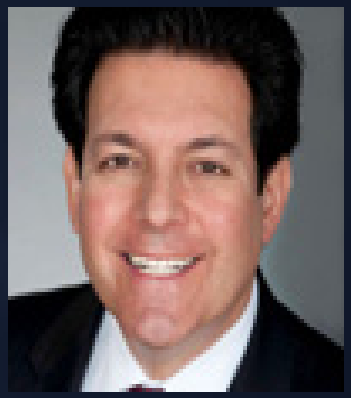
BALLON'S ANNUAL ACC BRIEFING: INTERNET AND MOBILE LAW AND LITIGATION TRENDS



Ian Ballon, JD, LLM, CIPP/US
Co-Chair, Global IP & Technology Practice Group
Greenberg Traurig LLP
(650) 289-7881 (310) 586-6575 (202) 331-3138
Ballon@GTLaw.com
Facebook, Twitter, LinkedIn: Ian Ballon
www.IanBallon.net


E-Commerce
& Internet Law
Ian C. Ballon

http://www.ianballon.net/

Search...

IANBALLON.NET

IAN C. BALLON

HOME | 2022 UPDATES | ABOUT THE TREATISE | MORE...

E-Commerce & Internet Law: Treatise with Forms - 2d Edition

BUY NOW

2022 UPDATES OUT SOON!

The revised and updated edition of this comprehensive work will provide you with a complete legal authority on e-commerce and Internet law, covering business-to-business and business-to-customer issues, regulatory issues, and emerging trends. It includes practice tips and forms and its unique organization facilitates finding quick answers to your questions. This valuable resource on Internet and e-commerce issues contains nearly 10,000 detailed footnotes, plus references to hundreds of unpublished court decisions, many of which are not available anywhere else.

E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS 2D - 2022
Download File

Year in Review and what to expect for 2022….

- CASE ACT
  - Copyright small claims (voluntary) (17 U.S.C. §§ 1501 to 1511)
- Copyright
  - *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021) (6-2) (Breyer)
    - Google's reimplementation of 37 of 166 of Java SE application programming interfaces (APIs) in the Android mobile operating system was a fair use
    - Declined to address software copyrightability but provided some guidance
- Expanding First Amendment rights (Lanham Act, service providers)
- Secondary IP liability and the CDA
- AI and Data Portability
  - FTC proposed rulemaking coming in 2022?
  - *Van Buren v. United States*, 141 S. Ct. 1648 (2021)
- Data Privacy
  - New CCPA-like statutes enacted in Virginia (1/1/23) and Colorado (7/1/23)
    - Other proposed laws not enacted. Federal preemption?
  - Amended Nevada privacy law, covering data brokers
  - CCPA litigation after 2 years
  - The California Privacy Protection Agency (CPPA) came into existence in 2021
  - CPRA implementation – regulations coming in 2022
- Cybersecurity breach, data privacy and AdTech putative class action litigation
  - ***TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) and its impact**
  - State wire fraud claims
  - Biometric privacy suits
- Online and mobile contract formation and arbitration (including mass arbitration)
- The TCPA and mobile/text marketing
  - *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021)
- Links and embedded links – revisited
- NFTs and IP
- Antitrust

COPYRIGHT
FAIR USE

Copyright Fair Use

- Multipart balancing test available when a work is used "for purposes such as criticism, comment, news reporting, teaching . . . Scholarship or research"
  - Courts must consider:
    - The purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes;
      - Commercial
      - Transformative
    - The nature of the work (creative works are closer to the core of intended copyright protection than informational or functional works)
    - The amount and substantiality of the portion used in related to the copyrighted work as a whole
    - The effect of the use upon the potential market for or value of the copyrighted work
  - Courts may consider other criteria
  - VCR recordings
    - *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)
  - For security research: *Apple Inc. v. Corellium, LLC*, 510 F. Supp. 3d 1269, 1285-92 (S.D. Fla. 2020)
  - Data mining/ Google books
    - *Author's Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2d Cir. 2014)
    - *Author's Guild, Inc. v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016)
  - Use in connection with criticism
    - *Katz v. Google, Inc.*, 802 F.3d 1178 (11th Cir. 2015)
- *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 2803 (2021)
  - A Dr. Seuss/ Star Trek mashup was not a fair use under copyright law
  - But the mash up was not actionable under trademark law
- *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021) (6-2) (Breyer)
  - Google's reimplementation of 37 of 166 of Java SE application programming interfaces (APIs) in the Android mobile operating system was a fair use
  - Declined to address software copyrightability but provided some guidance
- *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith,* 992 F.3d 99 (2d Cir. 2021)
- *Marano v. Metropolitan Museum of Art*, 844 F. App'x 436 (2d Cir. 2021)
- *O'Neil v. Ratajkowski,* 19 Civ. 9769 (AT), 2021 WL 4443259 (S.D.N.Y. Sept 28, 2021)

Griping Blogger Can Show Photo Of Griping Target–Katz v. Chevaldina

June 28, 2014 · *by* Eric Goldman · *in* Copyright, Publicity/Privacy Rights

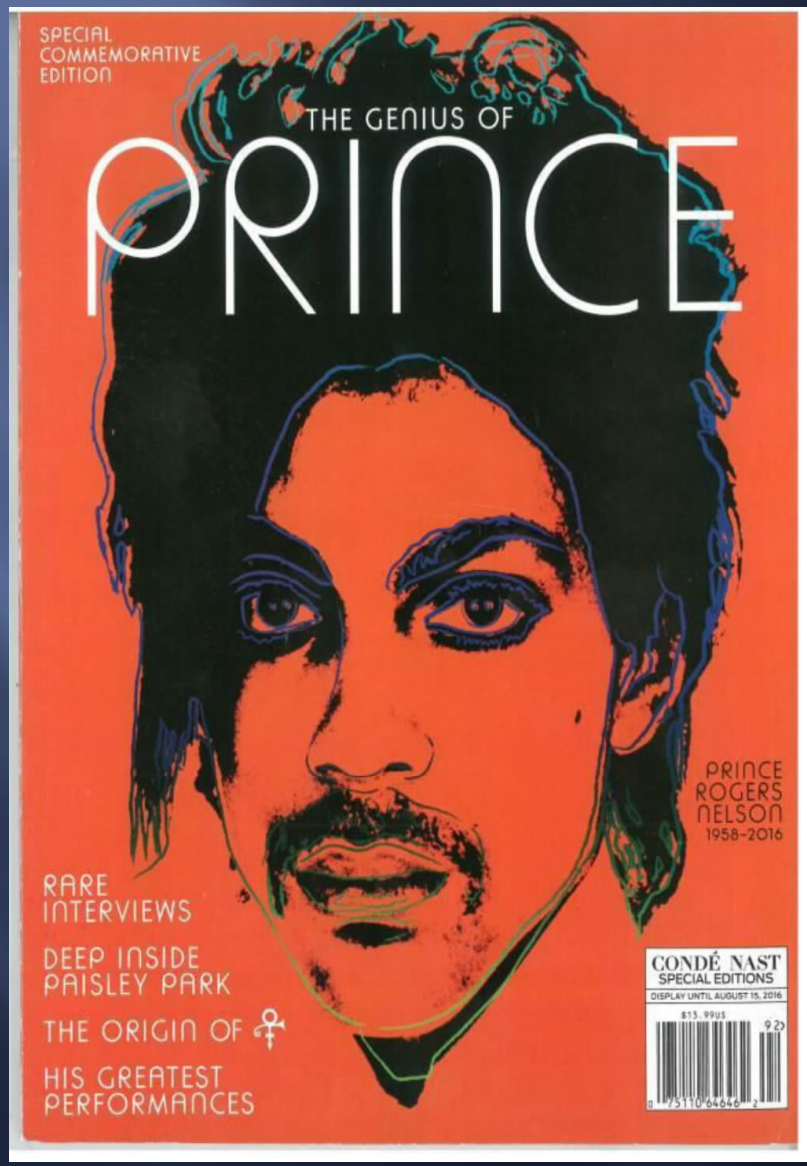
Chelvadina griped about Raanan Katz on her blog. As is common practice for bloggers, Chelvadina included a headshot photo of Katz. The court says the photo is unflattering (I'll let you decide).

Chevaldina found the photo on an Israeli website via a Google search and then republished it her blog,

Copyright Fair Use

- Multipart balancing test available when a work is used "for purposes such as criticism, comment, news reporting, teaching . . . Scholarship or research"
  - Courts must consider:
    - The purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes;
      - Commercial
      - Transformative
    - The nature of the work (creative works are closer to the core of intended copyright protection than informational or functional works)
    - The amount and substantiality of the portion used in related to the copyrighted work as a whole
    - The effect of the use upon the potential market for or value of the copyrighted work
  - Courts may consider other criteria
  - VCR recordings
    - *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)
  - For security research: *Apple Inc. v. Corellium, LLC*, 510 F. Supp. 3d 1269, 1285-92 (S.D. Fla. 2020)
  - Data mining/ Google books
    - *Author's Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2d Cir. 2014)
    - *Author's Guild, Inc. v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016)
  - Use in connection with criticism
    - *Katz v. Google, Inc.*, 802 F.3d 1178 (11th Cir. 2015)
- *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 2803 (2021)
  - A Dr. Seuss/ Star Trek mashup was not a fair use under copyright law
  - But the mash up was not actionable under trademark law
- *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021) (6-2) (Breyer)
  - Google's reimplementation of 37 of 166 of Java SE application programming interfaces (APIs) in the Android mobile operating system was a fair use
  - Declined to address software copyrightability but provided some guidance
- *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith,* 992 F.3d 99 (2d Cir. 2021)
- *Marano v. Metropolitan Museum of Art*, 844 F. App'x 436 (2d Cir. 2021)
- *O'Neil v. Ratajkowski,* 19 Civ. 9769 (AT), 2021 WL 4443259 (S.D.N.Y. Sept 28, 2021)

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99 (2d Cir. 2021)



O'Neil v. Ratajkowski, 19 Civ. 9769 (AT), 2021 WL 4443259 (S.D.N.Y. Sept 28, 2021)

ianballon

Liked by **alexjmla** and **68 others**

ianballon Father's Day 2021

View all 8 comments

davidmglickman What a great dad and beautiful family!

jennbollen Beautiful family ❤️

June 20

O'Neil v. Ratajkowski, 19 Civ. 9769 (AT), 2021 WL 4443259 (S.D.N.Y. Sept 28, 2021)

Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021)

- *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021) (6-2) (Breyer)
  - Google's reimplementation of 37 of 166 of Java SE application programming interfaces (APIs) in the Android mobile operating system was a fair use
  - Declined to address software copyrightability but provided guidance
- How did we get to this point?
- Copyright Fair Use
- What does it mean for software copyrightability?
  - Implicit rejection of the Federal Circuit's analysis on copyrightability

Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021)

- Copyright Fair Use – all 4 factors supported fair use
- Implementing code (original), method call (java.lng), declaring code (labels tasks (methods) and organizes them into packages and classes (file cabinets, drawers and files)
- Google reimplemented Java SE APIs (writing original code, but copying about 1/3 of the APIs so easy for programmers)
  - The nature of the work (creative works are closer to the core of intended copyright protection than informational or functional works)
  - The purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes;
    - Commercial
    - Transformative
  - The amount and substantiality of the portion used in related to the copyrighted work as a whole
  - The effect of the use upon the potential market for or value of the copyrighted work
- Software is different from other literary works

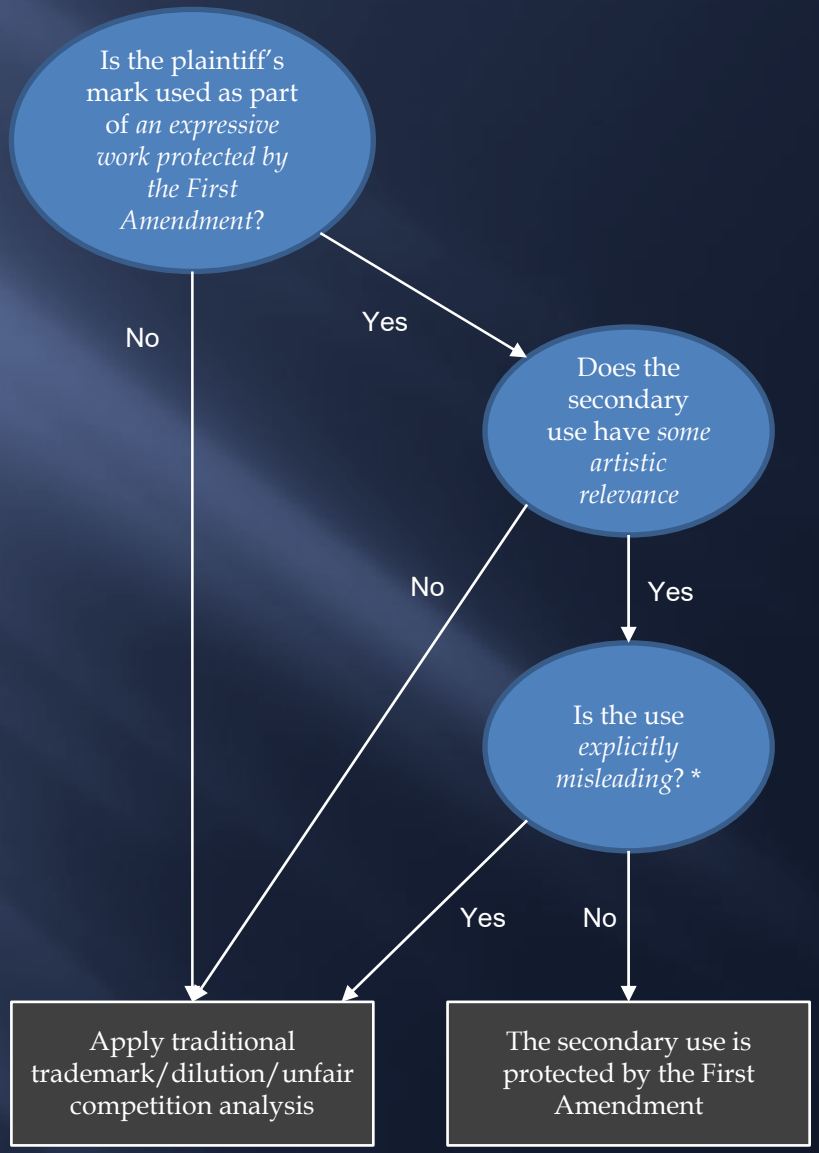
Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021)

- What does it mean for software copyrightability?
- Copyright: original and creative expression, excludes ideas, processes, methods of operation
  - The idea/expression dichotomy
- Software entitled to thin copyright protection – different from other literary works
- CONTU Commission
- (1) literal code, (2) nonliteral elements of a program, (3) user interface or appearance
- *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (rejection of "sweat of the brow")
- *Google v. Oracle*: "Generically speaking, computer programs differ from books, films, and many other 'literary works' in that such programs almost always serve functional purposes."
- *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992)
  - Abstraction – filtration – comparison
- *Lotus Development Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995), *aff'd mem.*, 516 U.S. 233 (1996) (4-4 decision) (elevator) (m-of-o)
- *Oracle America Corp. v. Google, Inc.*, 750 F.3d 1339 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015) (still good law…but bad…and inconsistent with the U.S. Sct opinion)
- *SAS Institute Inc. v. World Programming Ltd.*, 496 F. Supp. 3d 1019 (E.D. Tex. 2020)

FIRST AMENDMENT LIMITATIONS ON LANHAM ACT ENFORCEMENT

Lanham Act Fair Use

- Artistic, creative and expressive uses:
  - *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989)
  - *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2803 (2021)
  - *VIP Productions LLC v. Jack Daniel's Properties, Inc.*, 953 F.3d 1170, 1174-76 (9th Cir. 2020)
  - *Twentieth Century Fox Television v. Empire Distribution, Inc.*, 875 F.3d 1192, 1196-1200 (9th Cir. 2017)
  - *Punchbowl, Inc. v. AJ Press LLC*, _ F. Supp. 3d _, 2021 WL 3356848 (C.D. Cal. July 16, 2021), *appeal noticed*, No. 21-55881 (9th Cir.)
  - If applicable (i.e., expressive or creative use), the test asks –
    - (1) Does the junior user's use have *some* artistic relevance to the mark?
    - (2) Does the secondary use "explicitly mislead as to the source or the content of the work"?
    - If yes/no suit will be dismissed without consideration of *Sleekcraft/ Polaroid* factors



Courts consider:
(a) The degree to which the junior user uses the mark in the same way as the senior user
(b) The degree to which the junior has added his or her own expressive content to the work beyond the mark itself
Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443, 463 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 2803 (2021)

SECONDARY IP LIABILITY AND THE CDA

Secondary IP Liability

Copyright Litigation

- DMCA
  - Copyright Office Section 512 Report (May 2020)
- CASE Act small claims resolution
  - Available June 2022 or sooner
  - $30,000 cap per proceeding (plus fees and costs)
  - Voluntary but bound if you fail to opt-out within 60 days

Trademark Litigation

- Counterfeiting –
  - A counterfeit is "identical with, or substantially indistinguishable from, a registered mark"
  - While all counterfeits infringe a trademark, not all trademarks are counterfeits
- Direct Infringement
  - Print-on-Demand: *Ohio State University v. Redbubble, Inc.*, 989 F.3d 435 (6th Cir. 2021)
    - *YYGM SA v. Redbubble, Inc.*, 2020 WL 3984528 (C.D. Cal. 2020) (SJ for Redbubble on direct and vicarious liability claims)
    - *Atari Interactive, Inc. v. Redbubble, Inc.*, 2021 WL 706790 (N.D. Cal 2021)
- Contributory and vicarious liability
- Publisher's exemption - 15 U.S.C. § 1114(2)(B)-(C)
- No DMTA, but courts generally require notice and takedown
  - *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir.), 562 U.S. 1082 (2010)

Patent Litigation

- *Blazer v. eBay, Inc.*, Case No. 1:15-CV-01059-KOB, 2017 WL 1047572 (N.D. Ala. 2017)

The Communications Decency Act

- 47 U.S.C. § 230 (the Communications Decency Act) and IP claims
  - 230(c)(1): No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider
  - Preempts inconsistent state laws (including defamation, privacy) and some federal claims
  - Excludes: FOSTA/SESTA
  - Excludes: federal criminal claims; claims under ECPA or "any similar state law"; "any law pertaining to intellectual property."
    - State right of publicity, trademark trade secret and other IP claims?

230 – Intellectual Property

- 47 U.S.C. § 230 (the Communications Decency Act) and IP claims
  - 230(c)(1): No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider
  - Preempts inconsistent state laws (including defamation, privacy) and some federal claims
  - Excludes: FOSTA/SESTA
  - Excludes: federal criminal claims; claims under ECPA or "any similar state law"; "any law pertaining to intellectual property."
  - What is a law "pertaining to intellectual property"?
    - *Perfect 10, Inc. v. Ccbill*, 488 F.3d 1102 (9th Cir. 2007) (right of publicity preempted)
    - *Enigma Software Group, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019) (Lanham Act false advertising - not a law "pertaining to intellectual property"), *cert. denied*, 140 S. Ct. 2761 (2020)
    - *Hepp v. Facebook, Inc.*, 14 F.4th 204 (3d Cir. 2021) (right of publicity claim not preempted)
    - *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008)
    - *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009) (Chin)
    - *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Lanham Act false advertising claims of 14 locksmith companies, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located)
  - Defend Trade Secrets Act – not a "law pertaining to intellectual property"
  - Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018: 17 U.S.C. § 1401(a) is a "law pertaining to intellectual property" within the meaning of 47 U.S.C. § 230(e)(2)

230 & Related Speech Cases

- Plaintiff friendly (9th and 10th Circuits and maybe the 7th Circuit):
  - *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*)
  - *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009)
- Defendant friendly (1st, 2d, 4th, 6th and D.C. Circuits):
  - *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016)
  - *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (affirming dismissal)
  - *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014)
  - *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019)
  - *Marshall's Locksmith Service, Inc.*, 925 F.3d 1263 (D.C. Cir. 2019)
- *Lemmon v. Snap, Inc..*, 995 F.3d 1085 (9th Cir. 2021) (no immunity for negligent design)
- Conduct as content
  - *Gonzalez v. Google LLC*, 2 F.4th 871, 890 (9th Cir. 2021)
    - Claims brought under Justice Against Sponsors of International Terrorism Act (JASTA) were barred by the CDA
    - CDA didn't bar claim based on sharing ad revenue, but plaintiff failed to state a claim
    - Concurrences arguing to limit who is a publisher or for Congress to take action
  - *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019) (victims of Hamas)
  - *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019) (No development where the decedent used defendant's neutral tools to discuss drug use and meet up with a dealer who sold him fentanyl laced heroin)
  - *Herrick v. Grindr LLC*, 765 F. App'x 586 (2d Cir. 2019) (product liability – app)
- Legislative change?
- *Preventing Online Censorship*, Executive Order No. 13,925 of May 28, 2020, 85 Fed. Reg. 34079 (June 2, 2020), *revoked by, Revocation of Certain Presidential Actions and Technical Amendment, Executive Order 14029 of May 14, 2021*, 86 Fed. Reg. 27025 (May 19, 2021).
- Content Moderation/Terms of Use
  - *Domen v. Vimeo, Inc.*, 433 _ F. Supp. 3d 592, 606-07 _, 2020 WL 217048, at *9 (S.D.N.Y. 2020) (dismissing plaintiff's free speech claim under California's Constitution, arising out of Vimeo's deletion or removal of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), aff'd on other grounds, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021)

230 & Related Speech Cases

- Terms of Use
  - *Lewis v. Google LLC,* 851 F. App'x 723, 725 (9th Cir. 2021) ("YouTube's terms and Guidelines explicitly authorized YouTube to remove or demonetize content on its platform that violated its policies, including 'Hateful content.' Thus, YouTube's removal or demonetization of Lewis's videos, when YouTube determined them to violate the Guidelines, cannot support a claim for breach of the implied covenant of good faith and fair dealing.").
  - *Parler LLC v. Amazon Web Services, Inc.*, 514 F. Supp. 3d 1261 (W.D. Wash. 2021).
- First Amendment
  - *NetChoice, LLC v. Moody*, _ F. Supp. 3d _, 2021 WL 2690876, at *7-12 (N.D. Fla. June 30, 2021) (preliminarily enjoining enforcement of Fla. Stat. Ann. §§ 106.072 to 501.2041, which the court characterized as legislation that imposed "sweeping requirements on some but not all social-media providers" (those that were "large providers, not otherwise-identical but smaller providers," and exempting "providers under common ownership with any large Florida theme park") because the statutes were content-based, subject to strict scrutiny, and "a private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish other content in the same manner" and "leveling the playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest.").
  - *Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J. concurring) ("applying old doctrines to new digital platforms is rarely straightforward. Respondents have a point, for example, that some aspects of Mr. Trump's account resemble a constitutionally protected public forum. But it seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it.")
  - The First Amendment applies to government entities, not private companies:
    - *Prager University v. Google LLC*, 951 F.3d, 991, 999-1000 (9th Cir. 2020)
    - *Lewis v. Google LLC,* 851 F. App'x 723 (9th Cir. 2021) (applying *Prager*)
- Anti-SLAPP Circuit Split
  - Procedural conflict – not applied in federal court:
    - *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 238-39 (D.C. Cir. 2021) (reaffirming *Abbas*, holding that in a case based on diversity jurisdiction a court in the D.C. Circuit will not apply the D.C. anti-SLAPP statute);
    - *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349-57 (11th Cir. 2018) (holding that the Georgia anti-SLAPP statute conflicts with Rules 8, 12 and 56 and may not be applied in a federal court action).
    - *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 672–73 (10th Cir. 2018) (holding New Mexico's anti-SLAPP statute was solely a procedural mechanism that did not apply in federal court
  - Applied in federal court:
    - *Godin v. Schencks*, 629 F.3d 79, 86-87 (1st Cir. 2010)
    - *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-73 (9th Cir. 1999).

Marketplaces

- *Amazon.com, Inc. v. McMillan,* 2 F.4th 525 (5th Cir. 2021) (Amazon was not a "seller" under Texas product liability law because sellers using its marketplace don't relinquish title to their products; relying on *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 103-04 (Tex. 2021) (holding that "potentially liable sellers are limited to those who relinquished title to the product at some point in the distribution chain."))
- *State Farm Fire and Casualty Co. v. Amazon Services, Inc.*, 835 F. App'x 213 (9th Cir. 2020) (holding Amazon could not be held liable for damages caused by explosion of batteries, because it was not "seller" of the hoverboards which had been purchased on its site)
- *Erie Insurance Co. v. Amazon.com, Inc.*, 925 F.3d 125, 141-44 (4th Cir. 2019) (holding that, where Amazon did not obtain title to the headlamp shipped to its warehouse by Dream Light and Dream Light (the seller) set the price, designed the product description, paid Amazon for fulfillment services, and ultimately received the purchase price paid by the seller, Amazon was not a seller — one who transfers ownership of property for a price — and therefore did not have liability under Maryland law as a seller; "when Amazon sells its own goods on its website, it has the responsibility of a 'seller,' just as any other retailer, . . . But when it provides a website for use by other sellers of products and facilitates those sales under its fulfillment program, it is not a seller, and it does not have the liability of a seller.")
- *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 422-25 (6th Cir. 2019) (holding that Amazon was not a seller within the meaning of the Tennessee Products Liability Act – which the court defined as "any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain" – where Amazon.com "did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace.")
- *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136 (3d Cir. 2019), *vacated,* 936 F.3d 182 (3d Cir. 2019) (vacating the opinion and granting *en banc* review)
- *Loomis v. Amazon.com, LLC*, 63 Cal. App. 5th 466, 277 Cal. Rptr. 3d 769 (2d Dist. 2021)
- ***B**olger v. Amazon.com, LLC*, 53 Cal. App. 5th 431 (4th Dist. 2020) (imposing strict product liability on a platform, rejecting the applicability of the CDA)
- *Stiner v. Amazon.com, Inc.*, 162 Ohio St. 3d 128, 131-35, 164 N.E.3d 394, 397-401 (Ohio 2020) (Amazon was not a "supplier" within meaning of the Products Liability Act)

ARTIFICIAL INTELLIGENCE, SCREEN SCRAPING AND DATA PORTABILITY

AI/ Screen Scraping/ Data Portability

- Contract/TOU/PP restrictions
- Copyright protection
  - Facts vs creative expression
    - *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991)
  - Protection for compilations if originality in the selection, arrangement or organization of a database (but thin protection)
  - Data mining as a transformative fair use : *Author's Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
  - VHT, Inc. v. Zillow Group, Inc., 918 F.3d 723 (9th Cir. 2019) (search function not a fair use)
- Common law claims, such as misappropriation to the extent not preempted by 17 U.S.C. § 301
  - *International News Service v. Associated Press*, 248 U.S. 215 (1918)
  - *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997)
- Interference with contract or prospective economic advantage
- Unfair competition
- Trespass and Conversion
  - trespass to chattels may be based on unauthorized access (plus damage)
    - *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32 (2003)
  - conversion usually requires a showing of dispossession or at least substantial interference
- Computer Fraud and Abuse Act - Federal anti-trespass computer crimes statute
  - Must establish $5,000 in damages to sue
  - Split of authority on whether exceeding authorized access could be based on access vs. use restrictions

    Van Buren v. United States, 141 S. Ct. 1648 (2021)

    U.S. v. Nosal, 676 F.3d 854 (9th Cir. 2012) (*en banc*)

    WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199 (4th Cir. 2012)

    U.S. v. Valle, 807 F.3d 508 (2d Cir. 2015)
  - *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985 (9th Cir. 2019)
    - Affirming an injunction prohibiting LinkedIn from blocking hiQ's access, copying or use of public profiles on LinkedIn's website (information which LinkedIn members had designated as public) or blocking or putting in place technical or legal mechanisms to block hiQ's access to these public profiles, in response to LinkedIn's C&D letter
- Anti-circumvention provisions of the DMCA, 17 U.S.C. §§ 1201 *et seq.*
- Removing, altering or falsifying copyright management information (CMI) - 17 U.S.C. § 1202
- California BOT Law - Cal. Bus. & Prof. Code §§ 17940 *et seq.* prohibits the undisclosed use of bots to communicate or interact with a person in California online, with the intent to mislead the other person about the artificial identity of the bot, to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election
- CDA defense: *Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (holding Ancestry.com to be an interactive computer service provider of yearbook records, in an opinion holding it entitled to CDA immunity for California right of publicity, intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices claims, arising out of defendant's use of their yearbook photos and related information in its subscription database)

SECURITY BREACH, DATA PRIVACY & ADTECH PUTATIVE CLASS ACTION LITIGATION

Cybersecurity/Data Privacy Class Action Litigation

- Cybersecurity claims
  - Breach of contract (if there is a contract)
  - Breach of the covenant of good faith and fair dealing (if the contract claim isn't on point)
  - Breach of implied contract (if there is no express contract)
  - Breach of fiduciary duty, Negligence, Fraud, unfair competition
  - State cybersecurity statutes (especially those that provide for statutory damages and attorneys' fees)
  - California (and potentially Oregon) IoT Law, CCPA
- Securities fraud
  - *In re Alphabet, Inc. Securities Litigation*, 1 F.4th 687 (9th Cir. 2021)
  - *In re Facebook, Inc. Securities Litigation*, 477 F. Supp. 3d 980 (N.D. Cal. 2020) (dismissing plaintiffs' amended complaint for lack of causation and reliance)
- Data privacy claims
  - Electronic Communications Privacy Act
    - Wiretap Act
    - Stored Communications Act
  - Computer Fraud and Abuse Act
    - $5,000 minimum injury
    - *Van Buren v. United States*, 141 S. Ct. 1648 (2021)
  - Video Privacy Protection Act
  - State laws
    - Illinois Biometric Information Privacy Act (recently adopted in other states)
    - Michigan's Preservation of Personal Privacy Act
    - California laws including the California Consumer Privacy Act (CCPA)
      - Other claims are preempted by the CCPA *only* if based on a violation of the CCPA
  - Breach of contract/ privacy policies
    - *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1037-38 (N.D. Cal. 2019) (dismissing claims for breach of contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, quasi contract, and breach of confidence in a putative data security breach class action suit, where Facebook's Terms of Service included a limitation-of-liability clause)
  - Regulatory enforcement – the FTC and potentially state Attorneys General, including in California (under the CCPA)
    - FTC VTech (2018) and Vizio (2017) enforcement actions

Defense Strategies for Data Privacy & Cybersecurity litigation

- Can you compel arbitration?
- If there are multiple suits – is MDL consolidation possible or desirable?
  - Security breach cases are often consolidated in the district where the defendant is located
  - *In re Dickey's Barbecue Restaurants, Inc., Customer Data Security Breach Litigation*, 521 F. Supp. 3d 1355 (J.P.M.D.L. 2021) (denying consolidation)
- Motions to Dismiss
  - Rule 12(b)(1) standing – circuit split - 6th, 7th, 9th, DC vs. high threshold: 2d, 4th, 8th (3d)
  - Rule 12(b)(6) motion to dismiss for failure to state a claim
- Summary judgment
- Class Certification
- Work Product and other privileges
  - *In re: Capital One Consumer Data Security Breach Litig.*, MDL No. 1:19md2915, 2020 WL 3470261 (E.D. Va. June 25, 2020) (Ordering production of the Mandiant Report)
    - Applied the 4th Circuit's "driving force" test – (1) was the report prepared when the litigation was a real likelihood (yes); (2) would it have been created anyway in the absence of litigation (yes)
    - Capital One had a preexisting contractual relationship with Mandiant for similar reports and could not show that, absent the breach, the report would have been any different in addressing business critical issues (and the report was widely distributed to 50 employees, 4 different regulators and an accountant)
    - Footnote 8: use different vendors, scopes of work and/or different investigation teams
  - *In re: Capital One Consumer Data Security Breach Litig.*, MDL No. 1:19md2915, 2020 WL 5016930 (E.D. Va. Aug. 21, 2020) (Price Waterhouse – not produced)
  - The Ninth Circuit does not weigh motivations where documents may be used both for business purposes and litigation: *In re Grand Jury Subpoena*, 357 F.3d 900, 908 (9th Cir. 2004)
    - *Cf. In re Grand Jury Subpoena*, 13 F.4th 710 (9th Cir. 2021)
- Settlement

AdTech Cases

- California law
  - *Saleh v. Nike, Inc.*, _ F. Supp. 3d _, 2021 WL 4437734, at *12-14 (C.D. Cal. Sept. 27, 2021) (dismissing plaintiff's CIPA section 635 claim, alleging use of FullStory session replay software, because "[c]ontrary to Plaintiff's argument, § 635 does not prohibit the 'implementation' or 'use' of a wiretapping device; instead, it prohibits the manufacture, assembly, sale, offer for sale, advertisement for sale, possession, transport, import, or furnishment of such device" and ruling, by analogy to ECPA, that a private cause of action may not be premised on mere possession and therefore plaintiff lacked Article III standing)
  - *Graham v. Noom, Inc.*, No. 3:20-cv-6903, 2021 WL 1312765, at *7-8 (N.D. Cal. Apr. 8, 2021) (dismissing plaintiffs' 635(a) CIPA claim because plaintiffs could not allege eavesdropping where FullStory merely provided a cloud-based software tool and acted as "an extension of Noom[,]" and thus there could be no section 635 violation and plaintiffs lacked Article III standing)
  - *Yale v. Clicktale, Inc.*, No. 3:20-cv-7575, 2021 WL 1428400, at *3 (N.D. Cal. Apr. 15, 2021) (applying Noom to reach the same result); Johnson v. Blue Nile, Inc., No. 3:20-cv-8183, 2021 WL 1312771, at *3 (N.D. Cal. Apr. 8, 2021) (applying Noom to reach the same result)
- Florida law
  - *Jacome v. Spirit Airlines Inc.*, No. 2021-000947-CA-01, 2021 WL 3087860, at *2 (Fla. Cir. June 11, 2021) (holding that sections 934.03(1)(a) and 934.03(1)(d) of the Florida Security of Communications Act's purpose was "to address eavesdropping and illegal recordings regarding the substance of communications or personal and business records . . . and not to address the use by a website operator of analytics software to monitor visitors' interactions with that website operator's own website. . . . [T]he FSCA does not cover Plaintiff's claims seeking to penalize Spirit's use of session replay software on its Website.")

Cybersecurity Breach Class Action Litigation - Standing

- Circuit split on Article III standing: Low threshold: 6th, 7th, 9th, DC vs. higher: 2d, 4th, 8th, 11th (3d)
- ***TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)**
- ***Remijas v. Neiman Marcus Group*, 794 F.3d 688 (7th Cir. 2015)**
- ***Lewert v. P.F. Chang's China Bistro Inc.*, 819 F.3d 963 (7th Cir. 2016)**
- ***Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016) (2-1)**
- *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011), *cert. denied*, 566 U.S. 989 (2012)
- ***Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017)**
  - Allegation that data breaches created an enhanced risk of future identity theft was too speculative
    - Rejected evidence that 33% of health related data breaches result in identity theft
    - Rejected the argument that offering credit monitoring services evidenced a substantial risk of harm (rejecting *Remijas*)
  - Mitigation costs in response to a speculative harm do not qualify as injury in fact
- ***Whalen v. Michael's Stores, Inc.*, 689 F. App'x. 89** (2d Cir. 2017)
  - The theft of plaintiff's credit card numbers was not sufficiently concrete or particularized to satisfy *Spokeo* (name, address, PIN not exposed)
  - credit card was presented for unauthorized charges in Ecuador, but no allegation that fraudulent charges actually were incurred
- ***McMorris v. Carlos Lopez & Associates, LLC*, 995 F.3d 295 (2d Cir. 2020)**
  - **Plaintiffs may establish Article III standing based on an increased risk of identity theft or fraud following the unauthorized disclosure of their data, but employee was not at substantial risk of future identity theft**
- ***Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981** (2018)
  - following *Remijas v. Neiman Marcus Group, LLC* in holding that plaintiffs, whose information had been exposed but who were not victims of identity theft, had plausibly alleged a heightened risk of future injury because it was plausible to infer that a party accessing plaintiffs' personal information did so with "both the intent and ability to use the data for ill."
- ***In re U.S. Office of Personnel Management Data Security Breach Litig.***, 928 F.3d 42 (D.C. Cir. 2019) (21M records)
- ***In re SuperValu, Inc., Customer Data Security Breach Litig.*, 870 F.3d 763 (8th Cir. 2017)**
  - Affirming dismissal for lack of standing of the claims of 15 of the 16 plaintiffs but holding that the one plaintiff who alleged he suffered a fraudulent charge on his credit card had standing
  - **Rejected cost of mitigation (*Clapper*) (*Cf. P.F. Chang's*)**
- ***In re Zappos.com, Inc.*,** 888 F.3d 1020 (9th Cir. 2018), cert. denied, 139 S. Ct. 1373 (2019)
  - Merely having personal information exposed in a security breach constitutes sufficient harm to justify Article III standing in federal court, regardless of whether the information in fact is used for identity theft or other improper purposes
  - **Bootstrapping -** Because other plaintiffs alleged that their accounts or identities had been commandeered by hackers, the court concluded that the appellants in *Zappos* – who did not allege any such harm – could be subject to fraud or identity theft
- ***Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021)**
  - **No Article III standing for mitigation injuries (lost time, lost reward points, lost access to accounts) or potential future injury, where plaintiff's credit card was exposed when a restaurant's point of sale system was breached**

THE CALIFORNIA CONSUMER PRIVACY ACT (CCPA) & CALIFORNIA PRIVACY RIGHTS AND ENFORCEMENT ACT OF 2020 (CPRA)

CCPA Putative Class Action Litigation

- The CCPA applies to businesses (1) with annual gross revenue > $25 M; (2) that buy, sell or receive for commercial purposes personal information of 50,000 or more consumers, households or devices, or (3) that derive 50% or more of their annual revenue from selling consumers' personal information (excludes entities subject to federal regulation)
- The private right of action narrowly applies only to security breaches and the failure to implement reasonable measures, not other CCPA provisions
- But plaintiffs may recover statutory damages of between $100 and $750
- The CCPA creates a private right of action for [1] consumers [2] "whose nonencrypted or nonredacted [3] personal information [within the meaning of Cal. Civ. Code §§ 1798.150(a)(1) and 1798.81.5] . . . [4] is subject to an unauthorized access and exfiltration, theft, or disclosure [5] as a result of the business's [6] violation of the duty to implement and maintain reasonable security procedures and practices . . . ."
- What is *reasonable* will be defined by case law
- $100 - $750 "per consumer per incident or actual damages, whichever is greater, injunctive or declaratory relief, and any other relief that a court deems proper."
- 30 day notice and right to cure as a precondition to seeking statutory damages (modeled on the Consumer Legal Remedies Act)
  - If cured, a business must provide "an express written statement" (which could later be actionable)
- In assessing the amount of statutory damages, the court shall consider "any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth"
- CCPA claims typically are joined with other cybersecurity breach or data privacy claims

Defense Strategies for CCPA & Other Cybersecurity litigation

- Many "CCPA claims" aren't actually actionable under the CCPA
- The CCPA creates a private right of action for
  - [1] consumers
  - [2] "whose nonencrypted or nonredacted
  - [3] personal information [within the meaning of Cal. Civ. Code §§ 1798.150(a)(1) and 1798.81.5] . . .
  - [4] is subject to an unauthorized access and exfiltration, theft, or disclosure
  - [5] as a result of the business's
  - [6] violation of the duty to implement and maintain reasonable security procedures and practices . . . ."
- Cal. Civ. Code § 1798.150(c) ("Nothing in this title shall be interpreted to serve as the basis for a private right of action under any other law.")
- Should you respond to a CCPA 30 day cure notice and if so how?
- Court opinions
  - *Rahman v. Marriott International, Inc.*, Case No. SA CV 20-00654-DOC-KES, 2021 WL 346421 (C.D. Cal. Jan. 12, 2021) (dismissing CCPA, breach of contract, breach of implied contract, unjust enrichment and unfair competition claims, for lack of Article III standing, in a suit arising out of Russian employees accessing putative class members' names, addresses, and other publicly available information, because the sensitivity of personal information, combined with its theft, are prerequisites to finding that a plaintiff adequately alleged injury in fact)
  - *Gardiner v. Walmart Inc.*, Case No. 20-cv-04618-JSW, 2021 WL 2520103, at *2-3 (N.D. Cal. Mar. 5, 2021) (dismissing plaintiff's CCPA claim for failing to allege that the breach occurred after January 1, 2020, when the CCPA took effect, and failing to adequately allege the disclosure of personal information as defined by the statute)
  - *Gershfeld v. Teamviewer US, Inc.*, 2021 WL 3046775 (C.D. Cal. June 24, 2021) (dismissing claim)
  - *Silver v. Stripe Inc.*, 2021 WL 3191752 (N.D. Cal. July 28, 2021) (no UCL claim based on CCPA)
  - *In re Blackbaud, Inc., Customer Data Breach Litig.*, 2021 WL 3568394, at *4-6 (D.S.C. Aug. 12, 2021) (denying motion to dismiss where plaintiff adequately alleged d a *business*)

How will litigation change under the CPRA?

- The CPRA was adopted as a ballot initiative in November 2020 and will amend the CCPA litigation section effective January 1, 2023
- The litigation remedies are largely the same except:
  - New thresholds for CPRA applicability for a business (and covers sharing)
  - Expanded to cover anyone whose email address in combination with a password or security question and answer that would permit access to the account was subject to an unauthorized access and exfiltration, theft, or disclosure
  - The CPRA will apply to businesses engaged in consumer credit collection and reporting
  - New caveat on what constitutes a cure
  - Online contract formation
  - Representative action nonwaiver
- New threshold: The CPRA applies to businesses with (1) annual gross revenue > $25 M; (2) that buy, sell or receive for commercial purposes personal information of (50,000) 100,00 or more consumers, households or devices, and (3) businesses that derive 50% or more of their annual revenue from selling (buying or sharing) consumers' personal information (excludes entities subject to federal regulation)
- New Civil Code § 1798.150 - implementation and maintenance of reasonable security procedures and practices does not amount to a cure (in response to a 30 day letter)
- New Civil Code § 1798.140(h) - Consent does not include "acceptance of a general or broad terms of use" that describes "personal information processing along with other, unrelated information . . . ."
- New Civil Code § 1798.192 – prohibits and renders void "a representative action waiver"

MITIGATING RISK

Litigation - Risk Mitigation

- Businesses that seek to limit their liability to consumers may be able to do so to the extent an end user must sign on to a website or access an App to operate a device, at which point the user may be required to assent to Terms of Use, including potentially a binding arbitration agreement
- Where there is no privity of contract, a business cannot directly limit its potential exposure to consumers, but it may --
  - seek indemnification from others
  - contractually require that a business partner make it an intended beneficiary of an end user agreement (including an arbitration agreement), or
  - obtain insurance coverage
- If there is no enforceable contract, a business may be unable to avoid class action litigation in the event of a security breach, system failure, or alleged privacy violation, through binding arbitration, except in narrow circumstances where equitable estoppel may apply
- The best way to mitigate the risk of class action litigation is to have an enforceable arbitration agreement (or be an intended beneficiary of a party that does) --
  - You must have an enforceable online or mobile contract (or be an intended beneficiary of one)
  - You must have an enforceable arbitration provision (or be an intended beneficiary of one)
  - You should review your contract formation and arbitration provisions (or those of your business partners) every 6-12 months

ONLINE AND MOBILE CONTRACT FORMATION

Online and Mobile Contract Formation

- Trend: Continued hostility to implied contracts
  - *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1 (1st Cir. 2021) (enforcing ToS and arbitration provision under Mass law where plaintiff selected "Accept" in a mobile app)
  - *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014)
    - declining to enforce an arbitration clause
    - "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice"
  - *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019)
    - declining to enforce an arbitration clause in a mobile Terms of Service agreement
    - *Benson v. Double Down Interactive, LLC*, 798 F. App'x 117 (9th Cir. 2020) (no constructive notice)
  - *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482 (9th Cir. 2020)
    - Reversing the denial of a motion to compel arbitration
    - Holding the arbitration provision in Intuit's Terms of Use enforceable where a user, to access a TurboTax account, was required, after entering a user ID and password, to click a "Sign In" button, directly above the following language: "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement," where each of those documents was highlighted in blue hyperlinks which, if clicked, directed the user to a new webpage containing the agreement
  - *Lee v. Ticketmaster L.L.C.*, 817 F. App'x 393 (9th Cir. 2020)
  - *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016)
    - Reversing the lower court's order dismissing plaintiff's complaint, holding that whether the plaintiff was on inquiry notice of contract terms, including an arbitration clause, presented a question of fact where the user was not required to specifically manifest assent to the additional terms by clicking "I agree" and where the hyperlink to contract terms was not "conspicuous in light of the whole webpage."
  - *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017)
    - (1) Uber's presentation of its Terms of Service provided reasonably conspicuous notice as a matter of California law and (2) consumers' manifestation of assent was unambiguous
    - "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found."
    - "[T]here are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories."
  - *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018)
    - Displaying a notice of deemed acquiescence and a link to the terms is insufficient to provide reasonable notice to consumers
  - *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082 (9th Cir. 2020)
    - Visiting a website four years after agreeing to Terms of Use that permitted changes did not bind the plaintiff to the terms in effect on later visit

amazon.com

SIGN IN SHIPPING & PAYMENT GIFT OPTIONS PLACE ORDER

Review your order

By placing your order, you agree to Amazon.com's privacy notice and conditions of use.

Shipping address Change
[redacted]

Or try Amazon Locker
20 locations near this address

Payment method Change
VISA [redacted]
Gift Card

Billing address Change
Same as shipping address

Gift cards & promotional codes
Enter Code Apply

Place your order

Order Summary

Items:	[redacted]
Shipping & handling:	[redacted]
Total before tax:	[redacted]
Estimated tax to be collected:	[redacted]
Total:	[redacted]
Gift Card:	[redacted]
Order total:	[redacted]

How are shipping costs calculated?

FREE TWO-DAY SHIPPING

FREE Two-Day Shipping on this Order: [redacted], you can save $5.48 on this order by selecting "FREE Two-Day Shipping with a free trial of Amazon Prime" below.
» Sign up for a free trial

Estimated delivery: Sept. 25, 2014 - Sept. 26, 2014

[redacted]

Choose a delivery option:

- FREE Two-Day Shipping with a free trial of [redacted] --get it Wednesday, Sept. 24
- One-Day Shipping --get it tomorrow, Sept. 23
- Two-Day Shipping --get it Wednesday, Sept. 24
- Standard Shipping --get it Sept. 25 - 26
- FREE Shipping --get it Sept. 29 - Oct. 2

*Why has sales tax been applied? See tax and seller information

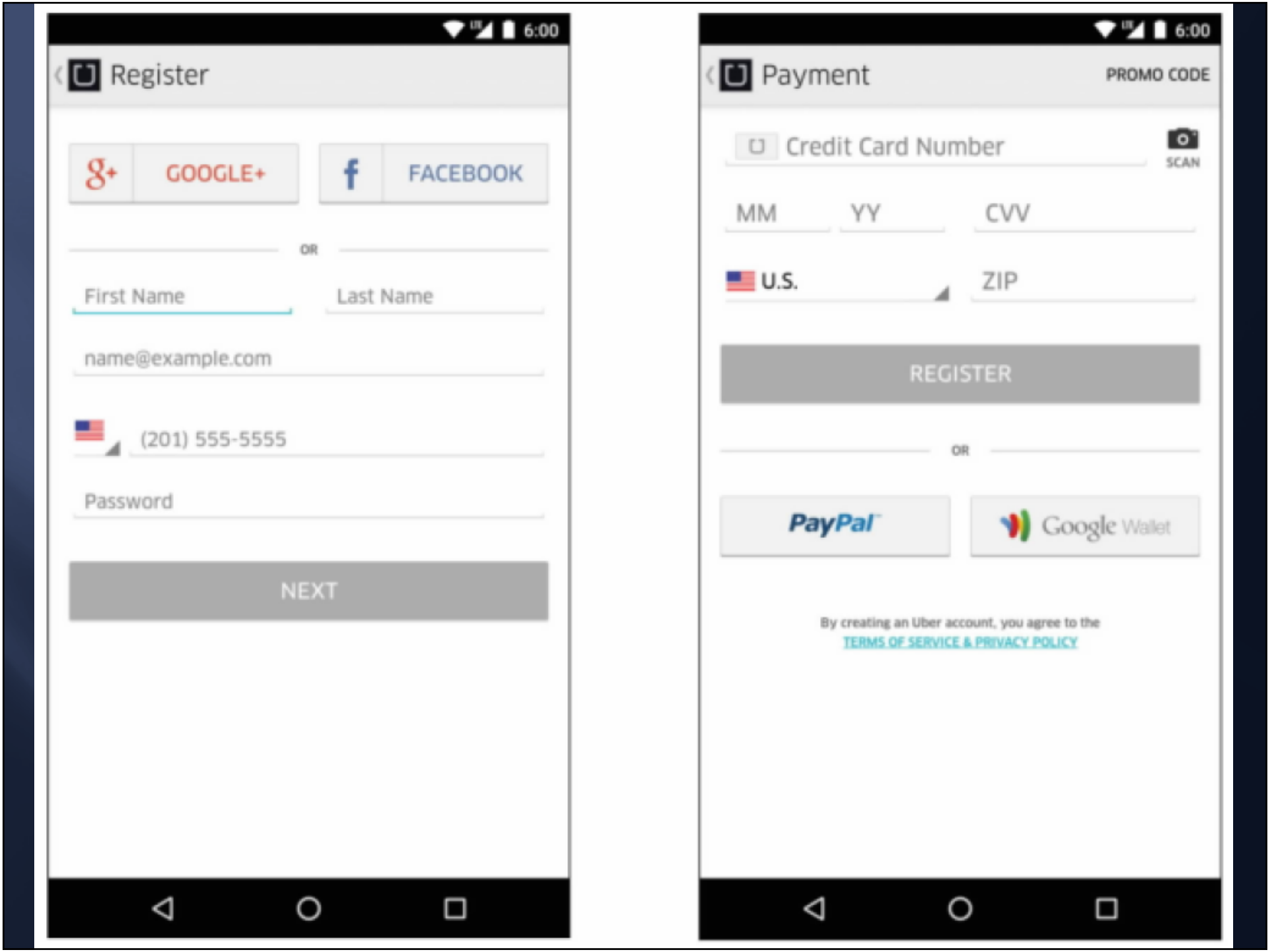
Do you need help? Explore our Help pages or contact us

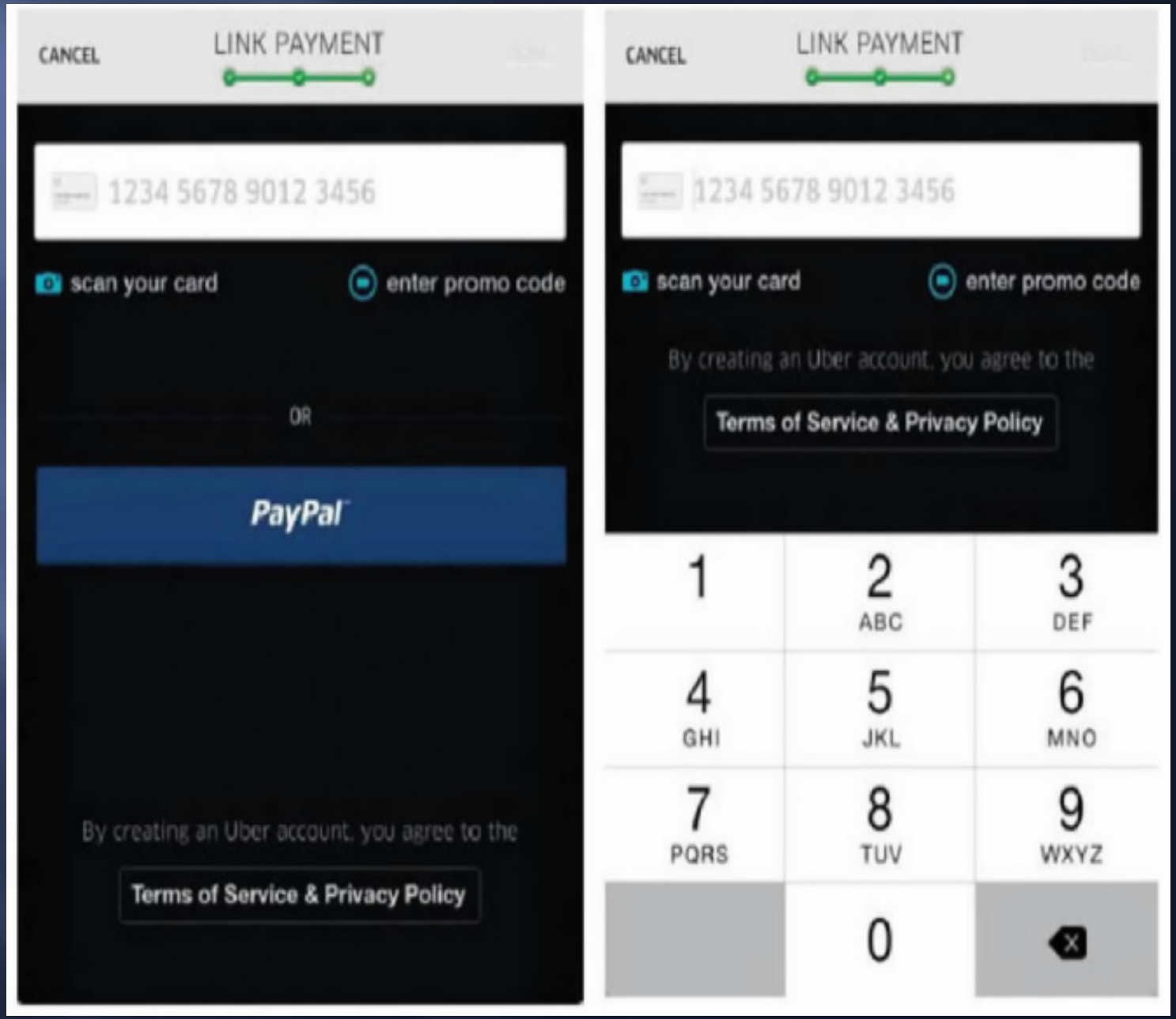
For an item sold by Amazon.com: When you click the "Place your order" button, we'll send you an email message acknowledging receipt of your order. Your contract to purchase an item will not be complete until we send you an email notifying you that the item has been shipped.

Colorado, Oklahoma, South Dakota and Vermont Purchasers: Important information regarding sales tax you may owe in your State

Within 30 days of delivery, you may return new, unopened merchandise in its original condition. Exceptions and restrictions apply. See Amazon.com's Returns Policy

Go to the Amazon.com homepage without completing your order.


6:00
Register
GOOGLE+
FACEBOOK
OR
First Name
Last Name
name@example.com
(201) 555-5555
Password
NEXT
6:00
Payment
PROMO CODE
Credit Card Number
SCAN
MM
YY
CVV
U.S.
ZIP
REGISTER
OR
PayPal
Google Wallet
By creating an Uber account, you agree to the
TERMS OF SERVICE & PRIVACY POLICY


CANCEL
LINK PAYMENT
1234 5678 9012 3456
scan your card
enter promo code
OR
PayPal
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy
CANCEL
LINK PAYMENT
1234 5678 9012 3456
scan your card
enter promo code
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy
1
2 ABC
3 DEF
4 GHI
5 JKL
6 MNO
7 PQRS
8 TUV
9 WXYZ
0

Online and Mobile Contract Formation

- Trend: Continued hostility to implied contracts
  - *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1 (1st Cir. 2021) (enforcing ToS and arbitration provision under Mass law where plaintiff selected "Accept" in a mobile app)
  - *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014)
    - declining to enforce an arbitration clause
    - "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice"
  - *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019)
    - declining to enforce an arbitration clause in a mobile Terms of Service agreement
    - *Benson v. Double Down Interactive, LLC*, 798 F. App'x 117 (9th Cir. 2020) (no constructive notice)
  - *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482 (9th Cir. 2020)
    - Reversing the denial of a motion to compel arbitration
    - Holding the arbitration provision in Intuit's Terms of Use enforceable where a user, to access a TurboTax account, was required, after entering a user ID and password, to click a "Sign In" button, directly above the following language: "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement," where each of those documents was highlighted in blue hyperlinks which, if clicked, directed the user to a new webpage containing the agreement
  - *Lee v. Ticketmaster L.L.C.*, 817 F. App'x 393 (9th Cir. 2020)
  - *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016)
    - Reversing the lower court's order dismissing plaintiff's complaint, holding that whether the plaintiff was on inquiry notice of contract terms, including an arbitration clause, presented a question of fact where the user was not required to specifically manifest assent to the additional terms by clicking "I agree" and where the hyperlink to contract terms was not "conspicuous in light of the whole webpage."
  - *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017)
    - (1) Uber's presentation of its Terms of Service provided reasonably conspicuous notice as a matter of California law and (2) consumers' manifestation of assent was unambiguous
    - "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found."
    - "[T]here are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories."
  - *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018)
    - Displaying a notice of deemed acquiescence and a link to the terms is insufficient to provide reasonable notice to consumers
  - *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082 (9th Cir. 2020)
    - Visiting a website four years after agreeing to Terms of Use that permitted changes did not bind the plaintiff to the terms in effect on later visit

Arbitration, Contract Formation & Mass Arbitration

- Arbitration and Class Action Waivers
  - *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)
  - *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)
  - *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)
  - *Tompkins v. 23andMe.com. Inc.*, 840 F.3d 1016 (9th Cir. 2016)
    - Abrogating or limiting earlier Ninth Circuit cases that applied pre-*Concepcion* California unconscionability case law, which had treated arbitration clauses differently from other contracts
    - Venue selection, bilateral attorneys' fee and IP carve out provisions not unconscionable
    - Enforcing delegation clause
- Mass Arbitration
  - *Adams v. Postmates, Inc.*, 823 F. App'x 535 (9th Cir. 2020) (affirming the district court's holding that the issue of whether mass arbitration claims violated the class action waiver provision of Postmates' arbitration agreement was an issue that had been delegated to the arbitrator);
  - *Postmates Inc. v. 10,356 Individuals*, CV 20-2783 PSG, 2020 WL 1908302 (C.D. Cal. 2020) (denying injunctive relief)
- Minors
  - *R.A. by and through Altes v. Epic Games, Inc.*, No. 5:19-cv-325-BO, 2020 WL 865420 (E.D.N.C. Feb. 20, 2020)
- Public Injunctions (Include? Exclude? Delegation)
  - *Capriole v. Uber Technologies, Inc.*, 7 F.4th 854 (9th Cir. 2021) (holding that injunctive relief seeking reclassification of plaintiff Uber drivers' status from "independent contractors" to "employees" was not public injunctive relief)
  - *DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1152-58 (9th Cir. 2021)
  - *Ramirez v. Electronic Arts Inc.*, Case No. 20-cv-05672-BLF, 2021 WL 843184, at *4 (N.D. Cal. Mar. 5, 2021)
  - *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 216 Cal. Rptr. 3d 627, 393 P.3d 85 (2017)
- Drafting Tips
  - *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010)
    - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
    - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable
  - *Rahimi v. Nintendo of America, Inc.*, 936 F. Supp. 2d 1141 (N.D. Cal. 2013)
  - *Mondigo v. Epson America, Inc.*, 2020 WL 8839981 (C.D. Cal. Oct. 13, 2020)
  - *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)
  - *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (holding that ambiguity in an arbitration agreement does not provide sufficient grounds for compelling classwide arbitration)
  - AAA – registration requirement
  - Address "mass arbitration" – JAMS vs AAA vs. FedArb
  - Review and update frequently

TELEPHONE CONSUMER PROTECTION ACT

TCPA Suits

- Up to $500 "per violation" – trebled if the defendant violated the statute "willfully or knowingly"
- Potential defenses:
  - Consent (potentially raising issues of revocation of consent and reconsenting)
  - Arbitration
  - No grounds for class certification
  - No use of an ATDS
- *ACA Int'l v. F.C.C.*, 885 F.3d 687 (D.C. Cir. 2018) - Invalidated 2003, 2008 and 2015 regs to the extent they expanded ATDS definition
- *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) (Sotomayor; 8-0, Alito concurring):
  - An ATDS is equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers
  - An ATDS must have the capacity to generate numbers randomly or sequentially (and not merely the ability to dial from a list of numbers) (resolving a circuit split)
  - 3d, 7th, 11th Circuits: a system must have the capacity to generate numbers randomly or sequentially
    - *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018) (statute requires number generation; *present* capacity); *Dominguez v. Yahoo, Inc.*, 629 F. App'x. 369, 373 & nn.1, 2 (3d Cir. 2015)
    - *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020)
    - *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020)
  - 2d, 6th, 9th Circuits: "using a random number generator" modifies only "produces" not "stores," and therefore broadly encompasses any system with the capacity to dial from a list of stored numbers
    - *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1289 (2019)
      - *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), rev'd, 141 S. Ct. 1163 (2021)
    - *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020)
    - *Allan v. Pa. Higher Education Assistance*, 968 F.3d 567 (6th Cir. 2020)
- Human intervention test – what is *automatic?*
  - *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1171 n.6 (2021): "We decline to interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much."
  - *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018)
  - *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020)
- Plaintiffs' arguments post-*Duguid*: DNC; MMS is a prerecorded voice call; sequential dialing from a list
- New focus since *Duguid*: Do not call (NDNC, internal DNC), including reassigned numbers, Florida law

USE OF #HASHTAGS

The Use of #Hashtags

- *Khaled v. Bordenave*, 18 Civ. 5187 (PAE), 2019 WL 1894321, at *6 (S.D.N.Y. Apr. 29, 2019) (allowing DJ Khaled and ATK Entertainment to amend their complaint to add allegations concerning uses by defendants of plaintiffs' WE THE BEST mark, including #WETHEBEST and #WETHEBESTBRANDS, as hashtags to advertise products in social media; rejecting the argument that use of a mark in hashtags could not amount to trademark infringement)

- *Chanel, Inc. v. WGACA, LLC*, 18 Civ. 2253 (LLS), 2018 WL 4440507, at *2-3 (S.D.N.Y. Sept. 14, 2018) (denying motion to dismiss and rejecting nominative fair use defense, holding that the owner of the CHANEL trademark plausibly alleged that WGACA's use of the hashtag #WGACACHANEL infringed Chanel's trademarks (and supported a claim for false advertising) by alleging that WGACA conjoined its acronym with the Chanel trademark to create the impression that WGACA was affiliated with Chanel or was an authorized Chanel retailer, where WGACA's social media pages included quotations of Coco Chanel, photographs of Chanel-branded products, and photographs of models and public-opinion influencers wearing or carrying Chanel handbags, including previous Chanel ads)

- *Juul Labs, Inc. v. 4X PODS*, Civil Action No. 18-15444 (KM) (MAH), 2020 WL 2029327 (D.N.J. Apr. 28, 2020) (denying defendant's motion to dismiss, holding that plaintiff plausibly stated a claim and that hashtags are not *per se* always fair use)
  - *Juul Labs, Inc. v. 4X PODS,* 509 F. Supp. 3d 52, 63 (D.N.J. 2020) (finding the defendant unlikely to prevail on its nominative fair use defense, in connection with entering a TRO in favor of the plaintiff; "[o]ne post with Juul hashtags among many unoffending posts could be written off, but that is not the case here. Given how many Juul-related hashtags were used and in how many posts, Eonsmoke stretched its usage of the Juul wordmark beyond nominative fair use.")

- *Pasadena Tournament of Roses Association v. City of Pasadena*, Case No. 2:21-CV-01051-AB-JEMx, 2021 WL 3553499, at *5-6 (C.D. Cal. July 12, 2021) (dismissing claims of trademark infringement, unfair competition, false association, false endorsement, and false designation of origin under the Lanham Act and California unfair competition, holding that defendant's use of ROSE BOWL on the Instagram account of the City of Pasadena, where the Rose Bowl typically is played, including as a hashtag, was a nominative fair use)

LINKING AND FRAMING REVISITED

Links, Frames, and In-line and Embedded Links

- *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)
  - The *server test:* merely creating a link to another website does not create a *copy* within the meaning of *MAI v. Peak* and cannot result in direct liability for copyright infringement (although it plausibly could lead to secondary infringement based on the direct infringement of a user, if any)
  - The case involved reproduction, distribution, and public display of photos
- *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012)
  - Granting summary judgment for the defendant where its video bookmarking service, which created in-line links to videos on third party websites via frames, could not support a claim for contributory infringement because merely creating links is not a material contribution (and stating in dicta that direct liability could not be imposed because creating an in-line link to videos via frames from the defendant's website did not amount to a public performance)
- *Live Nation Motor Sports, Inc. v. Davis*, 81 U.S.P.Q.2d 1826, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007) (holding that a link to a stream of a live webcast of motor races that were shown in real time constituted a public performance or display because those terms encompass "each step in the process by which a protected work wends its way to the audience"). Definition of *fixation* is broader for public performances than for other copyright rights
- Recently, some district courts have held that a *prima facie* case for direct infringement may be made (subject to potentially applicable defenses) where in-line or embedded links create public displays of photographs
  - *Goldman v. Breitbart News Network, LLC,* 302 F. Supp. 3d 585 (S.D.N.Y. 2018) (holding that that an image displayed via embedded links in various publications, from the Twitter feed where it had been posted, constituted a public display under the Copyright Act; granting partial summary judgment to the plaintiff)
  - *The Leader's Institute, LLC v. Jackson,* Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514, at *10 (N.D. Tex. Nov. 22, 2017) (denying plaintiff's motion for summary judgment on defendant's counterclaim for copyright infringement, holding that plaintiff publicly displayed copyrighted content from defendant's website by framing it on its own website; distinguishing framing from ordinary linking)
  - *Sinclair v. Ziff Davis, LLC*, 2020 WL 3450136 (S.D.N.Y. June 24, 2020) (denying MTD on reconsideration; by agreeing to Instagram's Terms of Use, plaintiff authorized Instagram to grant API users, such as Mashable, a sublicense to embed her public Instagram content, but the complaint failed to establish that Instagram exercised that right)
  - *McGucken v. Newsweek LLC*, 19-CV-9617, 2020 WL 2836427, at *4–5 (S.D.N.Y. June 1, 2020)
  - *Nicklen v. Sinclair Broadcast Group, Inc.*, _ F. Supp. 3d _, 2021 WL 3239510 (S.D.N.Y. July 30, 2021)
  - *Free Speech Systems, LLC v. Menzel*, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019) (reading *Perfect 10* as limited to search engines) (Orrick)
    - *Hunley v. Instagram, LLC*, Case No. 21-cv-03778-CRB, 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021) (Breyer)
    - *Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065 (9th Cir. 2021) (applying the server test to a public display of a photograph where the image wasn't indexed)
- Defenses – DMCA, fair use, implied license, *de minimis* infringement, *Sony* safe harbor
  - *Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020) (dismissing a photographer's claim against a sports news publisher, which had included an embedded link to an Instagram post by professional tennis player Caroline Wozniacki, announcing her retirements (which included a low-resolution, cropped version of a photograph taken by the plaintiff), in an article it published about Wozniacki's career, which also quoted the text of the Instagram post)
  - *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (dismissing, as fair use, a Paparazzi photographer's copyright infringement claim, brought against the publisher of XXL magazine, which had embedded a link to an Instagram post by hip hop artist Cardi B, which included a photograph taken by plaintiff of Cardi B at a Tom Ford fashion show, in an article entitled Cardi B Partners with Tom Ford for New Lipstick Shade, which was focused on the event and referenced the Cardi B Instagram post which featured the photograph).

ted sleeping in the halls of the U.S. Capitol on Wednesday morning, marking the first time the building has been used as a barracks since the Civil War.

Erin Schaff ✓
@erinschaff

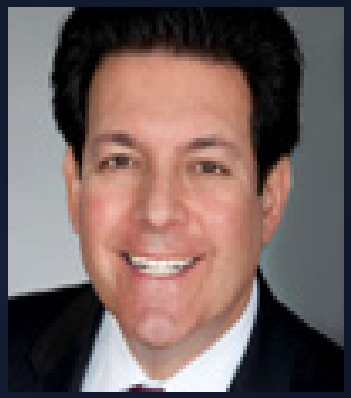
Inside the Capitol this morning where Speaker Pelosi usually walks to her office. https://t.co/BQIEf5b2s4

6:24 AM - 13 Jan 2021

♥ 5,963 ↻ 2,193

Photos of the National Guard members, who have been deployed at the Capitol after last week's riot, began making the rounds on social media Wednesday. One photo shows National Guard members

BALLON'S ANNUAL ACC BRIEFING: INTERNET AND MOBILE LAW AND LITIGATION TRENDS



Ian Ballon, JD, LLM, CIPP/US
Co-Chair, Global IP & Technology Practice Group
Greenberg Traurig LLP
(650) 289-7881 (310) 586-6575 (202) 331-3138
Ballon@GTLaw.com
Facebook, Twitter, LinkedIn: Ian Ballon
www.IanBallon.net