



*Copyright, Trademark and
Trade Secrets Intellectual
Property Update from
United States Federal Courts
2023 - 2024*



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Ms. Naumann has obtained trademarks, copyrights, and design patents on behalf of artists, writers, and companies. In addition to obtaining intellectual property protection through government agencies, Ms. Naumann advises and drafts documents on matters of ownership, shop rights, work for hire, transfers of rights, licenses, permissions, rescission, consents, non-disclosure agreements, releases, trade secrets, proprietary information, and web sites.

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Course Description

Course Presentation

This presentation will include important updates in Copyright, Trademark and Trade Secrets, Intellectual Property and related topics from July 2023 through June 2024. In particular this presentation will include, although not exclusively, United States federal appellate court decisions, United States Supreme Court decisions, and other important legal developments such as, although not exclusively, new federal statutes and statute amendments.

This presentation covers recent intellectual property updates from the United States federal courts in 2023 and 2024, focusing on copyright, trademarks, and trade secrets. In copyright, key cases include Warner Chappell vs. Neely regarding infringement damages, and American Society for Testing in Materials vs. Public Research Resource Organization, a fair use case. The Visual Rights Act is discussed in Kirsten vs. Vermont School of Law.

Trademark cases include the Supreme Court decision in V down vs. Elster on the constitutionality of the Lanham Act's names clause, and various disputes over trade dress, domain names, and source identification. Finally, trade secret cases, such as Paul's vs. Deloitte, address misappropriation and unjust enrichment claims, while Janssen Products vs. Evernote discusses the Defend Trade Secrets Act and ex parte seizure orders.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives:

The Learner will become knowledgeable of important updates in trademarks, copyrights, trade secrets and related topics from July 2023 through June 2024.

The participant will learn about the latest United States federal appellate court decisions, United States Supreme Court decisions, and other important legal developments regarding Intellectual property law.

The Learner will become familiar with new federal statutes and statute amendments in Intellectual Property Law.

Learners will gain knowledge about litigation related changes as well as transactional changes in Intellectual Property Law.

After this course, the Participant will understand the duties, roles, and responsibilities of counsel in situations involving Intellectual Property.

The Attorney will learn updates on writing appeal briefs in both federal litigation and to the patent office administrative board; as well as for trademarks, copyrights, and trade secrets

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Timed Agenda:

Presenter Name: Adrienne Naumann

CLE Course Title: Copyright, Trademark and Trade Secrets Intellectual Property Update from United States Federal Courts 2023 - 2024

Time Format (00:00:00 - Hours: Minutes: Seconds)	Description
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title: Copyright, Trademark and Trade Secrets Intellectual Property Update from United States Federal Courts 2023 - 2024
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00:00:52	CLE Substantive Material Presentation Introduction
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00:07:49	Visual Rights Act
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00:27:49	Website Trespass to Chattels
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00:36:34	Trade Dress Functionality
00:41:53	Trademark Source Identification
00:44:47	Personal Jurisdiction Trademark
00:56:5	Trademark Standing Requirement
01:06:03	Presenter Closing
01:06:59	ApexCLE Company Closing Credits
01:07:08	End of Video

Course Material

Copyright, Trademark and Trade Secrets Intellectual Property Update from United States Federal Courts 2023 - 2024

I. Copyright

A. Warner Chappell Music, Inc. et al. v. Nealy et al., 144 S. Ct. 1135 (2024)

1. Outcome: Affirmed the Second Circuit's interpretation of the U.S. copyright statute
2. Background
 - a. Mr. Nealy entered into a music business venture with a partner, and
 - (1) this business venture released one album and several singles.
 - b. the business dissolved and Mr. Nealy was imprisoned consecutively for two separate drug related convictions.
 - c. meanwhile, his former business partner purported to license musical works created during his former business relationship with Mr. Nealy.
 - d. when he left prison, Mr. Nealy discovered these transactions, and sued Warner Chappell for copyright infringement
 - (1) Mr. Nealy held the copyrights to this music, and
 - (2) the infringement began ten years prior to commencement of his lawsuit.

e. Mr. Nealy sued under the discovery rule interpretation of the copyright statute

f. although the commencement of his lawsuit was timely, the district court concluded that Mr. Nealy could not receive damages

(1) for more than three years of infringement prior to commencement of his lawsuit, but

(2) the district court did certify the question of damages for interlocutory appeal.

g. the Eleventh Circuit reversed, because the claims were timely under the discovery rule, and

(1) a plaintiff could obtain damages retroactively, and

(2) even if infringement occurred more than three years prior to the commencement of the lawsuit.

3. Supreme Court analysis

a. assume that the discovery rule governs, i.e.,

(1) the limitation period of three years runs from the date

(i) the plaintiff discovered, or

(ii) should have discovered the infringement

b. the U.S. copyright statute does not comprise a separate three-year period for recovering damages

c. in sum, a copyright owner with a timely claim for infringement may recover damages.

[B. American Society for Testing & Materials *et al.* v. Public Resource Org., Inc., 82 F.4th 1262 \(D.C. Cir. 2023\)](#)

1. Outcome: Affirmed the district court regarding fair use.

2. Background

a. plaintiffs were private organizations that created and owned copyright

(1) in written technical standards for best procedures such as prevention of fire, electrical and related hazards.

b. these standards are often incorporated by reference into the Code of Federal Regulations,

(1) as well as into the laws of municipalities and states.

c. Public.Resource is a not-or-profit organization which posted plaintiff's standards online, so

(1) the public could access these standards without purchasing a license from plaintiffs.

d. the plaintiffs sued for copyright infringement

e. after an initial appeal and remand, the district court concluded that

(1) posting of standards incorporated by reference into government regulations comprised fair use, but

(2) posting of standards not incorporated by reference into was not fair use, that is, those standards which

(i) had no informational purposes for public compliance with applicable laws, but

(ii) instead, were strictly used for scientific and technical purposes.

3. Appellate court analysis

a. Public.Resources' use was directed to non-profit educational purposes, and

- (1) was not commercial in nature.
- b. Public.Resources' use was transformative, because it served a different purpose, that is,
 - (1) to provide a legal resource, and not scientific or technical information.
- c. the public's knowledge of these standards is necessary for compliance if the government has given legal effect to them.
- d. the record was equivocal on market harm, and
- e. the public benefits of access to the law's requirements weighs heavily in this instance.

C. [Kerson v. Vermont School of Law, Inc.](#), 79 F.4th 257(2d Cir. 2023)

1. Outcome: Affirmed summary judgment of no liability under the federal Visual Art Rights Act (the Act)
2. Background
 - a. Mr. Kerson created a mural depicting the history of slavery in the United States, and
 - (1) this mural was part of a wall within a law school building.
 - b. after complaints the law school obstructed the entire view of the mural by
 - (1) placing a panel wall approximately two inches anterior thereto in a parallel manner.
 - c. Mr. Kerson sued the law school under the Act, but
 - d. on summary judgement the district court dismissed the case, because
 - (1) there was no destruction or damage to the mural by the panel wall, and

(2) the Act requires destruction and/or damage for liability

3. Appellate court analysis

a. The Act protects moral rights of attribution and integrity during an artist's lifetime, and

(1) prohibits third party modifications, damage, or destruction without the artist's consent.

b. here the mural was not physically changed in any manner.

(1) generally, visual art presentation, such as a less desirable location, are not actionable modifications under the Act.

(2) instead, only those modifications that prejudice the artist's integrity or reputation are actionable.

c. environmental harm is not an actionable modification, because

(1) it is within the statutory exception for modifications related to passage of time.

d. the Act only prevents intentional modification, but

(1) here there was no evidence of intent to mutilate, distort or modify, and

e. the panel wall did not touch or otherwise contact the mural, so the mural was not modified

[D. Valancourt Books LLC v. Garland et al](#), 82 F.4th 1222, *en banc* rehearing denied 2023 U.S. App. Lexis 33193 (D. C. Cir. 2023).

1. Outcome: Reversed and remanded summary judgment in favor of the U.S. copyright office.

2. Background

a. Valancourt sought a declaratory judgment against the copyright office, because

(1) section 407 of the Copyright Act comprises an unconstitutional taking under the Fifth Amendment by

(2) requiring paper copies of published works for deposit in the Library of Congress.

b. section 407 requires a deposit even if there is no copyright registration for the corresponding subject matter.

c. summary judgement was granted to the copyright office, and

(1) Valancourt appealed.

3. Appellate court analysis

a. the court only resolved circumstances where deposits are paper, and not electronic.

b. the mandatory deposit for published works under section 407 is not required for U.S. copyright registration

c. however, under the Takings Clause of the Fifth Amendment

(1) if the government takes private property from a person, then there must be a government benefit to that person in return.

d. in this instance the mandatory deposit is for paper copies that are private property

(1) the government is taking private property from the copyright owner without a government benefit.

(2) in sum, because there is no government benefit,

(3) copyright owners need not pay fines or deposit paper copies.

E. [Kyle Hanagami v. Epic Games, Inc. et al.](#), 85 F.4th 931 (9th Cir. 2023)

1. Outcome: Reversed the district court's ruling on copyright ineligibility of a choreographic work.

2. Background

a. Mr. Hanagami sued Epic for copyright infringement of choreography by incorporating his choreography into its video game.

b. Epic moved to dismiss by contending that

(1) Mr. Hanagami's individual dance poses were not protectable, and

(2) his video game was not substantially similar to Mr. Hanagami's choreography.

c. the district court concluded

(1) there was only protection for Mr. Hanagami's entire original five-minute choreography, but

(2) the choreography's individual poses were not protectable, and

(i) the allegedly infringing video game was not substantially similar to Mr. Hanagami's choreography.

3. Appellate court analysis

a. the district court erred in its comparison of protectable and unprotectable elements in Mr. Hanagami's choreography.

b. choreography comprises more than isolated poses, and

(1) there are copyright eligible relationships between movements, spatial patterns, composition, and arrangement within a choreographic work

c. individual dance elements, such as single steps and static poses, may be unprotectable in isolation, but

(1) their combination and arrangement may be copyright eligible.

(2) analogously to a written work: individual words are not copyright eligible, but

(3) those words' combination, organization, and relationship to each other are copyright eligible.

d. Mr. Hanagami also plausibly alleged that Epic's selection and arrangement of choreographed elements in its video game

(1) were substantially similar to those of his

e. the substantial similarity inquiry applies even if

(1) a relatively small portion is copied, but this portion is a qualitatively significant feature of the choreography

f. Mr. Hanagami's infringement lawsuit was reinstated

[F. Greer v. Moon et al.](#), 83 F. 4th 1283 (10th Cir. 2023) cert. denied 2024 U.S. Lexis 2088 (May 13, 2024)

1. Outcome: Reversed dismissal of contributory copyright infringement claim and remanded for further proceedings.

2. Background

a. Mr. Moon owns a website named Kiwi Farms.

b. on this website Mr. Moon posted

(1) Mr. Greer's song, and

(2) a link to a complete copy of Mr. Greer's book, and

(3) both without Mr. Greer's permission.

c. when Mr. Greer sent Mr. Moon a Digital Millennium Act take down notice for both works,

d. Moon refused to remove Mr. Greer's works from the website, so

(1) Mr. Greer sued Mr. Moon and Kiwi Farms for contributory copyright infringement

e. the district court dismissed his case and Mr. Greer appealed.

3. Appellate court analysis

a. for contributory copyright infringement there must be

(1) direct infringement by a third party,

(2) the defendant knew of the direct infringement, and

(3) intentionally caused or otherwise encouraged this direct infringement

b. Mr. Greer plausibly plead contributory infringement by alleging that Mr. Moon

(1) posted Mr. Greer's takedown notices on the website, and

(2) refused to remove the infringing works, and

(3) publicly and continuously displayed affirmative on-line disrespect to Mr. Greer.

[G. JLM Couture, Inc. v. Gutman, 91 F.4th 91\(2d Cir. 2024\).](#)

1. Outcome: Vacated that portion of an injunction based upon ownership of social media accounts

2. Background

a. Ms. Gutman was an employee of JLM, and
(1) by her employment contract she transferred intellectual property ownership of works she created during employment to JLM.

b. Ms. Gutman originally created an Instagram account and Pinterest account

(1) with her personal information, her own passwords and handle @mshailypage.

c. over time she transacted advertising and promotional content on these accounts on behalf of JLM.

d. upon leaving her JLM employment Ms. Gutman refused access to JLM for these two accounts under her own passwords.

e. JLM sued Ms. Gutman for breach of contract, conversion, and trespass to chattels, based upon Ms. Gutmans' refusal, and

(1) alleged that Ms. Gutman improperly took control of these accounts which belonged to JLM under her employment agreement.

f. after previous remands, the district court concluded that JLM would likely prevail on the merits, and

(1) issued a preliminary injunction against Ms. Gutman, which

(2) required her to transfer her social media accounts to JLM's exclusive control

(3) Ms. Gutman again appealed.

3. Appellate court analysis

a. the district court should have addressed which party owned these disputed social media accounts,

(1) prior to ordering Ms. Gutman to transfer the accounts

b. in doing so, the district court should have used the traditional property ownership test:

(1) who was the original owner; and

(2) was there subsequently a valid transfer of ownership

c. the correct inquiry on remand is: Whether JLM owned these social media accounts through Ms. Gutman's employment contract, and

(1) being aware that ownership of a social media account is not the same as ownership of intellectual property content displayed by that account

H. *Best Carpet Values, Inc. et al. v. Google LLC*, (9th Cir. 2024)

1. Outcome: Reversed and remanded the denial of Google's motion to dismiss

2. Background

a. Best Carpet Values filed a putative class action against Google, because

(1) Google' search app displayed copies of plaintiffs' intangible websites upon Android phones, but

(2) also displayed third party advertising superimposed, or banner ads over, plaintiffs' websites without the website owners' permission, and

b. the plaintiffs alleged trespass to chattels, implied in fact contract, and unjust enrichment, and

(1) where the alleged chattels comprised the plaintiffs' website copies sent to third parties.

c. after the court denied Google's motion to dismiss, Google filed an interlocutory appeal with the following certified questions:

(1) Whether plaintiffs alleged a legally sufficient trespass to chattels claim, and

(2) Whether the implied in fact contract and unjust enrichment claims were pre-empted by the U.S. copyright statute.

3. Appellate Court analysis

a. Trespass to chattels: plaintiffs had no claim regarding copies of their website, because

(1) no possessory interest, because third persons control these copies

(2) no property interest in intangible website copies under California law, because there is

(i) no exclusive possession or control,

(ii) no legitimate claim to exclusive possession or control; and

(iii) no capability for precise definition

b. unjust enrichment claim

(1) preempted by copyright statute because a website is copyright liable and the allegations implicate the exclusive rights of

copyright holders, with respect to derivative works.

c. implies in fact contract is also preempted by copyright statute because C

b. unjust enrichment claim

(1) preempted by the copyright statute, because

(2) a website is copyright eligible, and

(3) the allegations implicate the exclusive rights of copyright holders, and

(4) especially for derivative works.

c. implied in law contract

(1) also pre-empted by the copyright statute, for similar reasons as the unjust enrichment claim

[J. Ronald Ragan, Jr. v. Berkshire Hathaway Automotive, Inc., 91 F.4th 1267 \(8th Cir. 2024\)](#)

1. Outcome: Affirmed judgment of insufficient copyright originality.

2. Background

a. Mr. Ragan claimed to own a Guest Sheet which assists car dealerships in sales processes.

(1) this document was registered in the U.S. Copyright Office, and

(2) included questions, prompts, headings, fill in blank lines and checkboxes.

b. Mr. Ragan commenced a copyright infringement lawsuit after

(1) Berkshire Hathaway acquired the dealership, and

(2) used these forms without his permission.

c. the judge granted dismissal because the forms were copyright ineligible.

3. Appellate court analysis

a. the sheet was a basic customer intake sheet, and

(1) consisted of simple questions, prompts, checkboxes, and

(2) totaled fewer than one hundred words.

b. furthermore, the sheet primarily comprised a means to collect information, and

(1) not a means to provide information

II. Trademarks

A. [Vidal v. Elster](#), ___ U.S. ___, 2024 U.S. Lexis2605 (2024)

1. Outcome: The Lanham Act, 35 U.S.C. 1052(c)[names clause], does not violate the First Amendment.

2. Background

a. Steven Elster applied to federally register “Trump Too Small” as a mark.

b. the United States Patent & Trademark Office refused registration, because

(1) the Lanham Act prohibits federal registration of a mark containing a name identifying a particular **living** individual

(2) except by that individual’s written consent.

c. the U.S. Trademark Trial and Appeal Board (TTAB) affirmed the trademark office examiner, but

(1) the Federal Circuit reversed the TTAB's decision by concluding that the names clause of the Lanham Act is unconstitutional

3. Supreme Court analysis

a. The names clause is content based, but not viewpoint based, and

(1) it does not require heightened scrutiny under the First Amendment

b. there is a long historical association of trademark restrictions in the United States, and

(1) these restrictions have always been compatible with the First Amendment.

c. under the viewpoint neutral but content-based name clause,

(1) a person may justifiably withhold consent to avoid association with goods, or

(2) preserve his/her name from exploitation for another's gain.

d. concurring in part and concurring opinions primarily relied upon First Amendment precedent for view point neutral speech

(1) which only requires that the restriction be reasonable for the trademark system's purposes.

(2) here the names clause meets the reasonableness test, i.e., to preserve goodwill without consumer confusion

[B. PIM Brands v. Haribo of America, Inc., 81 F.4th 317 \(3rd Cir. 2023\)](#)

1. Outcome: Affirmed summary judgement cancelling the registration of trade dress.

2. Background

- a. PIM's federally registered trade dress comprised a wedge shape for a piece of candy displaying a green, white, and red pattern,
- b. so each individual candy resembled a watermelon wedge
- c. subsequently Haribou sold a similar wedge-shaped candy in red, white, and green.
- d. PIM sued Haribo for trademark and trade dress infringement, and
- e. Haribo countered that PIM's trade dress
 - (1) was functional, and
 - (2) consequently, the PIM trade dress registration should be cancelled.

3. Appellate court analysis

- a. U.S. trademark law does not protect functional design, and
 - (1) a trade dress is functional if it comprises uses beyond identifying a product source
- b. here the tricolored wedge shape would be perceived as watermelon flavored by consumers,
 - (1) the candy appearance as-a-whole is useful and therefore functional, and
 - (2) both the shape and colored design contribute to this function of indicating watermelon flavor.
- c. so, PIM could not prevent competitors from creating candy of this combined shape and color.

[C. M. Welles & Associates, Inc. v. Edwell Inc., 69 F.4th 723 \(10th Cir. 2023\).](#)

1. Outcome: Affirmed final judgment of trademark non-infringement.

2. Background

a. Welles provides classes, seminars, and certification workshops

(1) in project business management to corporations and individuals

(2) under the mark EDWEL and several related domain names

b. Welles primarily advertises its services via social media, emails, and Google.

c. Edwell is a non-profit entity providing mental health coaching services to schools and teachers, and

(1) with the domain name Edwell.org and brand name EDWELL.

d. Welles sued Edwell for trademark infringement based upon likelihood of confusion, but

(1) the district court found no likelihood of confusion between the two marks, and therefore no trademark infringement

(2) Welles appealed.

3. Appellate Court analysis

a. evidence of one instance of actual consumer confusion does not establish actual confusion, and

b. mere knowledge of a mark does not demonstrate an intent to deceive.

c. the parties' services and marketing channels were sufficiently dissimilar, because

(1) Welles markets to universities, large companies, and business professionals, but

(2) Edwell targets public school teachers, administrators and students seeking mental health coaching.

d. the relevant consumers in either market would exercise care in selection of either service, because

(1) both services require a significant investment of time, energy, and finances.

e. because there was no likelihood of confusion between the two different services, there was no trademark infringement.

[D. Great Concepts, LLC v. Chutter, Inc., 2024 U.S. App. Lexis 1876 \(Fed. Cir. October 18, 2023\) \(non-precedential\)](#)

1. Outcome: Reversed PTAB's cancellation of a registered mark based upon a fraudulent renewal/incontestability declaration.

2. Background

a. Great Concepts registered the mark DANTANNA'S for a steak and seafood restaurant.

(1) Great Concepts sued for infringement of its mark by Mr. Dan Tanna's common law mark DAN TANNA.

b. prior to the termination of the infringement lawsuit and a TTAB cancellation proceeding

(1) Great Concepts' former attorney filed a combined declaration of continued use and incontestability for the DANTANNA registration, and

(2) falsely declared that there were no proceedings involving rights pending and/or resolved in the trademark office or courts.

c. the PTAB found the renewal/incontestability declaration fraudulent and cancelled the registration, and

(1) Great Concepts appealed.

3. Federal Circuit analysis

a. the TTAB cannot cancel a registration based upon a fraudulent incontestable/renewal declaration, because

(1) the Lanham Act explicitly states that a **registration obtained** with fraudulent factual statements may be cancelled, but

(2) the Lanham Act is silent on the consequence for fraudulent petitions requesting **renewal and incontestability**.

(3) by statute, a request for incontestable status is a different right from federal registration

[E. *In re* GO and Associates LLC, 90 F.4th 1354 \(Fed. Cir. 2024\)](#)

1. Outcome: Affirmed TTAB's decision that GO's logo did not function as a trademark.

2. Background

a. GO submitted a U.S. federal register trademark application for the phrase EVERYBODY VS. RACISM in standard format.

b. the examiner refused registration because the phrase upon tote bags and clothing was

(1) exclusively ornamental use of a sentiment, and

(2) did not function as a source identifier for these products.

c. the TTAB affirmed the examiner and GO appealed.

3. Federal Circuit analysis

a. the TTAB properly considered GO's uses and third party uses to determine how the public would perceive this logo

b. for example, numerous unrelated third parties use this same phrase to express anti-racist sentiment, and

(1) none of these uses were attributable to GO.

c. because of the diversity and scope of third-party use, GO's own specimens and uses were insufficient as source identifiers.

d. logos may serve both as source identifiers and information/sentiment, and

(1) there is no unconstitutional content based discrimination, based

(2) upon this potential duality, but

(3) there is no source identification in this instance.

F. [Herbal Brands, Inc. v. Photoplaza, Inc. et al.](#), 72 F.4th 1085 (9th Cir. 2023), cert. denied 144 S. Ct. 663 (January 22, 2024)

1. Outcome: Reversed and remanded dismissal of a trademark infringement lawsuit

2. Background

a. Herbal Brands sells health-related physical products in Arizona, while

(1) Photoplaza is a reseller situated in New York

b. Herbal Brands discovered that Photoplaza was selling and distributing Herbal Brands' products

(1) from an interactive online Amazon site without Herbal Brand's permission.

c. after several cease and desist letters, Herbal Brands sued Photoplaza in an Arizona federal court, and

(1) alleged trademark infringement.

d. in particular, Herbal Brands alleged that Photoplaza shipped Herbal Brands' physical goods, sold on the Amazon website,

(1) into Arizona, and

(2) in the regular course of business with Herbal Brands' permission

e. the district court dismissed the complaint for absence of personal jurisdiction over Photoplaza in Arizona, and

(1) Herbal Brands appealed.

3. Appellate Court analysis

a. for specific personal jurisdiction, a defendant must either

(1) purposefully avail itself of a specific forum state, or

(2) expressly aim its conduct at a specific forum state

b. for expressly aiming, the defendant must also

(1) act intentionally,

(2) cause harm in the forum state, and

(3) be aware that harm will occur in the forum state from its intentional acts

c. here Photoplaza directly controlled ultimate product distribution through Amazon's distribution into Arizona

d. although mere passive website operation is insufficient for expressly aiming requirement without more

(1) website interactivity arising from customers' input and sales is a factor, and

(2) together with physical product deliveries into Arizona in the regular course of business under defendant's control through Amazon,

(3) here there is sufficient specific personal jurisdiction based upon Photoplaza's intentional distribution and sales through its agent Amazon.

e. Herbal Brands' claims clearly arise from Photoplaza's sales of unauthorized products to Arizona residents, which then adversely affect Herbal Brand's revenue.

(1) there are sufficient minimum contacts, and

(2) under these circumstances specific personal jurisdiction is not unreasonable.

4. Caveat: Other federal circuits may follow different approaches for evaluating this particular specific personal jurisdiction under similar circumstances.

[G. *In re Chestek PLLC*, 92 F. 4th 1105 \(Fed. Cir. 2024\), petition for *cert.* filed May 13, 2024](#)

1. Outcome: Confirmed the TTAB's refusal to register a trademark with a non-compliant post office box address.

2. Background

a. Chestek exclusively designated a post office box as a domicile address in a federal trademark registration application.

b. the TTAB affirmed the examiner’s refusal to register the mark, because under the relevant trademark regulation there must be

(1) an applicant’s U.S. domicile or permanent place of business, or

(2) an address of the applicant’s U.S. trademark counsel

c. Chestek appealed and contended that this regulation

(1) was not properly implemented by the trademark office, and

(2) in any event the regulation is arbitrary and capricious.

3. Federal Circuit analysis

a. public notice and comment for this United States domicile address requirement were unnecessary under the federal Administrative Procedure Act (APA), because

(1) the requirement for a domestic domicile or business address is procedural and not substantive.

b. the regulation is not arbitrary and capricious, because

(1) the domicile requirement is reasonably related to the domestic attorney requirement for prosecuting a United States trademark registration application.

c. the federal Administrative Procedure Act does not require a federal agency to consider and/or respond to every proposed impact of a policy change.

[H. TBL Licensing LLC v. Vidal, 98 F. 4th 500 \(4th Cir. 2024\)](#)

1. Outcome: Affirmed district court conclusion that trade dress features had not acquired secondary meaning.

2. Background

a. TBL submitted a federal trade dress registration application for design features of its tan work boot.

(1) in its application TBL designated some, but not all of the features of this boot.

b. the examiner refused registration based upon

(1) insufficient secondary meaning (acquired distinctiveness) of the designated boot features in the application, and

(2) functionality of the designated boot features in the application.

c. the TTAB affirmed and the district court agreed that

(1) all boot design elements designated in the application were functional, and

(2) there was no acquired secondary meaning

3. Appellate court analysis for acquired secondary meaning

a. by law all trade dress applicants must provide evidence that the trade dress has acquired secondary meaning

b. there several kinds of evidence for establishing acquired secondary meaning

c. TBL's advertising campaign and media coverage did not specifically address the design elements from the application

d. there was no evidence of exclusive use, and

(1) the existence of similar boots of third parties implied non-distinctiveness

e. TBL did not prove that competitors selling similar boots intended to deceive customers as to source.

(1) copying could also infer that competitors valued the boot's functionality

f. TBL's surveys were defective, because

(1) they relied upon features such as color, and which were not designated in the application.

g. sales evidence did not establish that the customers purchased boots based upon the designated design elements in the application, or

(1) they purchased them based upon source recognition

I. [Jalmar Araujo v. Framboise Holdings, Inc.](#) 2024 U.S. App. Lexis 10371 (Fed. Cir. 2024)

1. Outcome: Affirmed TTAB's refusal to register a mark.

2. Background

a. Mr. Araujo applied to register #TODECACHO as a standard character mark for hair combs.

b. Framboise opposed this registration, because

(1) Mr. Araujo's mark would likely cause confusion with its #TODECACHO design mark.

(2) Framboise asserted prior use of its design mark with hair products, and

(i) had submitted its own application for registration.

c. Framboise’s director submitted his detailed declaration as evidence supporting Framboise’s prior use.

d. after the TTAB sustained the opposition, Mr. Araujo appealed.

3. Federal Circuit analysis

a. the declaration alone was sufficient evidence, because

b. the declaration comprises detailed dates and products, as well as

(1) exhibits of the mark displayed upon products in stores.

c. Mr. Araujo did not depose the declarant,

(1) nor offer evidence to dispute these declaration statements, so

(2) Framboise’s single declaration easily met the preponderance of evidence standard.

[J. Luca McDermott Catena Gift Trust v. Fructuoso-Hobbs SL et al.](#), 102 F. 4th 1314 (Fed. Cir. 2024) (*en banc*).

1. Outcome: Affirmed dismissal of a petition to cancel registered marks.

2. Background

a. The Luca Trust and two related family trusts were

(1) each limited minority partners of Paul Hobbs Winery LP, and

(2) collectively owned more than 21% of Paul Hobbs Winery’s

b. the trusts petitioned to cancel Fructuoso’s and another winery’s registered marks,

(1) based upon likelihood of confusion with the Paul Hobbs Winery's registered marks.

c. the TTAB dismissed the cancellation procedure,

(1) in large part because the trusts did not have a sufficient proprietary interest in these marks to petition, and

(2) they were only limited partners in the Paul Hobbs Winery.

d. only the Luca Trust appealed

3. Federal Circuit analysis

a. Luca possessed Article III standing, because the diminished value of the Luca Trust's investment in the Paul Hobbs Winery comprised injury in fact, and

(1) the injury was 'fairly traceable' to the contested registrations.

b. however, the Luca Trust fell outside the zone of interest for persons protected by the Lanham Act, 15 U.S.C. section 1064, because

c. the Luca Trust only possessed a minority stake in the legally separate entity--- Paul Hobbs Winery---, and

(1) Paul Hobbs Winery owned the alleged infringing marks

d. the Luca Trust did not allege use of the same assertedly infringing marks in its own business, and

(1) these asserted marks were exclusively used by Paul Hobbs Winery as a separate entity, and

(2) in fact, Luca actually stated that it brought the cancellation petition **on behalf of** Paul Hobbs Winery.

III. Trade Secrets

A. *Pauwels v. Deloitte LLC et al.*, 83 F.4th 171 (2d Cir. 2023)

1. Outcome: Reversed and remanded the dismissal of an unjust enrichment claim against one party
2. Background
 - a. Mr. Pauwels transacted investment valuations for The Bank of New York Mellon, but without a written agreement.
 - b. Mr. Pauwels developed a valuation model, but
 - (1) the model and its spreadsheets were not password-protected, encrypted, or labeled confidential,'
 - (2) although there was an oral agreement with two Bank employees and Mr. Pauwels to refrain from distributing these spreadsheets
 - (3) nevertheless, Mr. Pauwels occasionally shared these spreadsheets with other Bank personnel without confidentiality restrictions.
 - c. the Bank eventually engaged Deloitte to perform Mr. Pauwel's work.
 - d. Mr. Pauwels discovered that the Bank provided Deloitte with his spreadsheets
 - e. Mr. Pauwels sued the Bank and Deloitte for, among other claims, trade secret misappropriation and unjust enrichment
 - f. the district court dismissed the trade secret misappropriation claim against both the Bank and Deloitte, and
 - (1) the unjust enrichment claim against both the Bank and Deloitte as duplicative

of the trade secret misappropriation claim,
and

(2) dismissed the remaining claims against
both these defendants

(3) Mr. Pauwels appealed.

3. Appellate court analysis

a. affirmed the dismissal of the trade secret
misappropriation claim against both the Bank and
Deloitte, because

(1) Mr. Pauwels took no reasonable
measures to maintain confidentiality, and

(2) Deloitte received the spread sheets as
part of a standard business agreement with
the Bank.

b. however, misappropriation is not an element of
an unjust enrichment claim, and

(1) there was a bona fide dispute whether
the oral contract between the Bank
representatives and Mr. Pauwels

(2) included creation and distribution of the
spread sheets and associated model, and

(3) the unjust enrichment claim was
reinstated against the Bank.

c. the court affirmed dismissal of the unjust
enrichment claim against Deloitte

(1) Mr. Pauwels did not allege a sufficient
relationship with Deloitte, and

(2) exclusively based upon several phone
calls.

[B. Janssen Products, L.P. v. eVenus Pharms. Laboratories, Inc.,
85 F.4th 147 \(3d Cir. 2023\).](#)

1. Outcome: Dismissed an appeal from the denial of an *ex parte* seizure order under the Defend Trade Secrets Act (DTSA)

2. Background

a. Janssen received FDA approval for a pharmaceutical, and

(1) thereafter eVenus sought FDA approval for a generical version of this same pharmaceutical.

b. Janssen sued eVenus for patent infringement and trade secret misappropriation

c. Janssen requested an *ex parte* seizure for eVenus' network servers, stored data, laptops, and cell phones under the federal Defend Trade Secrets Act (DTSA), but

(1) the district court denied this motion.

d. Janssen appealed the denial of its *ex parte* seizure order

3. Appellate court analysis

a. the denial of an *ex parte* seizure motion

(1) is not a final judgement, and

(2) does not comprise an exception to the final judgement rule for appellate jurisdiction.

b. a DTSA seizure order is not an injunction, because the injunction order is directed to a party and is enforceable by contempt.

(1) however, the DTSA requires law enforcement, and not a party to the litigation, to execute the seizure order, and consequently

(2) eVenus could not be held in contempt for non-compliance with an order that does not direct eVenus to act, or refrain from acting.

c. compare the Lanham Act expressly provides for interlocutory appeals of ex parte seizure orders, while

(1) there is no such express jurisdictional authority for appeals of ex parte civil seizures in the DTSA, nor

(2) is there a statutory connection between the injunction portion of the DTSA and the ex parte seizure section of this statute.

Program Transcript

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00:00:33:26 - 00:00:54:11

Hi, everybody, and welcome to this installment of intellectual property updates from the United States federal courts from, 2023 and 2024. These federal courts are going to include the appellate courts and the U.S. Supreme courts.

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Now we're going to go to copyright first is are are Supreme Court decision Warner Chappell versus Neely, which affirmed the Second Circuit's interpretation of the U.S. copyright statute with respect to infringement damages.

00:01:17:03 - 00:01:53:16

Mister Neely was in a business venture with another man. They put out some music during the lifetime of the venture. Sometime, Mister Neely, was in prison twice for a really significant period of time on drug related charges. And when he got out, he found out that his former business partner partner had purportedly licensed his music, which he had registered.

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To all kinds of, companies, one of them being Warner Chappell. So he, Mr. Neely, sued Warner Chappell, under and he sued under the discovery rule interpretation, which, there's two rules for the statute of limitations for copyright, depending on what circuit you're in, maybe what court you're in, there's the discovery rule, and then there's the accrual rule.

00:02:25:17 - 00:02:59:09

Under the discovery rule, you have three years to file your claim after you discover or should have discovered the infringement. Nobody's saying that Mr. Neely didn't file his claim in a timely manner. Which was also touched upon in the, the relatively recent case of Petrella versus MGM, which had to do with lodges. So the court did something wise.

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It certified the question of damages for interlocutory appeal because it was Mr. Neely's opinion that he could get damages and going all the way back past the three year period. And the other side said, no, it's a three year cutoff. And so that's yeah, the 11th circuit, reversed because the claims were timely under the discovery rule. So the plaintiffs could obtain damages even if infringement incurred more than three years prior to the lawsuits commencement.

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The Supreme Court agreed. If you look, it was pretty much the statutory interpretation. If you look at the copyright statute, there's no separate, limitations, period for damages. So the Supreme Court concluded that a copyright owner with a timely claim may recover damages for all past infringement. So that was relatively straightforward. So now our appellate court cases, American Society for Testing in Materials versus Public Research resource organization.

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This is a fair use case. The plaintiffs were, private or those private organization. They come out with standard ads after tests, running all kinds of tests. Their scientific organizations and, come up with, proposed standards, which, for example, are adopted by professional organizations or, technology associations, in this country. They're very good in some practical application.

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So they are, many times incorporated into the federal Code of regulations for some agencies that some agencies put out and even into state and municipal, regulations and statutes. But the ones in the Federal Code of Regulations are generally incorporated by reference, because you don't want the whole thing there. Public resource is a not for profit, which, without patient plaintiff's permission, posted plaintiff state standards, lie all of them, whether they were incorporated by reference or they weren't.

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The public, could access these standards without purchasing a license from the plaintiffs, which really unnerved them. So the plaintiffs sued for copyright infringement. And this went on for a while. There was an initial appeal and remand. Then the district court concluded. Who's going to cut the baby in half? Posting of standards which are incorporated into reference, incorporated by reference into the Federal Rules of the Federal Regulations, can stay on line because if people have to comply with, the public has to comply with them, they should be able to read them somewhere and they shouldn't have to buy them.

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They should be able to see them. And that weighs very heavily towards fair use. By a nonprofit who's not using them commercially. They just want, people to be able to access them and comply with the law. On the other hand, the ones that aren't incorporated by reference should not be posted. Because they just don't have that kind of, they're just not needed by the public for any kind of compliance.

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And the federal, the Federal Circuit agreed. So. Yeah. The public's access to the laws requirements was very important. So the defendants said they take down the other ones right away. Hopefully they did.

00:07:49:16 - 00:08:17:00

So now let's go to Kirsten versus Vermont School of Law, which isn't strictly a copyright case, but people really should be aware of the Visual Rights Act in this country that doesn't have a real high profile. And it came to be in the 90s. This is a case. Somebody found it and filed a lawsuit under it.

00:08:17:12 - 00:08:46:06

Mr. Curson created a mural, on the wall of the law school showing the history of slavery. And a lot of people didn't like it. And so what they did was they put up some panels in front of it. And so Mr. Curson sued them because they put panels up in front of it, and he sued them under the act.

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And the court dismissed the case because there wasn't any under the statute, there wasn't any destruction or damage to the mural by the panel wall, which was parallel to it. And a few inches interior. And the act requires destruction and damage. And the appellate court agreed the act. Prudence, moral rights, protects moral rights of artists in their works, whether or not they own them, which is kind of, if you think about it, when I, when I was in law school, there was no Official Rights Act, and everybody thought that was a real weird idea.

00:09:32:01 - 00:10:08:04

People being able to sue, because somebody was defacing their art, even if they did not own that art, that was considered way out there. Although, as I've often pointed out to people, because my parents were both artists, there was a lot of countries in Europe known as, civil law countries, and our common law countries have had these kind of, rights and even more, more so then under this statute, have had those rights for hundreds of years.

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It's built into their DNA. And they and that's a lot of countries, that's Portugal, Spain, Greece, and in France and Italy. And they have it. They just have a

different perspective on artwork. But I'm I'm digressing anyway. So the act protects protects moral rights of artists. It prohibits third party modification, damage or destruction with the artist's artists consent.

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Here, this mural wasn't changed in any way. Visual art, such as a less local, desirable location is not actionable. Only those modifications that make the artist look bad are actionable. And again, it's only certain kinds of art. It's again, it's much narrower than in, in Europe that the European countries that have these laws, it's much, much narrower.

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The protection in terms of what kind of art can have that scope, but apparently has fell into that category. Environmental harm is not actionable. It's within the statutory exception for, modifications related to the passage of time. And it only it only protects intentional modification. And there was no evidence of intent to mutilate or hurt Mr..

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Kirsten's mural and, panel didn't even touch it, as I mentioned before. So, that he had no cause of action under that statute. Next we have Vaillancourt Books versus Garland, the attorney general. Garland. And which reversed and remanded summary judgment in favor of the US Copyright Office. Vaillancourt wanted a declaratory judgment against the U.S Copyright Office because the copyright Office rules require deposits of what you want to copyright in the Library of Congress.

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But they didn't give you anything in return. I guess the, immediate response would be, well, you could get trademark, you can get copyright registration, but it's pretty easily discernible that you don't get copyright registration. In return for providing, paper copies or any other kinds of copies to the Library of Congress, they do have to be published copies.

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Of of published works. And so, according to, Vaillancourt, section 407 of the Copyright Act comprises an unconscious situational taking because it requires copies of published works, but it doesn't give anybody anything, and it doesn't give the private citizen anything in return for giving up their paper copies. That's pretty much what they're saying, because the case at the onset, they said, we're not going to talk about electronic copies, we're only going to talk about paper copies.

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And it requires copies of published materials or published works, even if there is no copyright registration or if there is copyright, there's this really totally independent requirement. The court granted summary judgment of the copyright office, and the appellate court said, it noted that the deposit requirement, isn't required for registration. So you're not getting a quid pro quo, you're not getting the registration if you give us your, your, your published work.

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That's not what's going on here. You have private. You're taking private property. Without a government benefit and under the under the takings clause, if you take something from a private citizen, private property, from a private citizen, you have to give them something in return. And the government couldn't point to anything, that Vaillancourt or anybody else was getting in return for their published, their published, works.

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So under that circumstance, the court said there you shouldn't have to give them any paper copies of anything that's the holding. Or that's that's the lesson from that. So next you have Hannah Gummy versus Epic Games, which reverse the district court's ruling, copyright ineligibility of a choreographic work. I thought this was interesting for several reasons.

00:15:10:14 - 00:15:35:10

One of which is, you know, it goes into what the copyright eligible, eligible elements of a core of choreography are, there aren't many cases out there on choreography. It's near and dear to my heart because that was really a hobby of

mine in college. So, but I don't think the district court in this case was familiar with choreography.

00:15:35:10 - 00:16:17:02

Anyway, it reversed the district court's ruling on copyright and eligibility. Mr. Hannah Godby, sued epic by, for copyright infringement by incorporating his Mr. Haran Mugabi choreography into Epic's video game. Epic moved to discredit to dismiss by saying that, Mr. Hannigan, his dance poses were not protectable. And in any event, his epic's video game was not substantially similar to Mr. Hannah Garvey's choreography.

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The district court concluded there was only protection for Mr. Hannah Gabby's entire five minute choreography and most importantly, for the rest of us, the individual poses were not protectable and the allegedly infringing game was not substantially similar to Mr. Hannah. Gabby's choreography. The appellate court disagreed. Most important, again for practitioners and not necessarily for Mr. Hammer and Gabby, is the rule in this case is choreography comprises more than isolated poses.

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There are copyright eligible relationships between movements, spatial patterns, compositions, and arrangement within a choreographic work. And again, as, as an amateur choreography. I agree with all that, individual dance elements, single steps and static pop poses may be copyright ineligible, all in isolation. It's a lot like if you think of it as a choreographed piece, analogous to a book, the individual words.

00:17:36:18 - 00:18:14:12

No one's going to argue that the individual words are not copyright eligible, but the relationship of those words to each other and in a sentence and in a paragraph and then between paragraphs, that is copyright eligible and you have the same thing going on with choreography. Individual poses may not be copyright eligible. But their relationship to all the moving other movements and spatial arrangements and connections and people holding people up as part of the arrangement, those all are copyright eligible.

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Mr. Hannigan may also plausibly alleged that Epic's, arrangement of the choreography and his its video game were substantially similar. Because here the inquiry applies even if a, relatively small portion is copied, but it's a very significant portion. So Mr. Hannah Gabby's choreography and infringement lawsuit was reinstated. Mr.. Great. Okay. So now we have Greer versus moon, which reversed and dismissed, reversed dismissal of a copyright infringement claim and remanded.

00:19:00:28 - 00:19:42:04

This is a story about a really mean man with a really mean website. What Mr. Moon did on his website, Kiwi Farms, was to take information about where people were making fun of other people, usually with physical handicaps. It posted them on his website. That's what he did on this one day on this one site, Mr. Moon posted Mr. Greer song and a link to a complete copy of Mr. Greer's book, and both without Mr. Greer's permission.

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Mr. Greer sent Mr. Moon a takedown notice, and Mr. Moon not only refused to do take them down, he put up the notices and made fun of them. So Mr. Greer sued Mr. Moon and Kim Farms for contributory copyright infringement, and the district court dismissed his case. And Mr. Greer appealed. And the appellate court said, first of all, for contributory infringement, there has to be direct infringement by somebody and the defendant here.

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Mr. moon knew about it and he unintentionally caused or encouraged the direct infringement, and Mr. Greer plausibly alleged contributory infringement. He alleged that Mr. Greer, knew about it and he had the takedown notice and instead of taking anything down, he just posted the takedown order so everyone could laugh at it. And he refused again, refused to remove the infringing work, and otherwise publicly and continuously displayed online disrespect to Mr. Greer.

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That certainly shows that it was intentional and he knew people would copy the work so Mr. Greer, got his complaint reinstated. Okay, here's another case that's one of my favorites. Because the defendant. It's a small world. The defendant was actually a colleague of my daughter's at Cornell, the Ivy League. Cornell? They were both in the fashion department.

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This case vacated that portion of injunction based upon ownership of social media accounts. The injunction was against, she's it's Miss Gutman, but she's known as Hailey Page. And Hailey Page, had a very successful line of bridal couture. And she went to work. She worked for GM for a number of years. She was being promoted.

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It appears that one day she, wasn't being paid, and apparently she left. But before that, she had she created two accounts after she, started work for GM. One was Pinterest, one was Instagram, and they were originally for her use. She used her own name. She used her own passwords. But she's so enamored of her, of her work and what she was doing with GM.

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She was really nice. And she let jail glam use her sites. And she promoted glam on these accounts on behalf of GM. When she left, Miss Gutman refused access to jail. For these two accounts under her own password. Segueing a little bit, I miss, Miss Pages, Miss Scotland's original appointment employment agreements that she transferred all her intellectual property to jail.

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But she didn't think these media accounts were theirs. This was her personal property. GM did not agree with her perspective. They sued her for breach of contract, conversion and trespass to channels based on her refusal to, transfer these two media accounts to them. After this went on for years and after previous three and remand, the district court concluded that JL m would likely prevail on the merits of these three claims and issued a preliminary injunction against Miss Gottman, which required her to transfer her social media accounts to jail LMS exclusive control.

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And Mr. Gutman appealed again. Just to still social media account prelim part of the, preliminary injunction. And the appellate court said before issuing the preliminary injunction, you should have decided who owns these accounts because you never really figure that one out. And you you just assume the J alum use them, own them because she was nice enough to let them, to to advertise on her, Instagram and Pinterest accounts.

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So the correct inquiry on remand is whether J am on the social media accounts through the employment contract, and being aware that ownership of a social media account is not the same as ownership of technical, I'm sorry, intellectual property displayed by that account. So that was the the reason I put that in, in this case, in is because it's talking about ownership of me, social media accounts and distinguishing it from the intellectual property, which with it with without question, she transferred in the contract her employment contract, but not necessarily the social media accounts because they weren't in her employment contract in any way.

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They weren't social media contract, counter tracks that were necessarily within the scope of her work for the employer. If you're wondering what happened to Miss Gottman, or maybe you already know, if your kids have been fired, your your children have been following it. There was a remand and the district court, transferred. The owner told jail to transfer the ownership of these accounts under the court's test for, ownership of property, which was who was the original owner?

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And was there subsequently a transfer of ownership? She was the original owner. There was no transfer of ownership just because she put glms, content on her social media sites. So meanwhile, after remand about a month ago or end of May to 2024, Miss Gottman settled in for about \$260,000. She got all our intellectual property back. She already had her social media accounts.

00:27:01:09 - 00:27:49:13

And the only person who had to sign off on it was the bankruptcy judge, because GM was in bankruptcy at that time. Best carpet values versus Google all reversed and remanded the denial of Google's motion to dismiss. This copied file a putative class action against Google. Because Google search app displayed copies of plaintiff's intangible websites upon Android phones, but it also displayed other people's advertisements and including disparaging statements, about the people who had paid for their these websites that were in the putative class action.

00:27:50:02 - 00:28:25:17

The plaintiffs alleged trespass to chattels implied in fair contract and unjust enrichment. So again, these are strictly copyright. Claims, but we'll see later. That's they didn't think they were, but they were the plaintiffs alleged those. And where the alleged chattels comprise the apps website, copies sent to third parties. The court denied. Google's motion to dismiss.

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Google filed an interlocutory appeal with the certified question whether plaintiffs alleged a legally sufficient trespass to chattels claim and whether the implied in fair contract and unjust enrichment were preempted by the U.S copyright statute. These lawyers seem very sharp to me. Those are good questions. So the appellate court said, well, trespass to chattels, the the, with respect to their claim, the plaintiffs had no claim, regarding copies of the websites, which are actually what's being sent to everybody's phone.

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They had no possessor interest in the, copies. There was an a there's a there's no property interest in intangible website copies under California law. And they had no possessor of exclusive possession or control of the copies. So you can't bring a trespass to chattels. Also, there's no legitimate claim to exclusive possession or control and something kind of interesting.

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No capability of for precise definition of the chattel, because the websites could be be in all kinds of different formats, as we already know. So that's like basic property concepts, apply as we applied to, Miss Gottman and, and one other

case we've already talked about with the exclusionary, the, exclusionary right. The IT case. So what about the unjust enrichment claim?

00:30:15:16 - 00:30:50:10

This was preempted by copy route copyright because of website. It's copyright eligible, and the claims implicate the exclusive rights of copyright holders, especially for derivative works, for implied in law, that was preempted by the copyright statute for similar reasons as the unjust enrichment claim. It was cool. Next is Ronald Reagan. No relative, versus Berkshire Hathaway.

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Firm judgment of insufficient copyright, originality. If you've been in practice, an appreciable period of time, you may have clients who've come in with forms they want to copyright, register. And, it appears it really depends whether you can copyright them. Of course. Depends on how complex the forms are. How much original material there is.

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I did one for a client. It was tremendously complex. It was harder, difficult to know what was excludable and which part wasn't, was a eventually we registered it, but I learned a lot about forms and copyright eligibility before that happened. Here we have what seems to be a little more straightforward case. Somebodies form was Mr. Reagan's form was registered in the Copyright Office, but it was very short and it had fill in blanks, checkboxes and prompts, very, very brief.

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And the court agreed. There was no it wasn't copyright eligible because it was just a basic customer intake form. And after you removed the parts that were not copyright eligible, you just hardly had anything left. So, it affirmed.

00:32:39:23 - 00:33:12:07

So now we're leaving copyright and we're going to trademarks. And we're going to start with, the Supreme Court decision and V down versus Elster, where the court held that the Lanham Act names clause does not violate the First

Amendment. Most of you may have heard about this in the popular press. Somebody and Mr. Elster wanted to read it as trademark.

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The trademark or the logo. Trump to small, the United States Trademark Office. The examiner refused. Because the landmark prohibits federal registration of a mark containing a name identifying a particular living individual except by that individual's written consent. The trademark law MPL board agreed. The Federal Circuit reversed the trademark board, concluding that the names clause is unconstitutional.

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So the Supreme Court had the last word and said it is constitutional. It had a really long section in the opinion about, the historical argument and why the history of, the First Amendment, coexisting with the names clause, was relevant and important, in deciding whether, trademark restrictions of this kind are, unconstitutional restrictions on free speech.

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And it, it wound up, saying the reason the names clause is not constitutional based on this history is it is content based but not viewpoint based. It doesn't matter what kind of logo it is. If you're like, for example, pro-Trump against Trump or, you know, Democrat, Republican, because the restriction is in viewpoint element, focused. If it had said, Kennedy to small or Biden to small, it would have been the same result.

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No matter what your that particular, political persuasion was. And so since it's content based but not viewpoint based under the First Amendment, it doesn't require that heightened scrutiny that we usually have for government regulation of speech. And here it all has to have a rationally related purpose. To trademark law. I hear the names clause means that the reasonableness test, to preserve goodwill without consumer confusion, is easily met.

00:36:01:23 - 00:36:34:07

Of course, another goal is somebody isn't using your name. To put on products that you don't approve of and are going to give you a bad rep. There were a lot of concurring and concurring in part. Opinions. The other justices, relied on First Amendment more on First Amendment precedent than they did, on the historical existence of trademark restrictions and, the First Amendment.

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But they they all took different path to the same conclusion and that this was a reasonable restriction, in the Lanham Act. Next we have PIM brands versus caribou. This is a trade dress case. PMS candy was shaped like little watermelons and caribou produced some that looked like little watermelons as well. So, Pim alleged trade dress infringement, and the court said the appellate court said, basic tenant.

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Everybody knows. U.S. trademark law does not protect functional design. And that could be a real problem with trade dress. But it doesn't what we think of function, we think of like somebody doing something with it. But it can also be something, that, what the law perceives to be an unfair advantage over your competitors. So in this case, the court said, well, Pimm's candy insinuates or strongly implies that those pieces of candy taste and smell like watermelon.

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And that's an advantage that just doesn't have to do with the source identifying, utility that trademarks are supposed to have. So that trade dress, is too functional, to be viable. Next Welles Mills versus Ed. Well, this is a case about two companies that had identical marks and some domain names. And just the same.

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But Wells provides classes and seminars for business management, while the other party is a not for profit providing mental health services for students and teachers. So they have really similar names. But the court ultimately said the appellate court noted that there was no evidence of actual consumer confusion. And there was like one anecdotal, incidence of actual actual conversion confusion.

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That's not enough. Mere knowledge of someone else's mark doesn't show intent to deceive. Most importantly, these two companies and the evidence show that they advertise in two completely different ways. They are completely different products, or in this case, services. And the people that they're accessing in each of their, group of public consumers are going to be careful because they're going to be investing a lot of time and money in services.

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So the consumers are gonna be real careful which company they sign up with. And so there is no likelihood of confusion. And even though the marks are like identical

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Next we have great concepts versus cutter. We have two very similar, marks. Again, one is common law. There was an infringement lawsuit. There was, patent board proceeding, great concepts. Former attorney filed the renewal declaration and swore that there wasn't any other proceeding going on. So they got their, renewal based on a fraudulent affidavit.

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And.

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One party asked the TBA to cancel the registration based upon a fraudulent renewal declaration. But after, if you look at the statute, it says a registration obtained with fraudulent, fraudulent statements may be canceled. There's nothing in the Lanham. It says that you could cancel a registration based on a petition requesting a renewal and incontestable. It's a different right.

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1st May not have thought this is another one of those things. You could be in practice for years and maybe, you know, it's never come up or you just thought the consequences were the same. So it's a good case to know. Next we have in

go and associate. This has to do again. We think we know about source identification until maybe a certain application comes up in the real world.

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Here the court, the fed, sir, affirmed the Trademark Board's decision that the logo did not function as a trademark. Go submitted a application for the phrase everybody versus racism. Tote bags and, another apparel item. The examiner refused registration because the sentiment was exclusively ornamental and did not function as a source identifier. And the trademark board affirmed, and the Federal Circuit affirmed.

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Said the trademark for did look at those uses and third party uses to determine how the public would perceive this logo. And again, this looking at third party uses can really, Obliterate what you think was a source identifying logo. If you're not aware of who else is using it out there and for what?

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And apparently that was one of the problems with Go's logo. Numerous unrelated parties used it. And none of these uses were attributable to go, because of the diversity and scope of this third party use. Goes on, specimens and uses were insufficient as source identifiers because they weren't the only ones using it. Everybody's using it.

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So if if it's that ubiquitous, people are going to look at it and say, oh, you know, they're not going to say, oh, that's just goes local. They're going to say, oh, that logo. Yeah, we've seen it before. So, it's not to say the court was careful to say it. We're not saying logos can't serve as both source identifiers and sentiment.

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It's just in this case it didn't have a source identifier, or source identifying, purpose, especially because there was so much third party use. Next we have herbal plant brands versus Photo Plaza, which reversed and remanded dismissal of a trademark infringement suit. Herbal Balance sells health related products in Arizona. And Photo Plaza is a reseller in New York.

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And Herbal Brands discovered that Photo Plasma was selling Herbal Brands products in Arizona without herbal variants. Permission. So herbal Brand sued Photo Plaza, in Arizona. This is kind of follow the bouncing ball kind of, fact pattern. Herbal brands allege that photo plazas shipped herbal brands sold on an Amazon website into Arizona in the regular course of business.

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The district court dismissed the complaint for absence of purple. I'm sorry. Personal jurisdiction over photo Plaza.

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The appellate court disagreed and said there was specific personal jurisdiction. And going back to that personal, they had purposeful veiling. Into the forum state argument or prong of finding specific jurisdiction because photo plasma affirmatively authorized Amazon to bring goods into Arizona. So even though you had a third party that maybe was incorporated in a completely different state, you asked that third party to bring the goods into Arizona.

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So you were purposely availing yourself through your agent of that form state. And so all the same is for expressly aiming this was an intentional act. You intentionally had Amazon deliver your products into Arizona and cause harm in the forum state. And as another part of the test, it was foreseeable that harm would occur in the forum state from the intentional acts.

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And since photo plasma directly control the ultimate distribution. And their specific personal jurisdiction. So you're getting the same kind of outlook from the court as you did when somebody was in Utah and somebody else was in another state. Lbg was in another state. If you, if you ask Amazon to do something for you, then there will be personal jurisdiction, there.

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Then of course, you had causation, and there's a sufficient minimum number of contacts. And under these circumstances, specific personal jurisdiction is not unreasonable. That's another another prong, especially if you're looking at the state statutes. A lot of these say any any kind of specific jurisdiction that is does not conflict with, you know, the notions of fair play and due process.

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So that's pretty much what this was in Ray chess stick. And there has been a petition for cert filed in this case. The outcome was it confirmed the trademark board's refusal to register a made. A non-compliant register, a trademark with a non-compliant post office box address chess deck, exclusively designated a post office box number for the requirement of a domicile address and a federal trademark registration application.

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We all trademark attorneys now, what that says towards the end of the application, the trademark board affirmed the right to the examiners refusal to register store because the regulations required an applicant's U.S domicile, permanent place of business, or an address of the applicant's U.S trademark counsel. Because they changed the rules several years ago. You have to have a U.S. attorney file an application in the United States Trademark Office.

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Even if you're in another country, you're going to have to find a U.S trademark attorney. Justic. Appeal and said, first of all, there's a requirement, this rule, for the domestic domicile address was not properly inter implemented under rulemaking procedures and that the regulation was arbitrary and capricious. And the Federal Circuit disagreed. It said the notice and, public notice and comment for U.S, domicile address requirement requirements.

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Wasn't necessary because it was a procedural rule and not a substantive rule. And the regulation is not arbitrary and capricious because the requirement is reasonably related to the, U.S. attorney requirement. And the Administrative Procedure Act does not require a response or consideration for every imaginable proposed impact of a policy change. You know where they could go.

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I could go forever. The TBC licensing versus v doll. Another trade dress case, tbl submitted an application for design features of its tan work boot, which was commercially very successful on its application. And of course, if you're a trademark attorney, you can see this in your head. It wanted, the, the application wants to know which features you're registering.

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When TBL registered it didn't list all the features of the tan work boot. It only registered some of them. The TBA. Oh. The the examiner refused registration because, the boot had not reached had not acquired sufficient secondary meaning or distinctiveness which all trade dress is supposed to have before you register it. And the trademark office agreed.

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And then he went to the district court, and the district court agreed. And they all agreed that all the boot design elements in the application were functional and that no, the quired secondary meaning, had been evidenced and the appellate court agreed and said for the secondary meaning, there has to be evidence that the trade dress had secondary meaning and there were several kinds of evidence for establishing this, none of which had been presented.

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The problem was with a lot of the evidence TBL had provided, you couldn't tell. The evidence wasn't specific enough to, conclusively, nail the designated features as the reasons that there was secondary meaning for all anybody knew it could be the features that were designated on the application. Or it could be just because people thought the boots worked really well and they just really didn't care what the second, features of the boot were.

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They were just comfortable and lasted a long time. So they didn't they didn't prove that any of these, boots were purchased based upon source recognition. So they couldn't establish that customers were buying based on the design elements in the application. And so there was no secondary meaning. And that was.

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Besides not having all the, features in the application, it was primarily a failure of proof problem. You couldn't really say that there was, secondary meaning based on the features that were designated, because that's not what the evidence showed.

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a guru, a Rocco versus Framboise. And this is from the board's refusal to register a mark. Mr. Rocco applied to register a mark that was really, really similar to Fran. Was this mark? Fran was asserted prior use of its mark with hair products, which were similar, to Mr. Arroyo's products. And in doing so, it, provided a detailed declaration, from its director, from voice's director, with evidence supporting Fran, was that this prior use of its mark?

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After the board sustained the opposition, Mr. Arroyo appealed. And his his big complaint on appeal was, there was, from Bob's only, provided that one declaration and that wasn't enough evidence from forum was and the Federal Circuit said, that was a great declaration. It alone was sufficient evidence, because it had all kinds of coherent chronological dates, as well as pictures of products on certain dates that were displayed in, the relevant with relevant vendors and in stores.

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And you had an opportunity to depose Fran was, and you didn't put any evidence into this to disprove the declaration. So really, what you're doing is why you didn't do much of anything. And the other party submitted a very good declaration. So they win because you didn't submit anything here? Very little. And in this case, the single declaration, easily met the purpose of the evidence standards.

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Next we have Luca McDermott versus fruit duos. You could really get it lost in the weeds in this project in this case, but, if you focus, it's really a pretty, pretty straightforward. I defer affirmed dismissal of a petition to cancel all federally

registered marks based on the standing of the people who brought the petition. So the Luca trust and two related trust each had, our minority partners in the Paul Hobbs winery.

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The trust petition to cancel fruit juices marks, based upon likelihood of a confusion with the Paul Hobbs marks. The Trademark Office dismissed the cancellation because the trust did not have a sufficient proprietary interest in these three marks. They didn't have any standing, and they didn't have any standing because they were only limited partners in the Paul Hobbs Winery.

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The only trust that appealed was the Luca Trust. But the Federal Circuit agreed. With the, trademark board. Luca Trust, had constitutional standing, which is, much lower standard than statutory standing, because they could say the injury, to their investment was fairly traceable to a trademark conflict. But these fell out. The Luca trust fell outside the statutory zone of interest from persons protected by the landmark, because they only had a small ownership interest in it.

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And they were a separate legal entity from the Paul Hobbs Winery, which was the one that owned the trademarks. The Luca Trust did not own them. They even said themselves they brought it on behalf of the Paul Hobbs Winery. And the Paul Hobbs Winery was the only entity using the marks. So there is constitutional standing and there's statutory standing.

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And, the Luca trust did not have statutory standing because they only owned a little bit. And they were they were a separate entity that never used the mark. Last but not least, we have trade secrets. We have we don't have any Supreme Court decisions. We have Paul's versus Deloitte, which reversed and remanded the dismissal of an unjust enrichment claim.

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Mr. Paul's apparently was an independent contractor. He did a lot of work, for this bank, New York Mellon. He developed a valuation model with spreadsheets, and he was, very haphazard about taking care of this model. And he spreadsheets, he told two people at the bank, please don't give these to anybody else.

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But then he would turn around and, for purportedly give them to other, bank agents without any kind of restriction on, for confidentiality at all. Eventually, the bank engaged Deloitte to perform Mr. Paul's work. Mr. Paul's found out, and he sued both the bank and Deloitte. For, among other claims, trade secret misappropriation and unjust enrichment.

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The district court dismissed, the trade secret misappropriation claims and the unjust enrichment claims against both parties. So Mr. Paul has appealed, and the appellate court affirmed in part and reversed and remanded in part. It affirmed the dismissal of trade secret misappropriation, because, first of all, you had to have a trade secret and you don't have a trade secret.

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If you didn't take reasonable measures to protect the confidentiality of the subject matter. So since he didn't have right confidential our proprietary on it, he didn't have any non-disclosure agreements. He just our passwords for it. He let all kinds of people look at it without restriction. So there was no trade secret or misappropriation, even if there was, however, the unjust enrichment claim did not does not.

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Unjust enrichment does not, as a matter of law include, misappropriation element. It just means that, you know, maybe you had a contract and you got more than you bargained for under the contract that the other person didn't intend for you to have, or the scope of the contract doesn't allow you to keep some, I guess, not justifiable, profit.

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So in this case, there seem there was, disagreement over what the scope of Mr. Paul's original oral agreement was with the bank regarding these, spreadsheets in this valuation model. So the court sent it back for. So the case could continue, on that basis, to see if the bank had been unjustly enriched, as far as Deloitte and unjust enrichment.

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The court said it was just the connection between Mr. Paul, as in Deloitte is far too tenuous to justify an unjust enrichment. Claim. The evidence shows that Mr. Paul's, is relying on a few short phone calls to Deloitte from himself, and that doesn't, justify an unjust enrichment claim. Deloitte probably assume that those came, along with the, transfer of work from the bank.

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So Deloitte was, not in the case anymore, just the bank on unjust enrichment. Next we have Janssen products versus Evernote. So this has to do with the Defend Trade Secrets Act and the ex party seizure order that everybody thought was going to be, you know, bring the house down around everyone's ears, which apparently, apparently it hasn't.

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But it has to do with that. That section, Janssen received FDA approval for pharmaceutical, then, you know, Venus wanted to do the generic and Janssen got all upset and requested it sued, even Venus, and requested the next party seizure order of all of Venus's paraphernalia, computer related, equipment. The district court denied the the motion for the expired seizure, and Janssen appealed immediately.

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The denial of this request, and the appellate court said the denial of an ex party seizure motion is not a final judgment, and it doesn't fall into the category of exceptions to final judgments, which are immediately appealable. Seizure order is not an injunction, so you can't go under the injunction section of the DSA because the persons who implement the seizure order are government law enforcement officers.

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There's not a party, that no party, to the order is allowed to participate in any way. That's very clear from the statute. It's only, order directed to other government, government actors, which in this case are law enforcement. So it can't be a party to the litigation. And because you can't hold anyone in contempt for noncompliance or compliant.

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This is very different from example, the landmark which expressly has a provision for immediate appeals of ex party seizure orders and there's no statutory connection within the D, the Defend Trade Secrets Act, which would tie an injunction into an ex party seizure order and make it something that's immediately appealable. So that concludes my presentation. I hope this all, expands everybody's scope of information on intellectual property for the past year.

01:06:55:15 - 01:06:58:17

Thank you very much for your attention.

Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org