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# *Game On: Copyright and the Right of Publicity Battle for Supremacy in Romantics v. Activision*

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Does a rock group have the right to prevent a “sound-alike” recording of its signature song from being used in a video game when the game’s publisher has a license to use the underlying musical composition? This is one of the interesting questions arising out of a recent lawsuit by 1980s band The Romantics against Activision, publisher of the enormously successful “Guitar Hero” video game franchise.<sup>1</sup>

The lawsuit stems from the 2007 release of “Guitar Hero Encore: Rocks the 80s,” one of several editions of Activision’s guitar simulation game (the Game). In addition to songs by such 80s staples as A Flock of Seagulls and Twisted Sister, the Game includes a cover version of “What I Like About You,” a new wave hit made famous by The Romantics (the Song). Activision did not use the master sound recording featuring The Romantics’ version of the Song, but instead obtained a “synch license” from EMI, copyright owner of the musical composition.<sup>2</sup> This license permitted Activision to record a new version of the Song and synchronize it with the game’s visual images. A cover band, WaveGroup, performed the new “sound-alike” version of the Song, which Activision incorporated into the Game.<sup>3</sup>

This did not sit well with The Romantics’ members, three of whom filed a lawsuit against Activision, WaveGroup, and the Game’s developers in November 2007. On the eve of the Christmas shopping season, the group filed a motion for preliminary injunction to enjoin sales of the Game pending trial.

Plaintiffs claimed violations of the right of publicity,<sup>4</sup> Section 43(a) of the Lanham Act,<sup>5</sup> and unfair competition. The group alleged that defendants had imitated their “identities, persona, and distinctive sound” to drive sales of the Game, and that the

sound-alike created the false and misleading impression that the band endorsed Activision’s product, confusing fans who thought that the song appearing in the Game was the version recorded by The Romantics.<sup>6</sup>

The court denied the motion for preliminary injunction on several grounds. In addition to finding that plaintiffs had not shown that monetary damages were inadequate,<sup>7</sup> the court held that plaintiffs did not establish a likelihood of success on the merits.<sup>8</sup>

The court first noted that it was unclear whether Michigan (the state in which the suit was brought), would even recognize a right of publicity in the sound of a voice, or a combination of voices, even if they were distinctive. Moreover, not all of the plaintiffs performed on the original master recording of the Song, and indeed, the lead singer on the master was not one of the litigants.<sup>9</sup>

The court went on to hold that even if Michigan were to recognize a right of publicity in a “distinctive sound,” the Game was protected as an expressive work entitled to First Amendment protection, as opposed to a “disguised commercial advertisement” for goods or services.<sup>10</sup>

Finally, as is discussed in detail below, the court held that the Copyright Act barred, or “preempted,” plaintiffs’ state law right of publicity claim.<sup>11</sup>

The court also rejected plaintiffs’ Lanham Act and unfair competition claims. The court found that Activision did not make improper use of the band’s name in its Game, but merely referenced “The Romantics” to accurately identify the group that made the Song famous. As to the use of the Song itself, the court held that the Song could not be protected as its own trademark under the Lanham Act and that there was no evidence of an express or implied endorsement. Neither the band nor the Song was referenced on the Game packaging or in any advertising material, and a player would only encounter the Song or a reference to The Romantics if he or she advanced sufficiently far in the Game.<sup>12</sup>

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## Copyright Preemption

These issues are all interesting and are all worthy of an article in their own right. But perhaps the most interesting issue in the case involves the intersection between the right of publicity and copyright law: the issue of “copyright preemption.”

“Preemption,” broadly defined, is the supremacy of federal law over conflicting or contradictory state law on the same issue.<sup>13</sup> Prior to the 1976 Copyright Act, copyright was the province of both federal and state law: A work could be protected by state law, often referred to as “common law copyright,” before it was published.<sup>14</sup> After publication, the work could only be protected by federal law, upon compliance with particular statutory formalities.<sup>15</sup>

The 1976 Copyright Act (the Act) did away with common law copyright protection for most unpublished works in favor of unitary federal protection that arose upon the fixation of a work in a tangible medium of expression (*e.g.*, writing it down).<sup>16</sup> In passing the new Act, Congress decided to preempt not only common law copyright, but all other state law causes of action that seek to protect rights equivalent to those protected by federal copyright law. In Section 301 of the Act, Congress expressly stated the terms of federal copyright preemption:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.<sup>17</sup>

Section 301 sets forth two requirements that, if satisfied, will result in the preemption of a state law claim. First, the asserted state law right must be in “works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.”<sup>18</sup> Section 102 of the Act sets forth the various categories of works of authorship comprising the subject matter of copyright, such as literary and musical works.<sup>19</sup> This provision also exempts from copyright protection certain fundamental concepts that may be embodied in a work

of authorship, such as ideas, procedures, processes, and systems.<sup>20</sup> While copyright does not protect these elements, they nevertheless come within the “subject matter of copyright.” Therefore, a state law that attempted to provide a remedy for the infringement of non-copyrightable ideas would be preempted by the Act.

The second preemption requirement is that the state law must create “legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106.”<sup>21</sup> Section 106 lists exclusive rights held by copyright owners, including the right to reproduce, adapt, distribute, perform, and display a copyrighted work.<sup>22</sup> This requirement has been sometimes referred to as the “extra element” prong because courts have held that a state law right is “qualitatively different” from a right protected by the Copyright Act if the state law requires proof of an additional element that is not required when protecting the federal right.<sup>23</sup> For example, while a state law could not protect against the infringement of ideas, it could recognize a claim for breach of an implied contract to pay for the use of a non-copyrightable idea. The mutual assent required to create the implied contract provides an extra element that makes the claim qualitatively different from one for copyright infringement.<sup>24</sup>

The application of Section 301 to state law claims often has proven difficult for courts, especially when the state law at issue is the right of publicity. This is aptly demonstrated by the Seventh Circuit’s two contrary decisions in *Toney v. L’Oreal USA, Inc.*<sup>25</sup>

Plaintiff, June Toney, authorized the defendants, manufacturers of hair care products, to use her likeness on product packaging and magazine advertisements for a limited period of time. Toney’s likeness on the packaging was embodied in a photograph in which defendants owned the copyright. She alleged that after the contractually-specified time limit had expired, defendants continued to use her likeness on packaging and promotion without her permission. The district court held that her right of publicity claim was preempted.<sup>26</sup> The Seventh Circuit initially affirmed, concluding that her claims were “based upon her right to publicity in her likeness in photographic form,” and that the likeness was therefore within the subject matter of copyright for preemption purposes.<sup>27</sup> The court also held that Toney’s right of publicity in her likeness was “qualitatively indistinguishable” from the exclusive rights granted by the Copyright Act.<sup>28</sup>

On rehearing, the panel vacated its original opinion and reversed the district court. This time, the court concluded that Toney’s right of publicity claim was

not preempted because it did not satisfy *either* prong of Section 301. First, as to the “subject matter of copyright” prong, the court found that plaintiff’s claim was premised on the use of her “identity” or “persona,” not on the unauthorized use of a particular copyrighted photograph.<sup>29</sup> Unlike the photograph, plaintiff’s “persona” was not a “work of authorship fixed in a tangible medium of expression” and therefore did not fall within the scope of Section 102 of the Copyright Act.<sup>30</sup> The court further concluded that the requirement that defendant’s use be for a “commercial purpose” constituted the necessary “extra element” that made the state law action not “equivalent to” a copyright infringement action.<sup>31</sup>

By holding that a claim based on the use of one’s likeness did not come within the “subject matter of copyright” and therefore was not preempted under Section 301, the Seventh Circuit joined a number of other courts that have considered this issue. For example, in *Downing v. Abercrombie & Fitch*,<sup>32</sup> the Ninth Circuit held that although plaintiffs’ images were embodied in a copyrighted photograph, the *subject matter* of their claims was not the particular image, but the unauthorized use of their likenesses, which were not “works of authorship.”<sup>33</sup>

What about when the subject of the claim is not a likeness, but a voice? Courts that confronted the issue early on also held that these right of publicity claims were not preempted. In *Midler v. Ford Motor Co.*,<sup>34</sup> Bette Midler asserted a right of publicity claim against an advertiser that hired Midler’s former backup singer to imitate her voice for a car commercial. The Ninth Circuit upheld the claim against a preemption challenge, holding that a “voice is not copyrightable. The sounds are not ‘fixed.’ What is put forward as protectable here is more personal than any work of authorship.”<sup>35</sup>

The Ninth Circuit followed this approach in *Waits v. Frito-Lay, Inc.*,<sup>36</sup> a similar case in which singer Tom Waits sued an advertiser for using a sound-alike to imitate his distinctive vocal style. The Ninth Circuit held that “Waits’ claim, like Bette Midler’s, is for infringement of voice, not for infringement of a copyrightable subject such as sound recording or musical composition.”<sup>37</sup>

A more recent Ninth Circuit case, however, imposed limits on the right of publicity’s reach, and, in turn, limited the ability of a performing artist to thwart a copyright owner’s licensing deal.<sup>38</sup> In *Laws v. Sony Music Entm’t, Inc.*, the plaintiff, professional recording artist Debra Laws, sued Sony for violating her right of publicity after Sony incorporated a sample of Laws’ version of “Very Special” into a new song by Jennifer Lopez and L.L. Cool J. Sony obtained a license for this

use from Elektra Records, the sole copyright owner of the “Very Special” sound recording. Sony did not seek Laws’ permission before it granted the license, nor was Laws compensated.<sup>39</sup>

After citing Section 301 of the Copyright Act, the court held that Laws’ right of publicity claim was preempted. Analyzing the “subject matter” prong of the preemption test, the court held that defendants’ sound recording was a work of authorship fixed in a tangible medium of expression, and therefore came within the subject matter of copyright. The court rejected Laws’ argument that her right of publicity claim concerned the unauthorized use of her “persona,” which was not a fixed work of authorship.<sup>40</sup>

Distinguishing *Midler* and *Waits*, the Ninth Circuit recognized that Sony had not used an *imitation* of Laws’ singing, but rather her actual voice as embodied on the sound recording: “In contrast to *Midler* and *Waits*, in where the licensing party obtained only a license to the song, and then imitated the artist’s voice, here Sony obtained a license to use Laws’s recording itself.”<sup>41</sup> The court concluded:

Although California law recognizes an assertable interest in the publicity associated with one’s voice, we think it is clear that federal copyright law preempts a claim alleging misappropriation of one’s voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium.<sup>42</sup>

The court also distinguished the Seventh Circuit’s *Toney* decision on the basis that Toney brought her right of publicity claim against the defendants that owned the copyright in her photograph and had agreed not to use her likeness after a specified date. By contrast, Laws’ claim was brought against Sony, which had properly licensed the “Very Special” sound recording from copyright owner Elektra. “The facts of this case would be analogous to *Toney* if Laws had brought her right of publicity claim against Elektra, which holds the copyright to the song and may have agreed to licensing limitations.”<sup>43</sup>

More than anything, the Ninth Circuit’s decision in *Laws* appears to be driven by a concern that if performing artists could prevent copyright owners from licensing their works for derivative uses, this would unduly trample the federally-protected rights of copyright owners. Interestingly, the Ninth Circuit did not seem overly-concerned by such an outcome in one of its earlier right of publicity cases pitting performers against copyright owners. In *Wendt v. Host Int’l, Inc.*,<sup>44</sup> the court rejected a preemption argument, holding

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that the actors from *Cheers* could use their rights of publicity to prevent the copyright owner of the popular television program and its licensees from creating derivative works (animatronic robots) based on the Norm and Cliff characters.<sup>45</sup>

## Analysis Applied to The Romantics' Lawsuit

This brings us back to The Romantics' lawsuit against Activision. Should the claim by the rock band there be analyzed as an attempt to prevent a copyright owner from enjoying the exclusive right to exploit its copyrighted work and to authorize others to do the same? Or is The Romantics' claim one for the imitation of a voice which, as the *Midler* court held, is "more personal than any work of authorship?"<sup>46</sup>

At first blush, The Romantics' lawsuit appears more similar to *Waits* and *Midler* than to *Laws*. Activision was not using the actual sound recording made famous by the band, but rather a sound-alike version that plaintiffs alleged constituted an unauthorized imitation of their personas. Nevertheless, the court found The Romantics' claim preempted. Interestingly, the court did not even cite *Waits* or *Midler* in its decision:

Plaintiffs' "identity" claims to the sound of the Song are essentially claims regarding the licensing of a copyrighted work, falling squarely within the "subject matter" of the Copyright Act. Moreover, Plaintiffs' right of publicity claim, as pleaded, arises from Defendants' arrangement and production of musical and vocal performances that allegedly sound similar to those embodied and reflected in a copyrighted sound recording released by The Romantics in 1980, as distinct from the sound of any individual's voice or musical performance existing separate and apart from a copyrighted work. Thus, the rights asserted by Plaintiffs are "rights equivalent" to those protected by the Copyright Act.<sup>47</sup>

The court's analysis of the two Section 301 prongs is suspect. Here, like the claims in *Midler* and *Waits*, the subject matter of The Romantics' claim was their "personas" or "identities," which do not fall within the subject matter of copyright. Unlike *Laws*, plaintiffs' actual voices were not used. Instead of properly focusing on the rights plaintiffs sought to protect, the court focused on the *defendants'* work

(a new sound recording of "What I Like About You") to conclude that the work fell within the subject matter of copyright. However, under this rationale, virtually *all* right of publicity claims would be preempted, because virtually all complain of the use of a plaintiff's persona in a work fixed by the defendant, whether a photograph, sound recording, or television commercial.

Moreover, while *The Romantics* court found that the second "equivalency" prong also was satisfied, it appears to have simply conflated this prong with the subject matter inquiry. The court held that plaintiffs' right of publicity claim arose from defendants' "arrangement and production of musical and vocal performances that allegedly sound similar to those embodied and reflected in copyrighted sound recordings." It contrasted this with "the sound of any individual voice or musical performance existing separate and apart from a copyrighted work." Thus, the court concluded, "the rights asserted by Plaintiffs are 'rights equivalent' to those protected by the Copyright Act."<sup>48</sup> But this is really just another way of restating the court's view that plaintiffs' claims came within the subject matter of copyright.

This is not to say that the court did not reach the correct *result* in finding that plaintiffs' state law claims were preempted by the Copyright Act. Section 301, however, is not the source of such preemption.

The court did briefly allude to another potential basis for preempting plaintiffs' claim, Copyright Act Section 114(b), which provides in relevant part:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 [rights to reproduce and prepare derivative works of a copyrighted work] 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. (Emphasis added).<sup>49</sup>

Section 114(b) expressly prevents copyright owners from blocking the creation and exploitation of a new sound recording that imitates the original. Thus, an aspiring cover band is free to re-record a song provided that it licenses the right to use the song from the owner of the underlying musical composition or, in appropriate circumstances, pays a "compulsory license" fee.<sup>50</sup>

Allowing a recording artist to block the distribution of a new sound recording via a state law right

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of publicity action arguably conflicts with, at least the spirit of Section 114(b), by giving the artist rights that the copyright owner in the sound recording does not have. Moreover, as a practical matter, such power could essentially give a monopoly on a musical composition to whichever recording artist happened to make the song famous, even when the performer has no copyright interest in the song.

Recognizing this conflict, *The Romantics* court held that plaintiffs' right of publicity claims also were barred because defendants "possess a valid synchronization license that allowed them to make their own recording of the Song to integrate into the Game without violating Plaintiffs' right of publicity." Relying on Section 114(b), the court held that this section "expressly disallows any recourse for such sound-alike recordings of a song."<sup>51</sup>

However, the court's statement is not entirely correct. While Section 114(b) certainly prevents a copyright owner from blocking the creation of new sound recordings by carving out an exception to its exclusive reproduction and adaptation rights, the statute says nothing about whether sound-alike recordings could nevertheless be actionable under state law. In other words, Section 114(b) does not expressly preempt state law right of publicity claims. Moreover, if one assumes that claims based on the appropriation of one's "distinctive voice" do not fall within the subject matter of copyright, as discussed above, then Section 301 cannot provide a basis for preemption either. Indeed, in both *Midler* and *Waits*, the Ninth Circuit *rejected* the argument that sound-alike claims are barred by Section 301(a), notwithstanding Section 114(b), because voices do not come within the subject matter of copyright.

Instead, to convincingly argue that sound-alike claims are preempted, one must move past the express language of Sections 114(b) and 301(a) to the Constitution's Supremacy Clause. As noted, this clause establishes a general principle that state laws are preempted when they conflict with the objectives of federal laws or the Constitution. In *Capital Cites Cable, Inc. v. Crisp*,<sup>52</sup> the Supreme Court described three instances in which state laws are preempted by federal law: (1) when Congress expresses a "clear intent to pre-empt state law" in a statute (so-called, statutory preemption); (2) "when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation" (field preemption); and (3) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (conflict preemption).<sup>53</sup>

## Conflict Preemption

As discussed above, "statutory preemption" under Section 301 does not apply to sound-alike claims if one assumes that an artist's persona or identity, however embodied, does not come within the subject matter of copyright. Nor does "field preemption" apply because, as Section 301 makes clear, Congress left room for some state intellectual property laws so long as they do not fall within the scope of federal copyright protection. Indeed, the legislative history to Section 301 specifically states that "[t]he evolving common law rights of 'privacy,' 'publicity,' and trade secrets . . . would remain unaffected [by section 301] as long as the causes of action contain elements . . . that are different in kind from copyright infringement."<sup>54</sup>

This leaves "conflict preemption." The argument is that if *The Romantics* could enjoin Activision's distribution of "Guitar Hero," they would be able to effectively block EMI (owner of the composition) from licensing the song and derivative versions of the song, even though the Copyright Act expressly provides that such derivative versions (including imitations and simulations) do not violate copyright law. In essence, a state law would be prohibiting an act that federal law permits, and arguably even encourages. While the court in *The Romantics* case did not refer to conflict preemption in its opinion, application of this principle would lead to the same result: Plaintiffs' right of publicity claims would be preempted.

What is the current state of the law on whether "sound-alike" right of publicity claims are preempted? It may depend on where a claim is litigated. In the Ninth Circuit, *Midler* and *Waits* are still good law, validated (although distinguished) as recently as 2006 in the *Laws* opinion. Future courts in other jurisdictions will either need to choose between the *Waits/Midler* approach and *The Romantics* approach, or else find a persuasive way to distinguish the two lines of cases.

One potential point of distinction is that both *Midler* and *Waits* involved sound-alike claims in the context of traditional commercial advertising. The *Midler* opinion itself stated that "[w]e 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."<sup>55</sup>

*Laws* reiterated that "[w]hat *Midler* sought was relief from an unauthorized vocal imitation for *advertising purposes*, and that was not the subject of copyright."<sup>56</sup> Compare this to Activision's use in *The Romantics*, in which the Song appeared in the game

“Guitar Hero” itself, but not in commercials for the Game or in any promotional materials.<sup>57</sup>

However, if the “conflict preemption” analysis begins with the assumption that Congress has decided to allow the creation and distribution of sound-alike recordings, should it matter for preemption purposes whether such recordings are used in a commercial context as opposed to an expressive work? Section 114(b) of the Copyright Act makes no distinction between commercial and non-commercial uses: A copyright owner may not prevent properly licensed sound-alike versions in either case. Likewise, at least some states (California being the most notable), have held that the common law right of publicity applies to the unauthorized appropriation of a plaintiff’s name or likeness “to defendant’s advantage, commercially or otherwise.”<sup>58</sup>

Therefore, while a plaintiff’s ultimate success on a given right of publicity claim may depend on the degree of commerciality associated with the defendant’s use, this does not appear to provide a reasonable basis of distinction from a preemption perspective.

The identity of the defendant was the basis on which *Laws* attempted to distinguish *Toney*. June Toney’s right of publicity claim was brought against the owner of the copyright in her photograph, which had agreed not to use her likeness after a certain date.

Debra Laws’ claim was brought against the licensee of the copyright in the “Very Special” sound recording. Putting aside whether this is a distinction without a difference, it does not provide a basis for distinguishing *The Romantics* from *Midler*: in each case, the defendant properly licensed the musical composition at issue from the copyright owner.<sup>59</sup>

Finally, in holding that plaintiffs’ right of publicity claim was preempted, *The Romantics* court found significant that plaintiffs’ claim arose from the exploitation of a musical performance that sounded similar to that embodied in a copyrighted sound recording, as opposed to the sound of a musical performance existing separate and apart from a copyrighted work.<sup>60</sup> However, in both *Midler* and *Waits*, defendants attempted to imitate plaintiff’s voices as captured on particular sound recordings, just as Activision did with “What I Like About You.” This too, does not provide a basis for distinction.

It remains to be seen whether courts will find another way to meaningfully reconcile *Midler/Waits* with *The Romantics*, and if not, which approach will prevail. Until there is more clarity, parties to a license agreement that contemplates the creation of a sound-alike recording would be well-advised to negotiate in advance their respective rights, liabilities, and indemnity obligations in the event that a recording artist comes forward with a claim.

1. *The Romantics v. Activision Pub’g. Inc.*, —F. Supp. 2d—, 2008 WL 186370 (E.D. Mich., January 22, 2008).
2. A song has at least two copyrights: One for the underlying musical composition and another for the actual sound recording. Different persons or entities often own these two distinct rights.
3. *The Romantics*, 2008 WL 186370, at \*1.
4. As defined by a leading commentator, the right of publicity is “the inherent right of every human being to control the commercial exploitation of his or her name, image, and likeness.” J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1:4 (2d ed. 2007).
5. Section 43(a) of the Lanham Act is designed to protect consumers against confusion resulting from the use of false designations of origin, false descriptions, and false representations in the advertising of goods and services. 15 U.S.C. § 1125(a).
6. Complaint, ¶ 1, *The Romantics a/k/a Master Beat, Inc. v. Activision Pub’g. Inc.*, No. 2:07-CV-14969 (E.D. Mich. November 20, 2007).
7. While the court’s opinion does not reflect it, the court may have been influenced by the Song’s extensive licensing history as alleged in plaintiffs’ complaint. *See id.*, ¶ 9 (“The Song is regularly performed by Plaintiffs and others licensed to perform it. It is also regularly licensed for use in movies, television, and radio advertising. For example, the Song has been used in the movies *Shrek 2*, the Disney remake of *Freaky Friday*, and *The Simpsons Movie*, and has been used in advertising campaigns for Budweiser, T.G.I. Friday’s restaurants, Barbie dolls, and the Los Angeles Dodgers baseball team.”).
8. *The Romantics*, 2008 WL 186370, at \*5.
9. *Id.* at \*3.
10. *Id.*
11. *Id.* at \*3-4.
12. *Id.* at \*4.
13. U.S. Const. art. IV, § 2, cl. 1.
14. 1909 Copyright Act, 17 U.S.C. § 2 (“Nothing in this title shall be construed to annul or limited the right of the author or proprietor of an unpublished work, at common law or equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefore.”).

15. *See, e.g.*, 1909 Copyright Act, 17 U.S.C. § 10 (notice requirement); § 11 (registration requirement); § 13 (deposit requirement).
16. 17 U.S.C. § 102(a).
17. 17 U.S.C. § 301(a).
18. *Id.*
19. 17 U.S.C. § 102(a).
20. 17 U.S.C. § 102(b).
21. 17 U.S.C. § 301(a).
22. 17 U.S.C. § 106.
23. *See, e.g.*, *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 776 (9th Cir. 1989) (fraud cause of action founded on an allegation that the defendant “misrepresented its intent to perform [a] contract” was “qualitatively different” from a copyright claim because of the additional element of misrepresentation).
24. *See, e.g.*, *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004).
25. *Toney v. L’Oreal USA, Inc.*, 384 F.3d 486 (7th Cir. 2004), *rev’d on rehearing* 406 F.3d 905 (7th Cir. 2005).
26. *Toney v. L’Oreal USA, Inc.*, 2002 WL 31455975 (N.D. Ill. November 1, 2002).
27. *Toney*, 384 F.3d at 490.
28. *Id.* at 492.
29. *Toney*, 406 F.3d at 910.
30. *Id.*
31. *Id.*
32. *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001).
33. *Id.* at 1004.
34. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).
35. *Id.* at 462.
36. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).
37. *Id.* at 1100.
38. *Laws v. Sony Music Entm’t, Inc.* 448 F.3d 1134, 1137 (9th Cir. 2006).
39. *Id.* at 1136.
40. *Id.* at 1140-1141.
41. *Id.*

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42. *Id.* at 1141.  
43. *Id.* at 1141 n.4.  
44. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997).  
45. *Id.* at 809-811.  
46. *Midler*, 849 F.2d at 462.  
47. *The Romantics*, 2008 WL 186370, at \*3.  
48. *Id.*  
49. 17 U.S.C. § 114(b).  
50. 17 U.S.C. § 115.  
51. *The Romantics*, 2008 WL 186370, at \*4.
52. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).  
53. *Id.* at 698-699 (citations omitted).  
54. H.R. Rep. No., 94-1476, at 132 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5748.  
55. *Midler*, 849 F.2d at 463 (emphasis added).  
56. *Laws*, 448 F.3d at 1140 (emphasis added).  
57. *The Romantics*, 2008 WL 186370, at \*1.  
58. *See, e.g., Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (1983).  
59. *The Romantics*, 2008 WL 186370, at \*1; *Midler*, 849 F.2d at 462.  
60. *Id.* at \*3.

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