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There is a Fountain: The Autobiography of a Civil Rights Lawyer / Legal Regulation of the Competitive Process

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BOOK REVIEWS

THERE IS A FOUNTAIN: THE AUTOBIOGRAPHY OF A CIVIL RIGHTS LAWYER. By Conrad J. Lynn. Westport, Conn.: Lawrence Hill & Co., 1979. $12.00.

*Reviewed by Leonard B. Boudin**

I have commented elsewhere on the art of judicial biography.[1] The autobiographies of judges and lawyers, however, are much more complex. Conrad Lynn, explaining that "[t]he autobiographical exercise is a typical expression of the ego,"[2] approaches his own life by asking "how does the experience of the individual justify publication?"[3] His response—that "[t]he disappointments of early life, if convincingly recounted, may aid a new generation in avoiding the pitfalls which bedeviled their elders and diverted them from their goals"[4]—is not quite appropriate, because life for Conrad Lynn has been a series of accomplishments. His contribution to the law, as he sees it, lies in providing the best and most competent representation possible for the "inarticulate peoples" with whom he has identified himself since his career began in the early 1930s.[5] By "inarticulate peoples," the author means the Black people of the United States.

This book is unlike other good legal autobiographies, such as those of D.N. Pritt,[6] Clarence Darrow,[7] and more recently Charles Morgan,[8] for Lynn throughout his life was very poor, a radical and, most importantly, Black. Those portions of his autobiography that recount his political life in college and in later years make exciting and important reading. Lynn was the only member of the Young Communist League at Syracuse University in the early 1930s, and was a member of the American Communist Party in his early career until he objected to the party's Black nationalist line.[9] As a young

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1. Boudin, Book Review, 90 HARV. L. REV. 1733 (1977) (reviewing G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977)).

2. C. LYNN, THERE IS A FOUNTAIN: THE AUTOBIOGRAPHY OF A CIVIL RIGHTS LAWYER xi (1979).

3. *Id.*

4. *Id.*

5. *Id.* at xiv.

6. D. PRITT, THE AUTOBIOGRAPHY OF D.N. PRITT (1966).

7. C. DARROW, THE STORY OF MY LIFE (1932).

8. C. MORGAN, ONE MAN, ONE VOICE (1979); C. MORGAN, A TIME TO SPEAK (1964).

9. The party in the late 1930's had supported Josef Stalin, who had assisted in the Italian invasion of Ethiopia and the French invasion of Algeria. "My loyalty to the colored

lawyer, he joined National Lawyers Guild, which he correctly praises for its unique role in providing legal services for politically unpopular causes.[10] He has been involved in most of the major political movements of our day, including the Popular Front movement, the Spanish Civil War, and the movement for Puerto Rican independence. Most significantly, however, Lynn for many years was the only Black lawyer handling political cases for Black people in the United States. It is painful even for one familiar with those cases to hear them retold *en bloc,* recognizing the handicaps under which Lynn and his clients worked and the indifference (often corruption) with which Lynn's efforts were greeted by courts and prosecutors.

There Is a Fountain[11] begins with a lengthy account of the "Harlem Six" case,[12] which was also the subject of Truman Nelson's *The Torture of Mothers.*[13] Lynn then discusses other causes in which he was intimately involved as an advocate, such as U.S. Army desegregation during World War II, the Freedom Riders, Pedro Albizu Campos and the Puerto Rican nationalist movement, the Robert Williams cases,[14] selective service, and the Black Panthers. Dispersed among his recollections of these cases are fragments of history, including the federal government's discrimination against Blacks during World War II, the emergence of Black leaders such as Malcolm X, the French air raids in Algeria during the 1950's, and Lynn's often bitter disputes with left wing colleagues.

In the 1964 "Harlem Six" case, Lynn represented young Black men who were charged with murder during a street disturbance in New York City and convicted upon the testimony of an ex-convict. As one reads Lynn's presentation together with the appellate briefs

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people of the world," Lynn explains, "was far greater than my loyalty to a political party. I had used the Communist party as an instrument; the goal was the liberation of the nonwhite peoples of the earth." C. LYNN, *supra* note 2, at 67.

10. *Id.* at 208.

11. The title is taken from the lyrics of an old Protestant hymn:

> There is a fountain filled with blood
> Drawn from Immanuel's veins
> And sinners plunged beneath that flood
> Lose all their guilty stains.
> The dying thief rejoiced to see
> That fountain in his day
> And there may I, though vile as he
> Wash all my sins away.

C. LYNN, *supra* note 2, at frontispiece.

12. People v. Baker, 23 N.Y.2d 307, 244 N.E.2d 232, 296 N.Y.S.2d 745 (1968).

13. T. NELSON, THE TORTURE OF MOTHERS (1965).

14. *E.g.,* Williams v. North Carolina, 378 U.S. 548 (1964) (per curiam), *vacating and remanding* State v. Williams, 253 N.C. 804, 117 S.E. 2d 824 (1961) (Lynn and this reviewer were co-counsel for the petitioner Williams); *see* notes 43-48 *infra* and accompanying text.

in that case, it is obvious that these young men were prosecuted solely because they sought to protect Harlem children from police violence. The details of this case, which will concern every person devoted to civil rights and liberties, include police raids on the defendants' homes, the appointment by the court of inadequate lawyers instead of the private counsel retained by the defendants' mothers in order that "the defendants . . . be protected from themselves,"[15] racially contemptuous judicial behavior toward the defendants,[16] exorbitant bail, perjured testimony, and egregious prosecutorial misconduct.[17] Is there anything in similar Southern cases, such as those of the "Scottsboro Boys,"[18] Angelo Herndon,[19] and Leo Frank,[20] that is worse? What was heartening in the "Harlem Six" case was Lynn's constancy and the entry of other New York lawyers, most notably William Kunstler, Gene Ann Condon, and my old associates Samuel Neuberger and Mary M. Kaufman.

After discussing the "Harlem Six," Lynn turns to his unsuccessful attempt to protect his brother Winfred from discriminatory conscription practices in World War II. Here one is appalled by the indifference of a federal judge to fundamental constitutional issues; Lynn concludes "it is surprising that moral cowardice is no more prevalent than it is."[21] The Second Circuit held in that case that both federal statute and custom justified segregation in the United States armed forces, and that the fourteenth amendment to the federal Constitution "did not clearly show the intent of Congress to change this practice."[22] Lynn considers this case conclusive proof of the essentially racist nature of American society.[23] Nevertheless, much good work was done by the Lynn Committee Against Segrega-

15. C. LYNN, *supra* note 2, at 10.

16. At one point during trial, the judge remarked that "[t]hese boys wouldn't know a good lawyer from a good watermelon." *Id.* at 14.

17. Four of the defendants agreed to plead guilty to a lesser charge of manslaughter, for which they would be sentenced to the time they had already served, but only if the other two defendants were "part of any deal that was made." The district attorney's office agreed to the arrangement, honored it as to the four plea bargaining defendants, and told Lynn and his co-counsel there "would be no objections" to releasing the other two. The other two, however, were not released. One was released in 1973, and the other is currently awaiting a new trial. *Id.* at 32-33.

18. Powell v. Alabama, 287 U.S. 45 (1932). For a detailed discussion of that case by one of the defendants, see N. WASHINGTON, THE LAST OF THE SCOTTSBORO BOYS (1979).

19. Herndon v. Lowry, 301 U.S. 242 (1937).

20. Frank v. Mangum, 237 U.S. 309 (1915).

21. C. LYNN, *supra* note 2, at 95. The author adds that "[i]t is considered a mark of ability for judges in this country to evade basic matters of principle when deciding cases: don't be controversial and don't rock the boat. This is particularly true in wartime." *Id.*

22. *Id.* at 100-01.

23. *Id.* at 101.

tion in the Armed Forces, which was concerned primarily with mistreatment of the neuropsychiatric casualties of the war.[24]

At this point in his career, however, Lynn tells us he seriously contemplated giving up the law because it "seemed too tricky and devious" for him,[25] and because of the extreme dearth of Black lawyers in New York City.[26] Lynn continued in practice, however, for reasons that were highly personal:

> I began to realize that the great attraction the law had for me was the mental strain it exacted. Also, I was slightly arrogant, and nothing was more sobering than to run into a superior mind that made me acknowledge I was not omniscient. Since humility was not one of my inherited characteristics, bruising conflict in the office and courtroom enabled me to be a tolerable companion in social life.[27]

He soon became one of the early Freedom Riders who traveled to the South for the purpose of testing the legality of accommodating passengers by race in interstate travel, although the Supreme Court had already ruled in the *Morgan* case[28] that such segregation was unconstitutional. One of the organizers of Lynn's trip was James Peck, who is presently suing the Federal Bureau of Investigation not only for failing to protect him from mob action during that trip but also for employing an informant who was part of the conspiracy to beat up the travelers.[29]

Lynn discusses "The Fight Against McCarthyism" very briefly, narrating the extraordinary case of Carl and Anne Braden, who were charged with sedition in Kentucky because of the sale of their home to a Black couple.[30] I was also involved in the early stages of that case, which was supported by the Emergency Civil Liberties Committee. Lynn joined the Committee "[b]ecause so many people [who were accused of being Communists or fellow travelers] were being hounded out of government jobs, teacher positions, and even private assignments."[31] The aftermath of that case was a subpoena to Carl Braden issued by the House Committee on Unamerican Activities, which he resisted on first amendment grounds that were ultimately rejected by the Supreme Court.[32]

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24. *Id.* at 105.
25. *Id.* at 106.
26. *Id.* at 108. For example, Lynn tells us that in the 1950's there were more than one million Blacks living in New York City, but that some 85% of their legal work was being done by white law firms. *Id.*
27. *Id.* at 107.
28. Morgan v. Virginia, 328 U.S. 373 (1946).
29. Peck v. Kelly, Civ. No. 76-983 (S.D.N.Y., filed Mar. 2, 1976).
30. C. LYNN, *supra* note 2, at 118; *see* Braden v. Commonwealth, 291 S.W.2d 843 (Ky. Ct. App. 1956).
31. C. LYNN, *supra* note 2, at 117.
32. Braden v. United States, 365 U.S. 431 (1961).

Lynn's discussion of his Communist past and revolutionary commitment is quite open, and he criticizes those fellow radicals of his early years who later tried to present themselves as "twentieth-century Americans" who "never contemplated overthrowing the existing capitalist structure."[33] This is a rather harsh criticism, however, of people who usually sought by their silence to protect others, not themselves. Although Lynn admits he was self-employed during the McCarthy era and therefore was "not as vulnerable as someone who was at the mercy of an employer," he nevertheless refuses to forgive those who "sold out" when "my license to practice law was constantly endangered, and it was not uncommon for a disgruntled client to complain about my political views to the bar association in an effort to have me disbarred."[34]

Lynn's devotion to Pedro Albizu Campos and the Puerto Rican Independence Movement is a major theme of his autobiography. During his debating days at Syracuse University, he tells us, he had espoused the cause of the Nicaraguan revolutionary Sandino (whose name was properly invoked by the recently successful Sandinist movement that overthrew the dictatorship of Gen. Antonio Somosa), and had criticized the United States' dealings with "the neocolonies of Cuba and Haiti" which, he argues, "foreshadowed the program for Puerto Rico."[35] Lynn describes Campos as a World War I volunteer who had been consigned to work with a black labor regiment in Panama, where he had been subjected to racism by United States forces stationed there.[36] Although Campos graduated from Harvard and became a lawyer whose advice was eagerly sought by American corporations, he later joined and led the Nationalist Party in Puerto Rico. Lynn tells us of Campos' conviction in 1936 of "conspiracy to overthrow the United States government in Puerto Rico,"[37] of his subsequent prosecution in 1950 for advocating the overthrow of the United States government,[38] and of his release in November 1953 and reimprisonment in 1954 after four Puerto Riçan Nationalists had fired guns from the gallery of the House of Representatives and wounded five Congressmen.[39]

Lynn tells the extraordinary story of his efforts to free Campos based upon the unconstitutionality of the pardon document,[40] which

33. C. LYNN, *supra* note 2, at 117.
34. *Id.*
35. *Id.* at 123.
36. *Id.* at 123-24.
37. *Id.* at 125.
38. *Id.* at 128.
39. *Id.* at 134-35.
40. *Id.* at 135-40.

had provided for reimprisonment if he attempted or conspired against the public security by "intending to subvert by violence or terror the constitutionally established order."[41]

I attended a meeting in the 1950's at which Robert Williams, a young Black activist, disturbed a liberal middle class audience by asserting the right of Blacks to use violence to protect themselves. One has only to read Lynn's account of Monroe, North Carolina during that period to understand Williams. As president of the Union County NAACP, he first posed the issue of the right of Black children to use the county's white swimming pool after two Black children were drowned while swimming in a creek.[42] Then came the "Kissing Case" in which two Black children, ages seven and nine, were sentenced to twelve and fourteen years' imprisonment respectively for allegedly kissing (or apparently being kissed) by some white children while playing house in a culvert. Williams asked Lynn to enter the case because of Lynn's willingness to handle unpopular and dangerous cases.[43] This was more than the state or national NAACP was willing to do. Lynn's story of his appearance before the Juvenile Court judge must be read to be believed, as illustrated by the following colloquy:

> *Lynn:* Judge, assuming that Sissy Marcus did kiss Hanover Thompson, and it was only on the cheek as I understand, why did you sentence Fuzzy Simpson?
> *Judge:* Sah! Don't you realize what that nigger boy witnessed? Don't you know what was planted in his mind? It'll take at least fourteen years to rehabilitate him.[44]

Lynn then describes the publicity campaign that he instituted, and the subsequent issuance of a federal writ of habeas corpus because Williams had pointed out that "Southern judges who were about to retire often wanted to do something to salve their consciences after spending a lifetime dispensing unequal justice."[45] Lynn lost the case but the children were released and their criminal records destroyed after an extraordinary chain of telephone calls from Lynn to Mrs. Eleanor Roosevelt, from Mrs. Roosevelt to President Eisenhower, and from Eisenhower to North Carolina Governor Luther Hodges. "It may not have been legal," Lynn triumphantly concludes, "but it was effective."[46] Lynn then tells of Williams' press statement

41. *Id.* at 135.
42. *Id.* at 142.
43. Lynn tells us that "[m]y office has heen called 'the house of last resort.'" *Id.* at 143.
44. *Id.* at 145.
45. *Id.* at 150.
46. *Id.* at 156.

advocating Black violence in response to Southern injustice.[47] Williams was suspended from the NAACP, was clubbed and convicted of trespass and disorderly conduct for attempting to desegregate a drugstore,[48] and was charged with kidnapping by people whose lives he had actually saved.

The fiery lawyer who describes these events is *not* a prototype of the American civil liberties lawyer. The average lawyer in that class came out of an Ivy League law school and was an editor of his law review. Many worked for a New Deal federal agency, usually the National Labor Relations Board. Whether liberal or radical in their political orientation, some joined the Communist Party, but all joined the National Lawyers Guild. Many of these young people became lawyers for the new progressive American labor movement, fought in World War II, or were members either of the Office of Special Services (OSS) or the Board of Economic Warfare, both predecessors of the Central Intelligence Agency. They wrote, interpreted, and enforced much of our liberal legislation. They were an extraordinary group of young men who were devoted to the country's welfare.

A second wave of liberal lawyers came with the civil rights movement of the 1960's and the Vietnam War. They were larger in number, a greater proportion came from the South, and there were a few Black lawyers like Howard Moore of Atlanta. Very few entered government service. Their sympathies embraced a somewhat different caseload; many had criminal law experience at an early age. Many of these young advocates joined legal aid societies, public defender groups, and the legal services corporation. Their work with the poor is today far more important than the more spectacular political litigation in which so many of us were heavily involved.

The National Lawyers Guild, of which many of the second wave liberal lawyers are members, still remains the most siguificant bar association of the country devoted to the interests of the politically disinherited. It has remained alive despite the extraordinary efforts of the American Bar Association during the 1950's, and the more recent efforts of the Federal Bureau of Investigation (through the COINTEL program) to discredit it. It has published very important manuals on the military draft, wiretapping, and grand juries, and

47. *Id.* at 159. The press statement read in part: "[T]he Negro in the South cannot expect justice in the courts. He must convict his attackers on the spot. He must meet violence with violence and lynching with lynching." *Id.*

48. *See* Williams v. North Carolina, 378 U.S. 548 (1964)(per curiam), *vacating and remanding* State v. Williams, 253 N.C. 804, 117 S.E.2d 824 (1961), in which Lynn and this reviewer were co-counsel for the petitioner Williams.

can look forward to a much greater future if it keeps internecine warfare to a minimum. The problems of American law and society are so difficult that the efforts of that great organization ought to be concentrated on those problems.

Conrad Lynn, as I have suggested in this review, is *sui generis.* He appears to have oriented his entire life and work around two basic principles. First, he is an ardent Marxist who believes that "the basic ideas of Karl Marx have afforded a key to understanding the fundamental factors about which the world has been in conflict for the last 150 years."[49] Second, Lynn is both motivated and thrilled by the recent advent of Black pride in the inner cities and in "the prisons, where so many of our children are receiving their basic political education."[50] This "new wave" of cultural and political awareness, Lynn argues, has given rise to the realization that "black victims of the system" still need militant lawyers of Lynn's ilk.[51] He is by no means a has-been.

I recognize the extraordinary honesty, and indeed arrogance, in Lynn's evaluation of society, his colleagues, and himself. Emphasizing his individuality, he claims that while the opportunity to join the Establishment was often snatched away from him, the "[r]ivalries and jealousies of my left associates" often prevented him from becoming a member of their Establishment as well.[52] Some have argued that Lynn's friendships were neither deep nor long lasting, but this is really not true. As Lynn states in the introduction to his autobiography, "[i]t would be more nearly accurate to say that the fidelity of many of my companions to our common goal was fleeting, and we parted when they listened to another siren. . . . The aim is not to villify or muckrake but to show how difficult it is to pursue the North Star."[53]

49. C. LYNN, *supra* note 2, at xii.
50. *Id.* at xiv.
51. *Id.* at xiv-xv.
52. *Id.* at xiv.
53. *Id.*

LEGAL REGULATION OF THE COMPETITIVE PROCESS. Second edition. By Edmund W. Kitch and Harvey S. Perlman. Mineola, N.Y.: The Foundation Press, Inc., 1979. Pp. xliv, 1098. $24.50 cloth. Statutory supplement. $5.75 paper.

*Reviewed by Kenneth B. Germain**

Although considerably overdue in light of major developments in the mid-1970s,[1] the new edition of this casebook is well worth waiting for. Indeed, its authors have successfully built upon the solid[2] foundation they laid in the first edition by some helpful reorganization, some sensible condensation, and some crucial expansion into new areas, in addition to the necessary updating. Consequently, this book represents the finest published casebook available for a broad-based course in Unfair Trade Practices, with the caveat that if a substantial segment of the course is devoted to "consumerism," another book may be preferable.[3]

The opening chapter, entitled "The Problem of Entry," has been expanded substantially since the first edition. A few new cases have been added, notably *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*,[4] which presents some provocative aspects of the interplay between federal and state law in an antitrust context. Significantly, this case, along with the earlier materials in the chapter, tends to indicate the precarious balance between "unfair" and "competition." This case is followed by the classic *INS* case[5] which, in turn, is followed by the landmark *Sears*[6] and

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1. *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (state trade secret law not preempted by federal patent law); Goldstein v. California, 412 U.S. 546 (1973)(state "tape piracy" statutes not preempted by United States Constitution or federal Copyright Act); Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1976); Copyright Act of 1976, 17 U.S.C. §§ 101-809 (1976).

2. *See* Germain, Book Review, 5 RUT.-CAM. L.J. 185 (1973); Maggs, Book Review, 52 NEB. L. REV. 308 (1973).

3. Because this reviewer currently structures his Unfair Trade Practices course in this fashion, he prefers S. OPPENHEIM & G. WESTON, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION (3d ed. 1974 & Supp. 1977), *reviewed in* Germain, Book Review, 49 N.Y.U.L. REV. 1256 (1974).

4. 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *see* E. KITCH & H. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 10-16 (2d ed. 1979).

5. International News Service v. Associated Press, 248 U.S. 215 (1918) (announced the arrival of the elusive "misappropriation" concept to protect plaintiff news gathering agency from having its news "pirated" by a competitor); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 18-33.

6. Sears, Reebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (federal preemption of state unfair competition laws that prohibited "product simulation"); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 39-43.

Compco[7] opinions. This new organization permits the overriding "preemption" issue to be introduced early enough in the course so that its parameters can be pursued more thoroughly in later materials.

Also noteworthy in the first chapter is the brief new section on "The Regulation of Public Goods,"[8] which serves both to introduce the curious concept of "public goods"[9] and to raise a number of crucial questions concerning the interface of law and economics. Such an orientation, of course, has become associated with the University of Chicago School of Law, where Professor Kitch teaches. The first chapter concludes with a new section on "The Regulation of Advertising," which features the important *Virginia State Board*[10] "commercial speech" case,[11] and an interesting note probing the economic and social justification of advertising and trademark protection.[12] Thus, the first chapter of the new edition, which is broader, longer, and more stimulating than its predecessor, represents a noteworthy improvement.[13]

The second chapter, entitled "Misleading Practices," follows the organizational trail blazed in the first edition except that it dubiously separates the opening common-law false advertising materials from the later discussion of sections 43(a) and 44 of the Lanham Act,[14] placing these closely related topics on either side of a somewhat incongruous discussion of disparagement.[15] This reviewer

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7. Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 43-47.

8. E. KITCH & H. PERLMAN, *supra* note 4, at 48-54.

9. The authors define the term "public goods" as follows:

> There is a class of goods known as "public goods," wherein the amount of use of the good or service by one person does not reduce the amount available to others *if* the good has been produced. Classic examples are melodies, poems, ideas, and theories. Anyone can use them without in any way reducing someone else's supply.

E. KITCH & H. PERLMAN, *supra* note 4, at 48 (quoting A. ALCHIAN & W. ALLEN, EXCHANGE AND PEODUCTION, THEORY IN USE 251 (1969)).

10. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (invalidating on first amendment grounds a state statute prohibiting advertising of prescription drug prices); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 54-65.

11. This might be a good place for the authors to discuss the very recent and controversial case of Friedman v. Rogers, 440 U.S. 1 (1979), in which the Supreme Court upheld a state law prohibiting the use of trade names for optometrical enterprises.

12. E. KITCH & H. PERLMAN, *supra* note 4, at 67-74.

13. On the negative side, this reviewer believes that the "Hit Parade" case, Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946) (music publishing company's claim that creators of a radio program supposedly featuring the most currently popular songs "wantonly" omitted its songs from the program with the intent to injure plaintiff recognized as stating a cause of action), which probes the "prima facie tort" concept, should appear somewhere in the first chapter.

14. 15 U.S.C. §§ 1125(a), 1126 (1976).

15. Disparagement, which is also known as "trade libel" or "injurious falsehood," has been defined as follows:

would adjust the order of presentation so as to allow a smoother flow from the common law of false advertising to the statutory treatment of that topic, which could then be followed by the different concept of disparagement. As an alternative, disparagement could be discussed first, followed by common law and then statutory false advertising materials. The latter approach would be advantageous in that the student would learn about the common-law tort of disparagement before seeing in the *Skil* case[16] that section 43(a) of the Lanham Act does have a role to play in cases involving inaccurate product comparisons in advertisements.

Aside from the above organizational defects, the second chapter is well done. The *Benzo Gas* case[17] that was featured in the first edition has been retired in favor of a recent case[18] that provides a pleasant update on common-law disparagement. Unfortunately, however, this case contains some rather unorthodox rulings on special damages and burden of proof that may mislead students unless carefully countered by proper statements of the current state of the law.[19] While the *Kemart* case[20] on privileges has sensibly been re-

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One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in barm to interests of the other having a pecuniary value, or either recognizes or should recognize tbat it is likely to do so, and

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

RESTATEMENT (SECOND) OF TORTS § 623A (1977).

16. Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777 (N.D. Ill. 1974) (interpreting Bernard Food Indus. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970), which held that section 43(a) does not encompass false representations about a *competitor's* product); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 123-25.

17. National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927) (containing a classic explication of the basic principles of "disparagement," as applied to a defendant's assertion that plaintiff's gasoline and benzol fuel was injurious to engines).

18. Systems Operations, Inc. v. Scientific Games Development Corp., 414 F. Supp. 750 (D.N.J. 1976) (the security of plaintiff's instant lottery tickets was challenged without explanation by defendant, an overzealous competitor); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 86-96.

19. The reported case holds that in disparagement cases the burden of proving the truth of the statement lies with the defendant as in defamation cases; not, as is generally held, that it is incumbent upon the plaintiff to show its falsity. The case also holds that no "special damages" are required in disparagement suits, in direct opposition to well-recognized principles. Significantly, the casebook authors half-heartedly sought to correct these misimpressions of current law by stating, in one paragraph of a note following this eleven-page case, that the Third Circuit reversed the district court on both grounds. *See* E. KITCH & H. PERLMAN, *supra* note 4, at 97 (citing Systems Operations, Inc. v. Scientific Games Development Corp., 555 F.2d 1131 (3d Cir. 1977)).

20. Kemart Corp. v. Printing Arts Research Lab., Inc., 269 F.2d 375 (9th Cir.), *cert. denied*, 361 U.S. 893 (1959) (allowing, under the "rival claimant's privilege," one competitor

tained, the *Smith-Victor* case,[21] which effectively summarized the material in chapter two of the first edition, has been deleted. One beneficial byproduct of the deletion, however, is that this case might now be used as a class problem or an examination question.

Coverage of the ever-growing "statutory civil wrong of false representation"[22] encompassed by section 43(a) of the Lanham Act[23] is considerably and capably expanded in the second edition. On the negative side, however, the authors chose not to segregate section 44 of the Act from section 43(a), thereby potentially creating the misapprehension that those two sections are related to each other. Furthermore, the coverage allotted to section 44—almost seven pages—seems excessive, considering that it is a dead letter on the domestic front except in the Ninth Circuit.[24]

In the second edition's subchapter on purchaser's remedies, a section addresses statutory remedies available to consumers, as opposed to competitors. This is a timely topic. It includes the now well-established *Colligan* case[25] disavowing a consumer right of action under section 43(a) of the Lanham Act, and the new *Kipperman* case,[26] which, in covering private actions that are judi-

to honestly, but falsely, advise members of the relevant trade that plaintiff's process infringed its patented process); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 106-09.

21. Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302 (N.D. Ill. 1965) (multicount complaint alleged disparagement and false advertising violative of common law, section 43(a) of the Lanham Act, a state criminal antifraud statute, and the Federal Trade Commission Act).

22. L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954). Section 43(a) of the Lanham Act is a federal statute that creates an action for false advertising and other unfair competitive practices where the common law did not provide any effective relief.

23. 15 U.S.C. § 1125(a) (1976); *see* Germain, *Unfair Trade Practices Under Section 43(a) of the Lanham Act: You've Come a Long Way, Baby—Too Far, Maybe?*, 49 IND. L.J. 84 (1973); Lunsford, *Protection From False and Misleading Advertising*, 35 FED. B.J. 87 (1976).

24. *See* Stauffer v. Exley, 184 F.2d 962 (9th Cir. 1950) (holding that a cause of action for unfair competition was stated under section 44 even though both plaintiff and defendant were citizens of the same state and notwithstanding the existence of any other federal question). Contrast the view accepted in other federal circuits:

> [S]ection 44, which together with Section 39 contains the provisions of the Lanham Act relied on here as the basis of jurisdiction, reveals merely a design to give United States citizens reciprocal rights against foreign nationals where foreign nationals compete unfairly with them. It does not aim to create a federal law of unfair competition available to United States citizens one against the other nor does it grant the federal courts any new authority to hear such controversies between citizens.

L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 652 (3d Cir. 1954).

25. Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686 (2d Cir. 1971) (section 43(a) does not create a cause of action in favor of mere consumers who claim that its provisions were violated); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 160-64.

26. Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977) (establishing a private right of action under 39 U.S.C. § 3009 (1976), which makes the mailing of unsolicited merchandise a per se unfair trade practice under the Federal Trade Commission Act); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 165-68.

cially implied from federal statutes, sets the scene for an important note on consumer actions based on the Federal Trade Commission Act.[27] The last section of the subchapter discusses consumer class actions. Here the mammoth, confusing *Eisen* saga[28] has been relegated to a note[29] in favor of two clearer, more manageable cases followed by improved textual notes.

The next subchapter in Chapter Two is devoted to the Federal Trade Commission. Its page coverage has justifiably been doubled so that it now is quite comprehensive, and its organization and content are quite sound. For example, the subchapter starts with good background text followed by intriguing policy pieces by Professor Richard Posner[30] and FTC Commissioner Robert Pitofsky.[31] The former explains why the dissemination of misleading information is commercially and legally dysfunctional to advertisers; the latter argues that the market system is inadequate to protect consumer interests. The standard "Rejuvenescence" case[32] has been retained and fortified by reworked notes that pay special attention to the constitutional dimensions of advertising regulation. The famous *Pfizer* "Un-burn" case,[33] which officially announced the arrival of the "unfairness" doctrine has been added, although it might have been better positioned after the "California white pine" case,[34] which, like the "Rejuvenescence" case, is a "deceptiveness" case rather than an "unfairness" case.

The FTC subchapter also contains some apt examples of trade regulation rules[35] and a brief but helpful introduction to the

27. E. KITCH & H. PERLMAN, *supra* note 4, at 168 n.2.

28. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). The eight-year history of this case is detailed in the Supreme Court opinion. *See* 417 U.S. at 160-69.

29. E. KITCH & H. PERLMAN, *supra* note 4, at 175.

30. *Id.*, at 182-85 (excerpting R. POSNER, REGULATION OF ADVERTISING BY THE FTC (1973)).

31. E. KITCH & H. PERLMAN, *supra* note 4, at 185-90 (excerpting Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 663-71 (1977)).

32. Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944) (unsubstantiated advertising claims that a facial cream could rejuvenate its users' faces held a deceptive trade practice under section 5 of the Federal Trade Commission Act, since deceptiveness is to be judged not by a reasonable person standard, but rather by what has come to be known as the "fool's test"); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 191-94.

33. Pfizer, Inc., 81 F.T.C. 23 (1972) (advertising claims violate the "unfairness" aspect of section 5 of the Federal Trade Commission Act when, even if they might be truthful, there is no "reasonable basis" for believing them at the time they are issued); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 198-206.

34. FTC v. Algoma Lumber Co., 291 U.S. 67 (1934) (it is a deceptive practice under section 5 of the Federal Trade Commission Act to sell yellow pine, an inferior type, under the trade designation "California white pine," where white pine is a superior type); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 209-15.

35. E. KITCH & H. PERLMAN, *supra* note 4, at 233-37.

Magnuson-Moss Warranty Act's provisions,[36] the latter of which is effectively designed to give the student a sense of the Act's basic thrust.[37] Of considerable importance is the new section on "Remedies and Enforcement,"[38] which provides in-depth coverage of the novel "corrective advertising" technique.[39]

Chapter Three is entitled "Product and Producer Identity," which is the authors' name for what is more commonly known as "trademarks and trade dress." This chapter, a good deal longer than its forerunner, contains a very sound, comprehensive treatment of virtually[40] all of the relevant areas. Of special note are some of the new entries: the Artie Shaw imitation recording case,[41] which demonstrates the difference between trademark law's bent toward protection and competition theory's preference for permissiveness, and a needed note on domestic and international registrations under the Lanham Act.[42]

The authors handle the particulars of trademark law especially well. Generic marks are clearly explicated, and the "Lite" case[43] is put to good use. The tough question whether generic marks can be redeemed by the acquisition of secondary meaning is represented by the brief notation of a recent case that answered it in the negative.[44] A nice, modern substitute for the timeworn surname cases has been found,[45] and a topic on the "subject matter" of trademarks has been

36. 15 U.S.C. §§ 2301-2312 (1976).

37. E. KITCH & H. PERLMAN, *supra* note 4, at 240 n.*.

38. *Id.* at 244-67.

39. "Corrective advertising" is a novel remedy whereby a party who has misled someone is required to correct the misimpressions it perpetrated, either by mandatory public statements or by a restriction that a certain portion of its future advertising contain "corrective" statements. Typically "corrective" messages must indicate tha the disseminator earlier misled its audience and that it now seeks to set the record straight.

40. One area that might have been included is the liability of trademark licensors for the torts of their licensees. *See* Borchard & Ehrlich, *Franchisor Tort Liability: Minimizing the Potential Liability of a Franchisor For a Franchisee's Torts,* 69 TRADEMARK REP. 109 (1979); Germain, *Tort Liability of Trademark Licensors in an Era of "Accountability": A Tale of Three Cases,* 69 TRADEMARK REP. 128 (1979).

41. Shaw v. Time-Life Records, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975) (famous clarinetist of a bygone era was not entitled to stop modern recreations of his "sound," provided that no confusion of source or sponsorship could be proven); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 277-80.

42. E. KITCH & H. PERLMAN, *supra* note 4, at 286-88.

43. Miller Brewing Co. v. G. Heilman Brewing Co., 561 F.2d 75 (7th Cir. 1977) ("Lite" and its phonetic equivalents held generic as applied to low calorie, less filling beer); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 306-08.

44. CES Publishing Corp. v. St. Regis Publications Inc., 531 F.2d 11 (2d Cir. 1975) (the trademark "Consumer Electronics Monthly," which was generic as applied to a magazine oriented toward tradespeople in the consumer electronic field, could not be protected through the acquisition of secondary meaning); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 310-11.

45. Taylor Wine Co. v. Bully Hill Vineyards, Inc., 569 F.2d 731 (2d Cir. 1978) (Walter

added, featuring a good recent case on "functionality."[46] An enlarged section on adoption, affixation, and use now appears. The treatment of the enigmatic doctrine of "incontestability,"[47] which this reviewer once improperly criticized,[48] has been updated and clarified somewhat, and the leading "Eveready" case[49] has been included, although in summarized form. The area of "noncompeting" goods[50] has been improved by the addition of the "Wombles"[51] and "Rally"[52] cases. The former is a humorous and effective vehicle introducing the basic problem, albeit with a rather questionable solution, whereas the latter shows the Court of Customs and Patent Appeals' liberality in recognizing market related

S. Taylor, grandson of the original Taylor of Taylor Wine fame, and himself experienced in the wine business, allowed to use his full name long with his trademark—"Bully Hill"—provided that his labels also include an express disclaimer of any connection with the predecessor company); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 318-22.

46. Fotomat Corp. v. Photo Drive-Thru, Inc., 425 F. Supp. 693 (D.N.J. 1977) (first user of film "kiosks" not entitled to enjoin second user of same concept since only functional, as opposed to source-indicating, features had been copied); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 332-36. A feature of an item is "functional" if it "affects [the] purpose, action or performance, or the facility or economy of processing, handling or using [the item]." RESTATEMENT OF TORTS § 742 (1938). Only nonfunctional features may possibly serve as protectible source-indicators and then only upon establishment of a secondary meaning.

47. "Incontestability" is a concept that derives from sections 15 and 33(b) of the Lanham Act. Although it was originally touted as one of the major advances of the Act, it has yet to be demonstrated that an "incontestable" mark is notably superior to any other mark that has remained on the Principal Register for at least five years and is thus subject to cancellation only on the limited grounds contained in sections 14(c) and (e).

48. In Germain, *supra* note 3, at 1257-58, this reviewer erroneously wrote that the first edition of the Kitch and Perlman casebook had failed to include "references to a number of relevant articles" on incontestability. In fact, the first edition did include such references.

49. Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976) (rejecting well-established doctrine that "incontestability" under sections 15 and 33(b) of the Lanham Act only had "defensive" uses); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 351-52.

50. "Noncompeting" goods are products that do not satisfy needs for each other but might be considered as so "related" to each other that confusion of source might ensue from the application of the same or substantially similar marks. *See, e.g.*, Yale Electric Corp. v. Robertson, 26 F.2d 972 (2d Cir. 1928) ("Yale" as applied to flashlights and batteries as opposed to locks and keys).

51. Wombles Ltd. v. Wombles Skips Ltd., [1977] R.P.C. 99 (Ch. 1975) (owner of famous English trademark "Wombles" (for mythical creatures who supposedly thrive on cleaning up Wimbledon Common), having broadly licensed the mark for all sorts of products, denied an interlocutory injunction against use of "Wombles" on commercial garbage collection containers on the ground that the litigants' uses of the mark were not on closely enough related goods); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 371-73.

52. E.I. DuPont DeNemours & Co., 476 F.2d 1357 (C.C.P.A. 1973) (the mark "Rally" for automobile cleaner-polisher held registrable under section 2(d) of the Lanham Act notwithstanding the existence of a prior use of the same mark on all-purpose detergent, where the prior user expressly recognized the unlikelihood of marketplace confusion); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 377-82.

concepts as bearing upon the judicial resolution of trademark disputes.[53]

"Confusion of sponsorship"[54] is now handled by one of the "patches" cases,[55] and an interesting state-run lottery case.[56] The former presents a good contrast between the public interest in readily available, low-priced goods and the commercial interest in relative monopoly. The latter reflects the important need to accommodate trademark protection to the overriding needs of the general public. At this point, however, the authors make an unnecessarily abrupt transition to the "dilution" doctrine.[57] Although the primary case[58] is a good one, it would be more meaningful if it followed the smirk-inducing "bugs" case[59] that was included in the first edition, for this case served as an excellent link between the true "noncompeting but related goods" cases and the true "dilution"

53. *Cf.* Beatrice Food Co. v. Fairway Foods, Inc., 429 F.2d 466 (C.C.P.A. 1970) (concurrent use proceeding under section 2(d) of the Lanham Act, holding that the Patent and Trademark Office should give considerable credence to bona fide agreements between lawful concurrent users when the agreements expressly recognize the various parties' exclusive trademark rights in prescribed geographical areas).

54. "Confusion of sponsorsbip" occurs when, although it is unlikely that the consuming public would be confused regarding the source of goods or services, it is likely that the public might believe that goods or services were being endorsed or "sponsored" by a party known to use the mark. For example, the young women's magazine *Seventeen* was able to establish that its readers were likely to believe that it in some way "sponsored" youth girdles sold under the mark "Miss Seventeen." Triangle Publications Inc. v. Rohrlich, 167 F.2d 969 (2d Cir. 1948).

55. Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) (National Hockey League, to which member teams' rights had been assigned, obtained an injunction barring an unlicensed company from making and selling cloth "patches" showing team logos); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 383-88. For a discussion of the "patches" cases, see Fletcher, *Still More About Patches*, 67 TRADEMARK REP. 76 (1977).

56. National Football League v. Governor of Delaware, 435 F. Supp. 1372 (D. Del. 1977) (state lottery director enjoined to disclaim NFL sponsorship of state-run football lottery); E. KITCH & H. PERLMAN, *supra* note 4, at 388-93.

57. "Dilution" is a doctrine, based almost exclusively on state statutes, that is designed to combat the weakening of otherwise strong marks by use of the same or confusingly similar marks on totally unrelated products or services. It goes beyond "confusion of sponsorship" and seeks to protect against "a likelihood of injury to business reputation or of dilution of the distinctive quality of the mark . . . notwithstanding the absence of competition between the parties or of confusion as to source of the goods or services." Ill. Rev. Stat. ch. 140, § 22 (Smith-Hurd Supp. 1979).

58. Allied Maintenance Corp. v. Allied Mechanical Trades, Inc., 42 N.Y.2d 538, 369 N.E.2d 1162, 390 N.Y.S.2d 101 (1977) ("Allied Maintenance," a highly descriptive and common mark for cleaning and maintenance services, held by a narrowly divided court not protectable via dilution theory from "Allied Mechanical Trades" as used for installation and repair of heating and cooling systems, on the ground that the former mark was so weak as not to be susceptible to "dilution"); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 396-400.

59. Chemical Corp. of America v. Anheuser-Busch, Inc., 306 F.2d 433 (5th Cir.), *cert. denied*, 372 U.S. 965 (1962) ("Where there's life, there's bugs" used as an advertising slogan for an insecticide).

cases. Similarly disappointing is the strange underemphasis afforded the momentous "Big O" case,[60] which deserves much more than summary treatment in a note. Indeed, this case is so all-encompassing that this reviewer has sometimes thought he could teach most or all of trademark law by using it as an example. In a welcome organizational switch, which this reviewer earlier recommended,[61] the authors have placed remedies, assignment and licensing, and contributory infringement,[62] in the trademark chapter, rather than in the separate conglomerate chapter on the enforcement of intellectual property rights which appeared at the end of the first edition. The subject of abandonment,[63] headed by the instructive "Cook's Goldblume" case,[64] is also a nice addition, which helps make the new version of the trademark materials seem even stronger than the old.

Chapter Four, entitled "Predatory Practices," combines the two first edition chapters on predatory and pricing matters, and condenses the latter materials considerably. The introductory notes on various pricing practices, such as sales below cost, price discrimination, and refusals to deal are sensibly capsulized to fifteen pages. The following materials, on interference with contractual relations, are fortified by new notes and problems, but would benefit still further from addition of the text of sections 766 to 774A of the *Restatement (Second) of Torts*,[65] which set forth the basic "rules" that generally govern this complex tort.

The next topic, "Appropriation," covers the protection of ideas by confidence, contract, or common-law copyright. The standard

60. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F. Supp. 1219 (D. Colo. 1976), *modified*, 561 F.2d 1365 (10th Cir. 1977), *cert. denied*, 434 U.S. 1052 (1978) (largest American tire manufacturer held liable for trademark infringement and "disparagement" for commencing a mammoth advertising campaign featuring the mark "Bigfoot" after discovering the plaintiff's prior use of the same mark, also on tires; plaintiff recovered compensatory and punitive damages totaling some $4.75 million, one of the largest awards on record in a case of this type); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 401 n.2.

61. Germain, *supra* note 2, at 188.

62. This would also be a good place for insertion of the trademark licensor tort liability matter referred to in note 40 *supra*.

63. "Abandonment" of a mark occurs when a mark owner allows a mark to fall into disuse with an accompanying intent to relinquish its rights in the mark. It can also be defined to include loss of rights by genericization of the mark. The definition in section 45 of the Lanham Act covers both meanings.

64. Sterling Brewers, Inc. v. Schenley Indus., Inc., 441 F.2d 675 (C.C.P.A. 1971) (federal registration of mark "Cook's Goldblume" not abandoned despite nonuse for period of almost ten years when initial nonuse was due to labor dispute, during which period owner constantly tried to arrange reopening of the brewery, and when mark demonstrated immediate consumer recognition upon resumption of use); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 423-26.

65. RESTATEMENT (SECOND) OF TORTS §§ 766-774A (1979).

Bristol case[66] is sufficient to state the traditional view, but regrettably the pivotal sentence in the opinion—"plaintiff communicated his system without marketing it"[67]—is again edited out.[68] What is really needed here, however, is an instructive case[69] or note on the methods modern companies use to deal with submissions of ideas by outsiders.[70] The basic materials on idea protection are followed by materials dealing with the overriding preemption problem.[71] The older cases have been neatly compacted into two pages of notes which lead comfortably to the landmark *Goldstein* tape piracy case[72] and the presumably preemptive section of the new federal Copyright Act,[73] embellished by some of the latter's confusing legislative history.

Trade secrets are covered in much the same way as in the first edition, except that one new case[74] has been added to show the "compensatory" nature of injunctions in this area. The problem of customer lists[75] is relocated as a subpart of trade secrets. A new

66. Bristol v. Equitable Life Assurance Soc'y, 132 N.Y. 264, 30 N.E. 506 (1892) (plaintiff, who unsolicitedly divulged his business idea in a letter sent to the defendant, held unprotected against use of that idea without consent or compensation notwithstanding the letter's conclusion requesting confidentiality); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 475-76.

67. Bristol v. Equitable Life Assurance Soc'y, 132 N.Y. 264, 268, 30 N.E. 506, 507 (1892).

68. This omission is "pivotal" because the quoted sentence clearly emphasizes the essence of the law of protection of ideas—that concepts of "contract" or "confidence," both of which rely upon *pre*disclosure behavior control, rather than generalized concepts of property.

69. *See, e.g.*, Downey v. General Foods Corp., 31 N.Y.2d 56, 286 N.E.2d 257, 334 N.Y.S.2d 874 (1972) (unsolicited idea submitted by consumer did not require compensation when "used" since it had been anticipated by company's advertising department which maintained separate files for consumer input information).

70. For example, some companies set up separate files for ideas submitted by nonemployees. These files are carefully kept apart from information developed by their own research and development divisions. *See id.*

71. "Preemption" is shorthand for "preemption of state law by conflicting federal law" either due to the preference given to federal statutes over state law by the Supremacy Clause ("statutory preemption") or by the direct preemptive effect of the United States Constitution ("constitutional preemption").

72. Goldstein v. California, 412 U.S. 546 (1973) (state "tape piracy" statutes not preempted by United States Constitution or federal Copyright Act); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 491-502.

73. Copyright Act of 1976, § 301, 17 U.S.C. § 301 (1976). The preemptive impact *vel non* of § 301 is quite controversial, as the statutory language indicates a broad impact while the legislative history is hopelessly confused. The likely judicial interpretation will be very narrow, in this reviewer's opinion, in keeping with the thrust of such recent, related Supreme Court decisions as *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

74. Northern Petrochemical Co. v. Tomlinson, 484 F.2d 1057 (7th Cir. 1973) (alleged trade secret misappropriator who voluntarily abstained from using the secret information for a longer time than it would have taken to develop the information through proper means held free to use the information); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 537-40.

75. Lists of current or prospective customers, when not generally available to business

subtopic, entitled "Protection from Governmental Disclosure," while a positive addition in concept, is cluttered by an underedited and thus unduly lengthy case.[76] A leading candidate for addition to these materials would be some practical information on programs designed to protect companies' trade secrets.[77]

Following a thorough airing of the trade secret preemption problem, the chapter on predatory practices closes with a new and interesting section entitled "A Case Study: Exploitation of Characters and Personalities." This includes a rundown of the melancholy melodrama of the true Paladin (Victor DeCosta, not Richard Boone)[78] and concludes with the explosive case of the "human cannonball,"[79] a case which strengthens the view that *Sears* and *Compco* have been devitalized and which, positioned as it is, serves as an excellent bridge to the following chapter on copyright law.

The last chapter to be reviewed[80] covers copyright law. This chapter appears to be generally sound but lacking in certain significant aspects of coverage. On the plus side are fundamentally well-chosen, well-organized cases and materials on the basics of copyright law. In particular there is a helpful new case on the protectibility of architectural drawings[81] and the "Monty Python" case[82] on the intriguing "droit moral" issue.[83] On the negative side, however, are

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firms and especially when compiled through effort and expense, are treated as a type of trade secret, since they tend to give competitive advantages to their owners.

76. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (probing the trade secret exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1976)); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 542-48.

77. *See, e.g.*, S. OPPENHEIM & G. WESTON, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION 355-57 (3d ed. 1974).

78. E. KITCH & H. PERLMAN, *supra* note 4, at 596-604.

79. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (state law protecting against misappropriation of a performer's "entire act" held not violative of the first or fourteenth amendments to the United States Constitution); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 610-18.

80. The last chapter in the book, on patent law, is apparently a very thorough explication of this technical area, but this reviewer does not feel qualified to review the topic.

81. Imperial Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972) (the copyright on a set of architectural drawings is not abandoned by the reproduction of the floor plans in an advertising brochure, and an unlicensed copying of the floor plan constitutes infringement of the architectural drawings); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 646-51.

82. Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976) (television network, as licensee of a number of original films made by a British comedy group, allegedly violated its contractual promise not to edit the films so as to impair their artistic integrity; preliminary injunction granted on joint grounds of copyright infringement and "mutilation" of the film in violation of § 43(a) of the Lanham Act); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 762-70.

83. "This cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of . . . moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it." Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24 (2d Cir. 1976).

a list of shortcomings, mostly sins of omission rather than of commission. For example, why was the crucial opinion in the *Williams & Wilkins* fair use case[84] replaced by a much less explanatory decision?[85] More importantly, why were the topics of ownership of copyright rights, the manufacturing requirement, and the Copyright Royalty Tribunal ignored? Perhaps even more disquieting, why is coverage of the constitutional underpinnings and the social and economic bases of copyright given such extremely short shrift? Lastly, why did the authors choose to omit all coverage of the remedies available for copyright infringement, indeed a crucial topic?[86] The answers to these questions are not apparent, especially since the second edition lacks a prefatory note that might have explained the authors' intentions in this regard. This reviewer must conclude that the copyright chapter is disappointingly inadequate as a comprehensive introduction to copyright law.[87]

Notwithstanding some surprising shortcomings, notably in the copyright chapter, the general verdict of this reviewer remains that the new edition of the Kitch and Perlman casebook is an excellent vehicle for a wide-ranging course on Unfair Trade Practices. Indeed, it still leads the pack in terms of sophistication and recognition of the vital interactions of state and federal—particularly constitutional—principles, and this reviewer can commend it to anyone who is willing to take the plunge into this difficult, challenging, but gratifying domain.

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84. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court,* 420 U.S. 376 (1975) (photocopying of professional journals by a federal research organization to facilitate library research deemed "fair use").

85. Encyclopedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978) (granting preliminary injunction against a nonprofit educational services system, which in furthering the needs of a public school system, regularly and without permission made videotape copies of off-the-air television programs); *see* E. KITCH & H. PERLMAN, *supra* note 4, at 751-55.

86. The predecessor edition contained about 15 pages on the various remedies—damages, "in lieu" damages, profits, and injunctions—for copyright infringement, and there is no obvious explanation for failing to retain this coverage in the new edition.

87. Perhaps the authors considered that any instructor truly devoted to copyright law would prefer to use a case book exclusively devoted to that topic. Other books containing extensive treatments of copyright law are, of course, available. *See, e.g.,* B. KAPLAN & R. BROWN, CASES ON COPYRIGHT (3d ed. 1978).