INTERNET, AI & PRIVACY LAW AND LITIGATION: YEAR IN REVIEW

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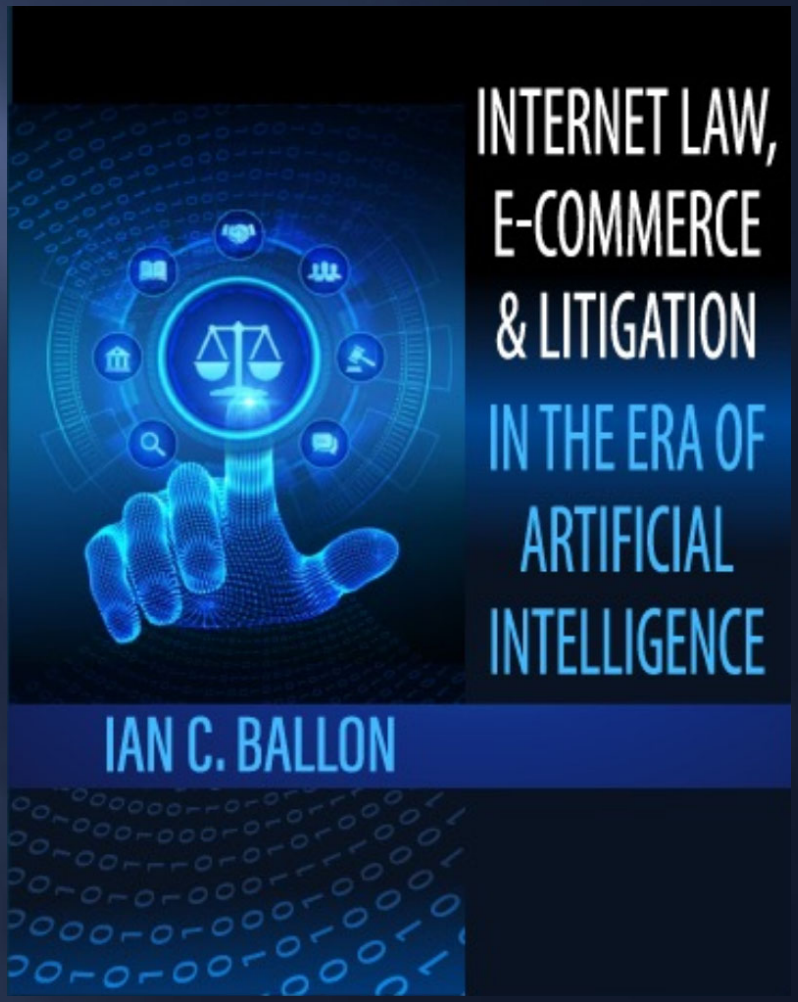
INTERNET LAW,
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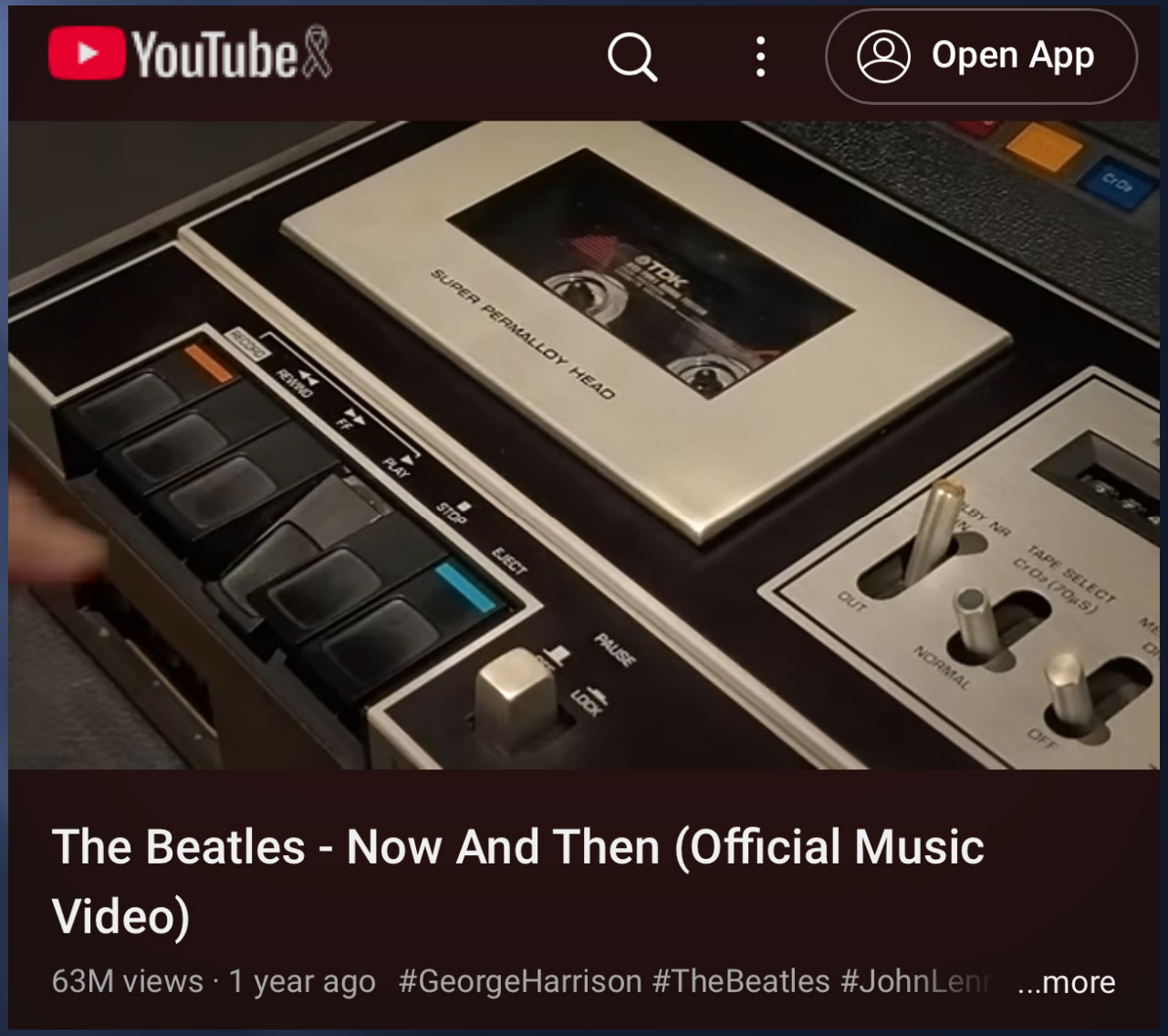
IN THE ERA OF
ARTIFICIAL
INTELLIGENCE
IAN C. BALLON

YEAR IN REVIEW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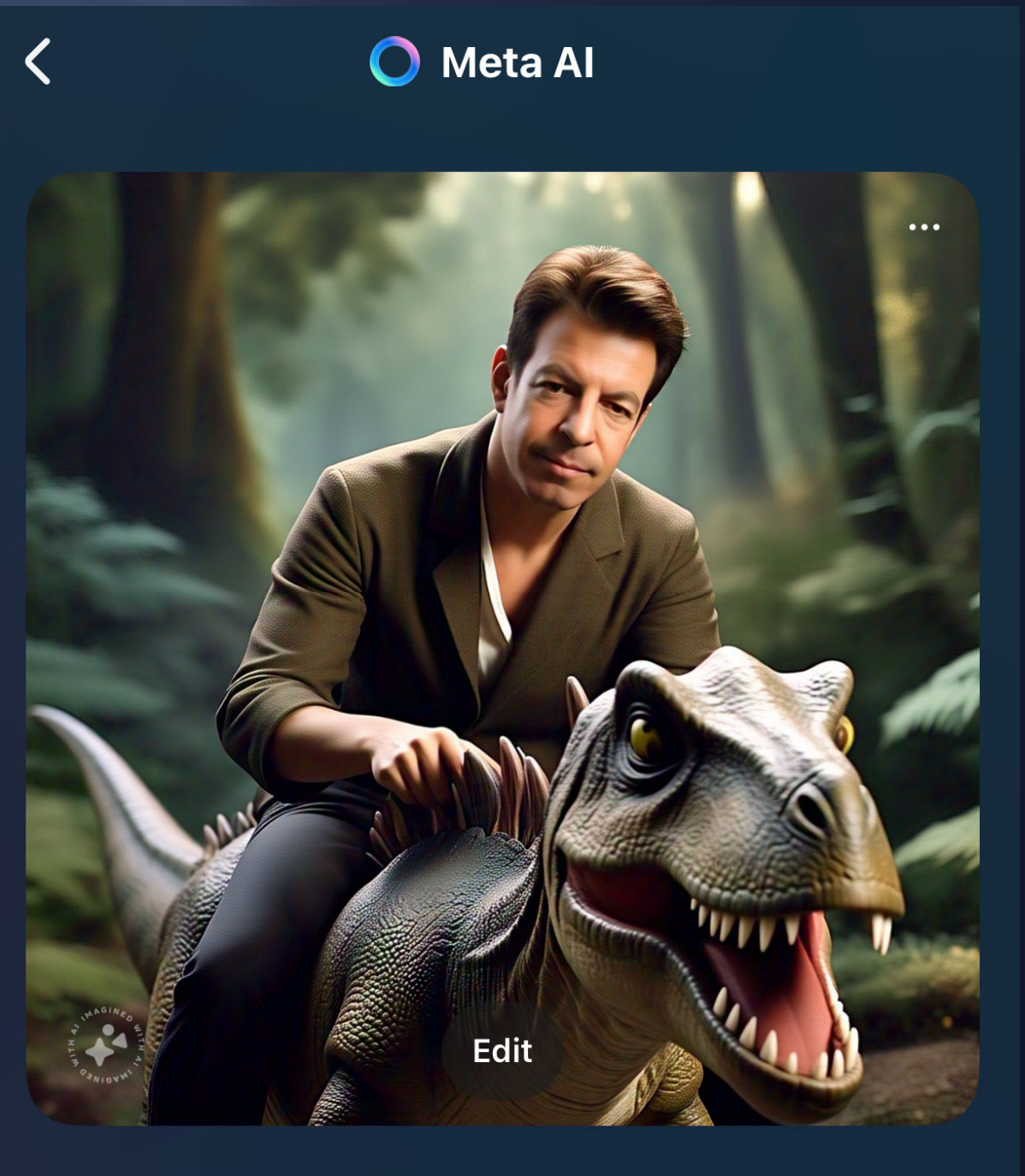
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MORONICUS
Vision Story
My name is Trumpus Ludicrous Moronicus... more
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Year in Review and what to expect for 2025….

- Latest AI case law, trends and strategy
- Supreme Court and important circuit court IP case law
- *Rogers v. Grimaldi* a year after *V.I.P.*
- The problem of mass arbitration and mass consumer class action litigation – new litigation strategies and transactional approaches
- Online and mobile contract formation
- CPRA and other privacy, Adtech and security breach class action litigation – trends, court opinions, and compliance lessons for transactional lawyers
- The First Amendment, service providers, the CDA and children
- Wire tap scams, mass arbitration and what your TOS, ToU or EULAs should provide for in 2025
- Data reuse and AI – the law and liability issues surrounding machine learning and generative AI
- The future with Trump: likely legal conflicts and opportunities

TRUMP ADMINISTRATION POLICIES

Trump Administration Policies

- AI
  - *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Executive Order 14110 (Oct. 30, 2023)
    - Safety and security; privacy; AI bias and civil rights; consumer, patient, and student protection; worker support; privacy; innovation and competition; worker support; international AI leadership; federal use of AI
    - Rescinded by *Initial Rescissions of Harmful Executive Orders and Actions,* Executive Order 14148
  - *Removing Barriers to American Leadership in Artificial Intelligence*, Executive Order 14179 (Jan. 23, 2025) (deregulation)
- Antitrust
  - Continued hostility to "Big Tech"
- CDA regulation
  - *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)
- Consumer Protection
  - *Rule Concerning Recurring Subscriptions and Other Negative Option Programs* (Nov. 15, 2024)
    - Effective Jan. 14, 2025, Compliance deadline May 15
    - Frozen or in effect?? How should companies respond?
  - NDAs
  - Arbitration
- COPPA Amendments (Jan. 16, 2025)
  - Regulatory Freeze Pending Review
  - FTC Commissioner (now Chair) Ferguson Concurring Statement
- PTO – return to work (96% of the PTO's 13,000 employees permanently work remotely-there is not enough office space to accommodate them all)

SUPREME COURT CASES

Supreme Court Cases

- *Vidal v. Elster*, 602 U.S. 286 (2024) (Trump Too Small) (Justice Thomas)
  - Lanham Act section prohibiting registration of trademark that consisted of or comprised name of particular living individual without written consent was not a viewpoint-based regulation and did not violate the First Amendment
- *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024)
  - Holding that a plaintiff with a timely copyright infringement claim under the discovery rule is entitled to damages regardless of when the infringement occurred
    - Declining to decide whether the discovery rule in fact applies
  - *But see Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014) (holding that laches is not a defense to a copyright infringement claim because the 3 year statute of limitations takes care of delay)
- *Murthy v. Missouri*, 603 U.S. 43 (2024) (holding that social-media users and States lacked standing to enjoin government defendants from allegedly pressuring platforms to suppress protected speech)
- *Lindke v. Freed*, 601 U.S. 187 (2024) (holding that, under the state action doctrine, to establish section 1983 liability, a social media user suing over a city manager's conduct in deleting the user's comments and blocking the user was required to show that the city manager had both actual authority to speak on behalf of State on particular matter and that he purported to exercise that authority in the relevant posts)
- *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (holding Florida and Texas social media laws largely invalid under the First Amendment)
- *Dewberry Group, Inc. v. Dewberry Engineers, Inc.*, _ S. Ct. _ (U.S. Feb. 26, 2025) (under the Lanham Act, profits may only be recovered from a named defendant, not separately incorporated entities not parties to the suit)
- *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, _ S. Ct. _ (2024) (granting cert.) (faxes sent to an email box)
  - Potentially wide ranging implications following *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (overturning *Chevron*)
  - Lower volume of TCPA cases (16 circuit court opinions in 2024 vs. 33 in 2023) – and most in 2024 involved insurance claims over earlier TCPA suits

GENERATIVE AI LAW: USING THIRD PARTY CONTENT, DATA AND INFORMATION TO TRAIN ALGORITHMS

Generative AI: What's clear and what's up for debate

- IP protection for the output of generative AI
- Liability for inputs: using content and data sets to train algorithms for ML/AI/Generative AI
  - Your own content or data
  - Content or data freely available for use
  - Content or data licensed for training
  - Third party content or data that may be accessible but not freely available
    - The owner may claim proprietary rights (under IP or other laws)
    - Third party data may be incomplete (due to privacy opt-out laws))
- Privacy laws, including state laws governing automated decision making (and opt out, access and notice rights)
- Ethical Issues
- Using AI in your legal practice
  - *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023)
- Potential regulation in the U.S. and E.U.
  - Compare: Japan
- AI is only as good as the test set data used to train the algorithms

AI Output-- Copyrightability and Patent Law

- Machines can't obtain patents
- Machines can't create works
  - Copyright Office position
    - *Thaler v. Perlmutter*, _ F. Supp. 3d _, 2023 WL 5333236 (D.D.C. Aug. 18, 2023) (holding that the Copyright Office did not act arbitrarily or capriciously in denying registration of an autonomously-generated work; on appeal)
  - *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) (holding that "animals other than humans . . . lack statutory standing to sue under the Copyright Act.")

- U.S. Copyright Office Copyright and Artificial Intelligence, Part 2: Copyrightability (Jan. 2025)
  - Copyright protects the original expression in a work created by a human author, even if the work also includes AI-generated material.
  - Copyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.
  - Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.
  - Based on the functioning of current generally available technology, prompts do not alone provide sufficient control.

- Can the output of generative AI result in liability? (*i.e.*, can "works" created by machines be infringing or a fair use?)
  - Look at the algorithm and the content or data used to train it
  - How many photos/songs/other creative works are used to train the algorithm
  - Does the algorithm replicate a specific creator's style?
  - What if the algorithm is so good that it independently creates a work that appears to be infringing?

Liability for Training Inputs and Output

- Contract/TOU/PP restrictions
  - *Meta Platforms, Inc. v. BrandTotal Ltd.*, _ F. Supp. 3d _, 2022 WL 1990225 (N.D. Cal. 2022) (automated access violated TOU)
  - *X Corp. v. Bright Data Ltd.*, No. C 23-03698 WHA, 2024 WL 2113859 (N.D. Cal. May 9, 2024)
- Copyright protection (statutory damages and potentially attorneys' fees if a work is timely registered)
  - 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)
  - Output vs. intermediate copying
  - Data mining as a transformative fair use: *Author's Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
  - *Tremblay v. OpenAI, Inc.*, _ F. Supp. 3d _, 2024 WL 557720 (N.D. Cal. July 30, 2024)
    - *Tremblay v. OpenAI, Inc.*, _ F. Supp. 3d _, 2024 WL 557720 (N.D. Cal. Feb. 12, 2024)
  - *Kadrey v. Meta Platforms, Inc.*, 2023 WL 3640501 (N.D. Cal. Nov. 20, 2023)
  - *Andersen v. Stability AI Ltd.*, 700 F. Supp. 3d 853 WL 7132064 (N.D. Cal. 2023)
    - *Andersen v. Stability AI Ltd.*, _ F. Supp. 3d _, 2024 WL 3823234 (N.D. Cal. Aug. 12, 2024)
    - *Andersen v. Stability AI Ltd.*, 2024 WL 536279 (N.D. Cal. Feb. 8, 2024)
- 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)
    - *Best Carpet Values, Inc. v. Google, LLC*, 90 F.4 962 (9th Cir. 2024) (no trespass claim for frame displayed on copy of website)
  - 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 $5,000 in damages to sue
  - Exceeding authorized access may not be based on use (vs. access) restrictions: *Van Buren v. United States*, 141 S. Ct. 1648 (2021)
  - *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180 (9th Cir. 2022)
  - *Meta Platforms, Inc. v. Voyager Lab$ Inc.*, Case No. 23-cv-00154-AMO, 2024 WL 2412419 (N.D. Cal. May 23, 2024) (denying MTD CFAA, CCDAF and breach of contract claims where Voyager scraped user profiles and sold the data to third parties)
- 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

Training AI algorithms/ Screen Scraping/ Data Portability

- Direct Liability
  - If you directly scrape or otherwise copy third party data you could be held liable under the theories noted on the prior slide
- Secondary Liability
  - Secondary liability may arise if you pay a third party to access the data or acquire data that has been obtained in breach of an agreement or violation of law
  - Secondary liability theories could be used to seek to impose individual liability, regardless of the corporate form
  - Secondary liability exists under IP laws and to a lesser extent under other laws but may be harder to establish absent strong documentary evidence (emails, text messages, slack), especially if scraping is done offshore
    - Contibutory copyright liability
    - Vicarious copyright liability
    - Inducing copyright liability
    - Secondary liability under the anti-circumvention provisions of the Digital Millennium Copyright Act
    - No secondary liability for breach of contract (but potentially interference with contract)
    - Potential direct liability for unfair competition
    - In extreme cases, fraud

Practical Rules of Thumb for Using Third Party Content, Data and Information to train AI

- Legal analysis. Ask:
  - What was copied?
  - How was it accessed?
  - How was it used?
  - How long will it be retained?
- Fair Use. Ask:
  - How much was copied?
  - Is the material factual/ functional or artistic/ highly creative?
  - What is it being used for (to train competitive algorithms? For a commercial purpose? For research or scholarship?)
  - Was an intermediate copy made?
    - If so, how long will it be retained?
- Practical business considerations

Copyright damages for the Use of AI

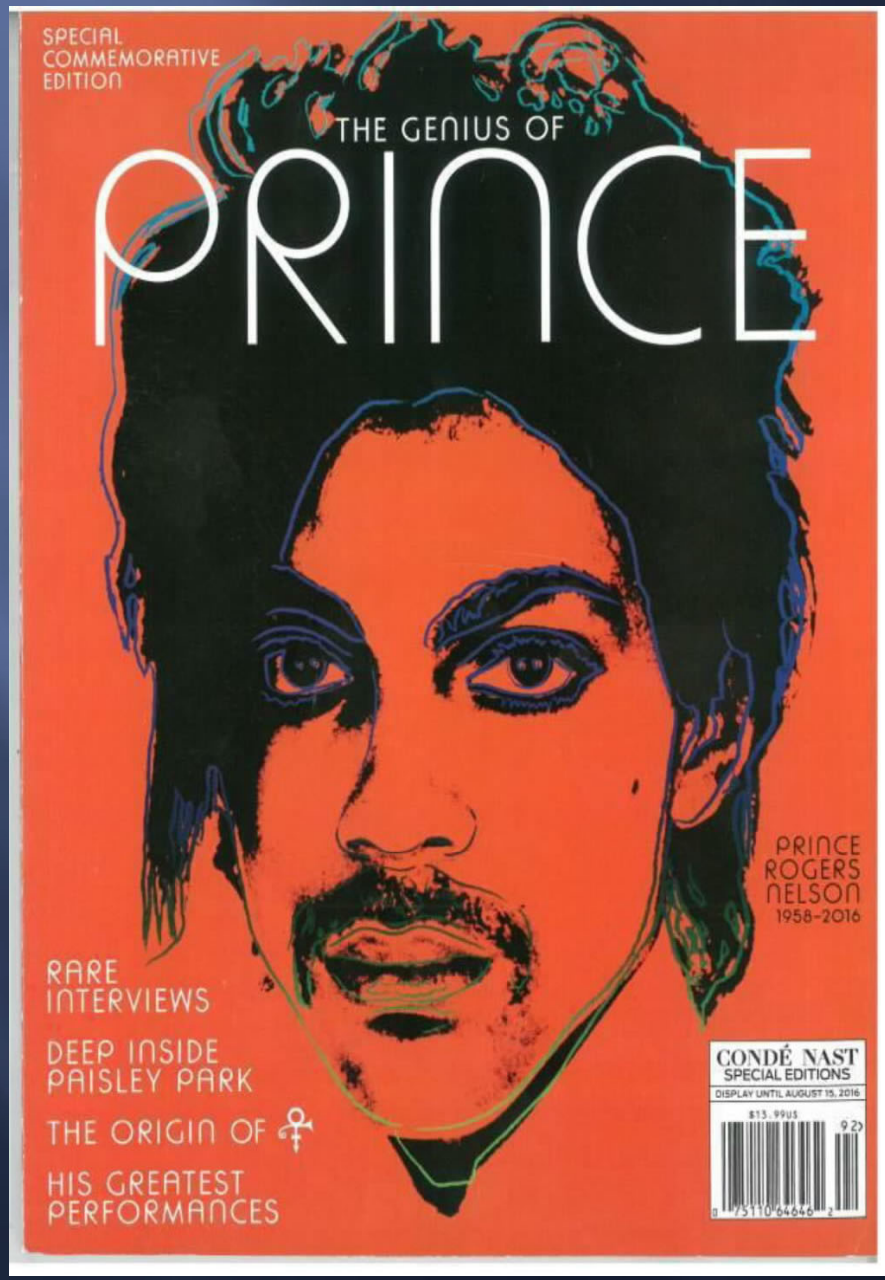
- Copyright owners may elect actual or statutory damages at any time prior to a jury verdict
  - The amount of damages is determined by the jury if a jury trial is selected
- Statutory damages (1 award per work infringed):
  - Usual range: $750-$30,000
  - Increased to $150,000 if plaintiff proves willfulness
  - Decreased to $200 if the defendant proves innocence
  - What is a work? *UMG Recordings, Inc. v. Grande Communications Networks, L.L.C.*, 118 F.4th 697, 720-24 (5th Cir. 2024) (holding that a registered compilation is eligible for only one award of statutory damages, rather than for multiple awards for each song in an album registered as a compilation)
    - Circuit split: Majority apply a functional test that looks to "where the market assigns value" in deciding whether the parts of a compilation are individually eligible for statutory damages because they have "independent economic value." *See, e.g., Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117-18 (1st Cir. 1993); *Sullivan v. Flora, Inc.*, I936 F.3d 562, 572 (7th Cir. 2019); *VHT, Inc. v. Zillow Group, Inc.*, 69 F.4th 983 (9th Cir. 2023) (holding that a photography studio's registration of a database of 2,700 photos amounted to a registration of each photo, and not just of the database as a compilation, thus entitling the plaintiff to statutory damages on each individual photo used by a real estate search engine); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996); *Walt Disney Co. v. Powell*, 897 F.2d 565, 570 (D.C. Cir. 1990).
- Actual Damages:
  - Actual damages suffered as a result of the infringement and, to the extent not duplicative,
  - Defendant's wrongful profits attributable to the infringement
    - May include indirect (or noninfringing) profits attributable to the infringement.
- Timely Registration:
  - Statutory damages and attorneys fees are not recoverable if a plaintiff failed to timely register its work (but actual damages and injunctive relief may be available)
    - A registration certificate is deemed sufficient even if it contains inaccurate information unless (a) the inaccurate information was included on the application with knowledge that it was inaccurate, and (b) the inaccuracy, if known, would have caused the Registrar of Copyrights to refuse registration. *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, 595 U.S. 178 (2022)
- Timing – Damages for 3 years prior to filing suit
  - *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014)
  - Except if the discovery rule applies: *Warner Chappell Music, Inc.* v. Nealy, 144 S. Ct. 1135 (2024)
- Attorneys' fees:
  - Reasonable attorneys' fees, where a copyright has been timely registered, may be awarded to the prevailing party as part of the costs of a case; the decision to award fees is in the sound discretion of the court
  - *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 543 n.19 (1994) (Frivolousness, Motivation, Objective unreasonableness (both in the factual and legal components of a case), the need in particular circumstances to advance considerations of compensation and deterrence)
  - *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016) (a court should give substantial weight to the objective reasonableness of the losing party's position (while an important factor it is not controlling) , may not award fees to a prevailing plaintiff as a matter or course, and may not treat prevailing plaintiffs and prevailing defendants differently (both should be encouraged to litigate meritorious claims or defenses)

AI & COPYRIGHT FAIR USE POST-*WARHOL*

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)
  - 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*, 578 U.S. 941 (2016)
- *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
  - *Apple Inc. v. Corellium, Inc.,* 2023 WL 3295671 (11th Cir. May 5, 2023) (finding virtualization software to run various operating systems (including iOS) with tools to that enable security researchers to gain deeper insights into the operating system a fair use because the virtualization software was transformative, the iOS is functional software, Corellium didn't "overhelp itself" to Apple's software, and there was no substantial harm to the genuine market)
- *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023)
  - *Philpot v. Independent Journal Review,* 92 F.4th 252 (4th Cir. 2024) (use of a copyrighted photo of Ted Nugent in connection with an article on signs you might be a conservative was not transformative)

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023)



Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (7-2) (Sotomayor)

- The purpose and character of Warhol's use of Goldsmith's photo *in commercially licensing Orange Prince to Conde Nast* was not a fair use
  - The court only addressed the first factor – not whether the use was fair overall
    - The central question is whether a use merely supersedes the original creation (supplanting the original) or adds something new, with a further purpose or different character (purpose & character judged by an objective inquiry)
    - NEW: As most copying has some further purpose and many secondary uses add something new, the first factor asks whether *and to what extent* the secondary use has a purpose or character different from the original. The larger the difference, the more likely the use is fair.
    - Transformativeness is a matter of degree – to preserve the copyright holder's right to prepare derivative works the degree of transformation must go beyond that required to qualify as a derivative work
    - Stated differently, if an original work and secondary use share the same or highly similar purposes, and the secondary use is commercial, the first factor is likely to weigh against fair use absent some other justification for copying
    - The purpose the court focused on was use of the image to illustrate a magazine article, not the painting itself. Even assuming that Warhol's purpose was to portray Prince as iconic, that difference was not significant enough for purposes of using one work or the other to illustrate a magazine article
      - Likewise Warhol's purpose of commenting on the dehumanizing nature of celebrity was not substantial enough as it was not focused specifically on the Goldstein photo that was used (as opposed to any image of Prince) (analogy to parody)
      - Because the use was commercial, a more substantial justification was required
  - The majority went to great lengths to limit its holding to the facts of the case – competitive commercial licensing, emphasizing that other uses of the Goldstein photo for Orange Prince (such as to display in a museum) could be fair
  - Nevertheless, the decision seems to import the fourth factor – impact on the market – as relevant to the first factor, much in the same way that Justice Breyer in *Google* found transformativeness to be relevant to all four factors.
  - The creative nature of the works – and their competitive use for magazine cover licensing – greatly impacted the decision
  - But if an Andy Warhol painting is not fair use, what is?
    - The decision seems to elevate visual impression over other aspects of whether a secondary use has a further purpose or different character than the original, which is "a matter of degree" (*see* Kagan dissent)
    - The degree of difference must be weighed against other considerations, like whether the use is commercial
    - New expression, meaning or message may be relevant, but is not, without more, dispositive
- Gorsuch (joined by Jackson) concurred (examine the purpose of the particular use challenged, not the artistic purpose of the underlying use)
- Kagan (joined by Chief Justice Roberts) dissented (sharp departure from *Campbell* and *Google*; this opinion will stifle creativity because a license is not always available)

Fair Use Post-*Warhol*

- *Keck v. Mix Creative Learning Center, L.L.C.*, 116 F.4th 448 (5th Cir. 2024) (studio's use of artist's Dog Art series in art kits its sold to children for learning at home was transformative and unlikely to devalue the market worth of artist's work)
- *Hachette Book Group, Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024) (holding that the Internet Archive's practice of scanning print copies of publishers' books to create digital copies and then lending those digital copies to users at a one-to-one ratio between printed books that the library owned and digital copies that it loaned to users was not a fair use)
- *Philpot v. Independent Journal Review*, 92 F.4th 252 (4th Cir. 2024) (defendant's use of plaintiff's copyrighted photo of Ted Nugent in an article entitled "15 Signs Your Daddy Was a Conservative" was not a fair use)
- *Griner v. King*, 104 F.4th 1 (8th Cir. 2024) (holding that former Congressman Steve King unlicensed use of plaintiff's copyrighted template photograph for the "Success Kind" internet meme was not a fair use)
- *Santos v. Kimmel*, _ F. Supp. 3d _, 2024 WL 3862149 (S.D.N.Y. Aug. 19, 2024) (appeal pending) (holding that Jimmy Kimmel's unauthorized use of George Santos's personalized celebrity message service message constituted a fair use)

FIRST AMENDMENT LIMITATIONS ON LANHAM ACT ENFORCEMENT AND THE *JACK DANIELS* CASE

VIP Productions LLC v. Jack Daniel's Properties, Inc., 599 U.S. 140 (2023)

VIP Productions LLC v. Jack Daniel's Properties, Inc., 599 U.S. 140 (2023)

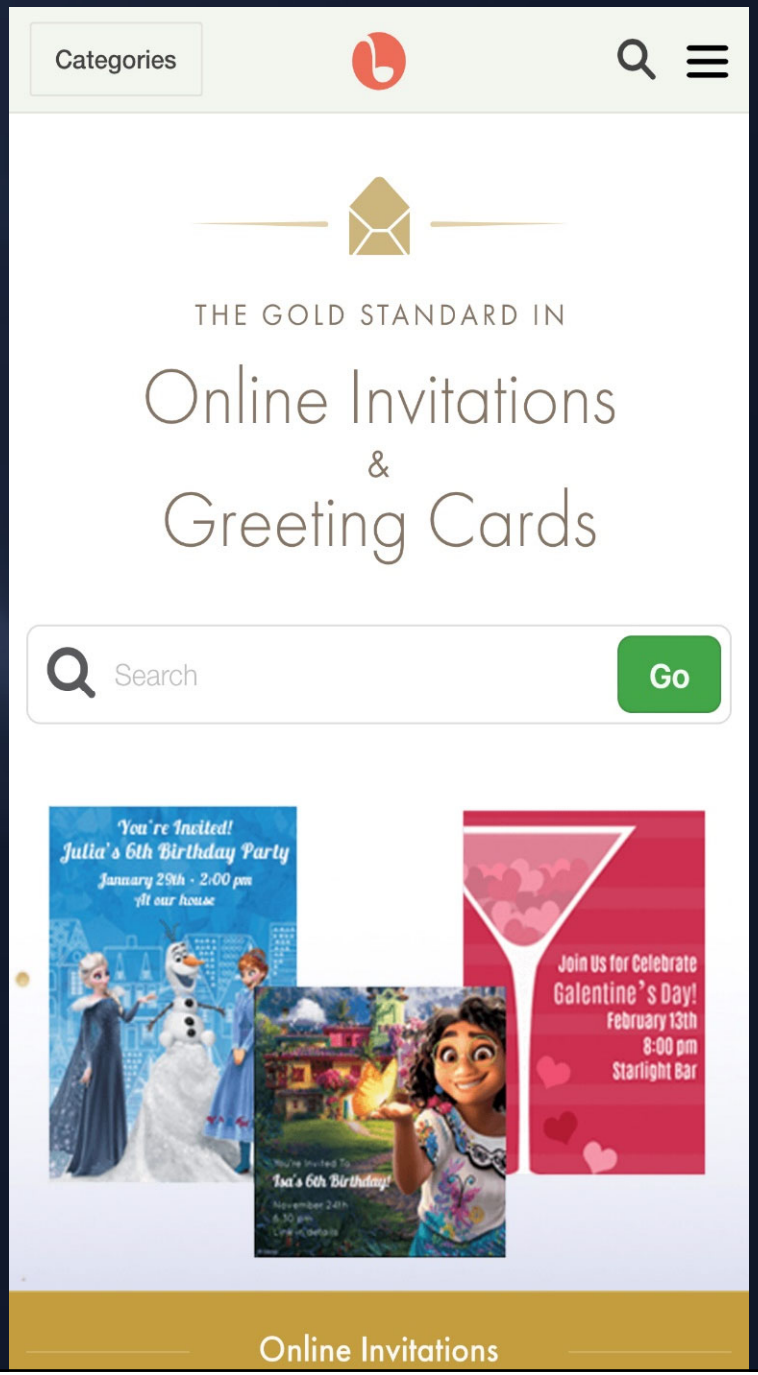
- The Supreme Court sidestepped the circuit split over how to apply *Rogers v. Grimaldi,* holding merely that the *Rogers* test is not appropriate when the accused infringer has used a trademark to designate the source of its own goods
- Trademark fair use still could be applicable where the defendant uses the plaintiff's mark as a source identifier
  - *VIP Productions LLC v. Jack Daniel's Properties, Inc.*, 2025 WL 275909 (D. Ariz. Jan. 23, 2025) (permanently enjoining VIP based on dilution by tarnishment; finding no likelihood of confusion)
- *Vans, Inc. v. MSCHF Product Studio, Inc.*, 88 F.4th 125 (2d Cir. 2023)

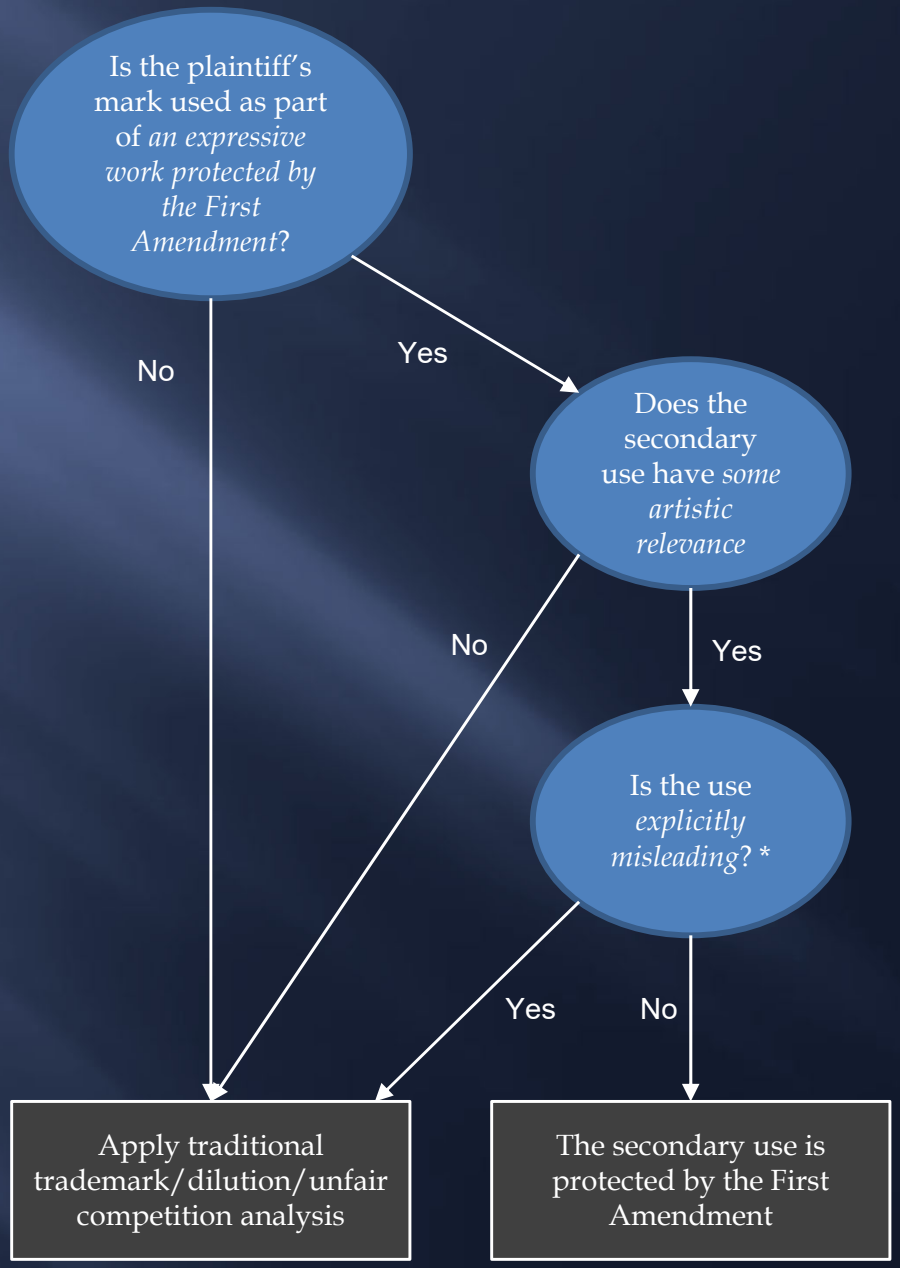
Vans' Trademarks/Trade Dress	WAVY BABY Design
	
	

Lanham Act Fair Use and the First Amendment

- 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), *cert. granted*, 143 S. Ct. 476 (Nov. 21, 2022)
  - *Twentieth Century Fox Television v. Empire Distribution, Inc.*, 875 F.3d 1192, 1196-1200 (9th Cir. 2017)
  - *Punchbowl, Inc. v. AJ Press LLC*, 52 F.4th 1091 (9th Cir. 2022)
    - *Punchbowl, Inc. v. AJ Press*, 90 F.4th 1022 (9th Cir. 2024)
    - *Punchbowl, Inc. v. AJ Press*, 2024 WL 4005220 (C.D. Cal. Aug. 24, 2024)
    - *Punchbowl, Inc. v. AJ Press, Inc.*, Case No. 1:21-cv-00136, 2021 WL 1178070 (E.D. Va. 2021)
  - 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

Punchbowl, Inc. v. AJ Press, 52 F.4th 1091(9th Cir. 2022)
Punchbowl, Inc. v. AJ Press, 90 F.4th 1022 (9th Cir. 2024)
Punchbowl, Inc. v. AJ Press, 2024 WL 4005220 (C.D. Cal. 2024)





Courts consider:

(a) The degree to which the junior user uses the mark in the same way as the senior user

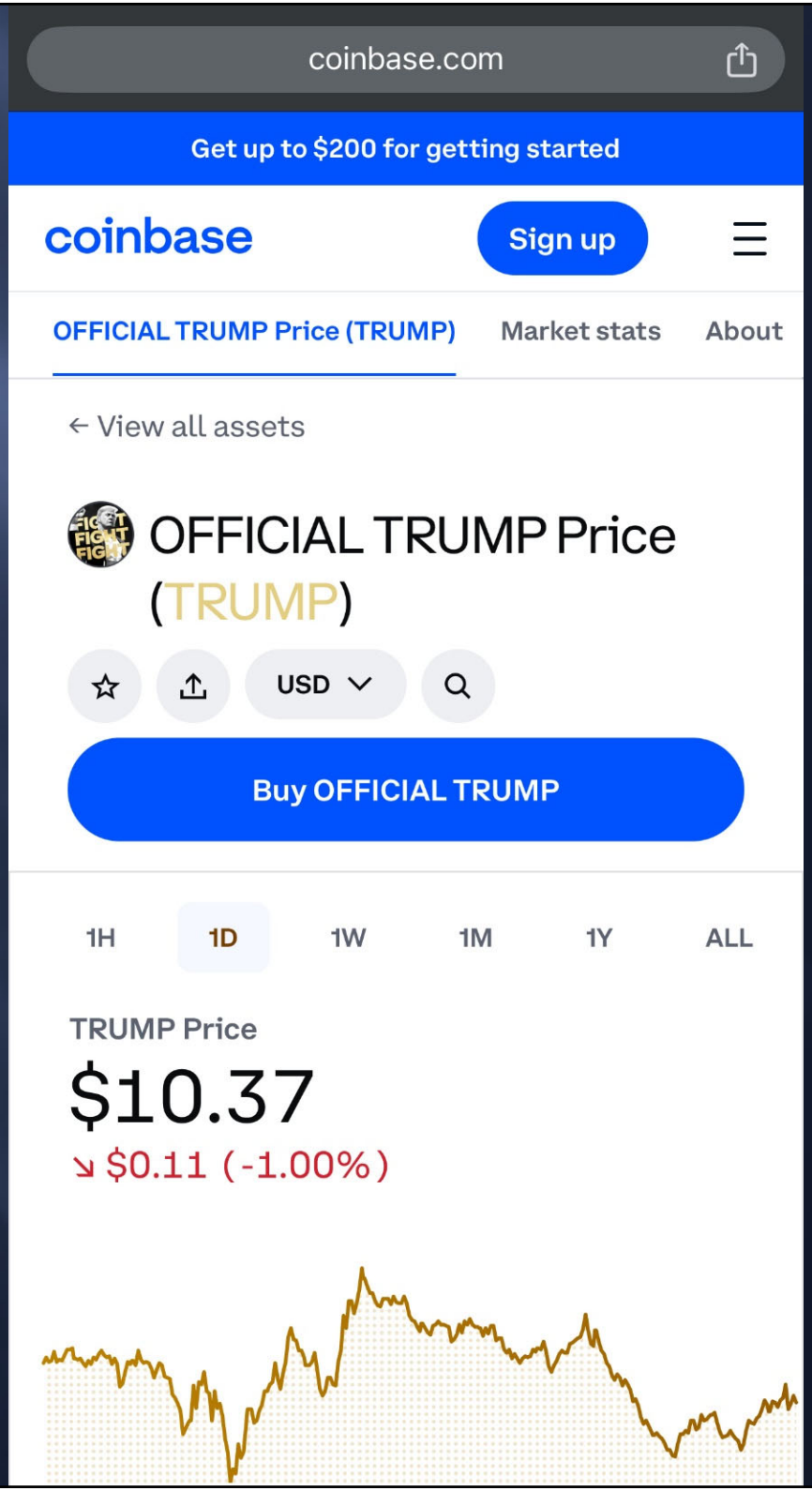
(b) The degree to which the junior has added his or her own expressive content to the work beyond the mark itself

Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443, 463 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 2803 (2021)

NFTs

NFTs and IP law

- An NFT may be reproduced, distributed or publicly displayed, implicating copyright rights
- If you buy an NFT you don't necessarily acquire underlying IP rights to exploit the work (beyond being able to resell the NFT)
- *Miramax, LLC v. Tarantino,* Case No. 2:21-cv-08979 (C.D. Cal.) (contract dispute over rights to pulp fiction; Quentin Tarantino issued NFTs containing portions of the handwritten version of the screenplay; Tarantino assigned all rights to Miramax but retained rights to the print version)
- *Yuga Labs, Inc. v. Ripps,* Case No. CV 22-4355-JFW(JEMx), 2023 WL 3316748 (C.D. Cal. Apr. 21, 2023) (Bored Ape Yacht Club)
- *Nike, Inc. v. StockX,* 22-CV-00983 (VEC)(SN), 2024 WL 3361411 (S.D.N.Y. July 10, 2024) (NFT tokens used to provide the holder with physical ownership)
- *Hermes Int'l v. Rothschild,* _ F. Supp. 3d _, 2022 WL 1564597 (S.D.N.Y. 2022) (denying MTD claims that defendant's NFTs of Birkin handbags infringed plaintiff's trademarks)
  - *Hermes Int'l v. Rothschild,* 590 F. Supp. 3d 647 (S.D.N.Y. 2022) (denying motion for interlocutory appeal)
  - Jury trial (Feb. 2023):
    - MetaBirkin NFTs - not protected speech
    - $133,000 damages
  - Permanent injunction
    - *Hermes Int'l v. Rothschild,* 678 F. Supp. 3d 475(S.D.N.Y. June 23, 2023)
    - *Hermes Int'l v. Rothschild,* 720 F. Supp. 3d 296 (S.D.N.Y. 2024) (Swedish art exhibit)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SECONDARY IP LIABILITY AND THE CDA

Secondary IP Liability

Copyright Litigation (& CASE Act)

- DMCA
  - Copyright Office Section 512 Report (May 2020)
- *Sony Music Entertainment v. Cox Communications, Inc.*, 93 F.4th 222 (4th Cir. 2024) (affirming the jury's finding of willful contributory infringement, but remanding for a new trial on damages because Cox did not profit from its subscribers' acts of infringement, a legal prerequisite for vicarious liability)
- Contributory: *UMG Recordings, Inc. v. Grande Communications Networks, LLC*, 118 F.4th 697 (5th Cir. 2024)
  - Affirming liability under the defense-friendly "simple measures" standard where Grande stopped terminating repeat infringers for a 7 year period. Based on prior practices, it easily could have done so in the face of evidence of user infringement via BitTorrant)

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
- Contributory and vicarious liability
- *YYGM SA v. Redbubble, Inc.*, 75 F.4th 995 (9th Cir. 2023)
  - willful blindness that gives rise to contributory liability for trademark infringement requires the defendant to have specific knowledge of infringers or instances of infringement
  - without specific knowledge of infringers or instances of infringement, there is no duty to look for trademark infringement by others on one's property
  - *YYGM SA v. Redbubble, Inc.*, 2024 WL 2107382 (C.D. Cal. Apr. 11, 2024) (denying cross-motions)
  - *Cf. Atari Interactive, Inc. v. Printify, Inc.*, 714 F. Supp. 3d 225 (S.D.N.Y. 2024) (denying TRO, finding Atari unlikely to prevail on the merits against a print platform provider)
- 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?

Recent 230 cases

- *M.P. by and through Pinckney v. Meta Platforms Inc.*, _ F.4th _, 2025 WL 377750 (4th Cir. Feb 4, 2025) (holding that the CDA preempted claims for negligence, strict products liability, and negligent infliction of emotional distress for improper content; Meta's use of an algorithm to deliver content was integral to its publishing function and did not take it outside the CDA)
- *Estate of Bride by and through Bride v. Yolo Technologies, Inc.*, 112 F.4th 1168 (9th Cir. 2024) (holding that the CDA precluded claims that Yolo's anonymous extension was inherently dangerous and that the company was on notice that is application was dangerous to teenagers, but holds representations re moderation decisions actionable outside 230)
- *Calise v. Meta Platforms, Inc.*, 103 F.4th 732 (9th Cir. 2024) (holding that the CDA preempted plaintiff's unfair competition claim premised on a duty to root out fraud)
- *M.H. On behalf of C.H. v. Omegle.com LLC*, 122 F.4th 1266 (11th Cir. 2024) (holding that the FOSTA-SESTA exception to CDA claim preclusion did not apply where the parents of a sex trafficking victim alleged merely that the service knew that predators used its services, enabled individuals to communicate with complete anonymity, did not require age verification or parental consent for minor users, and did not sufficiently protect users' data)
- *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024) (holding that TikTok's algorithm, which decided whether third-party speech on platform would be included or excluded from a compilation, and organized and presented the included items on users' unique personalized feeds of content, was TikTok's own expressive activity, and thus outside the scope of the CDA; allowing products-liability, negligence, and wrongful-death claims asserted by mother of a user who died participating in a challenge depicted in video on his feed)
- *A.B. v. Salesforce, Inc.*, 123 F.4th 788 (5th Cir. 2024) (holding that the CDA did not immunize Salesforce from claims brought by sex-trafficking victims alleging that Salesforce knowingly benefitted from participating in a sex-trafficking venture under the Trafficking Victims Protection Act and Texas Civil Practice and Remedies Code, by providing cloud-based software tools and support services to an online advertisement forum that facilitated sex trafficking through advertisements posted on the forum)
- *In re. Social Media Adolescent Addiction/Personal Injury Products Liability Litig.*, 2024 WL 4532937 (N.D. Cal. Oct. 15, 2024) ("Meta's design, development, and deployment of certain product features plausibly constitutes unfair or unconscionable practices. . . . However, . . . Section 230 insulates the design and deployment of most features alleged to be unfair or unconscionable. Similarly, Section 230 protects against personal injury plaintiffs' consumer-protection, concealment, and misrepresentation theories to the same extent.")

230 – Intellectual Property/ FOSTA-SESTA

- 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; *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022) (a website's own conduct, not that of a user, must violate child trafficking laws, for the exception to apply).
    - *But see G.G. v. Salesforce, Inc.*, 76 F.4th 544 (7th Cir. 2023)
    - *Woodhull Freedom Foundation v. United States*, 72 F.4th 1286 (D.C. Cir. 2023) (upholding 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)
    - *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657 (S.D.N.Y. 2023) (right of publicity)
    - *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of Lanham Act false advertising claims, where 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)

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)

DATA PRIVACY, CYBERSECURITY BREACH & ADTECH PUTATIVE CLASS ACTION LITIGATION

Developments over the Past Year and what to expect for 2025….

- Over 1,500 data breach lawsuits brought against companies in 2024 (ALM/Law.com)
- Lower volume of TCPA cases (16 circuit court opinions in 2024 vs. 33 in 2024) – and most in 2024 involve insurance claims over earlier TCPA suits
- Privacy, Adtech and security breach class action litigation and mass arbitration claims - trends, court opinions, litigation strategy and compliance lessons
- CPRA litigation – Lessons learned and how to win or settle these cases
- Data breach standing circuit splits, case law and settlement trends
- Ill. Biometric Information Privacy Act, Genetic Information Privacy Act and related state laws
- Wire tap troll claims, mass arbitration and what your TOS, ToU or EULAs should include
- Online and mobile contract formation, the challenges of amending Terms of Use and the enforceability of mass arbitration clauses
- How to simultaneously manage multiple class action suits and mass arbitration claims
- Trends – children (COPPA preemption inapplicable to those 13 and over), health data, the increasing significance of state law claims, suits brought by non-users who have not provided consent or assented to arbitration, and the interplay between class action litigation and mass arbitration
- State privacy laws: CA, CO, CT, Del, Fla, Ind (1/1/26), Iowa, KY (1/1/26), Md (10/1/25), Minn (7/31/25), MT, NE, NH, NJ, Ore, RI (1/126), Tenn. (7/1/25), Tex., Utah, VA
  - Only California has a private cause of action
  - State laws impact what is reasonable and best practices

Security Breach Class Action Litigation: How to Mitigate the Risks and Win or Favorably Settle Claims

- Claims
  - Anatomy of CPRA claims and how defendants can use the elements to their advantage
  - Other claims typically joined with CPRA claims
  - Trends: kitchen sink complaints vs narrow claims for negligence and unfair competition
- Defense strategies
  - Who are the plaintiffs and their lawyers?
  - What motions to bring – and when to bring them?
  - When to fight and when to settle
- Privilege and confidentiality issues
  - Problems that arise when nonlitigators respond to security incidents
- Class certification issues and the problem of mass arbitration
- Settlement strategies, structures and terms
  - Common mistakes, including panicking at the prospect of $750 CPRA class claims
  - Individual vs action class settlements
- Ways to mitigate risk
  - The importance of considering litigation in a company's compliance program
  - Online and mobile contract formation
  - Arbitration clauses – enforceability and how to deal with mass arbitration
- The next frontier
  - CPPA litigation under *other* provisions of the CPRA and other state laws
  - Washington state's My Health My Data Act, which includes a private right of action, and other health and child privacy claims

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
    - *Tamraz v. Bakotic Pathology Associates, LLC*, 2022 WL 16985001 (S.D. Cal. Nov. 16, 2022) (data security not part of bargained for exchange
  - State cybersecurity statutes (especially those that provide for statutory damages and attorneys' fees)
  - California (and potentially Oregon) IoT Law, CPRA
  - Negligence
    - ✓ *In re Accellion, Inc. Data Breach Litig.*, 713 F. Supp. 3d 623 (N.D. Cal. 2024)
    - ✓ *Gerber v. Twitter, Inc.*, 2024 WL 5173313 (N.D. Cal. Dec. 18, 2024) (gross negligence)
- Securities fraud
  - *In re Alphabet, Inc. Securities Litigation*, 1 F.4th 687 (9th Cir. 2021)
  - *SEC v. SolarWinds Corp.*, _ F. Supp. 3d _, 2024 WL 3461952 (S.D.N.Y. 2024)
- 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
    - ✓ *Salazar v. National Basketball Ass'n*, 118 F.4th 533 (2d Cir. 2024) (holding that a newsletter recipient was a subscriber of "goods or services" under the VPPA)
  - State laws
    - Illinois Biometric Information Privacy Act (recently adopted in other states)
    - Michigan's Preservation of Personal Privacy Act
    - California laws including the California Privacy Rights Act (CPRA)
      - ↳← Other claims are preempted by the CPRA *only* if based on a violation of the CPRA
  - 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 the California Privacy Protection Agency (CPPA)
    - Coordinate litigation and regulatory enforcement (usually confidential)

Defense Strategies for Data Privacy & Cybersecurity Breach 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)
  - *In re 23andMe, Inc., Customer Data Security Breach Litig.*, _ F. Supp. 4th _, 2024 WL 1596923 (MDL Apr. 11, 2024)
- 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
  - *In re Wawa, Inc. Data Security Litig.*, 85 F.4th 712 (3d Cir. 2023) (remanded: was clear sailing provision reasonable?)
  - *In re: T-Mobile Customer Data Security Breach Litig.*, 111 F.4th 849 (8th Cir. 2024) (award of $78.75M, or 22.5% of the $350M settlement fund, was an abuse of discretion)
  - *In re: Marriott Int'l, Inc., Customer Data Security Breach Litig.*, 78 F.4th 677 (4th Cir. 2023) (improper to certify a class without first addressing the defense of class action waivers)
- 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
  - *In re 23andMe, Inc. Customer Data Security Breach Litig.*, 2024 WL 4982986 (N.D. Cal. Dec. 4, 2024) (conditionally approving class settlement)
  - Siri voice assistant ($95 Million)

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)**
- ***Webb v. Injured Workers Pharmacy, LLC*, 72 F.4th 365 (1st Cir. 2023)**
- ***Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011), *cert. denied*, 566 U.S. 989 (2012)**
  - *Clemens V. ExecuPharm Inc.*, 48 F.4th 146 (3d Cir. 2022)
- ***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**
  - ***Bohnak v. Marsh & McLennan Cos.*, 79 F.4th 276 (2d Cir. 2023)**
- ***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**

Illinois Biometric Information Privacy Act

- A private cause of action for "any person aggrieved by a violation" of BIPA
  - *Rosenbach v. Six Flags Entertainment Corp.*, 129 N.E.3d 1197 (Ill. 2019) (holding that a person need not have sustained actual damage beyond violation of his or her rights under the statute to be *aggrieved* by a violation)
  - A plaintiff may recover the greater of
    - (1) actual damages or
    - (2) $1,000 in liquidated damages for negligent violations or $5,000 if intentional or reckless
  - August 2024 amendment: A private entity that collects or discloses "the same biometric identifier or biometric information from the same person using the same method of collection" only commits a single violation and my only recover a single damage award
    - ✓ Previously, a separate claim accrued under the Act each time a private entity scanned or transmitted an individual's biometric identifier or information in violation of the Act. *Cothron v. White Castle Systems, Inc.*, 216 N.E.3d 918 (Ill. 2023); *Cothron v. White Castle Systems, Inc.*, 79 F.4th 894 (7th Cir. 2023)
  - The statute also authorizes recovery of attorneys' fees
- *In re: Facebook Biometric Information Privacy Litigation*, No. 21-15553, 2022 WL 822923 (9th Cir. Mar. 17, 2022) (affirming a $650 Million settlement, approved after the district court had earlier rejected a $550 Million settlement, over objections to the $97.5 Million attorneys fee award)
  - $1.4 Billion settlement between the Texas AG and Meta (July 2024)
- *Zellmer v. Meta Platforms, Inc.*, 104 F.4th 1117 (9th Cir. 2024) (BIPA protects both users and non-users of a platform; but biometric identifiers must actually identify a person to be actionable – a numeric face signature that cannot identify an individual is not actionable (contra dist courts Ill))
- *Johnson v. Mitek Systems, Inc.*, 55 F.4th 1122 (7th Cir. 2022) (declining to compel arbitration where HyreCar, an intermediary between people who own vehicles and other people who would like to drive for services such as Uber and GrubHub, provided personal information to Mitek for background verification where plaintiff's contract with HyreCar required arbitration "with a long list of entities" including "all authorized or unauthorized users or beneficiaries of services or goods provided under the Agreement.")
- Standing arguments
- Choice of law: *Delgado v. Meta Platforms, Inc.*, 718 F. Supp. 3d 1146 (N.D. Cal. 2024) (applying Ill. law despite a California choice of law provision in the applicable ToS)
- 2022: 90 opinions referencing BIPA. Approved class settlements ranged from $250,000 to $100 Million *(Rivera v. Google*). First jury trial resulted in a $228 Million verdict (*Rogers v. BNSF Ry. Co.*)
- *New trend*: Suits under the Illinois Genetic Information Privacy Act (suits against employers over disclosure of family medical history).
  - *Bridges v. Blackstone, Inc.*, 66 F.4th 687 (7th Cir. 2023)
  - *Coatney v. Ancestry.com DNA, LLC*, 93 F.4th 1014 (7th Cir. 2024) (holding children not bound to arbitrate disputes per T&Cs entered into between Ancestry and their guardians)

AdTech Cases Involving Replay Software and Chat

- California law
  - *Massie v. General Motors LLC*, Civil Action No. 21-787-RGA2022 WL 534468 (D. Del. Feb. 17, 2022) (dismissing plaintiffs' Wiretap Act and CIPA claims, arising out of GM's use of Decibel's Session Replay software on GM's websites, for lack of Article III standing)
    - *Massie v. General Motors LLC,* 2021 WL 2142728 (E.D. Cal. May 26, 2021) (dismissing and transferring the case to the District of Delaware)
  - *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.")

AdTech Cases Involving Ad pixels and forms

- Expansive definition of *interception* under Pennsylvania law
  - *Popa v. Harriet Carter Gifts, Inc.*, 52 F.4th 121 (3d Cir. 2022)
    - Holding that under Pennsylvania law, as predicted by the 3d Circuit, there was no direct-party exception to liability under the Wiretapping and Electronic Surveillance Control Act (WESCA), 18 Pa. Cons. Stat. Ann. § 5702, meaning anyone could "intercept" communications, including people who acquired a text message or chat sent directly to them because the Pennsylvania legislature had a prototype for a direct-party exception in the Federal Wiretap Act, 18 U.S.C.A. § 2511(2)(d), but it codified only a law-enforcement exception, in effect limiting any direct-party exception to that context.
    - *But see, e.g., Pena v. Gamestop, Inc.*, _ F. Supp. 3d _, 2-23 WL 3170047 (C.D. Cal. 2023) (CIPA)
- No retroactive consent
  - *Javier v. Assurance IQ, LLC*, No. 21-16351, 2022 WL 1744107 (9th Cir. 2022)
    - Interpreting CIPA section 631(a) to require the prior consent of all parties to a communication. "Here, Javier has sufficiently alleged that he did not provide express prior consent to ActiveProspect's wiretapping of his communications with Assurance. According to the complaint, neither Assurance nor ActiveProspect asked for Javier's consent prior to his filling out the insurance questionnaire online, even though ActiveProspect was recording Javier's information as he was providing it. Javier has therefore alleged sufficient facts to plausibly state a claim that, under Section 631(a), his communications with Assurance were recorded by ActiveProspect without his valid express prior consent."
- Pen register claims
  - *Greenley v. Kochava, Inc.*, 684 F. Supp. 3d 1024 (S.D. Cal. 2023)
    - Kochava, a data broker alleged to have provided a software developer kit (SDK) to app developers that "surreptitiously intercept[ed] location data" from app users to sell to clients in "customized data feeds" to "assist in advertising and analyzing foot traffic at stores or other locations."
    - The court denied Kochava's MTD claims for invasion of privacy under the California Constitution, California Computer Data Access and Fraud Act (CDAFA), Cal. Penal Code § 502(c) (no consent), California Invasion of Privacy Act (CIPA), Cal. Penal Code § 638.51 (which prohibits installation of a pen register without first obtaining a court order), and CIPA section 631 (wiretapping0 (holding that location data constitutes the contents of communications)
    - A *pen register* is defined as "a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication." Id. § 638.50(b). For purposes of stating a claim, the court held that a private company's surreptitiously embedded software installed in a telephone may constitute a pen register.
    - The court dismissed eavesdropping (CIPA 632), UCL and unjust enrichment claims
    - *Moody v. C2 Educational Systems, Inc.*, 2024 WL 3561367 (C.D. Cal. July 25, 2025) (denying MTD; TikTok pixel)
- *Vita v. New England Baptist Hospital*, 243 N.E.3d 1185 (Mass. 2024) (holding that use of tracking software like the Meta Pixel and Google Analytics does not violate Massachusetts' Wiretap law)
- Strategies for troll suits
  - Settle vs. fight
  - Confidential claim vs. arbitration claim vs. state suits vs. federal suit
- Mitigation – pop up (just in time) disclosures

Litigation over Privacy Policy Disclosures

- *Calhoun V. Google*, 113 F.4th 1141 (9th Cir. 2024) ("Whether a 'reasonable' user of Google's computer software at issue in this case consented to a particular data collection practice is not to be determined by attributing to that user the skill of an experienced business lawyer or someone who is able to easily ferret through a labyrinth of legal jargon to understand what he or she is consenting to. Instead, a determination of what a 'reasonable' user would have understood must take into account the level of sophistication attributable to the general public, which uses Google's services.")
  - *Compare 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."

LITIGATION UNDER THE CALIFORNIA PRIVACY RIGHTS AND ENFORCEMENT ACT OF 2020 (CPRA)

CPRA Putative Class Action Litigation

- The private right of action narrowly applies only to security breaches and the failure to implement reasonable measures, not other CPRA provisions
  - Regulatory enforcement of the rest of the Act is by the California Privacy Protection Agency (CPPA).
  - *Sephora* (August 2022) ($1.2 M penalty, 2 years of compliance monitoring)
- But plaintiffs may recover statutory damages of between $100 and $750
- The CPRA 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)
  - Notice and an opportunity to cure only applies for private litigation, not regulatory enforcement by the California Privacy Protection Agency (CPPA)
- 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"
- CPRA claims typically are joined with other cybersecurity breach or data privacy claims in civil litigation

Defense Strategies for CPRA & Other Cybersecurity litigation

- Many "CPRA claims" aren't actually actionable under the CPRA
- The CPRA 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 CPRA 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*)
  - *Atkinson v. Minted, Inc.*, 2021 WL 6028374 (N.D. Cal. Dec. 17, 2021)
  - *Kostka v. Dickey's Barbecue Restaurants, Inc.*, 2022 WL 16821685 (N.D. Tex. Oct. 14, 2022)

Defense Strategies for CPRA & Other Cybersecurity litigation

- The CPRA creates a private right of action for
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  - [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 . . . ."
- Class certification
- Settlement
- Trial
- More court opinions
  - *Wynne v. Audi of America*, Case No. 21-cv-08518-DMR, 2022 WL 2916341 (N.D. Cal. July 25, 2023) (denying motion to remand, finding Article III standing; "To the extent that Shift Digital contends that an alleged violation of the CCPA alone is sufficient to confer standing, *TransUnion* expressly rejected such an argument, holding that "[u]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court." . . . However, the injury that gives rise to the alleged violation of the CCPA—that is, the "invasion of [Wynne's] privacy interests" that occurred as a result of the theft of her PII, is a concrete injury that establishes Article III standing.")
  - *Florence v. Order Express, Inc.*, _ F. Supp. 3d. , 2023 WL 3602248 (N.D. Ill. May 23, 2023) (denying defendant's motion to dismiss plaintiff's CPRA claim based on the notice and cure provision where plaintiff alleged it sent a notice and defendant's response advising that it had enhanced its security was insufficient to defeat a claim because "[t]he implementation and maintenance of reasonable security procedures and practices ... following a breach does not constitute a cure with respect to that breach." Cal. Civ. Code § 1798.150(b))

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
  - Consider the risk of mass arbitration and adjust your arbitration provision accordingly

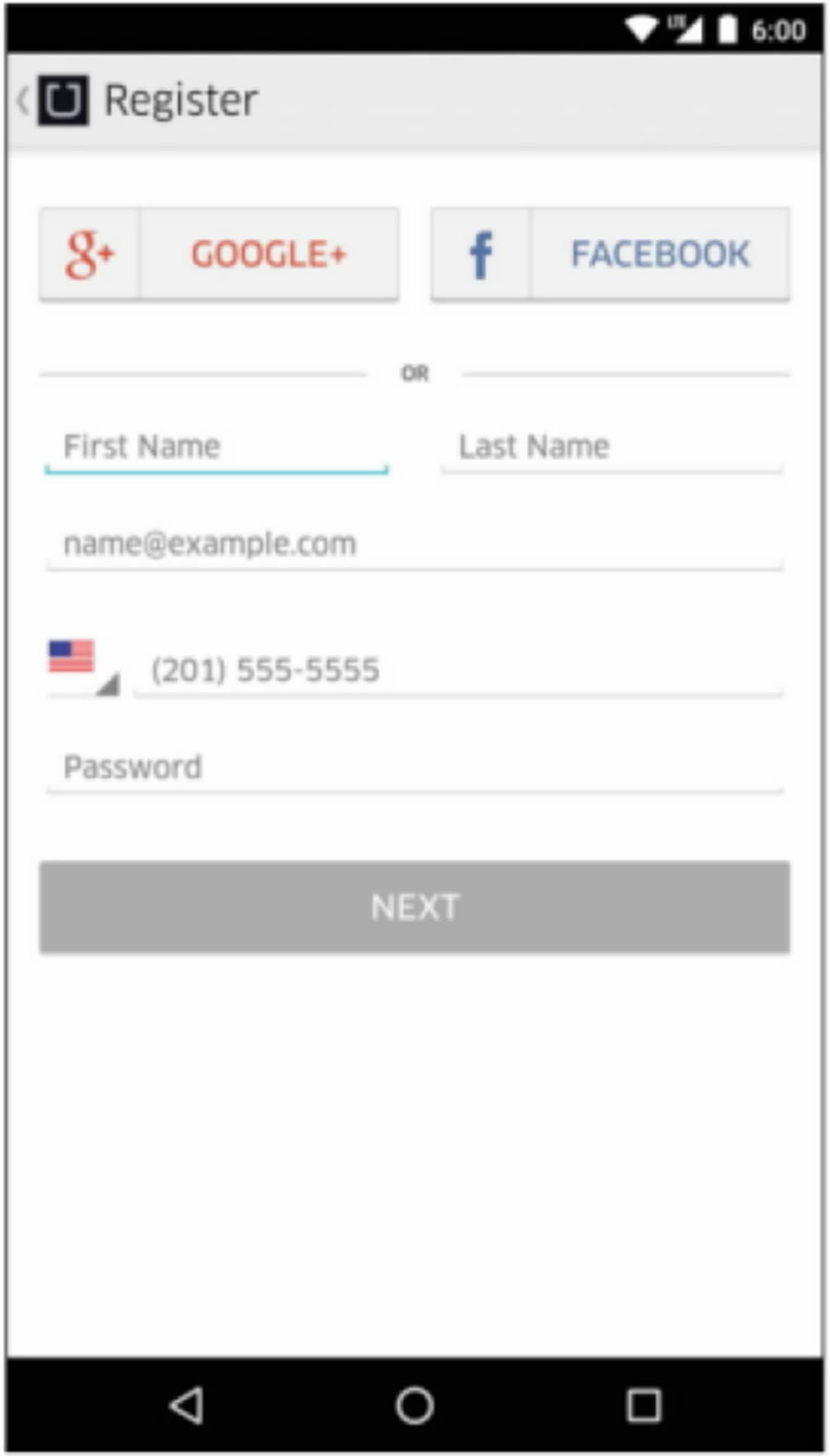
CPRA/Security Breach Class Action Litigation: How to Mitigate the Risks and Win or Favorably Settle Claims

- Regulatory enforcement and litigation brought by the CPPA

ONLINE AND MOBILE CONTRACT FORMATION

Online and Mobile Contract Formation

- Trend: Continued hostility to implied contracts
  - *Chabolla v. ClassPass, Inc.*, _ F.4th _, 2025 WL 630813 (9th Cir. 2025)
  - *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005 (9th Cir. 2024) (enforceable)
    - *Morrison v. Yippee Entertainment, Inc.*, _ F. Supp. 3d _, 2024 WL 4647296 (S.D. Cal. Oct. 31, 2024) ("While the 'Terms of Service' hyperlink appears in blue font against a white background—a characteristic to which many courts look—the font is not underlined nor completely capitalized and is small in proportion to most of the text on the page.")
  - *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. 2024) (holding that a hyperlinked agreement provided inquiry notice of arbitration agreement)
  - *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023) (reversing order denying MTC arbitration because under the totality of the circumstances Klarna's checkout widget provided reasonably conspicuous notice of contractual terms, including arbitration)
  - *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023) (affirming MTC arbitration because California law does not require that corporate parties to a contract use their full legal names & Live Nation's ToS included repeated references to its common trade names such that a reasonable user could have identified Ticketmaster's full legal name)
  - *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 2022)
    - *Sifuentes v. Dropbox, Inc.*, 2021 WL 2673080 (N.D. Cal. June 29, 2022)
  - *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)
  - *Toth v. Everly Well, Inc.*, 118 F.4th 403 (1st Cir. 2024) (enforcing clickwrap)
  - *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 arbitration clause in mobile ToS)
  - *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
    - Ways to make future amendments enforceable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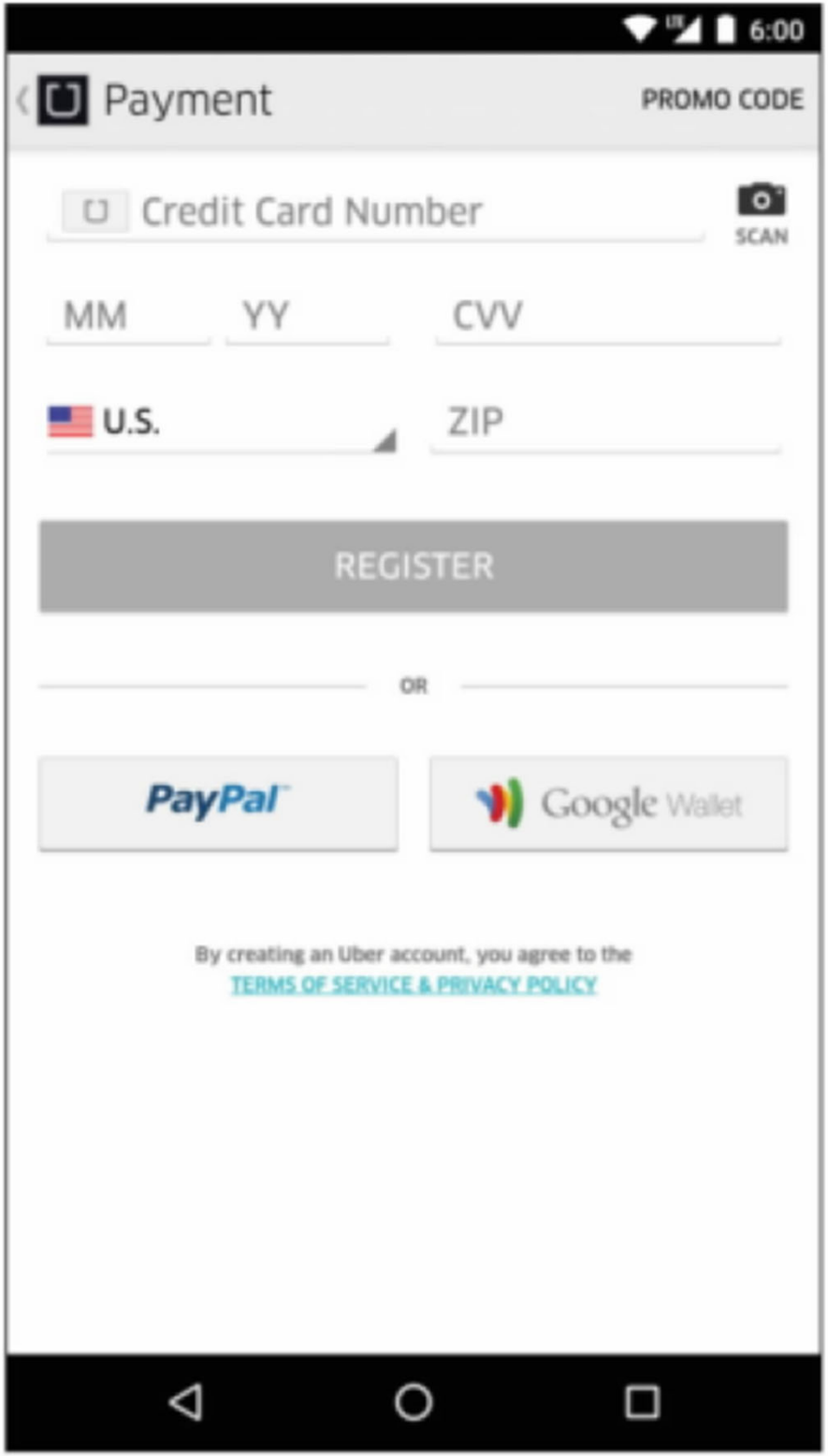
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By creating an Uber account, you agree to the
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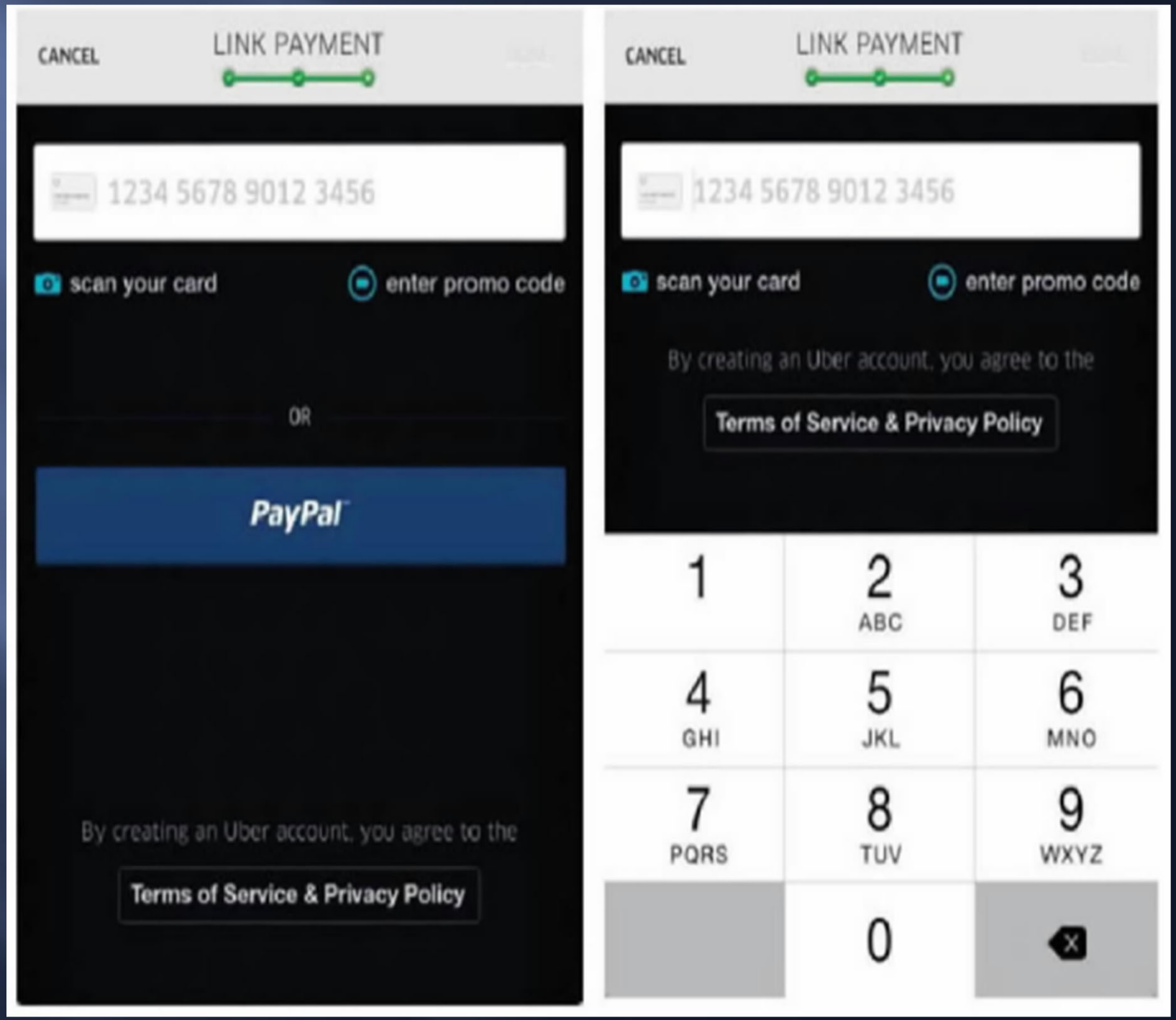
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1
2 ABC
3 DEF
4 GHI
5 JKL
6 MNO
7 PQRS
8 TUV
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Samples & Savings

TERMS | PRIVACY POLICY

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93930

I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy

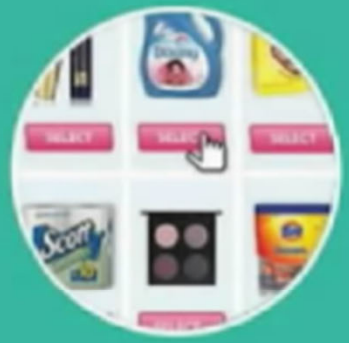
I AGREE to receive daily emails from SamplesandSavings and SweepstakesAlerts

This is correct, Continue! »

Getting Free Stuff Has Never Been Easier!

JOIN US!

Sign up and join our community of millions of users just like you on the prowl for samples, coupons, and freebies!



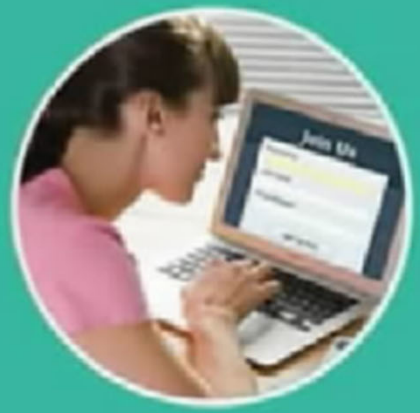
EXPLORE!

We will not only match you with products you are most interested, but you'll also be able to browse all samples we have available at the time.

SAVE BIG!

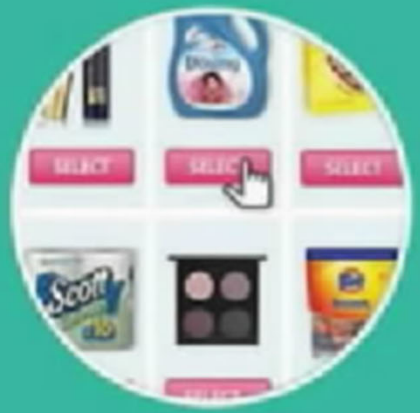
Let us provide you with freebies, trials, and samples that you'd typically be spending hard earned money on.

Getting Free Stuff Has Never Been Easier!



JOIN US!

Sign up and join our community of millions of users just like you on the prowl for samples, coupons, and freebies!



EXPLORE!

We will not only match you with products you are most interested, but you'll also be able to browse all samples we have available at the time.

SAVE BIG!

Let us provide you with freebies, trials, and samples that you'd typically be spending hard earned money on.

Shipping Information Required

Item #5160300095421

Complete your shipping information to continue towards your reward

First Name

Last Name

Street Address

ZIP Code

Telephone

Date of Birth:

MM DD 1923

Select Gender:

Male Female

I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy.

Continue »

Includes Express Shipping

NATIONAL CONSUMER CENTER

Program Requirements – Updated March 31, 2017: To earn an incentive, you must: 1) be a U.S. resident 18 years or older; 2) provide accurate and complete registration information; 3) complete the survey questions; 4) view optional offers; and 5) complete the requisite number of Silver, Gold and Platinum offers which are split into tier tiers based on the incentive's value. For Tier 1 incentives with a value of $100 or less, complete 1 Silver, 1 Gold and 2 Platinum offer. For Tier 2 incentives with a value of more than $100, complete 1 Silver, 1 Gold, and 3 Platinum offers. You must complete all offers within 20 days from when you complete your first offer. Completion of offers usually requires a purchase or entering into a paid subscription program for goods or services. Incentives are limited to one incentive of any kind per household (persons living at the same address) within any twelve calendar month period provided you must wait 24 calendar months after you claim a Tier 2 incentive before you can claim another Tier 2 incentive. The Representative Offer Chart describes the terms of several offers, including a description of the offer, the most commitment, ongoing obligations and how to cancel. We reserve the right to substitute a gift card of greater or equivalent value for any incentive. Failure to submit accurate registration information, complete the survey questions or comply with claim verification process will result in disqualification. SOLVING A PUZZLE, ANSWERING YOUR REGISTRATION INFORMATION, COMPLETING THE SURVEY OR VIEWING OPTIONAL OFFERS WITHOUT COMPLETING THE NUMBER OF REQUIRED OFFERS SPECIFIED ABOVE DOES NOT QUALIFY YOU FOR AN INCENTIVE. We verify your registration information and if it's inaccurate, the pages with the Gold, Silver and Platinum offers may not be displayed. If that happens, you won't be eligible to earn an incentive.

By participating, you agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy which includes your consent to our sharing your personally identifiable information with our Marketing Partners for which we may be compensated.

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Name on Card

Please enter your first and last name.

Card Number

Expiration Date

MM/YY

Security Code

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3-digits on back of card

Address

Please enter your billing address.

+ Add Unit # / Address Line 2

City

Please enter your billing city.

State

California

Postal Code

Please enter your billing postal code.

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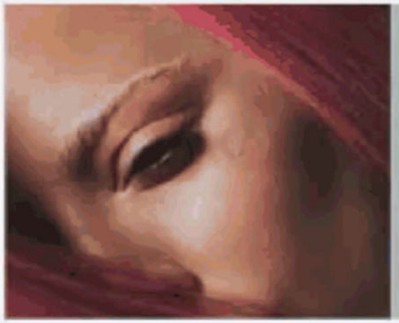

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2 Resale Tickets $250.0
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Notes From Seller
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Fees
$24.06 (Service Fee) x 2 $48
Order Processing Fee $2.

Delivery Update delivery FRE

Total $301.0

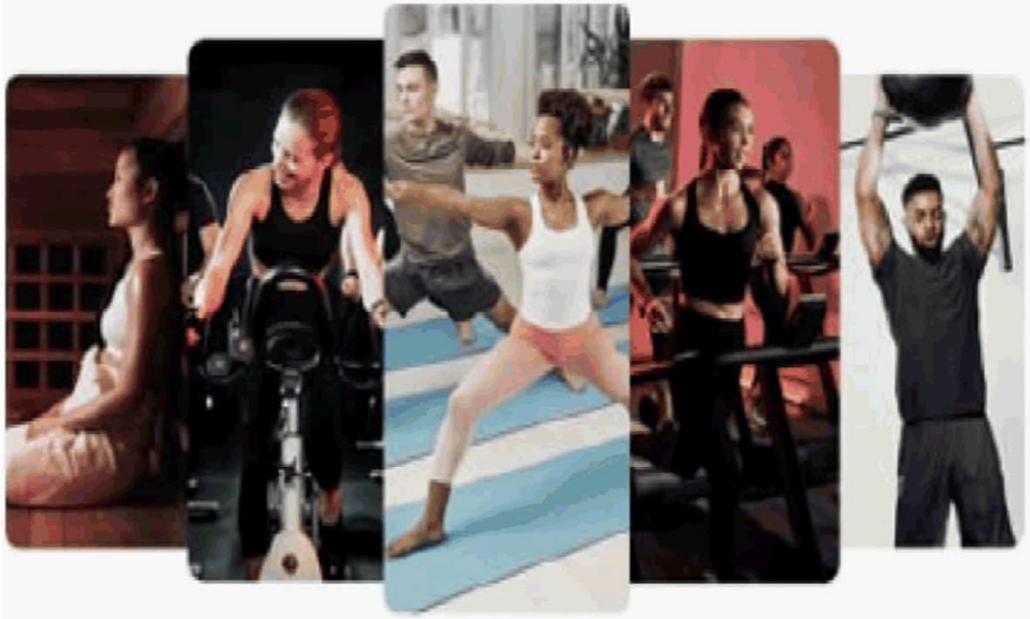
All Sales Final - No Refunds or Exchanges
By continuing past this page and clicking "Place Order", you agree to our Terms of Use.

Place Order

You're invited to join ClassPass!

Save $40 on your first month, plus your friend gets $40 when you join.

- Get access to top studio and wellness venues
- Save over 70% off drop in rates
- You're never locked in. Cancel anytime



Exclusive deal for friends of ClassPass

$40 OFF FIRST MONTH

Enter your email to continue

Email address

Continue

or

Sign up with Facebook

By clicking 'Sign up with Facebook' or 'Continue,' I agree to the Terms of Use and Privacy Policy.

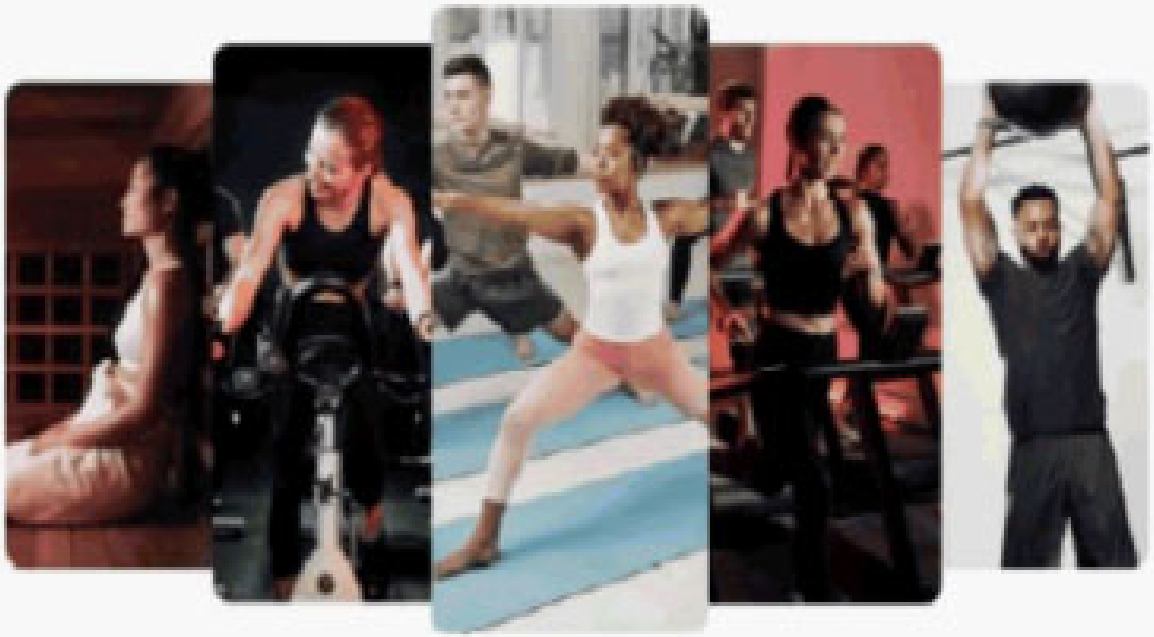
After first month, you'll auto-enroll in our $75/month plan. Change or cancel any time during your trial to not be charged.

I'm in **San Francisco**

You're invited to join ClassPass!

Save $40 on your first month, plus your friend **gets $40** when you join.

- Get access to top studio and wellness venues
- Save over 70% off drop in rates
- You're never locked in. Cancel anytime



Exclusive deal for friends of ClassPass

$40 OFF FIRST MONTH

What's your name?

First name

Last name

By signing up you agree to our Terms of Use and Privacy Policy.

Continue

After first month, you'll auto-enroll in our $75/month plan. Change or cancel any time during your trial to not be charged.

I'm in **San Francisco**

INCLUDED IN YOUR OFFER

1 month (and 45 credits) to book any classes you want.

With 45 credits, you can book 6 – 9 classes. The average class in San Francisco is 6 credits.

No commitments. **Cancel anytime.**

45-Credit Plan	$35.00 + Tax
Due today	**$35.00**

By purchasing through your friend's invitation, you are receiving a one-time discount of up to $40.00 off your first month. Adjusted price reflected below. Cannot be combined with other offers.

After first month, account will autorenew to the 45-credit plan membership monthly rate of $75 unless canceled before the end of trial period.

Gift can be applied towards monthly subscription rates only and not to other fees, such as late cancellation/missed class fees you incur or optional add-on classes/packs. Gifts recipient is responsible for the difference if gift is less than monthly fee and for applicable taxes. I agree to the ClassPass Gift Terms

Your saved billing information

Why do you need my credit card info?

Name on card

Jane Smith

Card number

•••• •••• •••• 4242

Exp date

2 / 22

CVC

•••

Postal code

11101

Powered by stripe

Received a ClassPass gift card?

I understand that my membership will automatically renew to the $75 per month plan plus applicable tax until I cancel. I agree to the Terms of Use and Privacy Policy.

Redeem now

Online and Mobile Contract Formation

- Trend: Continued hostility to implied contracts
  - *Chabolla v. ClassPass, Inc.*, _ F.4th _, 2025 WL 630813 (9th Cir. 2025)
  - *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005 (9th Cir. 2024) (enforceable)
    - *Morrison v. Yippee Entertainment, Inc.*, _ F. Supp. 3d _, 2024 WL 4647296 (S.D. Cal. Oct. 31, 2024) ("While the 'Terms of Service' hyperlink appears in blue font against a white background—a characteristic to which many courts look—the font is not underlined nor completely capitalized and is small in proportion to most of the text on the page.")
  - *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. 2024) (holding that a hyperlinked agreement provided inquiry notice of arbitration agreement)
  - *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023) (reversing order denying MTC arbitration because under the totality of the circumstances Klarna's checkout widget provided reasonably conspicuous notice of contractual terms, including arbitration)
  - *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023) (affirming MTC arbitration because California law does not require that corporate parties to a contract use their full legal names & Live Nation's ToS included repeated references to its common trade names such that a reasonable user could have identified Ticketmaster's full legal name)
  - *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 2022)
    - *Sifuentes v. Dropbox, Inc.*, 2021 WL 2673080 (N.D. Cal. June 29, 2022)
  - *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)
  - *Toth v. Everly Well, Inc.*, 118 F.4th 403 (1st Cir. 2024) (enforcing clickwrap)
  - *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 arbitration clause in mobile ToS)
  - *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
    - Ways to make future amendments enforceable

Arbitration & Mass Arbitration

- Arbitration and Class Action Waivers
  - *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)
  - *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023) (a district court must stay its proceedings while an interlocutory appeal on the issue of arbitrability is pending)
  - *Wu v. Uber Technologies, Inc.*, _ N.E.3d _, 2024 WL 4874383 (N.Y. 2024)
- Mass Arbitration
  - *Heckman v. Live Nation Entertainment, Inc.*, 120 F.4th 670 (9th Cir. 2024) (holding an amended arbitration provision changing the rules for mass arbitration to be procedurally and substantively unconscionable)
  - *MacClelland v. Cellco Partnership*, 609 F. Supp. 3d 1024 (N.D. Cal. 2022) (holding unconscionable a mass arbitration clause that provided that if 25 or more customers initiated dispute notices raising similar claims or brought by the same or coordinated counsel the claims would be arbitrated in tranches of 5 bellwether cases at a time, which the court concluded could take 156 years to resolve all claims at issue given the average time of 7 months to resolution of AAA claims), *appeal dismissed*, 2024 WL 5290897 (9th Cir. 2024)
  - *Wallrich v. Samsung Electronics America, Inc.*, 106 F.4th 609 (7th Cir. 2024)
  - *L'Occitane, Inc. v. Zimmerman Reed LLP*, 2024 WL 227181 (N.D. Cal. Apr. 12, 2024)
    - *L'Occitane, Inc. v. Zimmerman Reed LLP*, 2024 WL 2106957 (N.D. Cal. Apr. 25 2024)
  - *In re 23andMe, Inc. Customer Data Security Breach Litigation*, 2024 WL 4982986 (N.D. Cal. Dec. 4, 2024)
  - *In re Google Assistant Privacy Litigation*, Case No. 5:19-cv-04286-BLF, 2025 WL 510435 (N.D. Cal. Feb. 14, 2025) (rejecting Google's motion to reject a mass opt out request submitted by Labaton Keller Sucharow on behalf of 69,507 class members, notwithstanding individual signature requirement for opting out)
- 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)
  - *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 216 Cal. Rptr. 3d 627, 393 P.3d 85 (2017)
  - CPRA amendment
  - *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005 (9th Cir. 2024) (arbitration agreement was not substantively unconscionable due to its unenforceable ban on seeking public injunctive relief)
  - *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. 2024) (holding arbitration agreement enforceable)
- Strategies – mass vs. individual arbitration

Arbitration & Mass Arbitration

- Strategies – mass vs. individual arbitration
- Drafting Tips
  - *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (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 vs. Others
  - Review and update frequently
  - Consider the interplay between mass arbitration and multi-district litigation

INTERNET, AI & PRIVACY LAW AND LITIGATION: YEAR IN REVIEW

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