

FINDING HER VOICE

In 1952, singer Peggy Lee entered an agreement with Disney to work on the animated film *Lady and the Tramp*. Peggy Lee wrote six songs, sang three, and was the voice for four characters in the 1955 film. Lee was paid \$3,500 for her participation. Disney retained all rights to revenues earned from distributing the movie to theatres and television broadcasting companies in domestic and foreign markets. Lee retained the right to residual payments at 12.5% for such items as phonographic recordings sold to the public.

Specifically, the contract gave Disney the right to distribute the film including the rights to “any other technology yet to be invented,” but § 12(b) of the agreement provided that

Anything herein to the contrary notwithstanding, it is agreed that nothing in this agreement contained shall be construed as granting to us (Disney) the right to make phonograph recordings and/or transcriptions for sale to the public, wherein results or proceeds of your services hereunder are used.

In 1987 Disney began distributing videocassettes of the film. Lee sued in March 1988, claiming she was entitled to \$9 million. Specifically, she claimed that she was entitled to 12.5% of the profits Disney generated from the sales of videocassettes of *Lady and the Tramp* on the basis that the distribution of the videocassettes was not authorized by the 1952 contract. Disney countered that the distribution of the videocassettes was authorized in the contract and that Lee was therefore entitled only to residual payments for her songs and voice performances, which would be capped (under union rules) at \$381,000.

Disney introduced evidence that it was their “custom, practice and usage” not to allow profit participation deals for voice performers in animated movies, a policy which “evolved,” according to the testimony of Roy Disney, “from the notion of absolute ownership, no strings attached...It stems from bad experiences Dad and Walt had in the '20s.” Further, there was testimony from Jodi Benson, the voice of Ariel in *The Little Mermaid* (released in 1989), and Cheech Marin, a voice in *Oliver & Co.* (released in 1988), who each testified that Disney did not give voice actors profit participation deals.¹

Required

Assume that *your consulting team has been* hired to provide an unbiased report on the merits of this litigation and the damage claims made by Ms. Lee. (Use the guidelines for writing a report found on the course website.) The editors intend to use your report to write an informative article that will appear in an issue of their journal.

In preparing your answer, be sure to review financial accounting concepts 2 and 7, management accounting concepts 7 and 8, and business law concepts 1 and 2.

¹ “Breach of Contract: Lee v. Walt Disney Productions,” *The Entertainment Litigation Reporter*, April 8, 1991.

Exhibit 1 Lady & the Tramp Project Income Statement *
For the year ended 12/31/87

Sales	\$	77,236,000
Cost of Goods Sold		31,963,480
Marketing Expenses		3,487,316
General & Administrative		9,545,460
Profit before Tax	\$	32,239,744

****These are fictitious statements and do not represent the actual results that Disney received from Lady and the Tramp.***

Notes:

- Cost of Goods Sold includes the costs to produce the videocassettes for sale to the public.
- Marketing Expenses include the direct expenses of marketing and distributing these videocassettes to the public.
- General and Administrative expenses are the indirect costs of running Buena Vista Home Video. They are allocated to each project of Buena Vista based on a formula. The formula is each project's sales revenue divided by total sales revenue generated by all projects multiplied by the total general and administrative costs of Buena Vista.
- Individual projects of Buena Vista are not charged income tax expense since taxes are determined on Disney's worldwide operations.

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Interpretation of contracts

General rules of construction

Courts look to contracts to determine the parties' obligations. Most of this analysis is based on the language of the agreement. However, sometimes there are issues not mentioned or ambiguously addressed in the contract. What to do in such a case? Courts follow general rules in construing contracts called "rules of construction." Some of these rules are articulated in cases, some are intuitive but few are codified in statute. It makes is difficult, sometimes, for businesspersons to make business decisions. The more you understand how courts tend to approach contractual disputes, the more effective you will be at managing resources. Here are a few rules of construction that may apply to this case. Think about how they affect your analysis of the case. Use them (cite to specific sources) in your analysis of the case.

Courts seek to protect the reasonable expectations of the parties

Courts construe a contract's meaning to be consistent with the parties' intention. The central rule of contractual analysis is to interpret based upon the parties' intent on entering the agreement. It is central to legal analysis to recognize that courts do not enforce agreements based upon what the judge thinks is fairest, "right" or best. The judge wasn't a party to the agreement and his or her opinion is irrelevant on this issue. Instead, interpret contracts to most consistently enforce the parties' reasonable expectations. The judge's job (and your job in this assignment) is to figure out what the parties intended and to interpret the contract consistent with that intent.

Here is some authority for this proposition:

(The contractual meaning) is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract, the object, nature and subject matter of the contract, and the subsequent conduct of the parties. *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent acts and conduct of the parties. 1 Witkin *Summary of Cal. Law*, Contracts (9th ed. 1987) § 684, pp. 617-618.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. *Cal. Civ. Code* § 1636.

Missing or ambiguous terms

Contracts are interpreted as they were apparently intended by the parties at the time the contract was created. If the parties' intent can be determined, courts will supply missing terms or clarify ambiguities. They will not, however, insert terms to create an agreement where none, really, exists.

Here are some relevant references:

A contract extends only to those things concerning which it appears the parties intended to contract. Our function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. We do not have the power to create for the parties a contract which they did not make and cannot insert language which one party now wishes were there. *Levi Strauss & Co. v. Aetna Casualty & Surety Co.* (1986) 184 Cal. App. 3d 1479, 1485-1486.

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract. *Cal. Civ. Code* § 1648.

If parties had concluded (a) transaction in which it appears they intend to make contract, (the) court should not frustrate their intention, if it is possible to reach fair and just result, though this requires choice among conflicting meanings and filling of some gaps left by parties. *Rivers v Beadle* (1960) 183 Cal App 2d 691.

Invasion of privacy analysis

Invasion of privacy is actually a collection of four different types of wrongdoing, only one of which is relevant here: the use of one's name or likeness without consent. Despite the name, this tort has nothing to do with privacy. It is more accurate to say that it relates to publicity – the right of those who have a market for their name or likeness to sell it. If, for example, you took a picture of Tiger Woods and put it in an ad for your product without his permission Tiger might complain (legitimately) that you were using his likeness (i.e. a photo of him) without his permission. This results in a financial loss for Tiger Woods, since there is a market for his "likeness" – advertisers are willing to pay significant amounts of money to use Tiger Woods to endorse their products. Tiger Woods has a right to select those products he may want to endorse and he has a right to make money from it. If you use his likeness without his permission, you've effectively deprived him of his right to commercialize his image.

However, if one gives consent to the use, then there is no violation of one's right to privacy. If, for example, Tiger Woods agreed that you could use his picture on your product advertising, then he is barred from suing for it later. Consent is agreement voluntarily made, and can be express (i.e. specifically stated orally or in writing) or implied under the circumstances.

One problem with *Lady and the Tramp* is that Peggy Lee is claiming a violation of her right to privacy (specifically, the use of her name or likeness without her consent.) Did Disney use Lee's name or likeness without her consent?

Here are some relevant sources for this analysis:

California Civil Code § 3344 provides in part:

Unauthorized commercial use of name, voice, signature, photograph or likeness

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof.

From the case *Lugosi, v. Universal Pictures*, 25 Cal. 3d 813 (1979):

The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities. The protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy.

From the case *Midler v. Ford Motor Co.*, 849 F. 2d 460, 463 (1988) (In which Bette Midler sued on the basis that the defendant hired a "sound-alike" singer to imitate her voice):

A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. ..A fortiori, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity. (citations omitted) We need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable. We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California. Midler has made a showing, sufficient to defeat summary judgment, that the defendants here for their own profit in selling their product did appropriate part of her identity.