



# Free Speech and Proposition 65: Recent Developments

*Presented by:*

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# Overview

California's Proposition 65



Commercial Speech and the First Amendment



Recent Ninth Circuit cases on the intersection of First Amendment protection of commercial speech and mandatory health warnings under Proposition 65



Take-aways and future issues

NO SOLICITING  
BY ORDER OF BUILDING MANAGEMENT

PRIVATE PROPERTY

ACCESS LIMITED TO EMPLOYEES AND  
INVITEES OF BUILDING TENANTS ONLY

PROFESSIONALLY  
MANAGED BY CBRE

 **WARNING**

ENTERING THIS AREA CAN EXPOSE  
YOU TO CHEMICALS KNOWN TO  
THE STATE OF CALIFORNIA TO CAUSE  
CANCER AND BIRTH DEFECTS OR  
OTHER REPRODUCTIVE HARM,  
INCLUDING FORMALDEHYDE AND  
LEAD FROM BUILDING MATERIALS  
AND CLEANING PRODUCTS.

FOR MORE INFORMATION GO TO  
[WWW.P65WARNINGS.CA.GOV](http://WWW.P65WARNINGS.CA.GOV).



# California's Proposition 65

- Ballot measure in 1986: Safe Drinking Water and Toxic Enforcement Act
- “Right to know” statute: “Clear and reasonable” warning required for knowing and intentional exposure to chemicals “known to the state of California” to cause cancer or reproductive harm.
- “Safe harbor” warning language promulgated by OEHHA



## Proposition 65: Listed Chemicals

- Chemicals “known to the state of California” to cause cancer or reproductive harm
- More than 900 chemicals on the list
  - Lead and other heavy metals
  - Phthalates (e.g., DEHP)
  - BPA, BPS (as of 2025)
  - Dietary acrylamide
- Often based on determinations by “authoritative bodies.”



International Agency  
for Research on Cancer



World Health  
Organization



NTP

National Toxicology Program  
U.S. Department of Health and Human Services



## Proposition 65: Enforcement

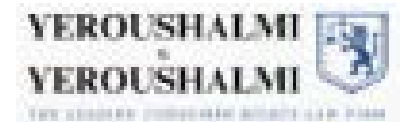


- Private attorney general provision. Health & Saf. Code § 25249.7.
- Notice of violation 60 days before lawsuit can be filed
- No injury required
- Reaches entire supply chain
- Few strong defenses and burden of proof effectively shifted to defendants
- Attorneys' fees only for plaintiffs under Cal. Code Civ. Proc. § 1021.5
- Usually less costly and burdensome to settle even meritless claims
- Result: Invites “bounty hunters.” Almost all cases settle, and warnings are ubiquitous



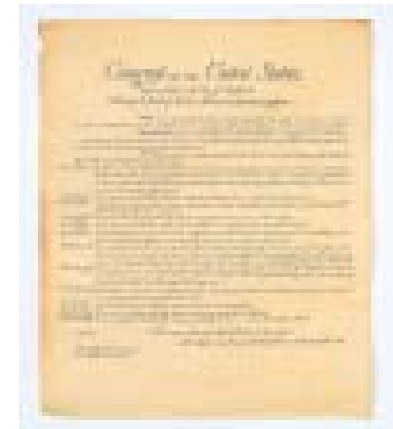
ATTORNEYS AT LAW

LAW OFFICES  
**BRODSKY SMITH**



# First Amendment Protection for Commercial Speech

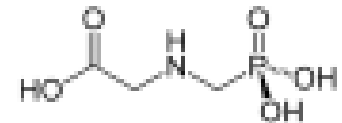
- Commercial speech is protected, but subject to one of two lower levels of scrutiny
- Quasi rational basis: *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985)
  - Threshold “Purely factual and uncontroversial”
  - Reasonably related to a substantial government interest, such as preventing deception of consumers
  - Not unjustified or unduly burdensome
- Intermediate scrutiny: *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557 (1980)
  - Directly advance a substantial government interest
  - Narrowly drawn to serve that interest (i.e., not “more extensive than necessary”)
- First Amendment right to free speech includes the right *not* to speak. *Wooley v. Maynard*, 403 U.S. 705, 714 (1977)



# Compelled Commercial Speech and Proposition 65: Glyphosate

*Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263 (9th Cir. 2023)

- Agricultural association sought to enjoin enforcement of Prop 65 warning for glyphosate
- Glyphosate added to the Prop 65 list because IARC determined it is “probably carcinogenic” to humans.
- *Zauderer* inquiry: Court asks, “What is ‘Uncontroversial’”?
  - “Robust disagreement by reputable scientific sources.”
  - Political controversy. *Nat'l Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018) (state mandated notifications about availability of subsidized abortion services)
- How would a reasonable consumer understand the message of the warning?
  - State proposed multiple factually truthful versions of clear and reasonable warnings, but all conveyed the overall message that glyphosate is carcinogenic.
    - Exposure to glyphosate. Known carcinogen because of IARC. EPA disagrees.
- Conclusion: glyphosate warning is not uncontroversial
  - IARC determination in conflict with USEPA and multiple other authorities
  - “Presence of a genuine, scientific controversy is sufficient to place a Prop 65 warning outside the realm of the lower level of review under *Zauderer*.”





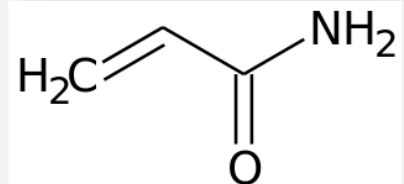
## *Wheat Growers* continued: Intermediate Scrutiny

- *Central Hudson*: (1) directly advance substantial government interest; (2) not more extensive than necessary
- Warning of an unconfirmed risk does not advance substantial interest in preserving public health.
- Other means available to promote the state’s “minority” view that glyphosate puts humans at risk of cancer.
  - For example, the state could conduct its own advertising campaign or post glyphosate information on its website.

# Compelled Commercial Speech and Proposition 65: Dietary Acrylamide

*Cal. Chamber of Commerce v. Bonta*, 2025 WL 1284779 (E.D. Cal., May 2, 2025)

- Preliminary injunction against enforcement of warning requirement for dietary acrylamide affirmed on appeal to Ninth Circuit. *Cal. Chamber of Com. v. Council for Educ. & Res. on Toxics*, 29 F.4th 468, 474 (9th Cir. 2022)
- OEHHA softens the safe harbor warning language:  
**WARNING:** Consuming this product can expose you to acrylamide. The International Agency for Research on Cancer has found that acrylamide is probably carcinogenic to humans. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed.
- Threshold issue: Standing
  - “The nature of Prop 65’s enforcement scheme creates a constant, credible threat of enforcement by private enforcers because to bring suit a private plaintiff need only credibly allege that a product has some of the chemical at issue, not that the amount of the chemical is harmful or that it exceeds this level.”



## *Chamber of Commerce continued: Zauderer scrutiny*

- What is the message of the warning?
  - OEHHA's new warning is factually true but still strongly implies that consuming food containing acrylamide increases cancer risk
- Not strictly factual and uncontroversial
  - Controversial even though multiple agencies (IARC, EPA, NTP) determined acrylamide to be a human carcinogen.
  - Court relies more heavily on experts retained for the litigation
  - Doubts from FDA
  - Contrary conclusions of NGOs: American Cancer Institute and American Cancer Society
- Hazard versus Risk
  - Theoretical capability to cause cancer vs. likelihood of cancer at real-world exposure level.
- Animal versus human evidence of risk

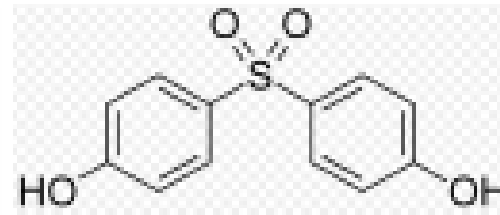
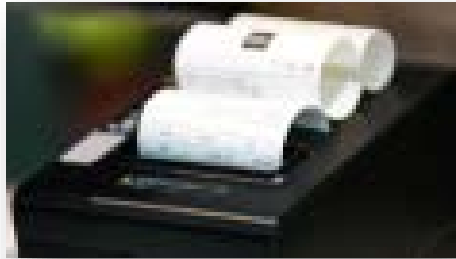
## *Chamber of Commerce continued: Intermediate Scrutiny*

- Acrylamide warning fails intermediate scrutiny – same reasons as *Wheat Growers*
- Cancer warning is misleading in view of the scientific controversy
- The state could advance its interest without burdening speech by using advertising campaigns or posting information on the Internet.
- **Result:** permanent injunction against enforcement of Prop 65 warning requirement for dietary acrylamide
  - State's appeal filed June 4 on hold through January 2026 for mediation

# Themes and Future Issues

- First Amendment defense worth exploring for industry-wide issues (but not necessarily individual enforcement actions)
- Required language that is factually true may still be unconstitutional if it implicitly conveys a controversial message to consumers.
- Applications outside Proposition 65: applicable to any compulsory warning, notifications, or other messages.
- How much scientific controversy is required to trigger intermediate scrutiny?
- Will Prop 65 warning requirements always fail intermediate scrutiny?

# Emerging Issue: Bisphenol S in thermal receipt paper



- BPS listed for male reproductive toxicity on January 3, 2025
- 384 notices of violation posted so far in 2025.
- How settled is the science that BPS causes reproductive toxicity in humans at realistic exposure levels?
- Hazard versus Risk: How settled is the science that brief contact with receipt paper can result in sufficient exposure to BPS?

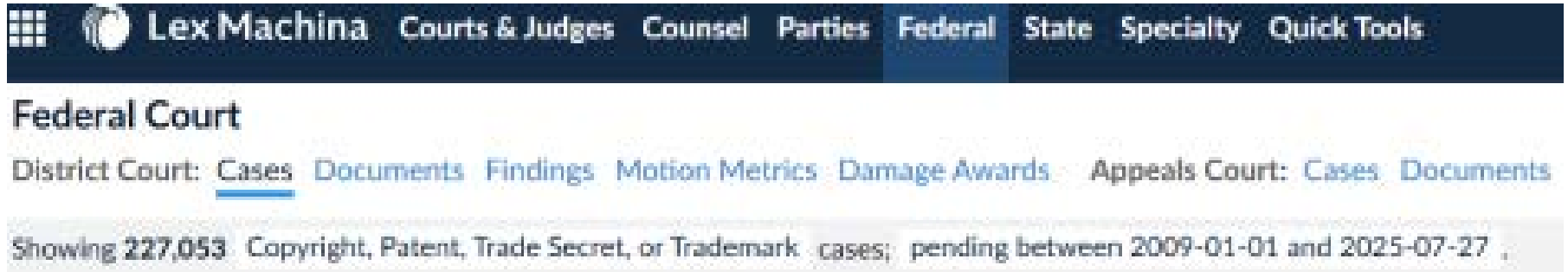


# Intellectual Property Litigation – Trends and Highlights

*Presented by:*

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Partner, Rutan & Tucker

# *What's Happening in IP Cases?*



The screenshot shows the Lex Machina website navigation bar with the following links: Lex Machina, Courts & Judges, Counsel, Parties, Federal (highlighted), State, Specialty, and Quick Tools. Below the navigation bar, the 'Federal Court' section is displayed, with sub-links for District Court: Cases (underlined), Documents, Findings, Motion Metrics, and Damage Awards, and Appeals Court: Cases and Documents. A summary bar at the bottom of the screenshot states: 'Showing 227,053 Copyright, Patent, Trade Secret, or Trademark cases; pending between 2009-01-01 and 2025-07-27'.

- First, we'll look at a Lex Machina search of the over 227,000 federal case filings with **Copyright**, **Patent**, **Trade Secret**, or **Trademark** from 2009 to the present (focusing on filings since 2016).



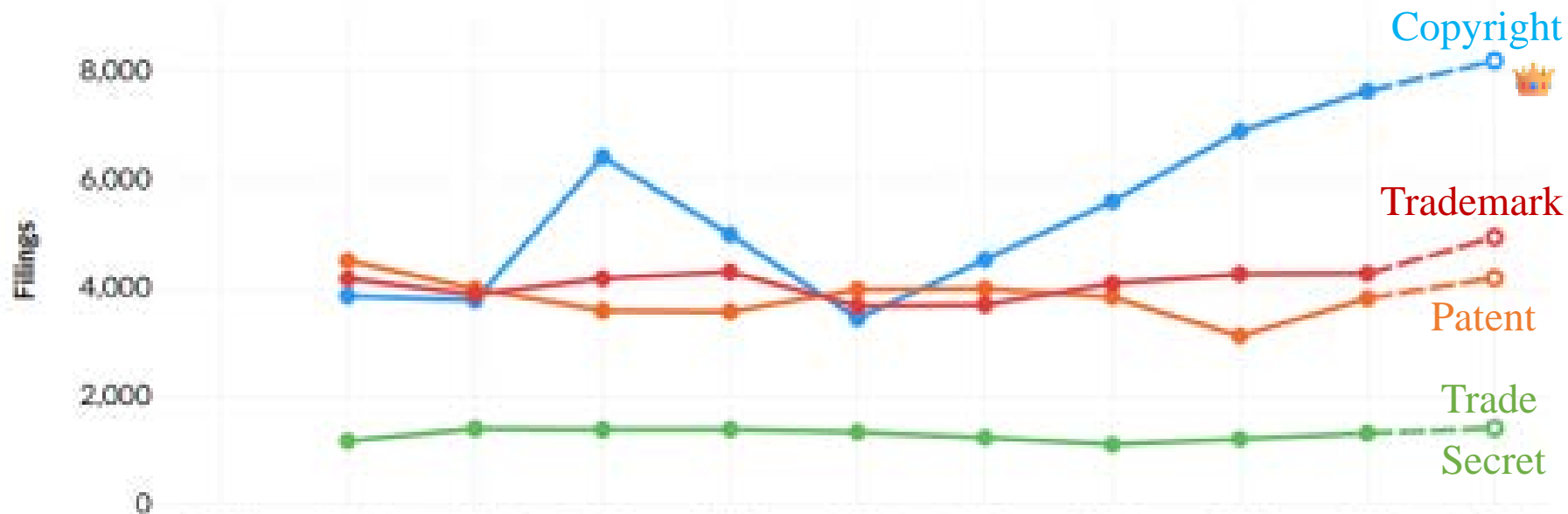
# *What's Happening in IP Cases?*

- Before we see the last decade's statistics for **Copyright**, **Patent**, **Trade Secret**, or **Trademark** filings, let's have some fun:
- Which category/ies reached an all-time high?
- Which category/ies held about steady? Why?
- Which category has the most filings? 🍌



# What's Happening in IP Cases?

Case Filings



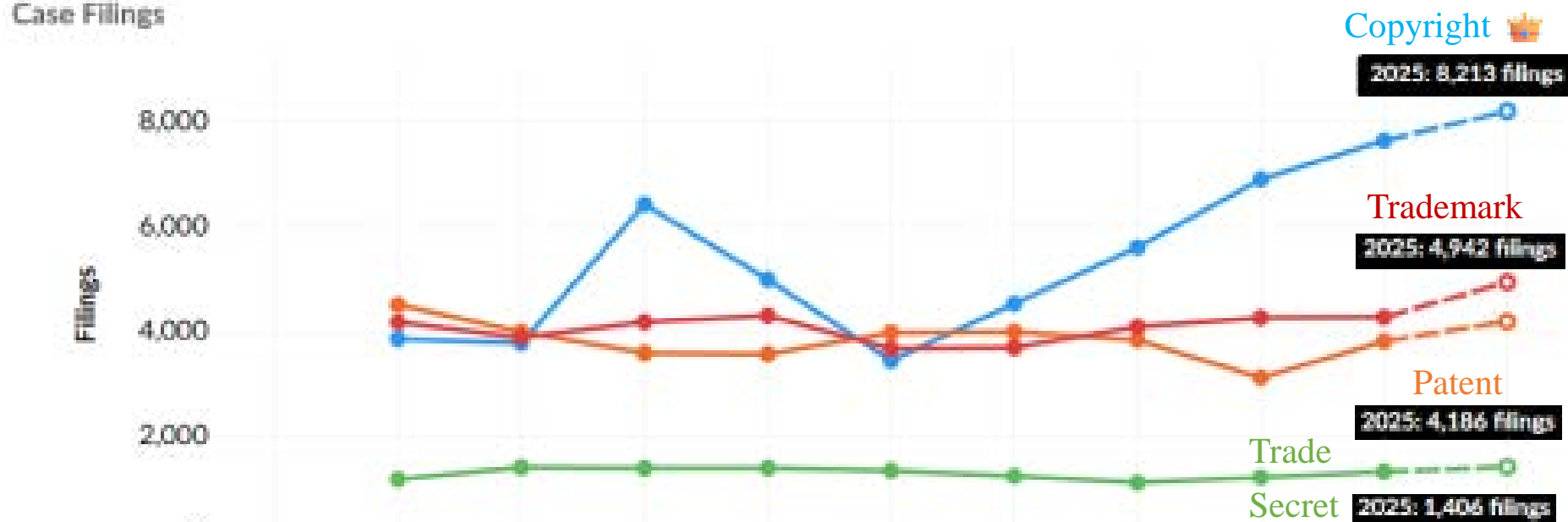
<2016	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025*
26,949	3,851	3,775	6,429	4,991	3,437	4,527	5,607	6,908	7,647	5,031
35,157	4,507	3,986	3,583	3,563	3,971	3,990	3,830	3,112	3,808	2,658
8,851	1,168	1,396	1,379	1,384	1,334	1,228	1,106	1,203	1,312	857
37,060	4,172	3,878	4,177	4,297	3,668	3,688	4,084	4,258	4,267	3,096

\* 2025 numbers are year-to-date. Open dots are full-year estimates.



# What's Happening in IP Cases?

Case Filings



	<2016	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025*
Copyright	26,949	3,851	3,775	6,429	4,991	3,437	4,527	5,607	6,908	7,647	8,213
Patent	35,157	4,507	3,986	3,583	3,563	3,971	3,990	3,830	3,112	3,808	4,186
Trade Secret	8,851	1,168	1,396	1,379	1,384	1,334	1,228	1,106	1,203	1,312	1,406
Trademark	37,060	4,172	3,878	4,177	4,297	3,668	3,688	4,084	4,258	4,267	4,942

\* 2025 numbers are year-to-date. Open dots are full-year estimates.

# *What's Happening in IP Cases? Longer Historical View...*

Figure 1: U.S. District Courts—Intellectual Property Cases Filed, by Type, 1996 - 2018



These figures from “Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark,” Published on February 13, 2020, available at [https://www.uscourts.gov/data-news/judiciary-news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark#figures\\_map](https://www.uscourts.gov/data-news/judiciary-news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark#figures_map)

# What's Happening in IP Cases? Longer Historical View...By Venue

Figure 2: U.S. District Courts—Intellectual Property Cases Filed, by Type, 1996 - 2018

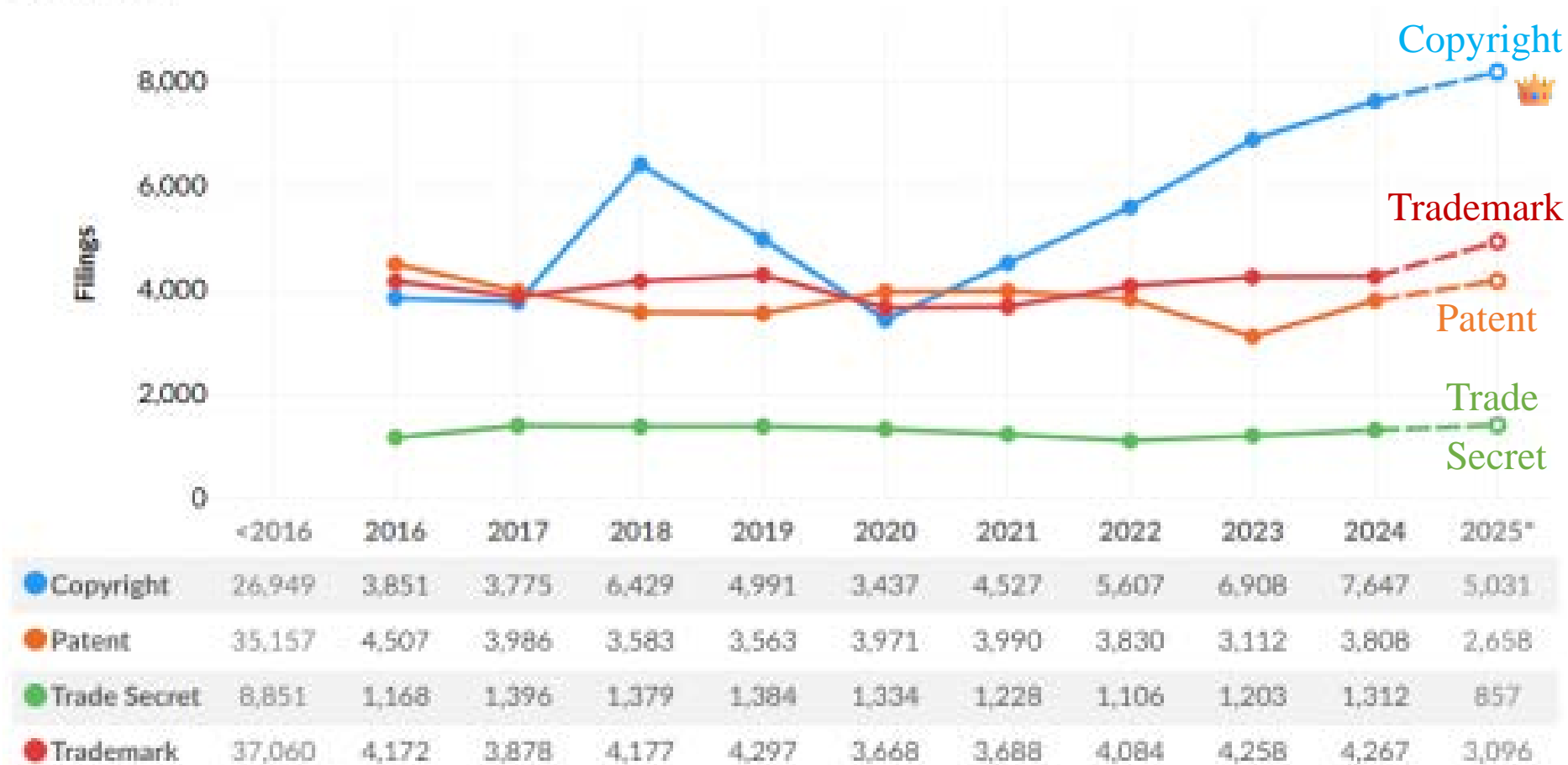


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# *The Most Popular IP Venues (Context)*

Case Filings



\* 2025 numbers are year-to-date. Open dots are full-year estimates.

# *The Most Popular IP Venues...Now*

## All Cases (2006-Present)

C.D.Cal.	24,135	11%
N.D.Ill.	17,228	8%
E.D.Tex.	16,411	7%
S.D.N.Y.	15,627	7%
D.Del.	12,398	5%
Other Courts	141,253	62%

## All Cases (2016-Present)

C.D.Cal.	14,290	10%
N.D.Ill.	12,804	9%
S.D.N.Y.	10,659	7%
E.D.Tex.	9,702	7%
D.Del.	8,107	6%
Other Courts	88,503	61%

## Copyright (2016-Present)

C.D.Cal.	7,476	13%
S.D.N.Y.	6,775	12%
N.D.Ill.	5,182	9%
E.D.N.Y.	3,105	6%
N.D.Cal.	2,996	5%
Other Courts	29,867	54%

## Trademark (2016-Present)

N.D.Ill.	6,717	15%
C.D.Cal.	4,811	11%
S.D.N.Y.	3,125	7%
S.D.Fla.	3,092	7%
N.D.Cal.	1,563	4%
Other Courts	25,278	57%

# *The Most Popular IP Venues...Now*

## Patent (2016-Present)

E.D.Tex.	8,848	21%
D.Del.	7,507	18%
W.D.Tex.	4,494	11%
C.D.Cal.	2,811	7%
N.D.Ill.	2,323	5%
Other Courts	16,794	39%

## Trade Secret (2016-Present)

C.D.Cal.	769	6%
S.D.N.Y.	698	5%
N.D.Ill.	662	5%
D.N.J.	559	4%
N.D.Cal.	545	4%
Other Courts	10,385	76%

## Copyright (2016-Present)

C.D.Cal.	7,476	13%
S.D.N.Y.	6,775	12%
N.D.Ill.	5,182	9%
E.D.N.Y.	3,105	6%
N.D.Cal.	2,996	5%
Other Courts	29,867	54%

## Trademark (2016-Present)

N.D.Ill.	6,717	15%
C.D.Cal.	4,811	11%
S.D.N.Y.	3,125	7%
S.D.Fla.	3,092	7%
N.D.Cal.	1,563	4%
Other Courts	25,278	57%





# *Trade Secret Cases: The DTSA Bump*

Note that the DTSA was enacted in 2016, which allowed claimants to file directly in federal court when a connection existed between a trade secret and interstate or foreign commerce. This explains the sharp increase in trade secret cases in 2017 compared to 2016.

Figure 1: Trade Secret Cases Filed from 2014 to 2023



# *Trade Secret Cases: Plaintiffs, Injunctive Relief, Resolution/Appeal*

- Lex Machina insights: in trade secret cases that were terminated from 2021 to 2023...
  - Financial institutions and insurance companies were predominant as the most active plaintiffs.
- Courts liberally granted injunctive relief:
  - preliminary injunctions on the merits 57%
  - temporary restraining orders on the merits 66%
  - permanent injunctions on the merits 73%
- Vast majority either settled or resolved on procedural grounds—for those resolved on substantive grounds:
  - Claimants won four times (4X) as often as defendants, with over half of those wins on consent judgment.
  - At trial, cases were resolved in favor of claimants 6X as often.
- But, for trade secret cases that were appealed to a federal appellate court and terminated 2021-2023 with a decision on the merits of the appeal, 45% were ultimately reversed.



# Trade Secret Cases: Damages— Results Will Vary! Beware Appeal

Figure 20: Total Trade Secret Damages (excluding Fees and Interest) Awarded from 2014 to 2023  
(millions)

During the three-  
awarded as Puniti

11 million

Figure 21: Damages I

Type	Year	Cases	Amount	Reversed Cases	Reversed Amount	Merits
Actual Damages	2023	20	\$27	1	\$1	
Punitive / Willful	2022	23	\$62	—	—	gment)
Reasonable Royalty	2021	36	\$658	2	\$290	
Attorneys' Fees /	2020	12	\$568	1	\$6	\$12
Other / Mixed Damages	2019	12	\$13	2	\$80	\$20
Prejudgment Interest	2018	17	\$32	3	\$30	—
	2017	23	\$202	1	\$4	\$128
	2016	20	\$166	1	\$0	\$1
	2015	15	\$163	3	\$88	\$258
	2014	23	\$82	1	\$1	

# On To Copyright: Why Is © Now 🏰 ?

Case Filings



\* 2025 numbers are year-to-date. Open dots are full-year estimates.

# *What Are the Factors Causing a Surge in Copyright© Cases?*

- Since 2009, there are overall way more
  - Patent filings (72k+) and
  - Trademark filings (76k+)
  - Combined (148k+) than...
  - ...when compared to Copyright filings (79k+).
- But looking at trends to 2024 filings,  
Copyright (7,600+) nearly beat  
Patent/Trademark (3,800/4,200)
- *Why is that?*
  - Let's ask the audience...



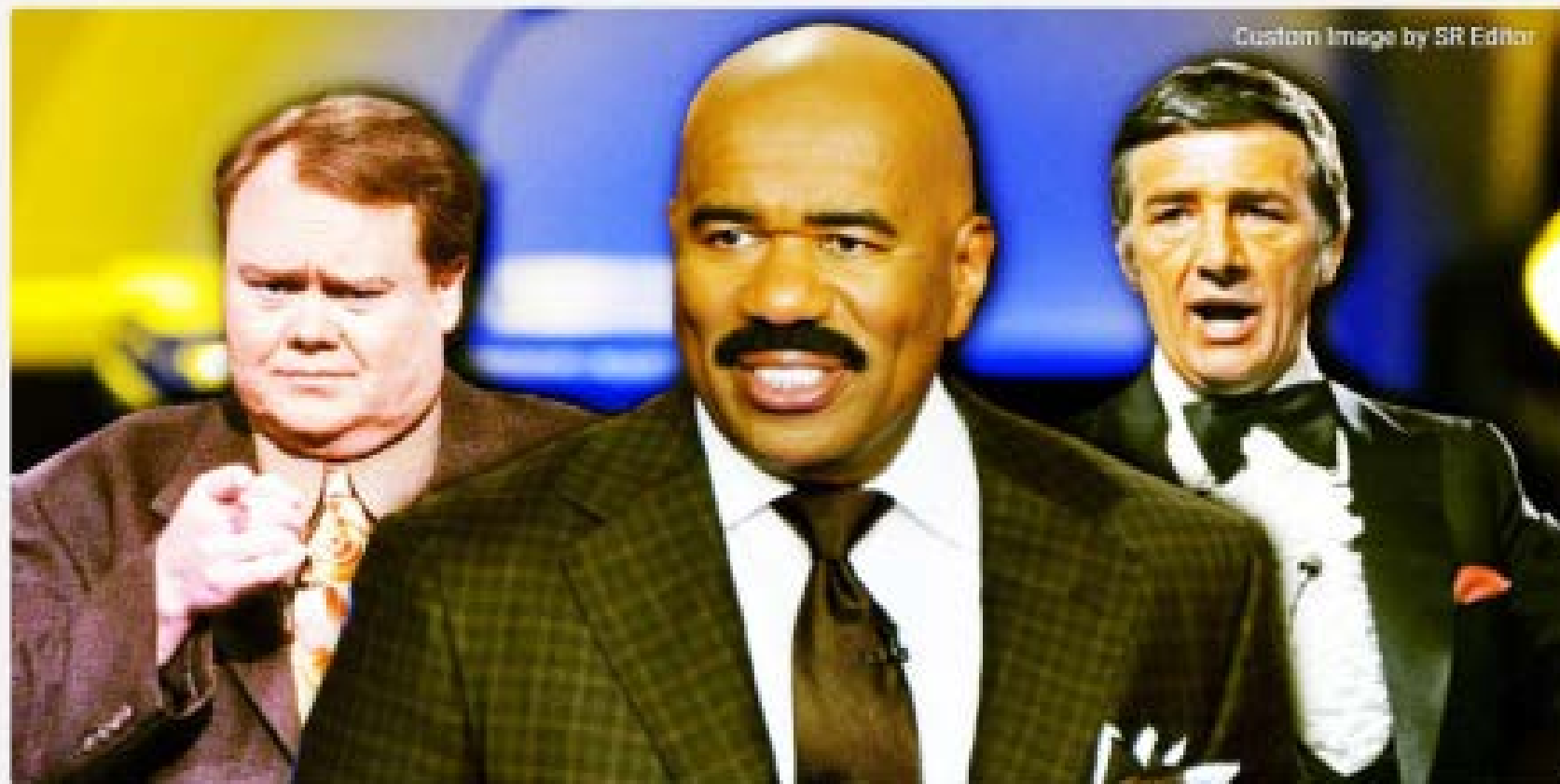
# *What Are the Factors Causing a Surge in Copyright© Cases?*

- Since 2009, there are about 72k-79k cases of each type (**Patent** / **Trademark** / **Copyright**). Let's ask the audience...why are there now more **Copyright** filings than almost **Patent** / **Trademark** combined?
  - Please share 1-3 word or very short phrases and
  - omit the word “Copyright” from your response (implicit)
  - so “Polls Everywhere” has a chance to aggregate similar results across respondents.





## Survey Says!: All 6 Family Feud Hosts Ranked



# *What Are the Factors Causing a Surge in Copyright© Cases?*

- Why are there more **Copyright** cases (7,600+©) than almost **Patent/Trademark** combined, i.e. 7,600+© vs. 3,800+<sup>Pat.</sup>/4,200+<sup>TM</sup> = 8,000+<sup>Pat./TM</sup>?
- More internet use, user-generated content, and new tech increase infringement & enforcement?
- Relative registration costs vs. availability of statutory damages and attorneys' fees?

## **Registration of a claim in an original work of authorship**

### Electronic filing:

Single author, same claimant, one work, not for hire \$45

Standard Application \$65

Paper Filing (Forms PA, SR, TX, VA, SE) \$125





# *What Are the Factors Causing a Surge in Copyright© Cases?*

- Copyright registration vs. other IP costs - relative registration costs?
  - Standard © registration application: \$65
  - Trademark filing fee \$350 – plus further fees based on various office actions and maintenance documents likely needed.
  - Patent filing fee \$330-740 (utility) or \$220 (design), plus further related attorney fees likely needed re prior art search etc.
- Statutory damages and attorneys' fees:
  - Copyright 17 U.S. Code § 504 statutory damages are \$750-\$30,000 per work in a standard case, reduced to \$200 per work for innocent infringement, or increased up to \$150,000 per work for willful infringement.
  - Copyright 17 U.S. Code § 505 court may award recovery of full costs and an award of reasonable attorney's fees to prevailing party
  - Both Copyright and Trademark statutes provide for profits of the infringer, plus potential actual damages / lost profits for the rights holder.
  - Trademark 15 U.S. Code § 1117 judgment may be entered above damages up to 3X such amount, and prevailing party can get "exceptional" case fees.
  - Patent 35 U.S. Code § 284 focuses on compensating the patent holder for the harm caused by the infringement, rather than disgorging infringer's profits.



# *What Are the Factors Causing a Surge in Copyright© Cases?*

- More copyright trolling – a proven, profitable business model?
  - Per 2021 Lex Machina report re cases terminated since 2018, © cases resolved w/settlement 82% of the time, one of the largest proportions of settled vs. litigated cases in any practice area.
- Though copyright trolling is not without its risks.
  - Lex Machina also notes prolific filer of thousands of cases, Richard Liebowitz, was disbarred last year...
  - <https://abovethelaw.com/2024/03/new-york-disbars-infamous-copyright-troll/>



## TECHNOLOGY

# New York Disbars Infamous Copyright Troll

For whom the bell tolls; it tolls for copyright trolls.

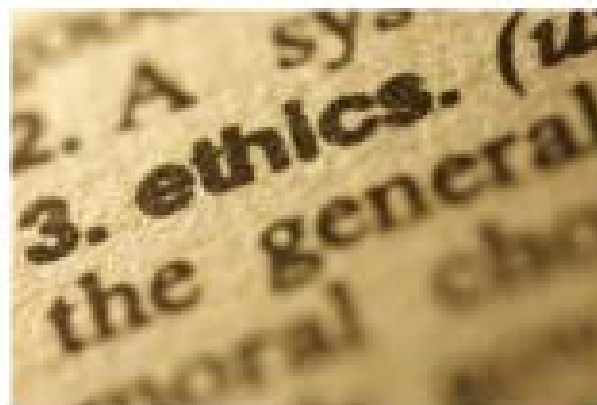
By Joe Patrice on March 14, 2024 11:43 am



Share

For years, Richard Liebowitz ran a very successful operation mostly sending threatening letters to companies claiming that they had infringed upon copyrights held by his photographer clients. Under the best of circumstances it's a niche practice

area that's... kinda shady. But Liebowitz gained a degree of infamy across a number of matters for high-profile missteps in cases that sparked the ire of federal judges. Now, finally, [New York has disbarred him](#).





But perhaps the most bizarre story involves Liebowitz missing an April 12, 2019 hearing, explaining that his grandfather had passed. When Judge Seibel directed Liebowitz under penalty of contempt to furnish evidence or documentation regarding the date of his grandfather's death, Liebowitz shot back that the order "likely constitutes a usurpation of judicial authority or a breach of judicial decorum."

*On November 7, 2019, the respondent retained counsel to represent him in the contempt proceedings, and on November 11, 2019, the respondent sent a letter to Judge Seibel admitting that he failed to carry out his responsibilities to the District Court and to his adversary. The respondent also admitted that his grandfather died on April 9, 2019, and was buried that same day.*

Just. Wow. You know, "my grandfather died this week" is something you can tell a court before a hearing and they'll probably grant it. [It's not like you're asking to give birth or anything](#) . But to lie about it to the court and then keep doubling down is... a choice.

And a poor one as it turns out:

*ORDERED that pursuant to 22 NYCRR 1240.13, the respondent, Richard P. Liebowitz, a suspended attorney, is disbarred, effective immediately, and his name is stricken from the roll of attorneys and counselors-at-law....*

# What Are the Factors Causing a Surge in Copyright© Cases?

**eService Claims: online application with uploaded digital deposit** (approximately 87% of all applications)

**Claims that DO NOT require correspondence** (approximately 75% of all eService claims and 65% of all claims)



**Claims WITH correspondence** (approximately 25% of all eService claims and 35% of all claims)



**Deposit Ticket Claims: online application with mail-in physical deposit** (approximately 12% of all applications)

**Claims that DO NOT require correspondence** (approximately 77% of all Deposit Ticket claims and 9% of all claims)



**Claims WITH correspondence** (approximately 23% of all Deposit Ticket claims and 9% of all claims)



**Mail Claims: application by paper form submission** (approximately 1% of all applications)

**Claims that DO NOT require correspondence** (approximately 47% of all Mail claims and less than 1% of all claims)



**Claims WITH correspondence** (approximately 53% of all Mail claims and 1% of all claims)





# *What Are the Factors Causing a Surge in Copyright© Cases?*

- Backlog at the Copyright Office, though nothing compared to the USPTO...
  - Copyright: 1.5 to 6.8 months.
- Trademark: total pendency at 5.9 months to first action, 12 months total, with a backlog in inventory of >1.25 million pending applications.
- Patent: total pendency at 26.1 months and growing, with a backlog of >1.2 million applications in inventory for utility patents.
- For more, including historical trends, *see* [www.uspto.gov/dashboard/patents/](http://www.uspto.gov/dashboard/patents/) and <https://www.uspto.gov/dashboard/trademarks/>.

# *What Are the Factors Causing a Surge in Copyright© Cases?*

- Other possibilities for the 2018 bounce and post-COVID significant upward trend:
  - Minimum damages were raised from \$500 to \$750, and maximum damages for willful infringements were increased from \$100,000 to \$150,000. (*Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033 (2018).)
  - Greater certainty to copyright liability based on valid registration and “substantial similarity” test, versus:
    - multi-factor, fact-driven “likelihood of confusion” test for trademark infringement and
    - intensive prior art, claim construction, and validity issues for patent infringement (more costly).
  - The rise of mass filings by entities seeking to enforce copyrights has also contributed to the increase in case filings. For example, Strike 3 Holdings filed nearly 2,000 copyright lawsuits in a single year, arguing that litigation was necessary to address the scale of infringement it faced. (*Strike 3 Holdings, LLC v. Doe*, 964 F.3d 1203 (2020).)

# *How Do Damages Compare in Copyright© Cases vs. Trademark?*

Figure 25: Total Copyright and Trademark Damages Awarded from 2011 to 2020 (Excluding Fees and Interest)

Year	Copyright Cases	Copyright Amount	Trademark Cases	Trademark Amount
2020	349	\$560,627,648	252	\$336,964,088
2019	328	\$1,251,590,864	283	\$1,024,626,539
2018	307	\$2,324,683,099	273	\$1,306,580,829
2017	277	\$247,879,166	240	\$460,386,431
2016	315	\$146,730,533	224	\$661,838,164
2015	238	\$405,367,494	254	\$838,132,122
2014	275	\$232,872,839	291	\$635,066,622
2013	241	\$239,871,904	253	\$2,060,764,882
2012	214	\$487,385,504	290	\$724,793,320
2011	223	\$97,656,558	406	\$447,939,904



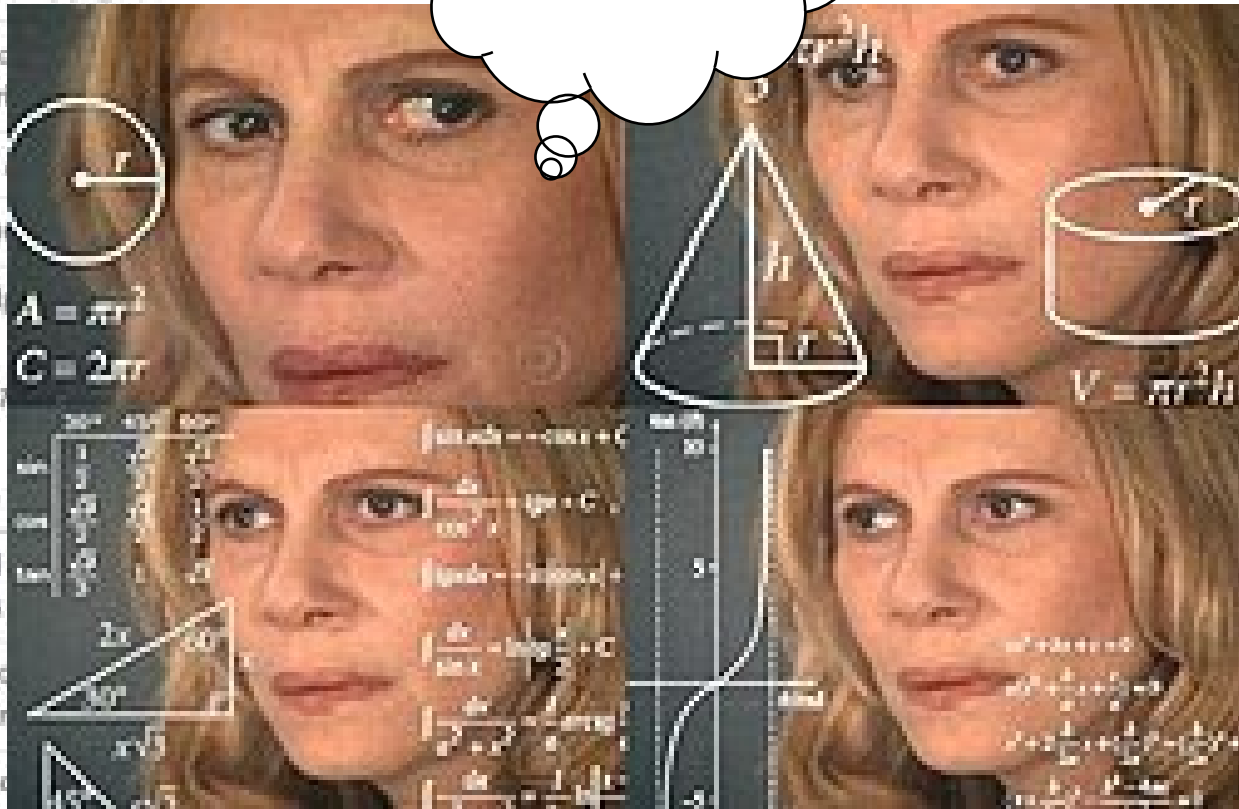
# How Do Damages Compare in Copyright© Cases vs. Trademark?

**Total Copyright and Trademark Damages Awarded from 2011-2020 (Excluding Fees/Interest)**

Year	© Cases	© Cases*	© Amount	© Amount	\$/© Award	\$/© Award	\$/TM Case	TM Cases*	TM Cases*	TM Amount	TM Amount	\$/TM Case
2020	349	349	\$560,627,648	\$560,627,648	\$1,606,383	\$1,606,383	\$1,337,159	252	252	\$336,964,088	\$336,964,088	\$1,337,159
2019	328	328	\$1,251,590,864	\$1,251,590,864	\$3,815,826	\$3,815,826	\$3,620,588	283	283	\$1,024,626,539	\$1,024,626,539	\$3,620,588
2018	307	307	\$2,324,683,099	\$2,324,683,099	\$7,572,258	\$7,572,258	\$4,786,010	273	273	\$1,306,580,829	\$1,306,580,829	\$4,786,010
2017	277	277	\$247,879,166	\$247,879,166	\$894,871	\$894,871	\$1,918,277	240	240	\$460,386,431	\$460,386,431	\$1,918,277
2016	315	315	\$146,730,533	\$146,730,533	\$465,811	\$465,811	\$2,954,635	224	224	\$661,838,164	\$661,838,164	\$2,954,635
2015	238	238	\$405,367,494	\$405,367,494	\$1,703,225	\$1,703,225	\$3,299,733	254	254	\$838,132,122	\$838,132,122	\$3,299,733
2014	275	275	\$232,872,839	\$232,872,839	\$846,810	\$846,810	\$2,182,360	291	291	\$635,066,622	\$635,066,622	\$2,182,360
2013	241	241	\$239,871,904	\$239,871,904	\$995,319	\$995,319	\$8,145,316	253	253	\$2,060,764,882	\$2,060,764,882	\$8,145,316
2012	214	214	\$487,385,594	\$487,385,594	\$2,277,502	\$2,277,502	\$2,499,287	290	253	\$724,793,320	\$724,793,320	\$2,499,287
2011	223	223	\$97,656,558	\$97,656,558	\$437,922	\$437,922	\$1,103,300	406	290	\$447,939,904	\$447,939,904	\$1,103,300
Average:					\$2,061,593		\$3,184,666					



Figure 26: Total Copyright Damages by Type Awarded from 2015

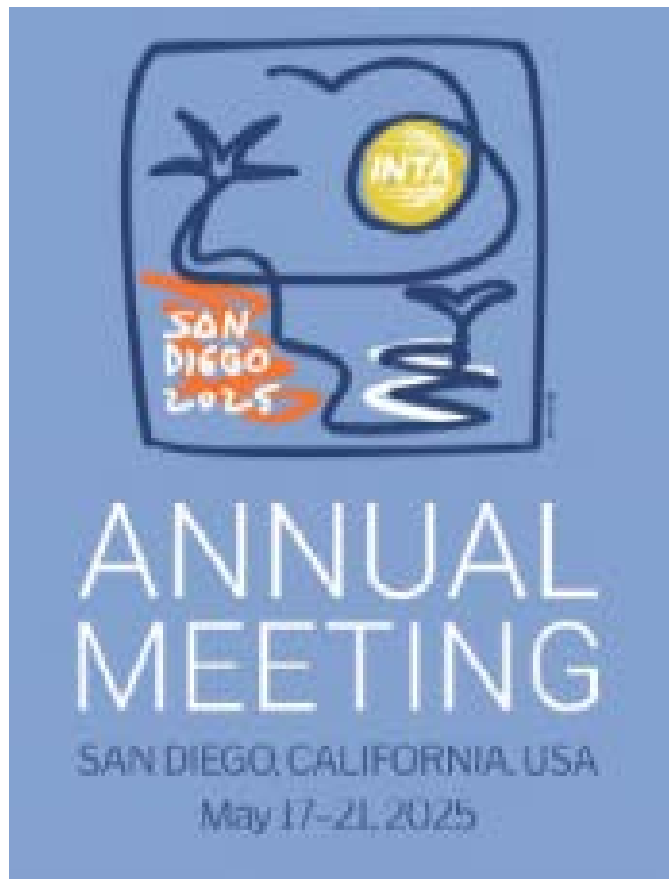
Name	Cases	Trials	Settlements	Verdict	Merits	
Actual Damages / Infringer's Profits (Copyright)	67			\$124,425	\$202,427,462	\$12,078,339
Statutory Damages (Copyright)	4				\$1,823,855	
Other / Mixed Damage Types	2				\$684,341	
Attorneys' Fees / Costs	0				\$33,602,183	
Prejudgment Interest					\$3,659,349	
						
Name	Cases	Trials	Settlements	Verdict	Merits	
Actual Damages / Infringer's Profits (Trademark)					\$251,576,361	
Statutory Damages (Trademark)					\$191,252,464	
Enhanced Damages (Trademark)					\$88,055,279	
Other / Mixed Damage Types	797	\$2,328,256,772	\$366,149,440	\$801,420,294	\$495,915,601	\$664,771,437
Attorneys' Fees / Costs	3,614	\$344,642,281	\$94,782,385	\$10,002,108	\$400	\$239,857,388
Prejudgment Interest	327	\$139,528,083	\$12,664,767	\$1,072,949	\$14,037	\$125,776,330

# How Do Damages Compare in Copyright© Cases Vs. Trademark?

## Total Copyright vs. Trademark Damages Awarded from 2018-2020 (Detailed Breakdown)

<u>\$ Type</u>	<u>© Cases*</u>	<u>© Amount</u>	<u>\$/© Award</u>	<u>\$/TM Case</u>	<u>TM Cases*</u>	<u>TM Amount</u>
Actual Damages/Infringer's Profits	67	\$290,999,003	\$4,343,269	\$1,783,787	747	\$1,332,489,232
Statutory Damages	838	\$3,382,304,780	\$4,036,163	\$2,556,714	2077	\$5,310,295,515
Other/Mixed Damages	86	\$523,597,828	\$6,088,347	\$3,355,961	220	\$738,311,355
Enhanced Damages (TM Only)				\$2,921,276	797	\$2,328,256,772
Attorneys' Fees/Costs	729	\$48,618,914	\$66,693	\$95,363	3614	\$344,642,281
Prejudgment Interest	17	\$5,311,759	\$312,456	\$426,691	327	\$139,528,083

# *What Else Is New In Trademark?*



# *What Else Is New In Trademark?*

- The Supreme Court muddied the waters with its “history and tradition analysis” (and irked the presenters by using “trademark” as a verb) in
  - *Vidal v. Elster*, 602 U.S. 286 (2024): Federal Circuit reversed, and USPTO’s denial upheld w/Lanham Act’s names clause, which prohibits registering a trademark with a living person’s name (“TRUMP TOO SMALL”).
- *Jack Daniel’s v. VIP Products LLC* (Bad Spaniels):
  - *Rogers* does not apply where the defendants’ uses are trademark uses, but still can apply if not.’
- Damages against trademark defendants – make sure to name any infringer to get each “defendant’s profits.”
  - *Dewberry Eng’rs Inc. v. Dewberry Grp.*, 145 S. Ct. 681 (2025): court can only award profits directly attributable to the named defendant, not profits earned by affiliated companies that were not named as defendants.

# *So What's Happening With Patent?*



Mark A. Lemley

OCIPLA

THURSDAY

FEBRUARY 20, 2025

12:00 PM - 1:00 PM

ANDREI'S CONCIIOUS  
CUISINE, IRVINE

TOPIC: PATENT YEAR  
IN REVIEW

# *Epic Patent Damages (vs. ©/TM)*

Figure 22: Total Patent Damages Awarded from 2015 to 2024 (excluding Fees and Interest) (Millions)

Year	Cases	Amount	Reversed Cases	Reversed Amount
2024	94	\$4,351	—	—
2023	82	\$3,638	—	—

Year	Cases	Amount	© Amount	TM Amount
2021	57	\$1,217		
2020	36	\$518	\$560	\$336
2019	50	\$774	\$1,251	\$1,024
2018	58	\$1,235	\$2,324	\$1,306
2017	61	\$700	\$247	\$460
2016	53	\$547	\$146	\$661
2015	43	\$338	\$405	\$838

# *Epic Patent Damages (vs. ©/TM)*

Figure 22: Total Patent Damages Awarded from 2015 to 2024 (excluding Fees and Interest) (Millions)

Year	Cases	Amount	<u>\$/Patent Award</u>	<u>\$/© Award</u>	<u>\$/TM Award</u>
2024	94	\$4,351	\$46,287,234	No data	No data
2023	82	\$3,638	\$44,365,854	No data	No data
2022	68	\$2,818	\$41,441,176	No data	No data
2021	57	\$1,217	\$21,350,877	No data	No data
2020	36	\$518	<b>\$14,388,889</b>	<b>\$1,606,383</b>	<b>\$1,337,159</b>
2019	50	\$774	<b>\$15,480,000</b>	<b>\$3,815,826</b>	<b>\$3,620,588</b>
2018	58	\$1,235	<b>\$21,293,103</b>	<b>\$7,572,258</b>	<b>\$4,786,010</b>
2017	61	\$700	<b>\$11,475,410</b>	<b>\$894,871</b>	<b>\$1,918,277</b>
2016	53	\$547	<b>\$10,320,755</b>	<b>\$465,811</b>	<b>\$2,954,635</b>
2015	43	\$338	<b>\$7,860,465</b>	<b>\$1,703,225</b>	<b>\$3,299,733</b>



# *Questions? Parting Thoughts?*

- *Where are you looking to get more IP protection?*
- *What IP rights would you like to enforce?*
- *Any other insights into the shifting factors as to why, where, and what claims IP plaintiffs file?*

Meredith L. Williams  
[mwilliams@rutan.com](mailto:mwilliams@rutan.com)  
(714) 641-3486

# Questions?

*Where are you looking to get more IP protection or enforcement?*

*Any other insights into the shifting factors for how IP plaintiffs file?*

Meredith L. Williams  
[mwilliams@rutan.com](mailto:mwilliams@rutan.com)  
(714) 641-3486

# **The Worker Adjustment and Retraining Act:**

## **When Should You Warn Employees About Impending Layoffs or Closures?**

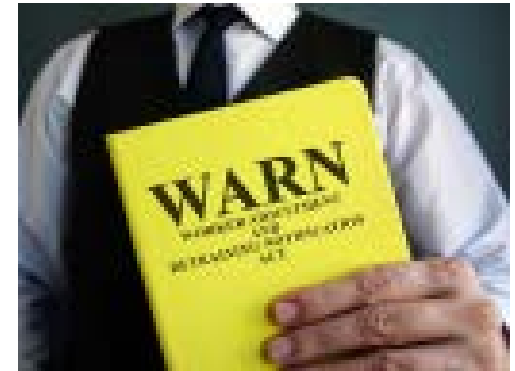
*Presented by:*

**K. Bartlett Jordan, Esq.**

# The Worker Adjustment and Retraining Notification (WARN) Act

## What Is the WARN Act?

- The WARN Act, 29 U.S.C. §§ 2101 *et seq.*, is a federal labor law passed in 1988 to ensure that employees, as well as local and state governments, receive 60 days' advance notice of certain mass layoffs and operating unit shutdowns.



# The Worker Adjustment and Retraining Notification (WARN) Act

## To Whom Does the WARN Act Apply?

- The WARN Act applies to any business that employs:
  - 100 or more employees, *excluding* part-time employees, or
  - 100 or more employees, *including* part-time employees, who in the aggregate work at least 4,000 hours per week, excluding overtime.



# The Worker Adjustment and Retraining Notification (WARN) Act

## When Is the WARN Act Triggered?

- The WARN Act may be triggered in two ways:
  - By a *mass layoff* of six months or more at a single site of employment of:
    - 500 or more employees, excluding part-time employees, or
    - 50–499 employees, excluding part-time employees, *if* these layoffs constate at least 33 percent of the employees at the single site of employment.
  - By the permanent or temporary *shutdown* of an operating unit or single site of employment that affects at least 50 employees, excluding part-time employees.

# The Worker Adjustment and Retraining Notification (WARN) Act

## What Timeframe Does the WARN Act Use?

- In determining the number of employees affected by a mass layoff or a shutdown, an employer must look 90 days ahead *and* behind.
  - For example, if an employer lays off 250 employees at a single site of employment on August 1, and then lays off *another* 250 employees at the same location on October 1, the WARN Act has been triggered and notice is required unless these layoffs are separate and distinct actions.



# The Worker Adjustment and Retraining Notification (WARN) Act

## Which Employees Should Be Counted?

- For both mass layoffs and shutdowns:
  - Hourly and salaried employees, including managers, supervisors, and employee representatives, whether at-will employees or not, *are* included.
  - Part-time employees, staffing agency employees, contractors, and consultants are *not* included.
    - Neither are employees who accept early retirement in lieu of a layoff.





# The Worker Adjustment and Retraining Notification (WARN) Act

## Which Employees Should Be Counted in Shutdowns?

- Employees at the single site of employment or the affected operating unit therein.
  - The WARN Act’s use of the term “single site of employment” can be misleading, as it encompasses geographically distinct locations that operate as a unit (*e.g.*, plants in different parts of town).
- Employees who do not work at the affected location, but who may reasonably be expected to be laid due to the mass layoff or shutdown, ***are*** included.
  - This may include fully remote employees.



# The Worker Adjustment and Retraining Notification (WARN) Act

## What Notice Does the WARN Act Require?

- At least 60 calendar days prior to the mass layoff or shutdown, the employer must provide written notice to:
  - Each affected employee;
  - Those employees' chief elected union officials, if any;
  - The state dislocated worker unit; and
  - The chief elected official of the local government.
- Each of these notices ***must*** contain specific information. *See* 20 C.F.R. § 639.7(a)–(e).



# The Worker Adjustment and Retraining Notification (WARN) Act

## What Are the Penalties for a WARN Act Violation?

- Back pay for each day of the violation, including holiday pay, tips, etc.
- All benefits (*e.g.*, health insurance, 401(k) contributions, vacation, etc.) the employees would otherwise have been eligible for.
- A civil penalty of no more than \$500 for ***each day*** of the violation.
  - This penalty can be avoided if the employer satisfies its liability as to each aggrieved employee within three weeks.
- Attorneys' fees, should an aggrieved employee successfully sue.



## State Mini-WARN Acts

### Are There State Analogues to the WARN Act?

- Nineteen states, including California, have enacted “mini-WARN Acts.”
- These mini-WARN Acts generally expand on the federal WARN Act by applying the protections to additional businesses with fewer employees, extending the notice period, and reducing the number of affected employees needed to trigger the notice requirement.
  - New York’s mini-WARN Act, for example, applies to businesses with 50 or more employees, extends the notice period to 90 days, and applies when a layoff affects 25 or more employees.



# The California WARN Act (Cal/WARN)

## How Does Cal/WARN Differ From the WARN Act?

- The Cal/WARN Act, Cal. Labor Code §§ 1400 et seq., applies to any “facility, or part thereof, that employs, or has employed within the preceding 12 months, 75 or more persons.”
  - Unlike federal WARN, this *includes* part-time employees.
- Cal/WARN does not specify a minimum number of employees that must be affected by a shutdown to trigger its notice requirements.



# The California WARN Act (Cal/WARN)

## How Does Cal/WARN Differ From the WARN Act?

- Under Cal/WARN, a mass layoff is one that affects 50 or more persons at a covered location, regardless of whether that constitutes 33 percent of the workforce.
  - Cal/WARN does exclude individuals who were employed for less than 6 of the last 12 months from this count.
- Cal/WARN also applies to operational relocations of 100 miles or more, not just shutdowns.



# WARN and Cal/WARN

## What Are the Most Common Mistakes by Employers?

- Failing to conduct an analysis under federal WARN and any applicable state mini-WARN.
  - A shutdown in California, for example, will not trigger federal WARN if it affects less than 50 employees—but it *will* trigger Cal/WARN if the location employed 75 or more persons in the previous 12 months.
- Failing to include related, but geographically separate, facilities in the analyses.
- Failing to include remote workers in the analyses.

## About the Presenter



- Bart represents employers in all aspects of employment litigation, from single plaintiff cases to class and representative actions. He also assists employers with their general employment counseling needs and has particular expertise in internal and government investigations.
- Prior to joining Rutan, Bart was an associate in the Orange County office of Gibson, Dunn & Crutcher LLP. He earned his law degree *cum laude* from the Georgetown University Law Center in 2019.
- Prior to and while attending law school, Bart spent 12 years in the U.S. Intelligence Community, most recently as a senior analyst on an interagency anti-money laundering and terrorist financing task force.
- Bart, a U.S. Marine Corps veteran, also served two tours in Iraq as an Arabic Cryptologic Linguist and Signals Intelligence Team Leader.