I will limit discussion primarily to the following treaties and a smattering of specific US and EU laws:

- (a) The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961;
- (b) the World Intellectual Property Organization Performances and Phonogram Treaty of 2002;
- (c) the Beijing Treaty on Audiovisual Performances of 2012.
- (d) US Copyright Law (specifically, 17 U.S.C. §1101, known as the "Anti-Bootlegging Statute");
- (e) US and European Trademark Law and unfair competition;
- (f) Laws relating to Rights of Publicity; and finally,
- (g) EU Directives: 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society; 2006/115/EC of The European Parliament And Of The Council of December 12, 2006; and 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

Regarding the above referenced treaties, the reader should keep in mind that as such they don't provide substantive protections for performers *per se*, but rather function as a guarantee that member states provide certain minimum protections for performers of those

states' residents. For example, if a performer's rights from one Rome Convention member state are violated in another signatory country, said performer can be assured that whichever of those nations is the appropriate jurisdiction for enforcing the performer's rights, she can rest assured that the laws of that jurisdiction shall at the minimum rise to the level of the agreed upon protection of the Convention. Consequently, however, in such instances there are always the often complicated "choice of law" issues -- the question of which member state's laws should be used for the specific situation. However, those are matters best left to the fancies of the relevant court -- and beyond the scope of this discussion.<sup>3</sup>

As such, these legal schemes and structures do not stand in isolation from each other. As in virtually every area of the law, a party seeking relief often has a cornucopia of statutory law, common law, treaties, and other theories, that are inextricably inter-related and intertwined, providing a framework within which such party can pursue her legal remedy. These are essentially the palette from which the aggrieved can choose the appropriate legal colors and shadings.

The goal here, then, is not to merely restate national and international laws or regurgitate the surfeit of scholarly commentary that already exists on these topics. Rather, as I mentioned earlier I would like to proffer the argument that perhaps the most successful way of protecting performers' rights is the notion that in addition to the protections granted by the various statutes and treaties addressing neighboring and related rights, ultimately it may be a market place solution that best serves the artist. In other words, it is considering the performer not as an *artist* but rather as a *brand*.

## II. WHAT IS THE LAW

### A. ROME CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS (1961)

The Rome Convention (as it is commonly referred to) is probably the first formal recognition, at least from an international perspective, of legal protections that flow to performers. Such protections were contemplated as early as 1903, when the 'International Literary and Artistic Association (ALAI) at its Congress in Weimar in 1903 looked

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<sup>3</sup> A key element of the Berne Convention is its provision providing "equal treatment" -- i.e., if the copyrights of a resident of one Berne member state are infringed in another Berne member state, the aggrieved party must be treated no differently than a resident of the nation in which the infringement occurred. However, it is not as simple as that -- United States courts, for instance, are not quite settled on how to approach this equal treatment. For a thorough discussion of one of the courts' prevailing views, see *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82.

sympathetically at the plight of solo performers." (WIPO, 1981, 1994, 1999) Seeking such protections seriously grew in importance as new technologies relating to the performing arts emerged -- for instance, gramophone records, cinema and radio -- "inventions which performers gladly accepted, since they offered great opportunities to reach a wide public but which tended, as they later found, to upset the pattern of their professional life. Coupled with the unemployment which followed the first world war, this had serious consequences for performers." (7)

The technological changes referenced above are generally seen as catalysts for the promulgation of the Rome Convention and its progeny. Up until the invention of the "moving pictures," for example, performances were pretty much ephemeral in nature -- once the performance occurred, there was no memorialization of the moment beyond writing about it, sketching a scene, or eventually capturing a photographic still of it (which, despite any aspect of realism, obviously could not depict the entire performance). One had to be present *in the moment* to actually experience and appreciate the performance. Consequently, beyond having their likenesses being exploited (with or without their permission), performers had no reason to fear that their actual entire performances would -- or even could -- be captured, duplicated, and disseminated. But once that was possible, then it is perhaps natural that efforts would be made to protect such performances.

The Rome Convention secures protection for the following individuals and entities:

(a) **Performers** (actors, singers, musicians, dancers and those who perform literary or artistic works) are protected against certain acts to which they have not consented, such as the broadcasting and communication to the public of a live performance; the fixation of the live performance; the reproduction of the fixation if the original fixation was made without the performer's consent or if the reproduction was made for purposes different from those for which consent was given.

(b) **Producers of phonograms** have the right to authorize or prohibit the direct or indirect reproduction of their phonograms. In the Rome Convention, "phonograms" means any exclusively aural fixation of sounds of a performance or of other sounds. Where a phonogram published for commercial purposes gives rise to secondary uses (such as broadcasting or communication to the public in any form), a single equitable remuneration must be paid by the user to the performers, to the producers of the phonograms, or to both. Contracting States are free, however, not to apply this rule or to limit its application.

(c) **Broadcasting organizations** have the right to authorize or prohibit certain acts, namely the rebroadcasting of their broadcasts; the fixation of their broadcasts; the reproduction of such fixations; the communication to the public of their television broadcasts if such

communication is made in places accessible to the public against payment of an entrance fee.

The Rome Convention allows for limitations and exceptions to the above-mentioned rights in national laws as regarding: (a) private use, (b) utilization of short excerpts in connection with reporting current events, (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, and (d) uses solely for the purpose of teaching or scientific research and in any other cases where national law provides exceptions to copyright in literary and artistic works -- such as, for instance, the US Copyright Law's Fair Use provision.<sup>4</sup> Furthermore -- and significantly -- once a performer has consented to the incorporation of a performance in a visual or audiovisual fixation, the provisions on performers' rights have no further application. It is thus the unauthorized fixation and exploitation of the performance that is the Rome Convention's chief concern.

Duration in accordance with the Convention must last at least until the end of a 20-year period computed from the end of the year in which (a) the fixation was made, for phonograms and for performances incorporated therein; (b) the performance took place, for performances not incorporated in phonograms; (c) the broadcast took place. However, national laws increasingly provide for a 50-year term of protection, at least for phonograms and performances.

## **B. WIPO PERFORMANCES AND PHONOGRAMS TREATY (2002)**

The WIPO Performances and Phonograms Treaty (WPPT) -- signed in 1996 and entered into force in 2002 -- deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds).

As far as performers are concerned, the Treaty grants performers and producers of phonograms economic rights in the following performances that are fixed in phonograms:

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<sup>4</sup> The doctrine of Fair Use is an *affirmative defense* that a defendant in an infringement action can invoke that acts as an exception to the permission requirement that would normally be required for an individual or entity to use the copyrighted work of another. The criteria are laid out in §107, and require that a court considering a Fair Use defense must consider the following four factors, none of which are to be deemed dispositive on its own:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

- **The right of reproduction** is the right to authorize direct or indirect reproduction of the phonogram in any manner or form.
- **The right of distribution** is the right to authorize the making available to the public of the original and copies of the phonogram through sale or other transfer of ownership.
- **The right of rental** is the right to authorize the commercial rental to the public of the original and copies of the phonogram, as determined in the national law of the Contracting Parties (except for countries that, since April 15, 1994, have had a system in force for equitable remuneration of such rental).
- **The right of making available** is the right to authorize the making available to the public, by wire or wireless means, of any performance fixed in a phonogram, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the Internet.

As to unfixed (live) performances, the Treaty grants performers: (i) the right of broadcasting (except in the case of rebroadcasting); (ii) the right of communication to the public (except where the performance is a broadcast performance); and (iii) the right of fixation.

The Treaty also grants performers *moral rights*, that is, the right to claim to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation.

The Treaty provides that performers and producers of phonograms have the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, broadcasting or communication to the public.

Other key elements of the WPPT include:

- (a) The term of protection must be at least 50 years.
- (b) Rights provided by the Treaty (and exercise of those rights by a performer or producer) cannot be subject to any formality.
- (c) Subject to several parameters, any Contracting Party may restrict or – provided that it makes a reservation to the Treaty – deny these rights.
- (d) Contracting Parties must provide legal remedies against the circumvention of technological measures (e.g., encryption) used by performers or phonogram producers in



connection with the exercise of their rights, and against the removal or altering of information – such as the identifying metadata regarding the performer, performance, producer of the phonogram and the phonogram itself – necessary for the management (e.g., licensing, collecting and distribution of royalties) of the said rights (according to the Treaty, "rights management information").

(e) Each Contracting Party must adopt, in accordance with its national legal system, the measures necessary to ensure the application of the Treaty. In particular, each Contracting Party must ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights covered by the Treaty. Such action must include expeditious remedies to prevent infringement as well as remedies that constitute a deterrent to further infringement.

(f) The Treaty is open to States that are members of WIPO and to the European Community.

### **C. BEIJING TREATY ON AUDIOVISUAL PERFORMANCES OF 2012**

The Beijing Treaty on Audiovisual Performances was adopted by the Diplomatic Conference on the Protection of Audiovisual Performances, which took place in Beijing from June 20 to 26, 2012. The Treaty deals with the intellectual property rights of performers in audiovisual performances. It grants performers four kinds of economic rights for their performances fixed in audiovisual fixations, such as motion pictures:

- The right of reproduction is the right to authorize director or indirect reproduction of the performance fixed in an audiovisual fixation in any manner or form.
- The right of distribution is the right to authorize the making available to the public of the original and copies of the performance fixed in an audiovisual fixation through sale or other transfer of ownership.
- The right of rental is the right to authorize the commercial rental to the public of the original and copies of the performance fixed in an audiovisual fixation.
- The right of making available is the right to authorize the making available to the public, by wire or wireless means, of any performance fixed in an audiovisual fixation, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive availability via the Internet.

As to unfixed live performances, the Treaty grants performers three kinds of economic rights: (i) the right of broadcasting (except in the case of rebroadcasting); (ii) the right of communication to the public (except where the performance is a broadcast performance); and (iii) the right of fixation.

The Beijing Treaty, like the WPPT, also grants performers moral rights, that is, the right to claim to be identified as the performer (except where such an omission would be dictated by the manner of the use of the performance); and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation, taking into account the nature of the audiovisual fixations. The Treaty also mirrors most, if not all, of the WPPT provisions -- including the duration of protection, anti-circumvention language, and remedies -- once again extending them to audio-visual performers.

### **E. 17 U.S.C. §1101 -- the "Anti-Bootlegging" Statute**

Enacted in 1994, this provision of the US Copyright Law provides:

§1101. Unauthorized fixation and trafficking in sound recordings and music videos

(a) Unauthorized Acts. Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States,

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

(b) Definition.—In this section, the term “traffic” has the same meaning as in section 2320(e) of title 18.

(c) Applicability.—This section shall apply to any act or acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act.

(d) State Law Not Pre-empted.—Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.

§1101 has proved to be somewhat of a problem child in the world of copyright scholarship. Although it is contained within 17 U.S.C., §1101 is not in reality a copyright law -- it does not protect original works of authorship, but rather the individuals performing in a music video. In addition, the last phrase of subsection (a) has been interpreted to demonstrate that Section 1101 is indeed not a copyright provision. It has been suggested that it instead falls under the Commerce Clause of the US Constitution (Article 1, Section 8, Clause 3), which grants Congress “the power...To regulate commerce with foreign nations, and among the several states, and with the Indian tribes...”

In addition, many commentators, if not most or even all, tend to reflect on the constitutionality of the provision: whether the US Congress even had the power to put 1101 into the copyright law. The "Copyright Clause" of the US Constitution -- Article 1 Section 8 -- grants Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." As such, "original works of authorship fixed in a tangible medium of expression" -- the cornerstone language of §101 of the US Copyright Law that establishes what types of work are afforded copyright protection-- are protected for the life of the author plus 70 years (for works created on or after January 1, 1978).<sup>5</sup> However, because 1101 addresses performers and not original works of authorship, such performances are not subject to the duration limitations set forth in the Copyright Law, and can theoretically last forever. The accepted view, if there is said to be one, is that 1101 does pass constitutional muster, because since it governs trade it arguably falls under the Commerce Clause. However, this is not a consensus view -- and neither is it a road I will travel down for this paper.<sup>6</sup>

## F. US AND EU TRADEMARK LAW

### i. The Lanham Act -- U.S.C. 15. §1051 et seq

A trademark or service mark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others. A service mark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of a service rather than goods. Some examples include: brand names, slogans, and logos. The

<sup>5</sup> This is true in the case of a single author; when there are two or more authors, the “life plus 70” applies to the last surviving author. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. For works created before January 1, 1978, the duration rules are quite complicated, and beyond the scope of this paper.

<sup>6</sup> See, for instance, Craig W. Dallon, *The Anti-Bootlegging Provisions: Congressional Power and Constitutional Limitations*, 13 Vanderbilt Journal of Law Entertainment and Technology Law 255 (2011)

term "trademark" is often used in a general sense to refer to both trademarks and service marks.

The Lanham Act, also known as the Trademark Act of 1946 15 U.S.C. §§ 1051 *et seq.*, was enacted by Congress in 1946, and provides for a national system of trademark registration which protects the owner of a federally registered mark against the use of similar marks if such use is likely to result in consumer confusion -- or if the *dilution* of a famous mark is likely to occur. As will be examined later in this paper, dilution and *passing off* (both explained *infra*) are important components of litigation that has arisen around performers using trademark law to protect their right.

Note the use of the phrase "...protects the owner of a federally registered mark against the use of similar marks..." It is important to understand that in the US there exist concurrent trademark protection systems: *federal registration* as described above, and *state and regional* trademark protection. Furthermore, while federal registration grants the greatest protection for a mark holder, such registration requires that the owner deal in interstate commerce, as Congress' power to create the Lanham Act originated in the US Constitution's Commerce Clause. If a business was limited to one state or region, then state trademark registration is might be more appropriate (several states have a mechanism for this), as is *common law trademark*, which requires only that the owner use the mark in the stream of commerce in a particular area, with no registration needed. The downside of this, of course, that while the owner of "Joe's Plumbing Company" located in Massachusetts may have rights to a mark for that company in Massachusetts, there is no bar from someone using a similar mark for a "Joe's Plumbing Company" in California. Federal registration, assuming there was an element of interstate commerce, would give Massachusetts Joe's Plumbing priority.<sup>7</sup>

Relevant to this discussion is §1125 of the Lanham Act, which provides, in part:

(a) (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or *any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which — [emphasis added]*

(A) 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,

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<sup>7</sup> This is of course an over-simplification of the issues that could impact the parties in such a situation, such as priority of use and challenges to the Federal registration. But for the purposes of this paper, which is most certainly not an in-depth exploration into the nuances of US Trademark Law, the broad strokes of this example adequately illustrate the point being made.

sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

In addition, the Act addresses a subset trademark violation, known as *dilution* -- often referred to a *misrepresentation*:

(c) Dilution by Blurring; Dilution by Tarnishment.--

(1) Injunctive relief.--Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

The reader should note that trade or service mark dilution is not the same as infringement. The latter requires there be a confusion in the mind of the consumer as to the origin of the mark and its associated product or service -- for instance, whether Apple Computer and Apple Corps (the media company) are the same company.<sup>8</sup> Part of the analysis in such a situation includes the specific market place that each product inhabits -- if the two are completely unrelated, then similar marks may co-exist.<sup>9</sup> The former, on the other hand, requires only that the "diluting" product tarnish the reputation of the aggrieved mark owner, whether or not the marketplaces are the same or similar (in fact it may be even more relevant that the products are in two different industries).<sup>10</sup>

In the US, at least, the Act, relying primarily on the above excerpts, has been used as a tool for protecting performers when the copyright law has not provided an adequate remedy for a situation in which there was clearly a violation of rights of some sort, even if such violation did not fall within the scope of copyright. In such situations, a cynic might see the Lanham Act as functioning as a kind of "workaround" the fact that the US, unlike European and many other western nations, does not recognize any moral rights in the copyrighted

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<sup>8</sup> See *Apple Corps Limited v. Apple Computer, Inc.*, (2006) EWHC 996 (Ch)

<sup>9</sup> See *Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026 (2d Cir. 1989)

<sup>10</sup> See *Ben & Jerry's v. Rodax Distributors*, 12 CIV 6734, S. Dist. NY (2012)

work, except in the case of visual art (as provided in §106A of the Copyright Law). In the case that will be discussed *infra*, *Terry Gilliam et al. v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976), the Court stated:

This statute, the federal counterpart to state unfair competition laws, has been invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned...It is sufficient to violate the Act a representation of a product, although technically true, creates a false impression of the product's origin...[citations omitted] (20)

## ii. European Union Trademark Law

As European readers are aware, somewhat akin to that of the USA, EU trademark law operates on two separate but concurrent systems. According to the European Commission: "There are two main ways to register a trade mark in the EU. They can either be registered at national level at the industrial property offices of EU countries, or at EU level as a 'European Union trade mark' (EUTM) at the European Union Intellectual Property Office (EUIPO).

National and EUTMs coexist and are complementary to each other. The same trade mark can be registered at EU and/or national level. The EUTM system consists of one single registration procedure that grants the owner an exclusive right in all 28 EU countries. This dual system meets the requirements of companies of different sizes, markets and geographical presence. National trade marks may be better for small and medium-sized enterprises (SMEs) or local firms who don't need EU-wide protection. The laws governing national trade mark registration in the EU were first harmonized in 1989. The EU trade mark was created in 1994."

The European Parliament's definitions of trade and service marks generally track those of the US:

An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- (a) distinguishing the goods or services of one undertaking from those of other undertakings; and
- (b) being represented on the Register of European Union trade marks ('the Register'), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

The European Commission has further clarified: "A trade mark is a sign which distinguishes the goods and services of one company from those of another. As indicators of business origin, trade can be words, logos, devices or other distinctive features, or a combination of these. They can also be referred to as 'brands'.

## G. THE CALIFORNIA RIGHT OF PUBLICITY

The so-called *rights of publicity* are entirely distinct from the laws and treaties previously discussed, in that they are rooted in the personal attributes of the violated party, as opposed to legal protections for an aggrieved party's intellectual property. According to *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption* (Shipley, 1981): "The right of publicity prevents the unauthorized commercial use of an individual's name, likeness, or other recognizable aspects of one's persona. It gives an individual the exclusive right to license the use of their identity for commercial promotion." (677)

The right of publicity was born as an extension of the common law right to privacy, the definition of which has evolved over time -- but essentially, it can be reduced, according to *California's Constitutional Right to Privacy* (Kelso, 1992) four distinct causes of action for invasion of privacy: (1) intrusion. into private matters; (2)

public disclosure of private facts; (3) false light; and (4) misappropriation of name or picture.(377) <sup>11</sup>

These rights are neither universal in United States nor the European Union -- and although the majority of US state jurisdictions have recognized such rights, they remain within the purview of state, not federal, laws. In Europe, where they are often called *personality rights*, they have been recognized in some form in the majority of countries, including Cyprus, Denmark, France, Germany, Greece, Italy, Spain, and Sweden. But once again, in the interests of brevity, and in light of the fact that legal theories supporting this doctrine are fairly consistent across the board, discussion will be confined to laws of California -- which, arguably being the world center of the entertainment industry, has a vigorous and well-developed statutory and common law history in this area.

California Civil Code §3344 provides, in part:

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or

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<sup>11</sup> The author quotes legal scholar Dean Prosser, whom the author calls "the great tort classifier."

persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages...

Thus, when determining whether the statute has been violated, the California courts, guided by §3344, consider (a) whether a person's likeness was used "knowingly," (b) such use was "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services," and (c) such use occurred without such person's prior consent."

California also recognizes a common law right of publicity, which predates §3344 and has been interpreted as being broader than the statute, in that nonconsensual use of a plaintiff's actual likeness -- a name or photograph, for instance -- is not a requirement for relief. Rather, the Courts have ruled that appropriation of a plaintiff's "identity" -- a celebrity's catch phrase or sound-alike voice<sup>12</sup> -- for commercial gain (and not, specifically, for advertising purposes) can give rise of a cause of action for violation of common law right of publicity: "...the common law right of publicity cause of action 'may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.'"<sup>13</sup>

It is worth noting here that the California statute as well as common law do not specify that rights of publicity belong solely to celebrities. In the contrary, unauthorized use of any person's name, likeness, or identity for commercial gain can give rise to a cause of action. However, for private individuals (i.e., non-celebrities) the cause of action is rooted more firmly in the person's right to privacy -- specifically, misappropriation of a name or likeness. But there is no bar from such a plaintiff pursuing a claim under a right of publicity theory. That said, the case law addressing rights of publicity overwhelmingly -- if not completely -- involve celebrities, which will thus be the focus of this paper.

## H. EU COPYRIGHT DIRECTIVES (EUCD)

This 2001 Directive issued by the European Parliament and the Council of the European Union sought to harmonize laws regarding copyright and related rights in EU member states, with particular emphasis on the so-called "information society." Regarding the rights

<sup>12</sup> See *Bette Midler v. Ford Motor Company and Young & Rubicam Inc.*, 849 F.2d 460 (9th Cir. 1988); *John W. Carson, d/b/a Johnny Carson, and Johnny Carson Apparel, Inc., v. HERE'S JOHNNY PORTABLE TOILETS, INC.*, 698 F.2d 831 (6th Cir. 1982).

<sup>13</sup> See *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992).



of performers, one might consider the Directive as a clarification of the other above-referenced treaties -- a codification, if you will, of the of the provisions found in the Rome Convention, WPPT, and the Beijing. Chapter II, Articles 2 of the Directive provides a “reproduction right” for performers:

Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organizations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

In a similar vein, Article 3 reserves to performers the “[r]ight of communication to the public of works and right of making available to the public other subject-matter”:

2. Member States shall provide for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organizations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

In addition, Article 5 of Chapter 1 provides that Member States may include an array of exceptions, such as in the case of “caricature, parody or pastiche.”

Further, Chapter IV, Article 8 requires that Member States provide adequate legal recourse for infringing activity:

#### Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.
2. Each Member State shall take the measures necessary to ensure that rightsholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).
3. Member States shall ensure that rights holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

The 2006 Directive expands on these rights. Chapter 1, Article 3 provides rights holders with

1. The exclusive right to authorize or prohibit rental and lending [which] shall belong to the following:
  - (a) the author in respect of the original and copies of his work;
  - (b) the performer in respect of fixations of his performance;
  - (c) the phonogram producer in respect of his phonograms;
  - (d) the producer of the first fixation of a film in respect of the original and copies of his film.

Article 5 also provides “Unwaivable right to equitable remuneration:”

1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.
2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.
4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

Articles 7, 8, and 9 of the Directive's Chapter 2 provide, respectively, fixation, broadcasting, and distribution rights for performers. "Member States shall provide for performers the exclusive right to authorize or prohibit the fixation of their performances...the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation...[and]shall provide the exclusive right to make available to the public, by sale or otherwise, 'the distribution right'...in respect of fixations of their performances..."

Finally, Directive 2011/77/EU extended the duration of protection for performers and sound recordings to life plus 70 years (up from 50) -- on par with the duration of protection for authors, done primarily to recognize the importance of royalty income from fixation of their performances.

The directive also contains "use it or lose it" clauses which will now have to be included in the contracts between artist performers and record companies. Such provisions will allow performers to get their rights back if the record producer does not market the sound recording during the extended protection period -- which will grant performers the ability to continue to exploit their recordings should the record label cease to do so.

To illustrate how individual countries choose to implement the directives, consider France and the United Kingdom, both of which take a moral rights approach. The former provides, in Article L212-2 IPC:

A performer shall have the right to respect for his name, his capacity and his performance. This inalienable and imprescriptible right shall attach to his person. It may be transmitted to his heirs in order to protect his performance and his memory after his death.

The Chapter 48, Section 250F of the U.K.'s Copyright, Designs and Patents Act of 1988, provides:

205FRight to object to derogatory treatment of performance

(1)The performer of a qualifying performance has a right which is infringed if—

(a) the performance is broadcast live, or

(b) by means of a sound recording the performance is played in public or communicated to the public, with any distortion, mutilation or other modification that is prejudicial to the reputation of the performer.

### III. TWO SAMPLE CASES

As a very cursory exploration into how a few of the laws and legal concepts discussed herein can be utilized in the courts, this paper will now look at two US cases in which the artists seeking relief successfully invoked legal theories outside of the realm of the copyright law to affirm their rights.<sup>14</sup>

*Gilliam et al. v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976)

The U.S. Court of Appeals for the 2nd Circuit considered an appeal from the comedy troupe Monty Python's Flying Circus, which had sued the American Broadcasting Companies (ABC) in US District Court for airing a series of the Python television shows on American network television that were heavily edited for commercial interruptions (as is typical of US broadcast stations). Gilliam alleged that such editing violated the group's underlying copyrights in the material, and while Gilliam & Co. lost at the trial level, they prevailed on appeal. While the court's decision in favor of Gilliam rested primarily on a derivative works theory,<sup>15</sup> the court also considered and accepted as valid the group's argument that the slicing and dicing of the Monty Python shows -- as originally aired in Britain on the BBC they were shown uninterrupted in their entirety -- damaged the group's *brand*, in that a person viewing them for the first time would be misled as to the quality of the Python's creative *product*.

Terry Gilliam, along with John Cleese, Graham Chapman, Michael Palin, Eric Idle, and Terry Jones were the creators of a British television series called *Monty Python's Flying Circus*. They sold the finished scripts to the BBC, which recorded and aired the show from

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<sup>14</sup> Although the core of the *Gilliam* case involved copyright, the court did indeed consider other legal theories in considering the parties' dispute.

<sup>15</sup> According to §101 of the US Copyright Law: A "derivative work" is a work based upon one or more preexisting 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."

1969 until 1974. As part of the contract with BBC, the broadcaster was not allowed to make any significant edits to any episode once it was recorded.

Fast forward to October 1973, when US company Time-Life Films acquired the right to distribute Python programs in the United States. The BBC agreed to permit Time-Life to edit the programs only "for insertion of commercials, applicable censorship or governmental . . . rules and regulations, and National Association of Broadcasters and time segment requirements." (*Python*, at 14) Significantly, no similar clause was included in the agreement between the Monty Python writers and the BBC. US television network ABC had previously sought to acquire the right to broadcast excerpts from various Monty Python programs in the spring of 1975, but the group rejected the proposal for such a disjointed format. However, in July 1975, ABC acquired the rights from Time-Life to broadcast two ninety-minute Python specials, each comprising three thirty-minute programs that had not previously been shown in this country. When ABC broadcast Python, they made significant edits to make room for commercials. Gilliam, as the named Plaintiff representing the Python writers and performers, sued ABC in Federal court (the Southern District of New York) to enjoin the network from broadcasting the 2<sup>nd</sup> set of shows (the first had already been broadcast) and subsequently lost at trial, the Court basing the verdict on its determination that the copyright ownership of the Python shows was unclear. The case was reversed on appeal.

Although both the District and Appellate courts focused on the copyright aspects of the scripts and TV shows -- the Appellate court rejecting all of ABC's arguments and ultimately finding that the filmed programs were derivative works of the scripts, thereby granting Gilliam et al the authority to disallow ABC from broadcasting the heavily edited shows -- the Appellate court also found merit in the argument that the heavily edited shows violated the Lanham Act by creating a false impression of the origin of a *product* -- in this case, the Python show. "Here, the appellants claim that the editing done for ABC mutilated the original work and that consequently the broadcast of those programs as the creation of Monty Python violated the Lanham Act s 43(a), 15 U.S.C. s 1125(a)... It is sufficient to violate the Act that a representation of a product, although technically true, creates a false impression of the product's origin." (*Python*, at 20) As stated earlier in this paper, this approach functioned as something of a "workaround" the fact that the US law does not recognize *moral rights* in creative works -- which even the Court admitted:

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, *Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973); *Mazer v. Stein*, 347 U.S. 201, 74 S.Ct. 460, 98 L.Ed. 630 (1954), cannot be reconciled with the inability of artists to

obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law, *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (substantial cutting of original work constitutes misrepresentation), or the tort of unfair competition, *Prouty v. National Broadcasting Co.*, 26 F.Supp. 265 (D.Mass.193). See *Strauss, The Moral Right of the Author* 128-138, in *Studies on Copyright* (1963). Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form. See *Gardella v. Log Cabin Products Co.*, 89 F.2d 891, 895-96 (2d Cir. 1937); Roeder, *The Doctrine of Moral Right*, 53 Harv.L.Rev. 554, 568 (1940). (*Python*, at 20)

The crucial component of the Court's opinion, at least in regard to one of the principal issues of this paper, is its reference to both the Python scripts and filmed TV shows as *products*. Arguably, this approach wasn't necessary for the appellants to prevail, as even the concurring opinion noted: "There is literally no need to discuss whether plaintiffs also have a claim for relief under the Lanham Act or for unfair competition under New York law. I agree with Judge Lumbard, however, that it may be an exercise of judicial economy to express our view on the Lanham Act claim, and I do not dissent therefrom." (*Python*, at 22) However, this exercise in "judicial economy" did introduce an interesting take on protecting creative works utilizing tools that lie outside the realm of copyright law. Although in *Gilliam* the Lanham Act was applied to literary and audio-visual "products," this writer believes it would not be a stretch to apply it in a similar fashion to a bootlegged recording of performance -- i.e., that capturing a performance in a phonogram or on audio-visual media without the authorization of the performer can be seen as a misrepresentation of the "product" that is the performance. This Court's characterization of *Python* as a product ostensibly creates another tool with which an aggrieved performer can seek redress.

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

In this case, the US Federal Court of Appeals for the 9<sup>th</sup> Circuit considered the issue of whether a "soundalike" voice of a celebrity constituted a violation of that celebrity's common right of publicity.

In 1985, Ford Motor Company retained the advertising agency Young & Rubicon, Inc., to launch an ad campaign for the automobile giant's Lincoln Mercury line of cars. The goal of the effort "was to make an emotional connection with Yuppies, bringing back memories of when they were in college." (*Midler*, at 460) In fact, campaign was dubbed by the agency *The Yuppie Campaign*. Young & Rubicon sought to get recordings of original songs from the 1970s (ostensibly when Yuppies would have been in college), but when attempting to

do so from pop star Bette Midler for her recording of the song *Do You Want To Dance*<sup>16</sup>, she (or specifically, her manager) politely but flatly refused. Undeterred, the agency hired one of Ms. Midler's backup singers to record a version of the song, instructing her to "sound as much as possible like the Bette Midler record." (*Midler* at 461) It apparently worked, as according to the Court,

After the commercial was aired Midler was told by "a number of people" that it "sounded exactly" like her record of "Do You Want To Dance." Hedwig was told by "many personal friends" that they thought it was Midler singing the commercial. Ken Fritz, a personal manager in the entertainment business not associated with Midler, declares by affidavit that he heard the commercial on more than one occasion and thought Midler was doing the singing. (*Midler* at 461)

It is important to note here that under US Copyright Law, exact duplication of a sound recording does not constitute an infringement on the rights of the copyright owner of that sound recording.<sup>17</sup> This is on marked contrast to the rights of the *song's* copyright owner, which, absent one of the Law's permission exceptions (such Fair Use), preclude another from copying anything but a *de minimus* amount of the song.<sup>18</sup> Thus, Young & Rubicon was within its rights to make a duplicate recording of *Do You Want To Dance* -- at least from a *copyright* perspective.

That aside, It is also crucial to note here that neither Ms. Midler's name nor likeness was used in the ad. For that reason, the Court found that Ford's actions did not violate California Civil Code §3344, but did tread on her common law right of publicity:

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." The defendants 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 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." *Id.* § 3344(g). (*Midler* at 463)

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<sup>16</sup> *Do You Want To Dance*, written by Bobby Freeman, © 1958 Clockus Music Incorporated, EMI Music Publishing, Limited.

<sup>17</sup> §114 of the US Copyright Law expressly provides that a imitation or replication of a sound recording does not constitute infringement in the sound recording copyright owner's rights. This is why the Defendants/Appellees inb this case took it upon themselves to imitate Ms. Midler's voice, which according to the Copyright Law was permissible. However, as this case demonstrates, there are times when the Copyright Law fails, and other legal remedies can come to the rescue,

<sup>18</sup> *De minimus* in the context of copyright law refers to an insignificant amount of unauthorized copying, such that it does not rise to the level of infringement.

The Court went on to say,

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." D. Ihde, *Listening and Voice* 77 (1976). 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 *identity* [emphasis added]. See W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on Torts* 852 (5th ed. 1984). (*Midler* at 464)

As was explained earlier in this paper, California courts have expanded the common law right of publicity to include a person's identity -- which, as is evident in the *Midler* case, does not require appropriation of an actual name or likeness. Rather, all that is needed is enough of a depiction -- even if an imitation -- to conjure the celebrity's identity, with the goal being for the user to capitalize on the distinctiveness of the voice at issue. In the case of such appropriations, it naturally follows that such a voice or likeness has enough value that a defendant would go to some lengths to imitate it.

Why did the defendants 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. (*Midler* at 464)

Ultimately, the Court found,

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 the defendants here for their own profit in selling their product did appropriate part of her identity. (*Midler* at 464)

#### **IV. CONCLUSION: PERFORMER AS ARTIST VS. PERFORMER AS BRAND**

For performers trying to protect their performances from unauthorized copying, the world's copyright laws are generally of no use. That is primarily because copyright protection attaches to tangible creative *works*. So, while a filmed recording of a dancer would likely



protect the *filmmaker* by virtue of the copyright law, the performance itself is not protected -- at least not under copyright laws. Which consequently means that the copyright owner of said film could exploit that work as he or she saw fit, with the dancer without recourse to prevent that. Admittedly that is somewhat of an oversimplification of the hypothetical, but theoretically that's how it might play out.

Enter the numerous treaties and EU directives discussed throughout this paper, created specifically to protect such performers, allowing them to benefit artistically (in the sense of having control over the broadcast, distribution and reproduction of those performances), and to enjoy remuneration from such artistic control (I must editorialize slightly here, and register my disappointment that the US grants no such protections to performers except inasmuch as they may own copyright in the work they are performing).

However, as this paper has also hopefully demonstrated, there are avenues of redress and available remedies for the dancer, singer, and musician who wish to control exploitation of their "uncopyrightable" performances, redress and remedies that go beyond treaties and statutory schemes.

International agreements such as the Rome Convention and the WPPT focus on the rights performers as being related to the intellectual property rights they or another person or entity might have in the material being performed. In a similar fashion, the implementation of the provisions of such treaties by individual countries -- the EU Directives and the statutory examples from France and the United Kingdom, all explained above -- provide solid footing for performers to enforce their rights.

However, this writer believes that an equally strong case -- or perhaps even a stronger one -- can be made for protecting performers utilizing the marketplace perspective: essentially, turning to trademark law and personal (as opposed to intellectual) property rights to enforce them. This would of course be in addition to, and not necessarily in lieu of, any protections found in the various treaties and statutes. As was demonstrated by the Monty Python case discussed earlier, US trademark law was but one of the several arguments the appellate court deemed valid in its ruling for Gilliam et al -- making it, at least in the United States, an effective tool in preventing misrepresentation of a performer's work. After all, it is arguably the marketplace that is the true measure of the power and effectiveness of a "brand," and if a performer can fashion a compelling case that establishes her performance unquestionably recognizable as "her own," and as such has a demonstrable market value, then that could be the most successful route to take.

## REFERENCES

### Articles

Bogsch, Arpad, *Neighboring Rights: Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organization (1981, reprinted 1994, 1999)

Dallon, Dallan W. *The Anti-Bootlegging Provisions: Congressional Power and Constitutional Limitations*, 13 *Vanderbilt Journal of Entertainment and Technology Law* 255 (2011)

Kelso, J. Clark. *California's Constitutional Right to Privacy*, 19 *Pepp. L. Rev.* 2 (1992)

Shipley, David E. *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 *Cornell L. Rev.* 673 (1981)

The Observer. "Yoko Ono: I feel that I am starting a new life at 80." *The Japan Times*, June 1, 2013, <https://www.japantimes.co.jp/culture/2013/06/01/music/yoko-ono-i-feel-that-i-am-starting-a-new-life-at-80/#.WyqnRTNKjyt>. Accessed June 20, 2018

### Laws & Treaties

California Civil Code § 3344

Copyright Law of the United States, 17 U.S.C. §101 et seq.

17 U.S.C. §101 (Definitions)

17 U.S.C. §106 (Exclusive Rights in Copyrighted Works)

17 U.S.C. §106A (Rights of Certain Authors to Attribution and Integrity)

17 U.S.C. §107 (Limitations on Exclusive Use: Fair Use)

17 U.S.C. §114 (Scope of Exclusive Rights in Sound recordings)

17 U.S.C. §§ 505-513 (Copyright Infringement and Remedies)

17 U.S.C. §1101 (Sound Recordings and Music Videos)

Commission Regulation (EC) No 2869/95 of 13 December 1995 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs)

COUNCIL REGULATION (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version)

EU Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

EU Directive: 2006/115/EC of The European Parliament And Of The Council of December 12, 2006; and 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

EU Directive 2008/95/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2008 to approximate the laws of the Member States relating to trade marks.

EU Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

France: Intellectual Property Code of France, Legislative Part, Article L212.

Lanham Act, 15 U.S.C. §§ 1051 et seq.

United States Constitution: Article 1 Section 8 [Copyright Clause], Article 1, Section 8, Clause 3 [Commerce Clause]

United Kingdom: Copyright, Designs and Patents Act of 1988, Chapter 48, Section 250F.

WORLD INTELLECTUAL PROPERTY ORGANIZATION. (1982). *Berne Convention for the Protection of Literary and Artistic Works: texts*. [Geneva], World Intellectual Property Organization.

WORLD INTELLECTUAL PROPERTY ORGANIZATION. (1961). *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations: : texts*. [Geneva], World Intellectual Property Organization.

WORLD INTELLECTUAL PROPERTY ORGANIZATION. (2002). *World Intellectual Property Organization Performances and Phonogram Treaty: texts*. [Geneva], World Intellectual Property Organization.

WORLD INTELLECTUAL PROPERTY ORGANIZATION. (2012). *Beijing Treaty on Audiovisual Performances: texts*. [Geneva], World Intellectual Property Organization.

## **Cases**

*Bette Midler v. Ford Motor Company and Young & Rubicam Inc.*, 849 F.2d 460 (9<sup>th</sup> Cir. 1988)

*Gilliam et al v. American Broadcasting Companies, Inc.* 538 F.2d 14 (2d Cir. 1976)

*John W. Carson, d/b/a Johnny Carson, and Johnny Carson Apparel, Inc., v. HERE'S JOHNNY PORTABLE TOILETS, INC.*, 698 F.2d 831 (6<sup>th</sup> Cir. 1982)

*Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82.

*United States v. Moghadam*, 175 F.3d 1269, 1272 (11th Cir. 1999)

*White v. Samsung*, 971 F.2d 1395 (9th Cir. 1993)