



*Intellectual Property Trademark,
Trade Secrets, Social Media, and
Internet Law Evolution: Opinions
from the United States Federal
Appellate Courts and U.S.
Supreme Court 2024 - 2025*



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About the Presenter

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Adrienne B. Naumann established her own practice in 1996 which is exclusively intellectual property law. Ms. Naumann's practice includes individual entrepreneurs and start-up companies, as well as small and medium sized businesses. Her issued patents include a broad range of technologies including: a razor handle, board game, agricultural method, pneumatically driven trench shoring device, floral containers, electromechanical lock, laminar flow nozzle, portable exercise devices, mechanical bag holder and shelving. She has also filed successful patent application appeals in the Patent & Trademark Office on behalf of clients.

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

TRADEMARKS

This presentation will discuss the trademark Latham Act, discussions in regards to obtaining profits from a defendant, and using Trademarks in regards to political speech. It will also discuss cases involving Certification Marks and how and how they are affected by Trademark Law. The Trademark Unlawful Use Doctrine will be discussed, licensing agreements of marks and the Zone of Natural Expansion doctrine in regards to products or services. This presentation will also discuss Trademark Genericness, Trademark infringement as it relates to the purchasing of keywords for internet searches and many more issues involving Trademarks.

TRADE SECRETS Digital

This presentation will discuss Trade Secrets and what constitutes Trade Secrets and violation of Trade Secrets according to the Federal and Supreme Courts. Impersonation to get information from competitors to use for a person own use will be discussed. Also, whether information readily available through independent investigation and reverse engineering qualifies as a Trade Secret.

SOCIAL MEDIA

A variety of Social Media Platform situations will be discussed and how the Federal, Appellate and Supreme Courts view these situations. How First Amendment rights are affected by social media will be discussed in detail including Platform editorial activities, and political speech on Social Media Platforms. The Protecting Americans from Foreign Adversary Controlled Application Act as it relates to Social Media Platforms will be discussed. The Video Privacy Protection Act will be discussed along with the protection of personal information of customers. Also, Privacy and Tracking Software will be discussed in cases by the courts.

COURSE MATERIALS

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

TRADEMARKS

The attorney will learn and understand about Trademarks.

The attorney will learn about several aspects of the Latham Act

The attorney will learn about Trademark infringement in regards to trying to obtain money profits from a defendant

The Learner will learn about Trademarks that are used in political speech.

The Learner will learn about Certification Marks and how they are affected by Trademark law.

The Attorney will become knowledgeable about the Trademark Unlawful Use Doctrine

The Learner will learn about Trademark genericness

The attorney will become knowledgeable about Licensing Agreements of marks and how they can be ineffective

The attorney will learn about the Zone of Natural Expansion Doctrine for products or services

The Learner will gain knowledge about Trademark infringement and how it relates to purchasing “Key Words” for internet search and the function of product features

TRADE SECRETS

The Attorney will be exposed to several Trade Secret cases and learn what constitutes a Trade Secret.

The Attorney will learn how the courts view a company gaining information by impersonating a customer of a competitor over the internet and then using the information in their own company to compete.

The attorney will learn what qualifies as Trade Secrets and the courts' view of information gained through independent investigation of readily available information.

The attorney will learn how the courts view reverse engineering.

SOCIAL MEDIA

The attorney will learn what kind of issues affect social media

The Learner will learn how First Amendment Rights are affected by social media

The Learner will learn Social Media Platforms and the Editing of information of customers content, whether it is general content or political and how the courts view the rights of the Social Media Platform.

The learner will learn about Social Media Platforms and Protecting Americans from Foreign Adversary Controlled Application Act and how it is viewed by the courts.

The Attorney will become knowledgeable about the Video Privacy Protection Act

The Learner will learn how the courts view the protection of Personal Information of Customers in relation to Social Media Platforms.

The learner will learn about Tracking Software and how it affects privacy and how the courts view it.

Timed Agenda:

Presenter Name: Adrienne Naumann

CLE Course Title: Intellectual Property, Trademark, Trade Secrets, Social Media, and Internet Law Evolution: Opinions from the United States Federal Appellate Courts and U.S. Supreme Court 2024/25

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00:06:42	Bureau National Interprofessionnel du Cognac et al. v. Cologne & Cognac Entertainment, 110 F.4th 1356 (Fed. Cir. 2024)
00:11:58	Trademarks - VPR Brands, LP v. Shenzhen Weiboli Technology Co., Ltd., 2024 U.S. App. Lexis 20450 (Fed. Cir. August 14, 2024)
00:14:33	Gibson, Inc. v. Armadillo Distribution Enterprises, Inc. et al., 107 F.4th 441(5th Cir. 2024)
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00:20:41	To-Ricos, Ltd. v. Productos Avicolas Del Sur, Inc., [hereinafter PAS], 118 F.4th 1 (1st Cir. 2024)
00:27:55	Trademarks - 1-800 Contacts, Inc. v JAND, Inc. 119 F.4th 234 (2nd Cir. 2024)
00:31:02	Cardinal Motors, Inc. v. H&H Sports Protection USA, Inc., 128 F.4th 112 (2d Cir. 2025)
00:33:26	CeramTec GmbH v. CoorsTek Bioceramics LLC, 124 F.4th 1358 (Fed. Cir. 2025)
00:35:01	Legal Force RAPC Worldwide PC v. LegalForce, Inc., 124 F.4th 1122 (9th Cir 2024)

00:36:44	Trademarks- Bullshine Distillery LLC v. Sazerac Brands, LLC, 130 F.4th 1025 (Fed. Cir. 2025)
00:41:03	Dollar Financial Group Inc. v. Brittex Financial, Inc., 132 F.4th 1363 (Fed. Cir. 2025)
00:45:15	Trademarks - American Girl, LLC v. Zembrka, 118 F.4th 271 (2nd Cir. 2024)
00:49:13	Jekyll Island-State Park Authority v. Polygroup Macau Ltd., Case No. 23-114 (11th Cir. June 10, 2024)
00:51:55	Trade Secrets - Compulife Software, Inc. v. Newman et al., 111 F.4th 1147 (11th Cir. 2024)
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01:00:48	Social Media and Internet - Murthy et al. v. Missouri et al., 603 U.S. 43 (2024)
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01:09:57	Social Media and Internet - TikTok,Inc. et al. v. Garland et al. 145 S. Ct. 57(2025)
01:15:33	Salazar et al. v. National Basketball Association, (NBA) 118 F.4th 533 (2nd Cir. 2024)
01:18:02	Social Media and Internet - Chabolla et al. v. ClassPass, Inc. et al., 129 F.4th 1147 (9th Cir. 2025)
01:22:55	Briskin et al. v. Shopify, Inc. et al., 135 F.4th 739 (9th Cir. 2025)
01:27:26	Social Media and Internet - Solomon et al. v. Flipp Media, Inc., 136 F.4th 41 (2nd Cir. 2025)
01:31:21	Presenter Closing
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Course Material

Intellectual Property Patents, Copyright, Trademark, Trade Secrets, Social Media, and Internet Law Evolution: Opinions from the United States Federal Appellate Courts and U.S. Supreme Court 2024 - 2025

I. Trademarks

A. *Dewberry Group, Inc. v. Dewberry Engineers, Inc.*, 145 S. Ct. 681(2025)

1. Outcome: Vacated and remanded for another award proceedings.
2. Background
 - a. the Lanham Act allows a prevailing plaintiff in a trademark infringement suit to obtain a defendant's profits. 15 U.S.C. 1117(a).
 - b. Dewberry Engineers sued Dewberry Group for trademark infringement
 - c. Dewberry Engineers prevailed and the district court awarded \$43 million in profits.
 - d. in this award the district court included profits of all Dewberry Group's independently incorporated affiliates where:
 - (1) all affiliates were owned by Mr. John Dewberry,
 - (2) Dewberry Group itself never showed a profit for decades.
 - e. Dewberry's affiliates were never named defendants in the trademark infringement lawsuit, and

(1) there was only one named defendant, i.e., Dewberry Group

f. nevertheless, the Fourth Circuit affirmed the district court.

3. Supreme Court analysis

a. a defendant is the party (i) against whom relief is sought, and (ii) is named in the court proceedings

(1) Dewberry Engineers did not designate the affiliates as defendants in the litigation.

b. furthermore, separately incorporated entities are distinct legal units, and

(1) even if they share a common owner, such as Mr. Dewberry.

c. there is a 'just sum' provision in the Lanham Act, where the court may award profits where the defendant divests earnings to an affiliate, 15 U.S.C. section 1117(a), but

(1) the district court never relied upon it, and

(2) the Fourth Circuit affirmed the district court analysis.

d. 'in sum', it was legal error to include the affiliates' profits in the award.

B. Libertarian National Committee, Inc. v. Saliba et al., 145 F.4th 530 (6th Cir. 2024)

1. Outcome: Affirmed in part the preliminary injunction against Saliba

2. Background

a. Saliba and other dissenting members originating from the Libertarian Party of Michigan used Libertarian's marks without permission, so

- b. Libertarian sued Saliba and other dissenting members for trademark infringement.
- c. the district court granted a preliminary injunction prohibiting Saliba and the other dissenting members from using Libertarian's marks, and so
 - (1) Saliba appealed.
- d. issue: Whether a mark's use to solicit party donations, advertise events and endorse political positions is governed by the Lanham Act without violating the First Amendment

3. Appellate analysis

- a. Lanham Act applies to political speech when the asserted mark is also a source identifier
- b. the Libertarian's mark designates a source of political services, and so its mark functions as a source identifier
- c. affirmed the preliminary injunction for some political services, but not for other services for which there were Saliba's visual disclaimers.

C. Bureau National Interprofessionnel du Cognac et al. v. Cologne & Cognac Entertainment, 110 F.4th 1356 (Fed. Cir. 2024).

1. Outcome: Vacated the Trademark Trial and Appeal Board's (TTAB) decision and remanded for further proceedings.

2. Background

- a. certification marks are used by a person other than the owner, but with that owner's authorization;
 - (1) example: a dairy association with a certification mark for display by dairy farm members.

- b. Bureau National owns the common law certification mark COGNAC
 - (1) for brandy produced in a specific region in France under specific conditions.
- c. Bureau National opposed a U.S. federal register trademark application for COLOGNE & COGNAC ENTERTAINMENT comprising a design
 - (1) submitted by Cologne & Cognac Entertainment, a hip hop record label
- d. the TTAB dismissed the opposition, in part because it found no likelihood of confusion with the Bureau's COGNAC certification mark
 - (1) in particular, the TTAB asserted there was no evidence that Bureau Nationale's certification mark was famous,
 - (i) without an association with a well-recognized house, product or service mark.
 - (2) there was also no evidence that the Bureau's mark had attained fame for being a certification mark per se
- e. so Bureau National appealed

3. Federal Circuit analysis regarding likelihood of confusion

- a. of the likelihood of confusion factors, fame of the senior mark is an important factor in this case
- b. the TTAB applied the incorrect legal standard for fame, because
 - (1) a certification mark may be famous for a product or service
 - (i) arising in a particular region or other origin,

- (ii) comprising a particular material composition,
- (iii) produced by a particular mode of manufacture, or
- (iv) comprising a particular quality or other characteristics.

c. that a famous house mark, service mark or product mark is physically associated with a certification mark

- (1) does not necessarily mean that the certification mark is not famous in its own right
- (2) evidence of sales and advertising expenditures should be reviewed, and
 - (i) if appropriate, allocated to advertising and marketing with the certification mark, and
 - (ii) even if the certification mark appears visually inconspicuous.
- (3) in sum, the TTAB should have determined whether COGNAC was famous as an indicator of geographic origin, and not famous *per se* as a certification mark.

[D. VPR Brands, LP v. Shenzhen Weiboli Technology Co., Ltd., 2024 U.S. App. Lexis 20450 \(Fed. Cir. August 14, 2024\) \[non-precedential\]](#)

1. Outcome: Vacated and remanded the district court's preliminary injunction order for consideration of evidence supporting an unlawful use defense
2. Background
 - a. VPR owns the U.S. federal registration of "ELF" for electronic cigarette products, while

- (1) Shenzhen markets e-cigarettes under “ELFBAR.”
- b. VPR alleged that Shenzhen’s mark infringes VPR’s mark, and
 - (1) requested a preliminary injunction, because
 - (2) Weiboli’s mark likely resulted in consumer confusion.
- c. the district court rejected Shenzhen’s affirmative unlawful use defense and granted VPR’s preliminary injunction, because
 - (1) the unlawful use defense doctrine had not previously been applied in infringement litigation, and
 - (2) the unlawful use doctrine is exclusively implemented in TTAB proceedings
 - (3) there was no evidence for this defense that VPR had violated the federal Food, Drug and Cosmetic Act
 - (i) regarding the product associated with its asserted registered mark.

3. Federal Circuit analysis

- a. the district court failed to properly evaluate the unlawful use doctrine as Shenzhen’s affirmative defense.
- b. this doctrine provides that a mark used in commerce, and in an illegal manner, cannot be federally registered.
- c. the federal appellate circuits conflict regarding the statutory basis and boundaries of this doctrine.

d. the Federal Circuit will not determine whether Shenzhen's evidence sufficed to show VPR was non-compliant with FDA requirements.

(1) however, Shenzhen's defense directly affects VPR's likelihood to succeed on its claim of trademark infringement, and

(i) which is a prerequisite to injunctive relief.

e. upon remand, the district court should

(1) reconsider evidence of Shenzhen's unlawful use defense, and

(2) re-evaluate VPR's motion for a preliminary injunction.

E. Gibson, Inc. v. Armadillo Distribution Enterprises, Inc. et al., 107 F.4th 441 (5th Cir. 2024), rehearing en banc denied August 8, 2024.

1. Outcome: Reversed the pretrial order excluding evidence of third-party use, and remanded for a new trial.

2. Background

a. Gibson alleged that Armadillo infringed its registered guitar body shaped marks as well as two-word marks.

(1) Armadillo counterclaimed for cancellation of Gibson's guitar body shape marks based upon genericness

(i) resulting from third party use of the guitar body shape for other products and services.

b. in its pre-trial order the court found that third party use of these marks was relevant, but

- (1) only from no earlier than for five years preceding Armadillo's purchase of a guitar producing business, because
- (2) third party use before this five-year cutoff was of low probative value for genericness, and so
- (3) the court entirely excluded this older evidence.

- c. the jury found infringement, and
 - (1) that guitar body marks (design marks) should not be cancelled due to genericness.
- d. the district court granted a permanent injunction against Armadillo, and
 - (1) both parties appealed.

3. Fifth Circuit analysis

- a. exclusion of all third-party use evidence earlier than five years from the first infringing act was an abuse of discretion under Converse, Inc. v. International Trade Commission, 909 F.3d 1110 (Fed. Cir. 2018), the Lanham Act section 1065(4) and Fed. R. Evidence 403, because
 - (1) third party use earlier than a five-year cutoff should be considered if
 - (i) this use was likely to impact consumer perception at the registration date.
- b. evidence established that third party uses of guitar body shapes as marks occurred as early as the 1960s, and
 - (1) this earlier evidence could affect a consumer's perception such that the asserted marks were either generic or incredibly weak prior to registration.

- c. section 1065(4) of the Lanham Act comprises no time limitation for demonstrating that a mark became generic prior to registration.
- d. therefore, evidence of prior use is relevant if this use
 - (1) probably affected consumer perception of the mark
 - (i) as of the first infringing use and without a predetermined cut-off date.
- e. Armadillo's genericness claim is central to its case, because
 - (1) generic marks are categorically excluded from trademark protection
- f. there was reversible error because the jury was denied the opportunity to hear all the evidence
 - (1) which could be relevant to genericness.

[F. Crocs, Inc. v. Effervescent, Inc. et al., 119 F.4th 1 \(Fed. Cir. 2024\).](#)

1. Reversed a grant of summary judgment and remanded
2. Background
 - a. Crocs sued Dawgs and other competitors (Effervescent) for patent infringement, and
 - b. Dawgs counterclaimed for false advertising by Crocs under 15 U.S.C. section 1125(a)(1)(B), because
 - (1) in its marketing, Crocs falsely described its own shoe material as patented, proprietary and exclusive (although this material was not actually 'patented'), and

- (2) these descriptors relate to the nature, characteristics or qualities of Crocs' products,
- (3) these descriptors implied that all Crocs' products comprise material superior to that of its competitors, including Dawgs, and
- (4) thereby deceiving consumers into concluding that Dawg's and other competitors' footwear comprised inferior materials.

- c. the district court granted summary judgment to Crocs, based upon the premise that
 - (1) there was no false advertising claim under the Lanham Act as a matter of law
- d. Dawgs appealed

- 3. Federal Circuit analysis
 - a. the district court erred in granting summary judgement to Crocs on Dawgs' counterclaim under section 43(a)(1)(B)
 - (1) this section of the Lanham Act prohibits commercial advertising or promotion which
 - (i) misrepresents the nature, characteristics, qualities, or geographic origin of goods, services or commercial activity.
 - b. the district court mischaracterized Dawgs' counterclaim as relating to false assertions of authorship or inventorship, and
 - (1) which would be outside the scope of section 43(a)(1)(B).
 - c. Dawgs presented evidence, such as website printouts, that Crocs' promotional statements

referred to the nature, characteristics or qualities of Croc's products

- (1) not in false inventorship or authorship.
- (2) in fact, Crocs' own webpages display the asserted numerous tangible benefits of all Crocs' shoes

d. so Dawgs has a cause of action under section 43(a)(1)(B).

G. To-Ricos, Ltd. v. Productos Avicolas Del Sur, Inc., [hereinafter PAS], 118 F.4th 1 (1st Cir. 2024)

1. Outcome: Affirmed the grant of the motion for summary judgment in favor of To-Ricos
2. Background
 - a. PAS originally sold chicken under a registered mark comprising a verbal logo and design
 - (1) the U.S. trademark office cancelled this registered mark in 2006 and 2009
 - (2) PAS ceased using this mark with chicken in 2011.
 - (3) in 2012 PAS unsuccessfully attempted to sell its assets, including the mark, but was unsuccessful in doing so
 - (4) in 2016 To-Ricos applied to register the originally registered PAS mark, and
 - (5) later in 2016 PAS applied to re-register and opposed To-Ricos' federal register application for this mark.
 - (6) in 2017 PAS entered into a licensing agreement for this mark with another company

- (7) in 2019 PAS bank no longer held a lien on this asserted mark.
- b. in 2019 To-Ricos sought a declaratory judgement to establish itself as the legal mark owner, and
 - (1) subsequently moved for summary judgment, contending that PAS had abandoned the mark
- c. the district court granted summary judgment to To-Ricos, because
 - (1) PAS did not use the asserted mark in commerce for at least the statutory period of three consecutive years
 - (i) prior to To-Ricos' submission of its trademark registration application, and
 - (2) during this three-year statutory period PAS had not demonstrated its intent to resume mark use, so
- d. PAS appealed.

- 3. First Circuit analysis with respect to intent to abandon
 - a. to establish *prima facie* abandonment under the Lanham Act, To-Ricos must establish that PAS
 - (1) has not used mark in commerce for three consecutive years, and
 - (i) the reason(s) therefore being irrelevant, 15 U.S.C. section 1127, and
 - (2) had no intent to resume use of the mark in commerce in the foreseeable future during those three consecutive years (emphasis added).

- b. a prior mark owner cannot prevail simply by providing a reason for non-use during the three-year statutory period.
 - (1) instead, there must be evidence of the intent to resume use which is manifested during the consecutive three-year statutory period.
- c. PAS admitted that it did not use its mark in commerce between 2011 and 2016, meeting the consecutive three-year period, and
 - (1) 2016 was also the year during which To-Ricos applied to register.
- d. PAS has not provided evidence arising during this three-year period of its intent to resume mark use in commerce, and in the reasonably foreseeable future.
 - (1) the attempted 2012 sale
 - (i) occurred prior to the presumptive three consecutive year statutory period between 2013 and 2016.
 - (2) PAS' ownership of an unencumbered right to a mark does not imply intent to resume use.
 - (3) the licensing agreement did not evidence intent to resume use, because
 - (i) the statutory period of nonuse had expired by 2017, and
 - (ii) resumption of use thereafter cannot cure the preceding abandonment.
 - (4) in any event, the licensing agreement was ineffective, because

(i) there were no adequate quality controls and such a 'naked license' cannot confer a priority right to the licensor.

H. [1-800 Contacts, Inc. v JAND, Inc.](#), 119 F.4th 234 (2nd Cir. 2024)

1. Outcome: Affirmed that purchase of a search advertising keyword containing a competitor's trademark
 - a. does not by itself comprise trademark infringement.
2. Background
 - a. JAND (Warby Parker) purchased search advertising keywords which included 1-800's trademarks.
 - b. 1-800 sued JAND alleging that purchase and use of 1-800's trademark key words comprised trademark infringement and results in consumer confusion
 - (1) although competitive bidding for search keywords which include competitors' marks is a widespread industry practice.
 - c. 1-800 further alleged that JAND's use of its marks as keywords was intended to deliberately create initial interest confusion.
 - d. the district court found that 1-800's trademarks and JAND's trademarks were visually dissimilar, and
 - (1) 1-800 marks were not displayed upon Warby Parker search result pages or Warby Parker's website landing page, so
 - (2) the court dismissed the complaint
 - e. 1-800 appealed.

3. Appellate Court analysis for key words comprising competitor trademarks
 - a. the mere act of purchasing competitor marks as keywords for searches does not comprise trademark infringement.
 - b. 1-800 did not allege that
 - (1) JAND used 1-800 trademarks in its actual advertisements, on any internet result page, or that
 - (2) JAND actually used 1-800 marks other than exclusively as keywords.
 - c. same result in the 4th Circuit: Lerner & Rowe PC v. Brown, Engstrand & Shely, LLC et al., 119 F.4th 711 (9th Cir. 2024), cert. den. 2025 U.S. Lexis 2053 (May 27, 2025) (initial interest internet confusion)

I. [Cardinal Motors, Inc. v. H&H Sports Protection USA, Inc.](#), 128 F.4th 112 (2d Cir. 2025)

1. Outcome: The dismissal of the case was vacated and remanded
2. Background
 - a. among other claims, Cardinal alleged that H&H unlawfully copied Cardinal Motor's helmet trade dress, that is,
 - (1) General Helmet design, and
 - (2) Detailed Helmet design
 - b. the district court granted the motion to dismiss with prejudice, based upon an insufficient description of Cardinal's helmet designs' distinctiveness.
3. Appellate court analysis

- a. elements of a successful product design trade dress infringement claim require (i) distinctiveness of a non-functional product design and (ii) likelihood of confusion
- b. however, PRIOR to evaluating distinctiveness, every asserted design component should be plead with precision and specificity (known as "articulation") [emphasis added]
 - (1) this articulation pleading is a pre-condition to, and
 - (i) independent from a distinctiveness analysis.
- c. the district court erred by conflating distinctiveness into its articulation analysis, because
- d. Cardinal's description of its (i) general trade dress and (ii) detailed trade dress
 - (1) were each plead with sufficient precision and particularity.

[J. CeramTec GmbH v. CoorsTek Bioceramics LLC, 124 F.4th 1358 \(Fed. Cir. 2025\)](#)

1. Outcome: Affirmed a TTAB decision canceling trademarks comprising the color pink.
2. Background
 - a. CeramTec manufactures pink ceramic hip components.
 - b. CeramTec obtained U.S. federally registered trademarks for the pink color as used in the hip components.
 - c. CoorTec challenged the registrations by contending the pink color was functional.

- d. the TTAB agreed, because the pink color necessarily results from a material known as chromia,
 - (1) which provides increased hardness to the ceramic.
- e. CeramTec appealed.

3. Federal Circuit analysis

- a. functional product features, even those creating a distinctive appearance, are not protected as trademarks
 - (1) when they provide a utilitarian purpose essential to the product's use or manufacture.
- b. CeramTec owned multiple patents disclosing the functional benefit of chromia which produces the pink color.
- c. CeramTec also distributed multiple advertising materials which disclosed that chromia provides mechanical benefits to the hip components.
- d. because the pink color results from a mechanical functionality, the mark is properly cancelled.

[K. Legal Force RAPC Worldwide PC v. LegalForce, Inc., 124 F.4th 1122 \(9th Cir 2024\)](#)

1. Outcome: Affirmed dismissal of claims under F.R.C.P. 12(b)(6).
2. Background
 - a. LegalForce RAPC (Legal Force U.S.A.) operates legal services websites and owns the U.S. mark LEGALFORCE.
 - b. LegalForce, Inc. (Legal Force Japan) provides legal software services and owns the mark LEGALFORCE in Japan.

- c. LegalForce USA sued LegalForce Japan for trademark infringement in the United States.
- d. the district court concluded that the LegalForce Japan's advertising and selling of equity does not comprise trademark infringement, because
 - (1) the logo LEGALFORCE was not connected to the sale of goods or services by LegalForce Japan.
- e. LegalForce USA appealed.

3. Appellate court analysis

- a. equity is not a product/good under the Lanham Act.
 - (1) equity is not a product, because equity is not a moveable tangible item
- b. equity is not a service because it does not comprise performance of labor for the benefit of another, and
 - (1) here there is no 'other' involved.
 - (i) individuals or entities who purchased equity in Legal Force Japan become owners thereof, and
 - (ii) are not legally separate "others."

L. Bullshine Distillery LLC v. Sazerac Brands, LLC, 130 F.4th 1025 (Fed. Cir. 2025)

- 1. Outcome: Affirmed the TTAB finding that a mark's genericness is determined at the time of registration.
- 2. Background
 - a. Bullshine applied for U.S. federal registration of BULLSHINE FIREBULL, and
 - (1) associated with alcoholic beverages except beer.

- b. Sazerac opposed the registration,
 - (1) asserting that Bullshine's mark was confusingly similar to its own registered mark FIREBALL, and
 - (2) where FIREBALL is associated with whiskeys and liqueurs
- c. Bullshine counterclaimed to cancel Sazerac's marks because they were generic, asserting that
 - (1) FIREBALL is a generic name for a common alcoholic drink with a spicy flavor such as that of cinnamon or hot sauce.
- d. the TTAB dismissed the opposition and the counterclaim, because
 - (1) FIREBALL was not generic at the time of registration, and
 - (2) BULLSHINE FIREBULL was not likely to cause confusion with Sazerac's marks comprising FIREBALL.
- e. both parties appealed

3. Federal Circuit analysis

- a. this is a case of first impression in the Federal Circuit regarding the time for assessing a mark's genericness.
 - (1) section 2(e) of the Lanham Act prohibits registration of merely descriptive terms, and which includes generic terms.
 - (2) how consumers would perceive a term with respect to associated goods or services is evaluated
 - (i) contemporaneously with the time of registration.

- b. for whether Sazerac's marks were generic at the time of registration,
 - (1) the TTAB looked at evidence from relevant consumers for the term "FIREBALL," and
- c. evidence relating to actual genericness showed that consumers did not associate the term FIREBALL with general whiskey or liquors.
 - (1) instead, consumers perceived FIREBALL more as a mark for candy or cinnamon whiskey,
 - (i) rather than as a non-distinctive term for a specific flavor
 - (2) many recipes submitted as evidence originated from specialized publications, and
 - (i) did not establish what consumers of whiskey and liquors perceived.
 - (3) there was also no evidence that competitors used the term FIREBALL at the time of registration.

4. Observation: How to reconcile with Fifth Circuit in Gibson, Inc. v. Armadillo Distribution Enterprises, supra.

M. Dollar Financial Group Inc. v. Brittex Financial, Inc., 132 F.4th 1363 (Fed. Cir. 2025)

1. Outcome: Affirmed TTAB's decision that Dollar could not offensively claim priority of a mark against an intervening common law mark through the natural expansion doctrine

2. Background

a. during the 1980s Dollar exclusively provided loan financing and check cashing services, and

- (1) with two U.S. federally registered service marks comprising the logo MONEY MART associated with these specific services.
- b. in 2012 Dollar began using this logo for pawn services, and
 - (1) in 2014 Dollar obtained federal registrations comprising MONEY MART for pawn services.
- c. during the 1990s Brittex began to use a common law mark comprising MONEY MART, and
 - (1) also associated with pawn services.
- d. Brittex petitioned the TTAB to cancel Dollar's registered MONEY MART marks for pawn services based upon
 - (1) date of first use (priority) by Brittex; and
 - (2) confusing similarity of marks for the same pawn services.
- e. the TTAB concluded that Brittex had priority, because
 - (1) Brittex used MONEY MART for pawn services prior to Dollar's registration of MONEY MART for pawn services.
 - (2) the TTAB cancelled Dollar's registration for pawn services, and
 - (3) Dollar appealed.

- 3. Federal Circuit analysis for priority of use
 - a. no one disputes that Brittex was first to use MONEY MART for pawn services.
 - b. the zone of natural expansion doctrine applies to products or services

- (1) into which a business is likely to expand from a purchaser's perspective.
- (2) however, this doctrine is only appropriate when used defensively.
- c. 'in sum', this doctrine only allows a senior user to prevent a junior user from
 - (1) federally registering a similar mark for related goods and/or services within the senior user's natural zone of expansion.
 - (2) this doctrine does not provide priority for goods or services not listed in the earliest registration; and
 - (3) thereby defeat an intervenor's rights which are earlier in time than the senior user's rights to the same products or services.

N. American Girl, LLC v. Zembrka, 118 F.4th 271 (2nd Cir. 2024)

- 1. Outcome: Reversed the grant of a motion to dismiss and remanded for further proceedings.
- 2. Background
 - a. Zembrka is an entity located in, and operating from, the People's Republic of China through several websites
 - b. American Girl sued Zembrka
 - (1) in New York federal district court for
 - (2) trademark infringement as well as sales of counterfeit and infringing versions of its dolls
 - c. New York's long-arm statute allows a court to
 - (1) exercise personal jurisdiction over a non-domiciliary who

- (i) transacts business in New York, or
 - (ii) contracts anywhere to supply goods to New York.
- d. after this litigation commenced Zembrka cancelled its New York orders, refunded payments to New York customers, and
 - (1) did not ship any merchandise to New York.
- e. Zembrka then moved to dismiss because no goods were actually shipped to New York.
- f. the district court dismissed the complaint based upon absence of personal specific jurisdiction, and
 - (1) American Girl appealed.

3. Appellate court analysis

- a. accepting orders, sending confirmatory e-mails and accepting payments comprise transacting business under the New York long-arm statute
 - (1) order cancellations and refunds did not change this conclusion.
- b. by its express terms, the long-arm statute requires a transaction and not necessarily a shipment or sale (emphasis added)
- c. for due process: Zembrka purposefully availed itself of conducting business within New York, and
 - (1) there were sufficient minimal contacts, i.e., the same receipts, confirmation e-mails, etc. that
 - (2) served as evidence to meet the long-arm statute requirements
 - (3) Zembrka knowingly assumed the risk of a lawsuit in New York based upon

(i) its transactions in counterfeit goods and trademark infringement in that state.

O. Jekyll Island-State Park Authority v. Polygroup Macau Ltd.,
Case No. 23-114 (11th Cir. June 10, 2024)

1. Outcome: Reversed a dismissal based upon personal jurisdiction.

2. Background

a. Polygroup is an intellectual property holding company registered and headquartered in the British Virgin Islands,

(1) Polygroup allowed its affiliates to display its mark SUMMAR WAVES in the United States, and

(i) its U.S. federal trademark registrations averred use in continuous commerce within the United States.

b. Jekyll Island is U.S. entity located in Georgia and owns the federally registered trademark SUMMER WAVES.

c. Jekyll Island sued Polygroup for trademark infringement and to cancel Polygroup's marks.

d. the district court dismissed the complaint for absence of personal jurisdiction, because Polygroup did not sell products directly in the U.S.

(1) Jekyll Island appealed.

3. Appellate court analysis

a. under F. R. C. P. 4(k)(2), personal jurisdiction over foreign defendants is proper

(1) if there are sufficient contacts with the United States as a whole.

- b. Polygroup owns more than sixty U.S. federal register registrations and allowed its affiliates to use these registered marks in the United States, so
- c. Polygroup purposefully availed itself of U.S. legal benefits
 - (1) by allowing affiliated companies to use its trademarks in markets targeting U.S. consumers, and
 - (i) subsequently generating sales, and
 - (2) engaging U.S. attorneys in Georgia.
- d. a strict causal connection between the litigation and these activities is not necessary if these activities are clearly related, and
 - (1) here obtaining and defending dozens of U.S. trademarks share a common link with this litigation.

II. Trade Secrets

[A. Compulife Software, Inc. v. Newman et al., 111 F.4th 1147 \(11th Cir. 2024\)](#)

- 1. Outcome: Affirmed judgment of trade secret misappropriation
- 2. Compulife generates life insurance quotations on the internet.
 - a. Compulife's software code provides access to its proprietary database for insurance rates, but
 - (1) Compulife does not publicly provide all of these insurance rates
 - b. Mr. Newman and his associates created several websites using Compulife's software without a license,

(1) they obtained this software by impersonating a legitimate licensee of Compulife.

c. Compulife sued Mr. Newman and his associates for trade secret misappropriation based upon

(1) the competitors' scraping of Compulife's website, and

(2) Mr. Newman's obtaining the insurance rates by improper means.

d. after a second bench trial the district court found that misappropriation of trade secrets had occurred, and

(1) granted an injunction as well as a judgement for damages.

e. Mr. Newman and the other defendants appealed, challenging

(1) whether there was a trade secret and

(2) if so whether the trade secret was misappropriated by improper means and/or use,

3. Appellate court analysis

a. there was a trade secret

(1) even if publicly available individual insurance rates each lack trade secret status,

(2) an entire proprietary database compilation may comprise a trade secret if sufficiently protected, and as was the case here.

b. there was misappropriation by unlawful acquisition because

(1) Mr. Newman unlawfully obtained Compulife's software code by impersonating a legitimate licensee, and

(i) his associates used this software code to scrape millions of variable dependent insurance quotations from Compulife's proprietary database.

c. there was misappropriation by use (derived from a person who used improper means), because

(1) three million to 43.5 million quotes were improperly scraped, and

(i) Compulife's revenue and customer base significantly declined after this scraping

(2) this evidence demonstrates that Newman improperly used the software he obtained by his impersonation.

B. [ams-OSRAM USA, Inc. v. Renesas Electronics America, Inc.](#),
133 F.4th 1337 (Fed. Cir. 2025)

1. Outcome: Reversed final judgement finding of the trade secret accessibility date where the remedy of profit disgorgement begins to accrue.
2. Background
 - a. ams disclosed its technical product information to Renesas during unsuccessful merger negotiations.
 - b. thereafter ams sued Renesas for, among other claims, trade secret misappropriation under federal and Texas state law
 - c. after a first trial, a first appeal and a second trial the district court entered a judgement for, among other remedies,

(1) disgorgement of profits for trade secret misappropriation which began to accrue in January 2006, because

(i) at this time Renesas successfully reverse engineered the product embodying the trade secret

(2) however, Renesas contended that

(i) the trade secret was readily ascertainable by reverse engineering in January 2005 when

(3) the embodying product became publicly available.

d. both parties appealed

3. Federal Circuit analysis

a. under Texas trade secret law information readily available by independent investigation does not qualify as a trade secret.

(1) Renesas could have legally accessed ams' trade secrets by February 2005, because

(2) the product comprising the trade secret became publicly available by January 2005

b. the evidence was also clear that reverse-engineering is a pervasive industry practice.

III. Social Media and Internet

[A. Murthy et al. v. Missouri et al., 603 U.S. 43 \(2024\)](#)

1. Outcome: Plaintiffs did not establish standing, i.e., injuries traceable to the federal government's alleged actions.

2. Background

a. in federal district court, several individuals and two states alleged that

(1) social media platforms had removed or demoted their covid-19 and/or election posts between 2020 and 2023

(i) in violation of the First Amendment

(2) several federal agencies and the White House were the named defendants [hereinafter 'federal entities'], but

(i) the social media platforms were not parties in this lawsuit.

b. the district court ordered a preliminary injunction against the federal entities which prohibited them from:

(1) contacting social media platforms to influence the posting and content moderation policies for all topics

c. the Fifth Circuit affirmed.

3. Supreme Court analysis

a. federal courts cannot remedy injuries from the independent actions of third parties not before the court,

(1) such as social media companies in this instance.

b. for federal entity liability plaintiffs must show that the federal entities would likely react in the alleged predictable manner, to

- (1) future posts and content, and
 - (2) thereby pose a real and immediate threat of injury to the plaintiffs by interference with social media companies' editorial processes.
- c. in this instance this future harm is speculative, because there was no specific evidence of causation,
 - (1) between specific federal entities and the corresponding alleged federal entity pressure upon a specific platform, and
 - (2) specifying which the actions of each federal entity were responsible for
 - (i) a specific platform's content moderation and posting policies, and
 - (ii) at a specific point in time, which
 - (iii) preceded the removal of the asserted posts.
- d. moreover, there was evidence that the social media companies
 - (1) implemented their own independent editorial and content moderation policies for posts relating to covid-19 and the 2020 election,
 - (i) prior to the alleged federal entities' communications with these same platforms regarding Covid-19 or the 2020 election
- e. moreover, there was no evidence that the federal entities' alleged content moderation would likely continue on these two topics, because

(1) communications between the federal entities and social media platforms on these two specific topics significantly diminished between 2021 and 2023.

f. in sum, plaintiffs should have

- (1) identified specific acts of the specific named federal entities which
 - (i) allegedly caused the removal or demotion of posts for each plaintiff,
- (2) established these acts occurred prior to the removal of their posts, and
- (3) provide evidence that this past alleged harm predicts likely imminent future federal entity action.

B. Moody et al. v. NetChoice, LLC et al., 603 U.S. 707 (2024)

1. Outcome: Reversed and remanded.
2. Background
 - a. Florida and Texas each passed a law in response to constituent claims that
 - (1) social media platforms favored politically liberal posts over conservative posts
 - b. NetChoice and others facially challenged both laws on First Amendment grounds, because
 - (1) both statutes comprise
 - (i) content moderation provisions, and
 - (ii) restrictions regarding platform choices for public display of user generated content
 - c. in each state the district court issued preliminary injunctions

(1) one injunction was upheld (Eleventh Circuit) and the other was reversed upon appeal (Fifth Circuit).

3. Supreme Court analysis

a. the editorial activities and selection of content by private social media platforms have First Amendment protection.

b. the correct analysis upon remand is:

(1) determining the full range of activities within the state laws' scope, and then

(2) weighing the constitutional v. unconstitutional applications within that scope.

c. neither the parties, district courts or appellate courts have yet addressed or applied this analysis.

d. expressive activity covered by the First Amendment includes curating speech originally created by others, and

(1) which includes decisions on editorial inclusion of speech content online by private social media platforms.

e. the government cannot prohibit speech content for the purpose of modifying the private "speech market,"

(1) this case is reversed and remanded for the district courts to

(i) reconsider the scope of each statute, and

(ii) thereafter weigh the constitutional against the unconstitutional applications of each statute.

C. [TikTok, Inc. et al. v. Garland et al.](#), 145 S. Ct. 57 (2025)

1. Outcome: Affirmed the D.C. Circuit decision, because
 - a. the Protecting Americans from Foreign Adversary Controlled Application Act [hereinafter the Act] does not violate the First Amendment as applied to the petitioners.
2. Background
 - a. TikTok is a social media platform for short videos with audio and text uploaded from the public's content.
 - b. Bytedance Ltd., located in the People's Republic of China [hereinafter the Chinese government] owns TikTok's proprietary algorithm, but TikTok is operated in the U.S. by TikTok, Inc., an American company.
 - c. under Chinese law, ByteDance must cooperate with the Chinese government's intelligence community
 - (1) under Chinese law, the Chinese government may access and control private data which TikTok collects from its users
 - (i) including those users in the United States.
 - d. the Act states that it is unlawful to provide services for a "foreign adversary-controlled application" operating in the U.S., but
 - (1) the Act exempts applications that undergo a qualified divestiture within a specified timeframe, so
 - (2) the application is no longer controlled by a foreign adversary such as the Chinese government.

e. the Act also specifically targets TikTok, based upon specific prohibitions of a foreign adversary's control over the platform, and

(1) the Act thereby requires divestiture from ByteDance as a condition for TikTok's continued U.S. operation.

f. ByteDance, TikTok and two groups of TikTok participants petitioned for review in the D.C. Circuit Court of Appeals.

(1) the D.C. court held that the Act does not violate the First Amendment, because

(2) it is narrowly tailored to protect compelling national security interests.

3. Supreme Court analysis

a. the Court assumed that the First Amendment was a relevant concern to the petitioners and implemented the following analysis:

(1) were the challenged provisions content based or content neutral?

(2) if content based, were the challenged provisions sufficiently narrow to serve a compelling U.S. government interest

(3) if content neutral, did these same provisions

(i) further important U.S. government concerns unrelated to speech, and

(ii) not excessively burden this speech more than necessary to further this interest, and

(iii) thereby merit an intermediate level of scrutiny

- b. in this instance, the challenged provisions are
 - (1) facially content neutral and justified by a content–neutral rationale, i.e., national security
 - (2) this rationale does not reference the content of speech on TikTok or reflect disagreement with TikTok’s message.
 - (3) the U.S. government’s content neutral justification is:
 - (i) preventing China as an adversarial government, from collecting vast amounts of sensitive data from TikTok’s U.S. participants, because
 - (4) extensive information from U.S. participants could enable China to, among other purposes, conduct corporate espionage in the U.S.
- c. under intermediate scrutiny the Act furthers an important government interest unrelated to free expression, that is, national security, and
 - (1) does not unduly burden speech
- d. the Act’s specific provisions concerning TikTok does not trigger strict scrutiny
 - (1) where there is adversarial foreign control over a tsunami of U.S. personal data, and
 - (2) consequently, a national security concern
- e. the Act’s prohibitions and divestiture requirements comprise a legitimate means to promote national security under intermediate scrutiny

**D. Salazar et al. v. National Basketball Association (NBA)118
F.4th 533 (2nd Cir. 2024) [hereinafter NBA]**

1. Outcome: Vacated the dismissal of the complaint and remanded under the Video Privacy Protection Act (18 U.S.C. section 2710) [hereinafter the Act]
2. Background
 - a. the Act defines a consumer as any renter, purchaser or subscriber of goods or services.
 - b. under the Act it is unlawful for a service provider to knowingly disclose personal identifiable information about a service's consumer
 - c. Mr. Salazar registered for a free NBA online e-mail newsletter, sent his personal information to NBA to receive it, and
 - (1) then watched NBA videos on the NBA's website.
 - d. Mr. Salazar sued under the Act, contending that
 - (1) the NBA had unlawfully exposed his personal information without his authorization
 - e. the court dismissed the complaint, stating that
 - (1) the Act exclusively applies to customers who purchase audio video services, and
 - (2) Mr. Salazar did not qualify as a purchaser because he only received a complimentary newsletter
3. Appellate Court analysis
 - a. public disclosure of private facts qualifies as a concrete and sufficient basis for standing.
 - b. the statutory term "consumer" includes subscribers for any of the provider's goods or services

- c. 'goods and services' comprise more than audio-video services, and
 - (1) does not require payment of money, and
 - (2) includes the free online newsletter sent in exchange for Mr. Salazar's personal information.

[E. Chabolla et al. v. ClassPass, Inc. et al., 129 F.4th 1147 \(9th Cir. 2025\)](#)

1. Outcome: Affirmed the denial of the motion to compel arbitration.
2. Background
 - a. the ClassPass website offers subscriptions for physical fitness programs
 - b. to navigate to ClassPass' Terms and Conditions, the user must scroll through several webpages
 - (1) the landing page is silent regarding Terms and Conditions, but it does display a 'Continue' button to access screen 1.
 - (2) screen 1 states that by clicking upon the Facebook link or 'Continue' button the subscriber agrees to the Terms and Conditions.
 - (3) screen 2 requires the user's e-mail address and displays another 'Continue' button to screen 3.
 - (4) Screen 3 displays the hyperlink to the Terms and Conditions, but
 - (i) there is no assent button at screen 3, and only a redeem button.
 - (ii) the hyperlink is proximal to notices in small grey font on a white background

c. in a class action lawsuit, Ms. Chabolla asserted that ClassPass violated California consumer laws, because

- (1) its Terms and Conditions did not comprise a clear assent display or button
- (2) ClassPass moved for compulsory arbitration, and
 - (i) which was the sole option for resolving disputes according to the Terms and Conditions

d. Ms. Chabolla asserted that she never agreed to compulsory arbitration under the Terms and Conditions, because,

- (1) there was no fair notice on the website that she agreed to arbitration by subscribing
- e. the district court denied ClassPass' motion to compel arbitration, and
 - (1) ClassPass appealed.

3. Appellate Court analysis

a. the hyperlinks to Terms and Conditions must be conspicuous, but

- (1) here the landing page did not even display a hyperlink to the Terms and Conditions
- (2) the remaining screens displayed questionably conspicuous hyperlinks and labeling thereof

b. nevertheless, the appearance or absence of hyperlinks is not dispositive in this particular case, because

- (1) there was no manner by which a customer could assent/agree to Terms and

Conditions, including a compulsory arbitration provision, anywhere upon the ClassPass website.

- c. in particular, there was no clickable assent button with an explanation of the button's legal significance in forming an online contract.
 - (1) instead, the only buttons were (in chronological screen page order): Continue, Continue, Continue, and Redeem Now.
- d. in sum, a reasonably prudent internet user could not unambiguously assent to the Term and Conditions and be aware of the agreement to arbitrate
 - (1) exclusively by scrolling through this multi-page website.

[F. Briskin et al. v. Shopify, Inc. et al., 135 F.4th 739 \(9th Cir. 2025\)](#)

1. Outcome: In a putative class action the en banc appellate court reversed the district court and an earlier three appellate judge panel.
2. Background
 - a. Shopify, a Canadian company, as well as its U.S. subsidiaries, are not California citizens.
 - b. Mr. Briskin, a California resident, sued Shopify and its U.S. subsidiaries in California federal district court, alleging that
 - (1) Shopify violated California privacy and business laws when it installed tracking software on his phone without his consent.
 - c. the federal district court located in California held that

- (1) it lacked specific personal jurisdiction over Shopify and its U.S. subsidiaries because there was no personal specific jurisdiction, and
- (2) dismissed the case (general jurisdiction was not raised).
- d. the original three-judge appellate panel affirmed.

3. En banc appellate court analysis

- a. the California long arm statute provides specific personal jurisdiction to the extent allowed by the U.S. Constitution's due process clause
- b. for specific personal jurisdiction over a nonresident defendant, there must be minimum contacts comprising
 - (1) an intentional availment act into a forum state, and
 - (2) a purposeful direction of the intentional availment act expressly aimed at the forum state
 - (3) causing harm which the defendant knows will occur in the forum state
 - (4) and which would include the purposeful availment and purpose direction requirements.
- c. Shopify purposefully targeted California consumers by
 - (1) obtaining and commercializing California consumers' personal data by tracking them with cookies on their devices, and
 - (2) selling this data to third persons

- (i) without California consumers' consent or knowledge.
- d. no exclusivity of jurisdictions is necessary, and even if Shopify targets other states in the same manner if Shopify
 - (1) targeted California consumers to
 - (2) profit from their personal information by installing tracking software in their devices
- e. if a company is knowledgeable about its customer base within a particular jurisdiction, exploits that base for commercial gain, and
 - (1) when its contacts within that jurisdiction are its own choice and not random, isolated or fortuitous,
 - (2) then specific personal jurisdiction exists, and
 - (i) even if the platform cultivates a nationwide audience for commercial gain in a similar manner

[G. Solomon et al. v. Flipps Media, Inc., 136 F.4th 41 \(2nd Cir. 2025\)](#)

1. Outcome: Affirmed grant of the motion to dismiss under Rule 12(b)(6).
2. Background
 - a. the federal Video Privacy Protection Act, 18 U.S.C. section 2710 (the Act) prohibits
 - (1) disclosing a customer's personal identifiable information without their knowledge or consent (with some exceptions), and
 - (i) with no ability for the customer to opt out.

- b. Flpps is a digital streaming service with video content, pay per view events and live streaming events.
 - (1) without consumer knowledge, Flpps sent pixels comprising customer information to Facebook
 - (i) from which Facebook could discern personal information about Flipp's customers
- c. Ms. Solomon was a subscriber to Flipp's digital streaming service,
 - (1) as well as a Facebook user.
- d. Ms. Solomon brought this consumer privacy class action lawsuit, alleging that
 - (1) Flpps embedded Facebook pixels into the Flpps site and
 - (2) thereby transferred Flpps users' information to Facebook without the customers' knowledge or consent
- e. the district court dismissed the case,
 - (1) because the personal identifying information was only decipherable to a sophisticated technology company, and
 - (2) Solomon appealed.

3. Appellate court analysis

- a. there are currently two standards for the scope of the term 'personally identifying information' in the federal appellate circuits:
 - (1) reasonable foreseeability, and
 - (2) ordinary person

b. the ordinary person standard is adopted by this circuit, because

(1) an ordinary person does not have the technical ability to decipher the digital identity associated with Facebook's pixels embedded in the Flipps website, and

(i) to thereby identify a specific individual's personal identifying information.

Program Transcript

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00:00:32:23 - 00:00:58:03

Hi, everybody. Welcome to this presentation of 2024 to 2025 updates from the United States federal appellate courts and U.S. supreme courts. It was hard to select all the cases that I wanted to talk about. So I did the best I could to select the ones I thought would be most noteworthy and something we could all learn something about.

00:00:58:05 - 00:01:01:26

So I'm going to start right away

00:01:01:28 - 00:01:39:08

So now we are into trademarks. The first case is from the Supreme Court that came down a few months, actually more than a few months ago. It's a trademark infringement case. It's really more about how to name defendants in your trademark infringement lawsuit, but it's a good case to be aware of because, I would imagine that the lesson from this case that I've heard in scuttlebutt is, when in doubt, sue everybody.

00:01:39:10 - 00:02:33:25

What happened was, the Supreme Court vacated the appellate court and remanded the LRA and the Lanham Act, which is the Trademark Act, allows a prevailing plaintiff to obtain a defendant's profits. So Dewberry engineers sued Dewberry Group for trademark infringement, and they, Dewberry engineers, was awarded \$43 million in profits. The problem with this was it wasn't just from Dewberry Group, it was from a group, independently incorporated entities which were not named defendants in the lawsuit.

00:02:33:28 - 00:03:15:10

And they were all independent entities, even though Mr. Dewberry owned the stock and all of them. So there was only one named defendant. Nevertheless, the Fourth Circuit affirmed the district court that made the \$43 million award from

all these entities, which were not defendants in the lawsuit. And the Supreme Court said, you can't do that. Defendant is the party who was named in the court proceedings.

00:03:15:13 - 00:03:59:06

And Dewberry engineers did not designate the affiliates as defendants. Separately incorporated entities are distinct legal units, as most people or lawyers are aware, and even if they share a common owner, which in this case was Mr. Dewberry. And even though there was evidence that what Mr. Dewberry was doing was taking profits from his corporation and shifting them into all these affiliates, that even though they were independent legal entities under the law, he controlled them, presumably as a shareholder.

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So it was wrong to include them. There is something called just some provision in the Land Act where the court may award profits, where the defendant defense earnings is to an affiliate because, I mean, this is something that people would do all the time if it's just to protect their assets, to send them somewhere else.

00:04:28:03 - 00:04:48:00

But the district court never relied upon it. And the Fourth Circuit affirmed the district court analysis. So it had to go back, and figure out what was the real amount, which could be a heck of a lot less than 43 million.

00:04:48:02 - 00:05:31:06

Libertarian National Committee versus a lot. Saliba. I think that's how you pronounce it. The outcome was affirmed preliminary injunction against Mr. Saliba and his colleagues, Mr. Saliba and other people of a like mine originating from the Libertarian Party used libertarian Mark's without permission. So libertarian sued Saliba and his cohorts for trademark infringement. And a district court granted a preliminary injunction prohibiting them and the other dissenting members from using these marks.

00:05:31:12 - 00:06:06:17

And so they, Mr. Saliba appealed. The issue was that we're looking at whether or not marks used to solicit party donations, advertise events and endorse political opinion positions are covered by the landmark without violating the First Amendment. So here we go with the First Amendment again. And the appellate

court says the commercial basically, what they're saying is the commercial use trumps the First Amendment in this instant.

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It applies to politics because the Lanham Act applies to political speech. When the asserted mark is also a source identifier, and this mark is a source of political services. So it affirmed the preliminary injunction, except for some services for which there were already disclaimers in place. So it's good to know that the source identifier trumps anything else.

00:06:43:02 - 00:07:18:15

Next we have Bureau Nacional Interprofessional. Do cognac versus Cologne in cognac? Yes. Outcome vacated the Trademark Trial and Appeal Board's decision and remanded. This has to do with certification marks and certification marks confuse people. Maybe because you don't see them. It often is or uses them, or as often as trademarks or service marks or they don't come through your offices.

00:07:18:16 - 00:07:54:01

So as often, but what happened? Well, first let's, let's just briefly say what certification marks are there kind of a trademark, but they're really, assertive, a branding of an association or other organization that makes products or gives provides certain services in a certain way that may have to do with, geography or ingredients or method of, of manufacture.

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And if you're a member and you do everything your product meets the specifications of this association or organization, then you get to use the certification mark on your products in addition to any trademark or service marks or house marks, you may also be displaying. So getting back to the facts of the case, Bureau Nazionale owns the common law mark certification.

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Mark cognac for brandy produced in a specific region in France under specific conditions. Bureau Nacional opposed a trademark registration for Cologne and Cognac entertainment submitted by a hip hop label. The board dismissed the opposition, in part because it didn't find any likelihood of confusion with the Bureau certification mark. There's a list of, it listed the criteria for determining, when a senior user, has a, has a strong mark certification.

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Mark. And it said that one of them is whether there's evidence the mark is famous. And the board asserted there was no evidence that the mark was famous. It can't be fame. And what they said that the upper Court didn't really agree with was that it can't be famous unless it's associated with a famous service mark, or house mark or trade mark.

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And also, there was no evidence that the Bureau's market attained fame just for being a certification mark per se. So the Federal Circuit, looking at likelihood of confusion, said fame of the mark senior mark, fame of the senior mark is an important factor in this case, and the board applied the incorrect legal standard for fame because it doesn't have to be famous for being a certification mark.

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It can be famous, for a product or service from a certain region, certain material composition, certain way it was made, or any other kinds of qualities or characteristics. And, House Mark, I'm sorry, a certification mark does not have to be physically associated with the certification mark. The fact that a certification mark is displayed in proximity with a house mark, a service mark, or a trade mark doesn't mean that the certification mark is not famous by itself.

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That means if you're displaying all of them together, the way that it should be analyzed is by allocating the sales and advertising revenue strictly for the certification mark. And looking at that to determine whether it was famous. And even if the mark is not the most visually conspicuous mark. So what should the board have done? It should have determined whether cognac was famous as an indicator of geographic origin and not famous per se.

00:11:51:04 - 00:12:10:22

As a certification mark.

00:12:10:24 - 00:12:35:00

Next, we have VP brands versus Jensen. We've only, which vacated, remanded the preliminary injunction. Order a VP PR on the registration of all three

electronic cigarette products. While Jensen markets e-cigarettes under an elf bar. So those are pretty close.

00:12:35:03 - 00:13:21:05

VP alleged that Sen Gens mark infringes VP mark and requested a preliminary injunction because of likelihood of confusion, but the district court said, no. And it rejected Jensen's affirmative. Said yes because Jensen's affirmative lawful used defense was not appropriate in court. It was only appropriate in front of the trademark board and administrative proceedings. And there was no evidence that VP PR had violated the federal Drug and Food Administration law.

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That was related to the product that was being trademarked. The Federal Circuit said, well, there's really no clear line on what the decision is whether to use the unlawful use defense in trial proceedings. But we concluded that the district court failed to properly evaluate the use of the unlawful use doctrine that provides that a mark used in commerce in an illegal manner cannot be federally registered, which is Jensen's position where they weren't allowed to give any evidence.

00:14:07:23 - 00:14:47:04

So it's going to go back. We don't have any, we don't really have any opinion on the statutory basis or boundaries of the doctrine. But since this defense is central to the defendant's case, the district court should hear the evidence and are excluded entirely. Next, we have Gibson, Gibson versus Armadillo Distribution Enterprises, which reversed a triple file order excluding evidence of third party use.

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Gibson alleged that armadillo infringed its guitar shaped, body shaped marks, as well as two word marks, which we won't be talking about. Armadillo counterclaimed for cancellation of Gibson's guitar body shape marks, saying that they were generic, resulting from third party use for other products and services. In its tree trial order, the court found that third party use of these marks was relevant, but only going back five years preceding Armadillo's purchase of a guitar producing business.

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Because use before the five year cutoff, was not probative for generic notes, so just entirely exclude the court, entirely excluded evidence that was older than just going back five years. And both parties appealed. The Fifth Circuit said exclusion of all third party evidence earlier than five years from the first infringing act, was not the way to go.

00:16:10:22 - 00:16:49:13

Earlier. You should be considered if it's relevant. And it would be relevant if this use was likely to impact consumer perception of the ad at the time of the registration date, evidence established that third party use of guitar shapes occurred as early as the 1960s. While that's really old, and this earlier evidence could affect the consumer's perception such that the asserted marks were generic or incredibly weak.

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So in the Fifth Circuit, you can let all that in. And as support, the court said, the relevant section of the Lanham Act doesn't have a five year time limitation or any kind of time limitation for that matter. Midget, since Armidale's generic news claim is central to its case, if this evidence is generically broad, excluded and completely excluded, the Trier of fact is not getting the whole picture.

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So I guess you can go back to the 70s. I mean, the 60s.

00:17:50:25 - 00:18:33:20

Next is cracks versus effervescent which reversed summary judgment and remanded crack sue dogs and other competitors such as effervescent for patent infringement and dogs counterclaim for false adversary tasing by cracks under the Lanham Act because in its marketing cracks, falsely described its own shoe material as patented, proprietary and exclusive. Although it turned out that the material was not, the material of the shoes was not actually patented.

00:18:33:22 - 00:19:13:18

These descriptions relate to the nature, characteristics, and qualities of Crocs. Patents. I'm sorry, Crocs products and these descriptors imply that all Crocs products comprise materials superior to those of its competitors, including dogs, thereby deceiving customers into concluding that dogs and other competitors had

inferior material in their footwear. The district court granted summary judgment to Crocs because there was no false advertising claim under the Lanham Act.

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As a matter of law and Dogs appeal, and the Federal Circuit said, actually, there is a provision under the Lanham Act for that. And it's in your, in your notes what the section is which prohibits commercial advertising or promotion, which miss misrepresents the nature, characteristics, qualities, geographical origin, any other qualities of the item or services that are being advertised and the district court was looking at whether there were false claims of authorship and inventors ship, which are certainly outside the scope of the Lanham Act.

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But if you look at the advertising materials, if you look at cracks, advertise materials on websites, you'll see that it's making all kinds of assertions about the qualities and properties of the material it uses in its shoes, which clearly they're they're being advertised. So clearly that falls within the scope of the landmark. And there's definitely a cause of action under that particular provision of the landmark.

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Next, we have to recourse for this product. We call ourselves, sir. And this affirmed the district court's grant of summary judgment. Now, this case does have a very convoluted fact pattern. I'm going to try not to get into the weeds too much, just enough to understand what the court did. Predictors of a call us, which I'm referring to, are pies sold in Puerto Rico under a registered mark comprising a Virgo vert verbal logo and a picture of a chicken.

00:21:26:03 - 00:21:58:01

Unfortunately, the U.S. registrations were canceled in 2006 and 2009 because you have to renew them with affidavits of use or excusable nonuse. And this was never done. In any event in the past you can use it is still used as a common law mark. But Pisces used this mark with chicken in 2011.

00:21:58:03 - 00:22:49:14

In and during this time back at the ranch during this time, Paz was having very bad financial difficulties and it was in big trouble with its bank that all its bank money, things were really bad. So in 2012, Paz successfully attempted to sell its

assets, including the mark, but was unsuccessful in doing so. Meanwhile, in 2016, another chicken company, Tore Rico's, also from Puerto Rico, applied to register the originally registered Paz mark, but later in 2016, Paz applied to re-register and oppose it.

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Oppose Toll Rico's application. Also going on at this time. In 2017, Paz entered into a licensing agreement for this mark with another company, and in 2019, Paz Bank no longer held the lead on the asserted mark and finally in 2019, to a Rico sided declaratory judgment to establish itself as the legal mark owner and move for summary judgment, contending that Paz had abandoned the mark and the district court granted summary judgment to Tel Rico's.

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Because Paz did not use the asserted mark in commerce for at least the statutory period of three consecutive years. And again, our trademark colleagues know that that raises if you haven't used a mark. It has nothing to do with whether it was, you lost your registration if you're using it even as a common law mark, if you stop using it for three consecutive years, there's a presumption that you have abandoned it.

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So you're going to have to show evidence that you intended to resume use. And you have to do this during the three year statutory period. And the district court said there's not any evidence arising from the three year period the parties intended to resume use. So Paz appealed, and the First Circuit agreed with the district court.

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Paz admitted that it did not use its mark between 2011 and 2016, and of course, 2016 was the year during which Tio Rico's applied to register. We already talked about establishing *prima facie* abandonment and the fact that you have to show intent to resume use within that three year period and not thereafter, and not before. It has to be right in there.

00:25:18:03 - 00:25:51:15

So as a matter of law, the prior mark owner cannot prevail simply by providing a reason why he didn't use it during the three year period, which is, what posited

that's not relevant, the court emphasizes. It's totally not relevant to the inquiry here. And as to all the facts, all the chronological events, none of those, none of those show an intent to resume during that three year period.

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For example, the attempted 2012 sale occurred prior to the three year period. So we're not interested in that. It's irrelevant. Past ownership of an unencumbered right to a mark does not imply intent to use because during that three year period, because you may not be using it just because you own it, you may be perhaps licensing it to somebody, but you are not necessarily using the mark just because the bank released a lien on it.

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And the licensing agreement also did not show intent to use because it was on the other side of the three year period. Here's the three year period. The license was over here. The mark was legally abandoned during the three year period. So there was nothing to resume using thereafter. And in any event, this license of agreement wasn't any good because there were no quality controls.

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And so a naked license isn't any good anyway. So, hopefully that one's helpful to confirm that you have to have the intent to resume during that period, if that period exists in the history of your client's trademarks and I think that's the big thing to take away from this. And it's going to have to be very specific.

00:27:37:10 - 00:28:08:07

Evidence can't be evidence of a sale that didn't work out or a license that didn't work out when, especially when they're neither of them are in the relevant time frame. Again. This is whenever there's a three year, consecutive period.

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Next, we have 100 contacts versus Jand, which is actually Warby Parker, which affirmed the purchase of a search advertising keyword containing a competitor's trademark in and of itself does not comprise trademark infringement.

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Apparently this is a very widespread practice, but I guess one 800 contacts thought it was okay until it happened to them. So, January B Parker purchased

search advertising keywords, which included one 800 trademarks, and so one 800 sued Sue Jan, about the trademark keywords being trademark infringement and consequent consumer confusion. Although competitive bidding for search keywords is something that everybody does, one 800 for them allege that Jan's use was intended to deliberately create initial interest confusion.

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But the court found that one 800 marks and Jan's marks were visually dissimilar, and that one eight hundred marks were not displayed upon the search result. Pages or Warby Parker's web landing page, so the court dismissed the complaint in one 800, appealed.

00:29:48:12 - 00:30:33:05

So the appellate court analysis for with respect to keywords comprising competitive trademarks said what everybody presumed was the law and that was the mere act of purchasing competitor keywords, as their marks as keywords does not comprise trademark infringement. We noticed here that one 800 didn't say that Jan used the trademarks in its own advertisements, or any internet result page and Jan actually, or that it used it other than exclusively as keywords.

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And there is a fourth circuit case. Lerner and Rowe. Same result. Apparently it's okay to take your competitor's keywords and use them to get a search page where you may be at the top of the search page. I've, I've seen that happen quite a bit.

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Next is Cardinal motors versus H and H Sports Protection USA. The dismissal was vacated and remanded among other claims, Cardinal alleged that H and H had infringed the trade dress of its helmets, meaning the design of its helmets. It had one that had a generic helmet design, and the other one was a more detailed helmet design.

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And the district court said that they granted the motion to dismiss with prejudice because the pleadings did not comprise an adequate discussion of the distinct distinctiveness of either design. So, Cardinal Motors appealed and the appellate court agreed with Cardinal Motors. It said that the law is that for, trade dress, you first allege the particulars with detail in your pleadings of the actual trade dress.

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We just want to know what the trade dress looks like and whether it's distinctive is something you analyze, thereafter. And that's a completely separate inquiry. So prior to evaluating distinctiveness, and you have to plead with a position called articulation, the structure of the, the design of the helmet, it's the precondition from a distinctiveness analysis. Unfortunately, the district court conflated them, and that wasn't the right thing to do.

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In this case, the designs were pleaded with sufficient particularity. So, the district court has to reinstate the case. Next we have ceramic tech versus course tech bio ceramics, which affirmed a board decision canceling trademarks comprising the color pink. Cirrus ceramic manufacturers, pink ceramic hip components and obtained a registered trademark which contained the color pink.

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Cortex challenged the rest of the registrations by contending that the color pink was functional and you can't have a functional trademark, and the board agreed because the pink color necessarily results from a material that's supposed to give increased hardness but necessarily results in a pink color. So that's functional. And the Federal Circuit agreed. It said ceramic owns multiple patents disclosing the functional benefit of chromium, which produces the pink color.

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It has advertising. But it also, since it has a utilitarian purpose, it by its own advertising and patents, you cannot get, you can't get a trademark on it. So they were canceled.

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Legal force RPC versus Legal Force, Inc., which affirmed dismissal of claims under rule 12 B six Legal Force RPC is actually the American entity which operates legal service websites and owns the legal force. Legal Force, Inc is a Japanese company which provides legal software services and owns the Mach legal force in Japan. So those are pretty confusing.

00:35:36:11 - 00:36:08:25

Legal Force USA sued Legal Force Japan for trademark infringement in the United States. The district court said that Legal Force Japan's advertising and selling of equity doesn't constitute trademark infringement because selling equity is not a service or a product, and the appellate court agreed. It said equity is not a service or a product under the alliance of miAC.

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First of all, it's not a product because it's not a movable, tangible thing. And equity is not a service because it does not comprise performance of labor for the benefit of another. And that's particularly true of the word another, because by definition, if you buy equity in a company, then, you're a part owner and there is no another.

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So, yeah, that doesn't work out if someone's selling equity.

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Next we have ball Shine Distillery versus Sazerac Brands, which affirm the board finding that a merck's generic ness is determined at the time of registration. And this is the Federal Circuit. This is not the Fifth Circuit where we already had a case looking at generic ness and a timeline for generic ness.

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Bull shine applied for registration of bull shined fireball, for alcoholic beverages except beer. Sazerac opposed the registration because the mark was confusingly similar to its own mark. Fireball and where fireball is associated with liquor and whiskeys. Both shine counters claim that says or X marks were generic because fireball is a generic name for a common alcoholic drink, which has this specific spicy flavor.

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The board dismissed the generic, the board.

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Dismissed the opposition and the counterclaim because fireball was not generic when it was registered. That is, at the time of registration both Shine fireballs were not likely to cause confusion. Obviously, no one was happy. So they both

appealed. The Federal Circuit said this is a case of first impression in the Federal Circuit regarding the time for assessing a marks generic ness, section E, to see if the landmark prohibits registration of merely descriptive terms, which also includes, generic terms, how consumers would perceive a mark associated good for goods or serious or services.

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They just flatly held that it is a veil. The Federal Circuit held. It's evaluated contemptuously. At the same time, with the time of registration.

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Whether they answer X marks for generic at the time of registration, the board looked at evidence from the relevant consumers for the term fireball and evidence. Relating to actual generic news shows that consumers did not associate the term fireball with any run of the mill, garden variety whiskey or liquors. Instead, they perceived it, associated with very specific kinds of liquors that had a spicy cinnamon flavor.

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The other problem was a lot of the evidence showing, purporting to show genericness, was from specialized publications, which would not necessarily reflect what the relevant, consuming, public would perceive about these marks. There was also no evidence that competitors used the term fireball, that anyone else used the term fireball at the time of registration.

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So there wasn't any discussion in this case about how far back you go to look at evidence of generic ness, and made it pretty clear they weren't really involved in that. They only cared about whether it was generic at the time of registration. Doesn't really directly conflict with the case, Gibson versus armadillo. But I just thought I'd point that out.

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They don't seem to have the same views on what evidence is relevant. Next we have the dollar financial group versus predictions, which affirmed the board's decision. The dollar could not offensively claim priority against an intervening common law mark through the natural expansion doctrine, which is if you have a senior registration and for example, it's associated with books and someone you

might think, consumer might think, well, maybe they'll start selling calendars and greeting cards.

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We've seen that. And then somebody tries to register the same mark for greeting cards. You're going to be able to say, well, you really shouldn't be doing that, because I might naturally expand into that. So that's kind of what this case is about. During the 1980s, dollar provided loan financing and check cashing services. That's all it did.

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And during, with two federally registered marks comprising the local Money Mart in 2000, \$12 began using this logo for pawn services. And in \$2,014 obtained federal registrations comprising Money Mart for pawn services. So there was quite a gap in time there. But during the 1990s, critics began to use a common law mark comprising money mark, also associated with pawn services, so critics petitioned the board to cancel dollars.

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Money mark marks for pawn services based upon date of first use, which was in the 2000, and confusing similarity of marks for the same pawn services. The board concluded that predicts he had priority because verdicts use money marks for pawn services prior to dollar registration for pawn services. So the board then canceled dollars registration for pawn services and dollars appealed, and the Federal Circuit's analysis for priority use was.

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First of all, no one disputes that vertex was the first to use money mark for pawn services. The zone of natural expansion doctrine applies to products or services into which a business is likely to expand. From a purchaser's perspective, however, this doctrine is only appropriate when appropriate. When used defensively. That is, it only allows a senior user to prevent a junior user from federally registering a similar mark for related goods within the senior users.

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Natural zone of expansion, like the greeting cards for the business, which was originally just books this doctrine does not provide. Here's the important part: the doctrine does not provide priority for anything not listed in the earliest

registration. And there you cannot defeat an intervenor's rights which are earlier in time than the senior users rights to use the same, rights to the same products or services.

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So you can use it if somebody is trying to get a registration. But you can't stop them from using the mark on something you eventually applied for. If they you eventually applied for, if they started using it, sooner than you did.

00:45:28:03 - 00:45:57:02

Next we have American Girl versus Burkhardt, which reversed a motion to dismiss because the judge thought there wasn't any specific personal jurisdiction. So this is really what the case is about? Not really, *per se*, trademark infringement, but it's still good to know, as it is, located in the People's Republic of China through several websites.

00:45:57:04 - 00:46:31:21

American Girl sued some burka for trademark infringement and distributing counterfeit dolls that look like American Girl dolls, especially in New York. New York's long arms stance statute allows a court to exercise personal jurisdiction over a non domiciliary who transacts business in New York or Transacts anywhere to supply goods to New York. So that's pretty broad.

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After this litigation commenced, the burqas decided that they were going to get around this. They canceled all their New York orders. They refunded everybody's money. They didn't take any more orders. And then they went to New York Court at district court, federal court, and said, there's no specific jurisdiction over us because we're not transacting. We're not selling anything in New York.

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And the courts thought that was just fine and dismissed the complaint based on lack of personal, specific jurisdiction. An American girl appealed, and the appellate court said the statute says transacting business. It doesn't say you have to actually ship goods. So accepting the original orders, sending the confirmation emails and accepting payments. Once you did that, there was jurisdiction.

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Doesn't matter that you sent the money back or sent the orders back, or didn't send the orders that had been paid for doesn't change anything. By its express terms, the long arm statute requires a transaction and not necessarily a shipment or sale. The statute also complies with due process requirements, which generally means purpose. Purposeful. A veil meant of the benefits in a particular forum.

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Here's. And burqa purposely availed itself of conducting business within New York so there was sufficient minimum contacts and all their emails and order and invoices served as evidence of this. As far as whether the equitable consideration of whether it was going to be an undue hardship to defend in New York, if you're in China, a court said they purposely send a purposely did business in New York and should have been aware of the risk of sending counterfeit, purposely sending counterfeit dolls to New York.

00:49:09:12 - 00:49:55:23

Under these circumstances. Next, we have Jekyll Island versus poly Group, which reversed a district court dismissal and also based on personal jurisdiction. Poly Group is a company registered and headquartered in the British Virgin Islands. Poly Group allowed its business affiliates to display its mark summer waves in the United States, and use its trademark razor registrations, and in addition to that, it had numerous federal trademark registrations, which all averred use in commerce in the United States.

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Jekyll Island is a U.S. entity located in Georgia and owns the federally registered trademark Summer waves in the United States. So Jekyll Island sued Poly Group for trademark infringement and to cancel Poly Group's marks in the United States, but the district court dismissed the complaint based on personal jurisdiction because Poly Group itself did not sell products directly in the US.

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The court disagreed with this conclusion. There's actually a federal rule of civil procedure, which says personal jurisdiction over foreign defendants is proper when there are sufficient contacts with the United States as a whole. Which is interesting because usually everybody goes straight to the state long arm statute. But there actually is one, in the federal rules, poly Group owns more than 60

registrations for marks and allowed its affiliates purposely allowed its affiliates to use these in the United States.

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Therefore, I purposely availed itself of United States legal benefits by allowing these companies to use its trademarks in markets targeting U.S. consumers and then subsequently generating sales. And by the way, they also employed attorneys that were all from Georgia. The court also said that a strict causal connection between the litigation and these activities is not necessary if they're clearly related.

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And here, obtaining and defending dozens of trademarks share a common link with this clearly share a common link with this litigation.

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Next, we're going to go to trademarks. Doesn't seem like a lot was new at the federal level, but there were some we have comp your life versus Newman, which affirmed the district court judgment of trade secret misappropriation.

00:52:33:12 - 00:53:32:03

I'd say the fact pattern stood out in this case because copyright has software code, which a licensee or consular could use to access a proprietary database of insurance information. Now, not all the information was confidential. Some of the quotations from the database were publicly available, and you could just download them. But a significant portion of them were proprietary and encrypted, and people had other companies had licenses, to access this proprietary database that had millions and millions and millions of pieces of data.

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Meanwhile, Mr. Newman and his associates created several websites using the software without a license, and Mr. Newman obtained the software by impersonating a licensee over the phone. So this might also, be, raise awareness. People demand access to software or any other trade secret over the phone. Somehow, Mr. Newman got hold of it.

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He and his colleagues used it to set up their own website. They used the software to scrape millions of items from CompuServe. But databases and subsequently computerization started losing a lot of business. And it sued Mr. Newman and his associates for trade secret misappropriation. After a second bench trial, because this went back and forth quite a bit, the district court found that misappropriation of trade secrets had occurred.

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Granted an injunction and a judgment for damages. Now, Mr. Newman and the other defendants challenged whether there was a trade secret and whether the trade secret was misappropriated by improper means and or use as to whether there was a trade secret, the appellate court said, even though there was some publicly available, insurance quotes, even though they were publicly available, and even though the individual codes in and of themselves may not have, achieved trade secrets status, the entire compilation definitely does have trade secrets status.

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It's encrypted, it has passwords. You need a license. There was very, very definitely a trade secret. There was misappropriation by unlawful acquisition. Because, Mr. Newman impersonated a legitimate licensee to obtain the software code and use this to scrape millions of quotations from the computer's database and you can see that they were using them. They not only improperly acquired them, they improperly used them because Mr. Newman scraped between 3 million and 43.5 million quotations and missed the copy.

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Capulet's revenue and customer base really shrank after that. These circumstances evidenced evidence evidencing that Newman used the software he obtained by his licensee impersonations. So you had the misappropriation when somebody knew or should have known that it was acquired by improper means, and then by use, because the person using it knew or had reason to know it was acquired by improper means before they used it.

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Next, we have AMD's Aspen versus Renesas Electronics, which reversed the final judgment, finding trade secret accessibility date, finding a trade secret

accessibility date where the remedy of profit disgorgement begins to accrue. In a scenario that unfortunately is not too uncommon. And I'm always telling my clients to look out for this, arm's disclosed its technical product information.

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Two and analysis during unsuccessful merger negotiations. Thereafter, Renaissance was sued by IMS for a trade secret misappropriation under federal and Texas law. And this is another one of these things that goes on forever after a first trial, a first appeal, and a second trial, the district court entered a judgment for, among other remedies, disgorgement of profits for trade secret misappropriation, where the court said it began to accrue in 2006, where the defendant acts when the defendant actually reverse engineered the trade secret.

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And as you may recall, under the federal Trade Secret Act, reverse engineering is fine. It's allowed. It's not, you can do it. However, Renesas contended that the trade secret pardon me, the trade secret, was readily ascertainable by First Reverse Engineering in January 2005, because that's when the embodying product became publicly available. So everyone appealed. And the Federal Circuit said under Texas state law, information readily available by independent investigation does not qualify as a trade secret, because here and here, the product comprising the trade secret became publicly available by January 2005.

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The evidence was also clear that reverse engineering is a pervasive industry practice. So if the model embodying the trade secret was publicly available in 2005, even though Renesas completed its own product in 2006, you don't have to have actually done it if you could have done it earlier, which is what happened here. So they get one year off their profit, the profit penalty.

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Which leads me to my observation that. Some after the Federal Defense Trade Secret Act passed, one might think that the only statute you need is the federal one. But this is a very good example of always dragging the state trade secret statute along with you, because it may have something in it that the federal statute does not.

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And that turns out to be a real game changer, as it did in this case.

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Next, I've added a new section to this presentation on social media, and the internet. So a lot of these again have to do with the First Amendment. But you should be aware of them. Murphy. Murphy versus Missouri, was a Supreme Court decision from last year.

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Where the court concluded the plaintiffs did not establish standing. So what happened here was in the federal district court, several individuals in two states alleged that several years ago, social media platforms had removed or demoted their Covid and election posts between the years 2020 and 2023. As you may remember, we had Covid and then we had the election and everybody stormed Congress.

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So that probably made a lot of posts. And that was anyway, they had removed their content in violation of the First Amendment. Several federal agencies and the white House were the named defendants, but the social media platforms were not parties in this lawsuit. Going back to the problem with the Dewberry case, but to a lesser extent here.

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The district court ordered a preliminary injunction against the federal agencies, which prohibited them from contacting social media platforms for posting any kind of content, not just Covid and the 2020 election and the Fifth Circuit affirmed. But the Supreme Court said, no, this isn't going to go anywhere. Federal court, first of all, federal courts can't remedy injuries from the independent actions of third parties not before the court, which was a problem here.

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Not as big a problem as in the Dewberry case, such as social media companies in this instance, for federal entity liability here, plaintiffs must show that the federal ad entities would most likely react in the same manner in law in order for them to have standing to abort this, brought this lawsuit, there had to be imminent injury.

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In fact, and that these particular government agencies and the white House, would react in a similar manner to future posts in kind of content on Covid and the election and thereby pose a real immediate threat to the plaintiffs by interference with social media, editorial processes. The court said, in this instance, this future harm is speculative because they just didn't do their homework for the right evidence.

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They needed a lot of very specific information. They should have had a lot of very specific evidence that preceded the alleged harmful acts. And during the alleged harmful act period, to show that there was actually a specific agency or agency, contacting a specific media, social media platform and telling them to either take something down or to change what was what was written.

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And they just mentioned 3 or 4, plaintiffs. They said one plaintiff came close but didn't quite make it. The others weren't anywhere near, having done this, they didn't specify which federal agency was responsible for a specific platform's content moderating at a specific point in time, which preceded the removal of these asserted posts. Not only that, there was evidence that the social media companies had their own independent policies, on which posts to take down and when with respect to, Covid and the 2020 election.

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And prior these existed prior to the alleged. Federal agency communications with these so with these same platforms regarding Covid or the 2020 election.

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Moreover, there was no evidence that the federal entities alleged content modification would continue because after 2023, they just weren't that many communications or as many posts about Covid and the 2020 election. And any communications significantly decreased. Between 2021 and 2023. What's the lesson from this story? Plaintiffs should have identified specific acts of the specific named at federal entities, which allegedly caused the removal or demotion of posts for each plaintiff established that these acts occurred prior to

the removal of their post, and then provide evidence that this past alleged harm predicts likely future similar actions by the government.

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Total lack of evidence. Another Supreme Court case from 2024, Moodie versus net choice, which was reversed and remanded. Florida and Texas each passed a law in response to constituent claims that social media platforms favored politically liberal posts over conservative posts, so the state legislators thought they had the answer to this. They each passed a law, that would govern moderation provisions of private people, the social media companies, both statutes comprise content moderation and restrictions regarding editorial choices.

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In each state, the district court issued a preliminary injunction. Against Moody, the government but in one one injunction was upheld in the 11th circuit and another was reversed in the Fifth Circuit appellate court. The Supreme Court analysis was that the editorial activities and selection of content by private actors have First Amendment protection. This is correct.

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And everybody probably agrees with that to begin with. But, the court said that the analysis in the federal, the appellate courts was flawed in the district court. What you have to do is determine the full range of activities within the state law scope, weigh the constitutional against the unconstitutional and neither party, the district court or the appellate courts, recognized or applied this analysis.

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The court also had a few other things to say in passing. One was expressive activity covered by the First Amendment, includes curating speech of other people, and includes decisions on editorial inclusion of speech by private social media platforms. And they said the government cannot prohibit speech for the purpose of modifying the quote unquote speech market. So the case was reversed and remanded to reconsider the scope of each statute and to compare constitutional versus unconstitutional applications.

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Next is TikTok versus Garland from earlier this year, which, in this decision, the plaintiffs challenge the Protecting Americans from Foreign Adversary Control

Application Act, which I'm going to call the act it does not violate. The First Amendment is applied to the petitioners. I didn't even know this existed, but it's good to know that it's there. Okay.

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TikTok, we all know about TikTok. It's a social media platform for videos, uplifting. The owner of the algorithm, ByteDance, is located in the People's Republic of China, and it owns the algorithm and is. But the TikTok is operated in the US by an American company. Under Chinese law, ByteDance must cooperate with the Chinese government's intelligence community.

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And under Chinese law, the Chinese government may access and control private data. Excuse me, which Tic TAC collects from its users, including those in the United States. The act states that it is unlawful to provide services for a foreign adversary, control the application operating in the US, presumably China, but the act exempts applications that undergo a qualified divestiture within a specified time frame, so the application is no longer controlled, for example, by the Chinese government.

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The Chinese government isn't operating anything. The United States. So although this is a general prohibition, the act also specifically mentions Tic TAC based upon the prohibitions. And the act thereby requires divestiture from ByteDance as a condition for TikTok's continued U.S operation.

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ByteDance, TikTok and two groups of TikTok participants, petitioned for a review in the D.C. Court of Appeals. The appellate court held that the act does not violate the First Amendment because it is narrowly tailored to protect compelling national security interests. The Supreme Court agreed, it's assumed for the purpose of this decision that the First Amendment was a relevant concern.

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So it looked at where was the challenge provision, where the challenge provisions of the act, content based or content neutral, if content based or the challenge provisions sufficiently narrow to serve a compelling U.S government interest if content neutral, which it is, did these same provisions further important

U.S concerns and not excessively burdens speech and therefore only merit an intermediate level of scrutiny.

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So the court said that the challenge provisions were clearly facially content neutral and justified by a content neutral rationale, which is national security under an intermediate scrutiny standard. It doesn't reference because it doesn't reference the content of speech. Our reflected disagreement with TikTok's message, the US government's control content neutral justification is preventing China from collecting vast amounts of sensitive data from, folks and companies in the US, because extensive information from the U.S could enable China to conduct corporate espionage.

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Under intermediate scrutiny, the act furthers an important government interest unrelated to free expression, which is national security. It does not burden the speech more than necessary. The Act's specific addressing of TikTok does not trigger strict scrutiny where the, foreign control, where there's adversarial foreign control over a tsunami of U.S personal data and consequently a national security concern, and the prohibitions and divestiture requirements comprise a legitimate means to promote national security.

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So the last time I looked at this, President Trump was still negotiating with TikTok, about this whole divestiture thing. So we'll see what happens. But that's what the Supreme Court said. Now, back to some, federal appeal court decisions. We have Salazar versus National Basketball Association, which vacated the dismissal of the complaint. And we're talking about the Video Privacy Protection Act and a class action lawsuit, of which there's been several of this genre, especially, West.

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The act defines a consumer as any renter, purchaser or subscriber of goods or services under the act, it is unlawful for a service provider to knowingly disclose personal and identifiable information about a consumer. So Mr. Salazar registered for a free NBA online newsletter from the National Basketball Association. Then he watched the videos on the website.

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I was very happy for a while. But then he sued under the act, contending that the NBA had unlawfully exposed his personal information without his authorization. The court dismissed the complaint, stating that the act only applies to customers who purchase the audio video services, and said since he didn't purchase anything, he just got the newsletter. He doesn't qualify under the act.

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But the appellate court disagreed and had a much broader interpretation of who could sue. Public disclosure. Private facts qualify as a concrete and sufficient basis for standing. And for those of you who remember your torts courses, that's actually a tort in most states. And the statutory term consumer includes subscribers and goods and services comprises more than audio video services and by its terms does not require payment of money.

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So it includes the free online newsletter in exchange for Mr. Salazar's personal information. So that's a good one. To remember, if you do a lot of work under this act.

01:18:19:08 - 01:18:40:07

Another class action case. Shibboleth versus class pass. This one's a little more convoluted with the facts. Affirm the denial of a motion to compel arbitration. The ClassPass website offers subscriptions for physical fitness programs.

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And, of course, you have to have terms and conditions. The problem was with ClassPass, they didn't seem to know how to format them. So the problem was to navigate to the terms and conditions. If you were the user, you had the skull scroll through several web pages. There's nothing about it on its landing page. There's a continue button on this landing page, and then it goes to screen one.

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It just tells you to click on Facebook or continue. And by clicking on those, you agree to the terms and conditions. But there aren't any at that link. Screen three requires the email address and displays another continue button. Screen three displays the hyperlink to the terms and conditions, but there's no essence button. It's screen three, only a redeem button.

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And the hyperlink is next to a notice that isn't very easy to read. So in the class action lawsuit, Miss Shabalala asserted that ClassPass violated California consumer laws because it was impossible to understand and manifest as sent. Our consent to being bound by the online terms and conditions of ClassPass. ClassPass moved for compulsory arbitration.

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Which was part of the terms and conditions, was compulsory arbitration. Miss Shabalala said that she never agreed to compulsory arbitration, and there was no notice on the website that she agreed to arbitration by subscribing. So the district court denied class passes motion to compel arbitration. And so ClassPass appealed. The appellate court went through a very detailed step by step, analysis of where exactly you could find the terms and conditions.

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Going through each screen, what was on each screen. But then after doing that, it said, but that's not really what I'm basing my decision on. I'm basing my decision on there is no appearance of. An express assent button for terms and conditions, which would include the compulsory arbitration period provision anywhere upon the website. For example, there was no clip clickable ascent button with an explanation as to the legal significance of forming a contract with ClassPass.

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There were just like three continue buttons and redeem buttons, which were misleading in some a reasonably prudent user could not an ambiguously is sent and be aware of the agreement to arbitration exclusively by scrolling through this multi page website and if you have any, clients who are very, very eyes, they're very, very good, inventors and artists, you give them a one page, you send them a one page document to sign, and they can't even find the place on that document to put their signature above their already written, printed out name.

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Then you can understand why a lot of people would be confused by the formatting of this website. It's very easy for someone such as myself to understand. Next we have Briskin versus Shopify. This is a putative class action

where the on bank appellate court reversed the district court and an earlier three appellate court panel.

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For reasons that will become clear in a minute. Shopify is a Canadian company. We're all familiar with Shopify. I think I know someone who works for Shopify, but it's a Canadian company. It also has US subsidiaries, which are not California citizens. Mr. Briskin is, California resident who sued Shopify and its subsidiaries in federal district court in California, alleging that Shopify violated California privacy and business laws when it stalled tracking software on his phone without his consent.

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So the federal district court in California held that it lacked personal jurisdiction over Shopify and its subsidiaries. Because they didn't have any presence in California. Even anything connected, presumably connected, to specific jurisdiction, general jurisdiction was not raised because they clearly didn't have any of that. The plaintiffs. So the appellate on banc court said it for specific personal jurisdiction over nonresident, you need purpose or the ailment of a forum state for a purpose in a purposeful direction of an intentional act expressly aimed at the foreign state and the California Longmire statute, allows any kind of specific jurisdiction, that's congruent with the constitutional due process requirements.

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And going to the facts of the case, Shopify personally purposefully targeted consumers in California by obtaining and commercializing California consumers data, by tracking them with cookies on their device, even though they didn't have permission to do that and they didn't have permission to sell this information to third persons without the consumers can't consent or knowledge. Now what some people, some commentators have found, somewhat alarming about this case is that it's really they they assert that it really broadens, what you can who you have jurisdiction over specific jurisdiction over in a particular state, because Shopify purposely avails every state avails itself of every state, in the United States and not just California.

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So they're not really singling out Shopify and singling out California and the appellate courts. It doesn't matter. It doesn't matter if Shopify, under the criteria we're giving today, if they purposely availed themselves and are subject to jurisdiction and every other state in the country, it only matters that they also did it in California. And if they did it in California, it doesn't matter that they did it everywhere else.

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There's jurisdiction in California, so that is questionably someone could argue that really, broad and specific jurisdiction. But as the court said, you know, this wasn't a fortuitous accident, that they got information from somebody's phone. This is part of their whole business model, is to follow people around in other states and gather their information on behalf of others, of their constituent vendors.

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So, yeah, meets all the constitutional due process requirements.

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Next we have Solomon versus Philips Media from earlier this year, which are from the district court's grant of the motion to dismiss under rule 12 B six. And we're back to the Video Privacy Protection Act, which prohibits disclosing a customer's personal, personal identifiable information without their knowledge or consent. With some exceptions not relevant in this case.

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They also cannot do that with no. And where the customer cannot opt out. Philips is a digital streaming service with video content, pay per view events, and live streaming events. Without the consumer's knowledge. Philips sent pixels comprising customer information to Facebook, from which Facebook could discern personal information about Philips customers.

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Mr. Solomon was a subscriber to Philips as well as Facebook. Mr. Salmond brought this consumer privacy class action lawsuit alleging that Philips Embedded Facebook Pixels into the flip site, therefore thereby transforming Flip's users information, giving it to Facebook without knowledge or consent,

and that actually the case went into a great big, big thing about, how the technology works.

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So if you're interested in how they did it, you can read the case. But for the purposes of this discussion, you just really need to know they embedded Facebook pixels in the consumers products. And then that went back to Facebook. Because the personal, the district court dismissed the case because the only personal identifying, the personal identifying information was only decipherable to a sophisticated technology company.

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Like, if you were just anybody, the premises and you're just anybody, and you got hold of these pixels with this information, you wouldn't know anything about anyone, any of these consumers, because you can't read it and you don't know how to decipher it. So that's why there was no cause of action, according to the district court. And the appellate court agreed.

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It said there's currently two standards for the scope of the term personally identifiable, identifying information, which is in the statute. There's the real reason for ability. And what would an ordinary person be able to glean? The court adopted the ordinary person standard for the circuit, and so an ordinary person does not have the technical ability to decipher the pics.

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Facebook's pixels embedded in Flip's website and thereby identify specific individuals information which. Your clients who were buying things, from this platform or a lot of other platforms, might want to be aware of. So that concludes the end of this presentation on recent updates. Thank you very much for your attendance.

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