

# SURVEY OF ADDITIONAL IP AND TECHNOLOGY LAW DEVELOPMENTS

## I. PATENT DEVELOPMENTS

### A. *DELANO FARMS CO. V. CALIFORNIA TABLE GRAPE COMM'N*<sup>1</sup>

The United States Court of Appeals for the Federal Circuit held that an invention is not in public use if there is an expectation of secrecy,<sup>2</sup> and it established that use is only public if the invention is given with no limitation, restriction, or “injunction of secrecy.”<sup>3</sup> This ruling is distinguished from *Egbert v. Lippmann*, wherein the Supreme Court held that an invention is in public use if it is given to a third party to use, even if nobody else knows the invention is in use.<sup>4</sup>

The plaintiffs, three grape growers from California, filed suit against the United States Department of Agriculture (USDA) and the California Table Grape Commission (“Commission”), alleging that two patents on grapes, namely Scarlet Royal (U.S. Patent No. PP16,229) and Autumn King (U.S. Patent No. PP16,284), were invalid.<sup>5</sup> The patents were filed on September 28, 2004, making the critical date for public use September 28, 2003.<sup>6</sup> Before challenging the patents’ validity, the plaintiffs had purchased the patented varieties after they were made commercially available and obtained a license from the Commission, requiring that royalties be paid.<sup>7</sup> The plaintiffs argued that the contested varieties of grapes had been obtained and grown by two individuals prior to the critical date, thus constituting public use and invalidating the patents.<sup>8</sup>

In initial proceedings before the United States District Court for the Eastern District of California, the USDA was dismissed from the case on the grounds of sovereign immunity.<sup>9</sup> On appeal, the court held that the USDA waived immunity. As a result, the USDA was reinstated, and the

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1. 778 F.3d 1243 (Fed. Cir. 2015).

2. *Id.* at 1248–49.

3. *Id.* at 1248.

4. *Id.* (citing *Egbert v. Lippmann*, 104 U.S. 333, 336 (1881)).

5. *Id.* at 1245.

6. *Id.*

7. *Id.* at 1244.

8. *Id.*

9. *Id.*

case was remanded to the district court.<sup>10</sup> On remand, the district court found that there was no public use of the grapes prior to the critical date, and this ruling was affirmed on appeal to the Federal Circuit.<sup>11</sup>

As stated in 35 U.S.C. § 102(b), a patent should be found invalid if the invention is “in public use . . . in this country, more than one year prior to the date of the application for patent in the United States.”<sup>12</sup> This provision requires the invention’s use to be “accessible to the public or commercially exploited.”<sup>13</sup> For an invention to be accessible to the public, the public must reasonably believe that it is freely available, which requires considering the nature of the activity occurring in public, “the public’s access to and knowledge of the public use,” and the existence of a “confidentiality obligation imposed on persons who observed the use.”<sup>14</sup> This holding also applies to unaffiliated third parties, and a patent should not be invalidated if the third party’s use is secret or confidential.<sup>15</sup> But a third party’s use can be invalidating if no attempt is made to maintain confidentiality or to conceal the invention.<sup>16</sup> The public use of the invention is a question of law, which must be shown by clear and convincing evidence.<sup>17</sup>

In the case at hand, the use at issue stemmed from the unauthorized growing of vines by two third-party California grape growers, the Ludys.<sup>18</sup> One of the Ludys obtained samples of the patented plants at a convention from an employee of the USDA, Robert Klassen, who was unauthorized to give the samples.<sup>19</sup> Klassen told the Ludys to keep the plants private and not to let it get away from them.<sup>20</sup> The growers went so far as to perjure themselves in order to protect Klassen.<sup>21</sup> The plants were only shared with the other Ludy and the Ludy’s publicist, Richard Sandrini, both of whom were told to keep the plants a secret and not to sell any grapes until they

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10. *Id.*

11. *Id.*

12. 35 U.S.C. § 102(b) (2006).

13. *Delano Farms*, 778 F.3d at 1247 (citing *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 424 F.3d 1374, 1380 (Fed. Cir. 2005)).

14. *Id.* (citing *Bernhardt, L.L.C. v. Collezione Europa USA, Inc.*, 386 F.3d 1371, 1379 (Fed. Cir. 2004)).

15. *Id.* at 1247.

16. *Id.* (citing *Dey, L.P. v. Sunovion Pharms., Inc.*, 715 F.3d 1351, 1355 (Fed. Cir. 2013)).

17. *Id.* at 1246–47.

18. *Id.* at 1246.

19. *Id.* at 1245–46.

20. *Id.* at 1246.

21. *Id.*

were made commercially available.<sup>22</sup> The plants were visible from a public road but were not marked or labeled, and the variety could not be reliably ascertained from view.<sup>23</sup>

The plaintiffs maintained three main arguments to support that the grapes were in public use. The first one is that the plants were shared with the other Ludy without limitation, restriction, or injunction to secrecy and that this constituted a lack of confidentiality.<sup>24</sup> This contention was rejected on the grounds that the other Ludy knew and had an incentive to keep the plants a secret.<sup>25</sup> Lying to protect Klassen was cited as support.<sup>26</sup> No explicit agreement to confidentiality was needed; the expectation of secrecy was enough.<sup>27</sup> The court further distinguished the case from *Egbert*, noting that while the inventor in *Egbert* had relinquished control over his invention, the continued confidentiality of the plants underscored the Ludys' control.<sup>28</sup>

Next, the plaintiffs asserted that disclosing the growth of the grapes to Sandrini was public use.<sup>29</sup> This argument was also rejected because Sandrini, like the others, had incentives to keep the plants a secret.<sup>30</sup>

Finally, the plaintiffs argued that the visibility of the plants from a public road made the use public.<sup>31</sup> This assertion was also rejected because the variety of the plants could not be reliably ascertained from the road, and there was no evidence that anyone had recognized them.<sup>32</sup> The vines were unlabeled, and the amount of growth of the contested plants was minimal relative to the total growth on the Ludys' farms.<sup>33</sup>

Based on this reasoning, the Federal Circuit upheld the district court's ruling that the plants were not in public use one year prior to the filing of the patents at issue and that the patents were valid.<sup>34</sup>

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22. *Id.*

23. *Id.* at 1250.

24. *Id.* at 1248.

25. *Id.*

26. *Id.*

27. *Id.* (citing *Dey, L.P. v. Sunovion Pharms., Inc.*, 715 F.3d 1351, 1357 (Fed. Cir. 2013)).

28. *Id.* at 1249.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 1249.

34. *Id.* at 1250.

B. *HELPERICH PATENT LICENSING, LLC v. NEW YORK TIMES CO.*<sup>35</sup>

The United States Court of Appeals for the Federal Circuit held that third parties practicing unlicensed claims complementary to licensed technology are not within the scope of the patent exhaustion doctrine.<sup>36</sup>

In *Helperich Patent Licensing, LLC v. New York Times Co.*, Helperich Patent Licensing, LLC (“Helperich”) licensed its patent portfolio to all mobile handset manufacturers in the United States.<sup>37</sup> The claims within Helperich’s portfolio related to the transfer of information to wireless handsets, and were divided between handset claims (“apparatus and methods relating to handsets”) and content claims (“systems and methods for handling information and sending it to handsets”).<sup>38</sup> The licenses limited the manufacturers to the use of the handset claims, and explicitly denied any grant of rights with respect to the content claims.<sup>39</sup> Helperich filed suit in the United States District Court for the Northern District of Illinois against New York Times, Co. (“NYT”) and various other content providers, alleging infringement of its content claims.<sup>40</sup> The district court granted summary judgment in favor of NYT on the grounds of non-infringement based on patent exhaustion.<sup>41</sup>

The patent exhaustion doctrine is a non-codified rule, which asserts that the authorized sale of a patented item eliminates any legal restrictions on the purchaser or any subsequent user to use or sell that item.<sup>42</sup> The district court held that, by licensing handset claims to the manufacturers, Helperich exhausted any rights to assert the claims against the handset purchasers and content providers.<sup>43</sup> In essence, the court found that because the utility of handset claims is contingent on the use of content claims, the licensing of the handset claims extends patent exhaustion to the content claims as well.<sup>44</sup>

On appeal, the Federal Circuit held that the doctrine of patent exhaustion does not prevent Helperich from asserting rights on the

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35. 778 F.3d 1293 (Fed. Cir. 2015).

36. *Helperich Patent Licensing, LLC v. New York Times Co. (Helperich I)*, 778 F.3d 1293 (Fed. Cir. 2015).

37. *Id.* at 1296.

38. *Id.* at 1295.

39. *Id.* at 1297.

40. *Helperich Patent Licensing, LLC v. New York Times, Co. (Helperich II)*, 965 F. Supp. 2d 971, 973 (N.D. Ill. 2013).

41. *Id.* at 981.

42. *Helperich I*, 778 F.3d at 1301.

43. *Id.* at 1295.

44. *Id.* at 1298.

unlicensed content claims, even when their use occurs in conjunction with licensed handset claims.<sup>45</sup> The Federal Circuit cited the Supreme Court's decision in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, which distinguished the application of the doctrine "between situations where related, complementary products are both patented and situations where only one is patented."<sup>46</sup> Morgan Envelope Co. ("Morgan"), which possessed corresponding patents on a toilet paper dispenser and oval-shaped toilet paper roll, claimed infringement by Albany Perforated Wrapping Paper Co. ("Albany") for its authorized sale of Morgan dispensers with unauthorized Albany toilet rolls.<sup>47</sup> The Court ultimately invalidated Morgan's toilet roll patent, and held that because the perishable element of its technology was not itself patentable, Morgan had exhausted its right to renewal through the authorized sale of its dispensers.<sup>48</sup>

The Supreme Court explicitly distinguished the facts of *Morgan*, where the perishable technology was unpatentable, from those of *Aiken v. Manchester Print Works*, where two distinct patented inventions were used together.<sup>49</sup> In *Aiken*, the Circuit Court for the District of New Hampshire held that the authorized sale of a knitting machine and needles did not eliminate infringement liability concerning manufacture of replacement needles, because the needles themselves were separately patentable.<sup>50</sup>

The Federal Circuit synthesized *Morgan* and *Aiken* to mean that an authorized buyer of product X cannot, by virtue of his purchase, prevent patent infringement rights on product Y, despite the fact that Y is essential to X's utility.<sup>51</sup>

The Federal Circuit further rejected the policy considerations of "practical enhanced utility," which asserts that patent exhaustion should extend to complementary claims because they are inextricably linked to the utility of the licensed technologies.<sup>52</sup> The court found that the approach would "extend exhaustion far beyond the doctrine's traditional scope" and

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45. *Id.* at 1301.

46. *Id.* at 1303 (citing *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U.S. 425, 435 (1894)).

47. *Id.* (citing *Morgan Envelope Co.*, 152 U.S. at 431–32).

48. *Id.*

49. *Id.* at 1304 (citing *Aiken v. Manchester Print Works*, 1 F. Cas. 245 (C.C.D.N.H. 1865)).

50. *Id.* (citing *Aiken*, 1 F. Cas. at 247).

51. *Id.*

52. *Id.* at 1306.

explained how with a “walkie-talkie” example.<sup>53</sup> If patent exhaustion were extended based on “practical enhanced utility,” a single licensed purchase of a “walkie-talkie,” whose utilization is dependent on multiple persons owning the same patented device, would extend infringement protection to an entire group of non-purchasers to make, sale, or use unauthorized copies.<sup>54</sup> The court further held that such an approach would discourage innovation through unachievable patent pricing because patentees will likely set exorbitant prices for the first sales to account for their terminated patent rights to subsequent users.<sup>55</sup>

Therefore, in light of *Morgan* and *Aiken*, as well as policy considerations, the Federal Circuit reversed the district court decision and held that the patent exhaustion doctrine does not extend the elimination of rights against licensed handset claims to complementary content claims against a third party.<sup>56</sup>

C. *PAR PHARMACEUTICAL, INC. V. TWI PHARMACEUTICALS, INC.*<sup>57</sup>

The United States Court of Appeals for the Federal Circuit held that the United States District Court for the District of Maryland erred in its application of the inherency doctrine on Par Pharmaceutical’s (“Par”) U.S. Patent No. 7,101,576 (‘576 patent), and vacated and remanded the district court’s judgment of invalidity.<sup>58</sup>

In 1993, Bristol-Myers Squibb began marketing an oral suspension of micronized megestrol, named Megace OS, for the treatment of patients suffering from anorexia, cachexia, or loss of body mass.<sup>59</sup> Megace OS proved to be a commercial success.<sup>60</sup> Par applied for and received approval to market a generic micronized megestrol formulation and further developed megestrol nanoparticles.<sup>61</sup> Par’s nanoscale formulation, Megace ES, exhibited a reduced food effect and was indicated for use “without regard to meals,” which is especially important for AIDS patients who have substantially reduced appetites.<sup>62</sup> TWi Pharmaceuticals (“TWi”) filed an Abbreviated New Drug Application under the Hatch-Waxman Act,

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1311.

57. 773 F.3d 1186 (Fed. Cir. 2014).

58. *Id.* at 1188.

59. *Id.* at 1188–89.

60. *Id.* at 1189.

61. *Id.*

62. *Id.* at 1189–90.

seeking approval to sell a generic version of nanosized megestrol and asserting that the '576 patent was invalid or would not be infringed by the sale of their nanosized megestrol formulation.<sup>63</sup>

Par initiated a patent infringement action under 35 U.S.C. § 271(e)(2)(A),<sup>64</sup> and in response, TWi moved for summary judgment.<sup>65</sup> The district court relied on the inherency doctrine to rule that although TWi had failed to prove that Megace OS's bioavailability problem or food effect was known in the art, the patent challenger had shown that all the elements of the claimed formulation were disclosed in the prior art.<sup>66</sup> The trial court therefore concluded that the food effect was an inherent feature of nanosized megestrol, even if the existence of a food effect was previously unknown in the prior art.<sup>67</sup> The court also found that there was sufficient motivation to combine the prior art references to yield the nanoparticles formulation.<sup>68</sup>

The Federal Circuit reviewed the district court's ruling of obviousness *de novo* and its factual findings for clear error.<sup>69</sup> Obviousness is a question of law based on underlying factual determinations of the *John Deere* factors: (1) the scope and content of prior art; (2) differences between prior art and claims; (3) the level of ordinary skill in the art; and (4) objective indicia of nonobviousness.<sup>70</sup>

The Federal Circuit first addressed whether TWi had satisfied its burden of proof that all claims were in the prior art.<sup>71</sup> It found that the district court had correctly determined that there was no known food effect for megestrol in the prior art, but concluded that the trial court had erred in its inherency determination.<sup>72</sup> The court recognized that, based on precedent, "inherency may supply a missing claim limitation in an obviousness analysis."<sup>73</sup> However, the court further provided that "[a] party must . . . meet a high standard in order to rely on inherency" and noted that "the limitation at issue necessarily must be present, or the natural

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63. *Id.* at 1190.

64. *Id.*

65. *Id.* at 1191.

66. *Id.* at 1192.

67. *Id.*

68. *Id.*

69. *Id.* at 1194.

70. *Id.* at 1193 (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966)).

71. *Id.* at 1194.

72. *Id.*

73. *Id.* at 1194–95.

result of the combination of elements explicitly disclosed by the prior art.”<sup>74</sup>

Applying this standard, the Federal Circuit concluded that the district court’s broad judgment regarding the effect of particle size on bioavailability and food effect were not proportional with the claimed limitations under dispute, because it had not required TWi to offer evidence that a decrease in particle size improves bioavailability.<sup>75</sup> Based on the record, the court found that TWi had failed to provide clear and convincing evidence to support that the claimed food limitation was necessarily present in the prior art, and therefore vacated the district court’s inherency analysis and remanded the case to determine whether the limitation was inherent in the disputed claim.<sup>76</sup>

The Federal Circuit then analyzed the remaining factors in an obviousness analysis: (1) whether one of ordinary skill in the art would have motivation to combine the prior art to arrive at the claimed invention, and (2) whether one of ordinary skill in the art would have reasonable expectation of success in doing so.<sup>77</sup> The court affirmed the district court’s ruling that the viscosity and inter-patient variability problems associated with micronized megestrol were motivation to combine megestrol with nanoparticle technology.<sup>78</sup> The court further affirmed the lower court’s judgment that a person skilled in the art would have had a reasonable expectation of success in using nanoparticle technology with megestrol to improve bioavailability, decrease viscosity, and reduce inter-patient variability.<sup>79</sup>

Finally, the Federal Circuit considered Par’s evidence of objective indicia of nonobviousness.<sup>80</sup> The court concluded that Par’s claims of unexpected results—reduced food effect and patient weight gain—did not rebut the *prima facie* case of obviousness and the nanosized megestrol formulation did not fulfill a long-felt need.<sup>81</sup>

Despite upholding the district court’s rulings on the motivation to combine, reasonable expectation of success, and unexpected results, the Federal Circuit vacated the finding of obviousness and remanded the case

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74. *Id.* at 1195–96.

75. *Id.* at 1196.

76. *Id.*

77. *Id.*

78. *Id.* at 1197–98.

79. *Id.* at 1199.

80. *Id.* at 1199–1200.

81. *Id.* at 1200.



to the district court to address if TWi had presented clear and convincing evidence that demonstrates the food effect *as claimed* is *necessarily present* in the prior art combination.<sup>82</sup>

D. *SUPREMA, INC. v. ITC*<sup>83</sup>

The United States Court of Appeals for the Federal Circuit, in an en banc opinion, held valid the International Trade Commission's (ITC or "Commission") interpretation of 19 U.S.C. § 1337 ("Section 337") as allowing the exclusion of goods that do not directly infringe on a patent until combined with another product after importation.<sup>84</sup> The court based its ruling on the well-known *Chevron* standard of review, which gives deference to a federal agency's interpretation of a relevant statute as long as (1) Congress has not directly spoken on the issue at hand and (2) the agency's actions are based on a reasonable and permissible interpretation of the statute.<sup>85</sup>

In May 2010, Cross Match Technologies, Inc. ("Cross Match") filed a patent infringement complaint with the ITC against Suprema and Mentalix for fingerprint scanners sold within the United States.<sup>86</sup> The complaint alleged Suprema and Mentalix had infringed on Claim 19 of U.S. Patent No. 7,203,344 ('344 patent), which related to a "method for capturing and processing a fingerprint image."<sup>87</sup> Suprema is a Korean company that manufactured the scanners and imported them to the United States, where Mentalix installed software and then sold the scanners.<sup>88</sup> The scanners did not work without the installed software and the combination of the physical scanners and the installed software was alleged to have infringed Claim 19.<sup>89</sup>

The ITC found that the scanners equipped with the installed software did directly infringe on Cross Match's patent. By exerting its powers granted under Section 337, the Commission issued a limited exclusion order preventing Suprema from importing the scanners.<sup>90</sup> It also issued a cease and desist order to prevent Mentalix from selling the scanners.<sup>91</sup> The

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82. *Id.*

83. 796 F.3d 1338 (Fed. Cir. 2015).

84. *Id.* at 1340.

85. *Id.* at 1346 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

86. *Id.* at 1341.

87. *Id.*

88. *Id.* at 1341–42.

89. *Id.* at 1342.

90. *Id.* at 1343.

91. *Id.* at 1344.

ITC ruled that Mentalix directly infringed on Claim 19 of the '344 patent by integrating the software with the scanners and by its subsequent use within the United States.<sup>92</sup> The Commission further found Suprema liable for induced infringement through its willful blindness in collaborating with Mentalix to import and sell the scanners.<sup>93</sup> Suprema and Mentalix appealed the ITC's decision as well as its exclusion and cease and desist orders.<sup>94</sup> On appeal, the Federal Circuit reversed the Commission's decision and held that in order for an exclusion order to be enacted, the infringement must occur at the time of the product's importation.<sup>95</sup> In response, Cross Match and the ITC petitioned for a rehearing en banc.<sup>96</sup>

The disputed issue in the rehearing was whether or not the ITC has the power to issue an exclusion order on products that do not infringe a patent at the time of importation, but only infringe when combined with another necessary component after importation into the United States.<sup>97</sup> In its decision, the Federal Circuit relied on *Chevron*, which established a two-part test for reviewing an agency's administration of a statute.<sup>98</sup> The first threshold inquiry is "whether Congress has directly spoken to the precise question at issue."<sup>99</sup> If the answer is yes, then the agency must follow its unambiguous direction.<sup>100</sup> If the answer is no, however, the court must address the second question of "whether the agency's answer [to the precise question at issue] is based on a permissible construction of the statute."<sup>101</sup> If and only if this is found to be the case, the agency's ruling should be upheld.<sup>102</sup>

Applying the first step of the *Chevron* framework, the Federal Circuit examined the language of Section 337,<sup>103</sup> which permits a stop at the border of "articles that infringe" on a valid United States patent.<sup>104</sup> The court found that there was textual uncertainty as to whether the statute applied to inducement of post-importation infringement, and Congress

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92. *Id.* at 1342–43.

93. *Id.* at 1343.

94. *Id.* at 1344.

95. *Id.*

96. *Id.*

97. *Id.* at 1345.

98. *Id.* at 1346.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1345.

had not provided an unambiguous resolution.<sup>105</sup> Further, the court found that there had been no unambiguous statements on whether this section applied to induced infringement or to direct infringement.<sup>106</sup>

In the second part of the analysis, the Federal Circuit considered whether the ITC's interpretation of Section 337 was permissible.<sup>107</sup> The court stressed that the Commission's interpretation did not have to be the best one—it just had to be reasonable.<sup>108</sup> Based on the language of Section 337, the court ruled that the ITC was permitted to look at actions that occurred after the product's importation to determine if it would be sold and thus infringe on the patent.<sup>109</sup> The Federal Circuit further noted that there was nothing in the legislative or statutory history that prevented the ITC from exercising this power to prevent unfair practices and therefore deferred to the Commission's interpretation.<sup>110</sup>

Based on this reasoning, the Federal Circuit overturned its panel's prior decision to remove the exclusion order and remanded the case.<sup>111</sup> In his dissent, Judge Dyk criticized the decision on the grounds that the scanners could be used without the software from Mentalix, and thus should not have been excluded.<sup>112</sup> Judge O'Malley also dissented, contending that the wording of Section 337 is unambiguous, and therefore the ITC was not entitled to *Chevron* deference.<sup>113</sup>

## II. COPYRIGHT DEVELOPMENTS

### A. *SAM FRANCIS FOUNDATION V. CHRISTIES, INC.*<sup>114</sup>

The United States Court of Appeals for the Ninth Circuit, in an en banc decision, held that a provision in the California Resale Royalties Act (“the Royalty Act”) regulating sales outside the state of California facially violated the dormant Commerce Clause of the United States Constitution.<sup>115</sup> The court further held that the offending clause was

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105. *Id.* at 1346.

106. *Id.* at 1348.

107. *Id.* at 1349.

108. *Id.*

109. *Id.*

110. *Id.* at 1350.

111. *Id.* at 1352–53.

112. *Id.* at 1353–54.

113. *Id.* at 1354.

114. 784 F.3d 1320 (9th Cir. 2014).

115. *Id.* at 1322.

severable from the remainder of the Act because it was “grammatically, functionally, and volitionally separable.”<sup>116</sup>

In 2011, Plaintiffs, artists and estates of artists, brought three class actions against Defendants, two New York auction houses (Sotheby’s, Inc. and Christie’s, Inc.), and an online retailer (eBay, Inc.).<sup>117</sup> The class actions alleged that Defendants, acting as agents of art sellers, violated the Royalty Act when they failed to pay mandatory royalties on sales due under the statutory provisions.<sup>118</sup> The Royalty Act requires the seller of fine art to withhold five percent of the amount of the sale and pay the artist if (1) the seller is a resident of California or (2) the sale takes place in California.<sup>119</sup> If the artist cannot be located within 90 days, the seller or agent must transfer the royalty to the California Arts Council.<sup>120</sup> The district court dismissed the actions in favor of the auction houses, holding that the entire Royalty Act must be stricken as unconstitutional because the invalid portion of the Act could not be severed.<sup>121</sup> Plaintiffs appealed, and after a three-judge panel heard oral arguments, the Ninth Circuit decided to hear the case en banc.<sup>122</sup>

The Ninth Circuit en banc affirmed the trial court in part by finding the first clause of the Act, specifically the requirement of payment of royalties to the artist where the seller is a resident of California, violated the dormant Commerce Clause.<sup>123</sup> The Commerce Clause of the United States Constitution assigns to Congress the authority “to regulate Commerce with foreign Nations, and among the several States.”<sup>124</sup> Implicit in this affirmative grant is a negative component, referred to as the dormant Commerce Clause, which places a limitation on the power of states by prohibiting “discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce.”<sup>125</sup> In effect, the dormant Commerce Clause precludes individual states from applying state statutes to transactions that take place entirely outside the states’ borders.<sup>126</sup> The Ninth Circuit reasoned that because the first clause of the

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116. *Id.* at 1325.

117. *Id.* at 1322.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1323.

123. *Id.*

124. *Id.*

125. *Id.* (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992)).

126. *Id.*

Act requires a California resident to pay royalties to artists for selling their artwork “even if the [artwork], the artist, and the buyer never traveled to, or had any connection with, California,” it regulates sales outside the state borders and thus violates the dormant Commerce Clause.<sup>127</sup>

In reviewing whether the invalid clause could be severed from the rest of the Act, the Ninth Circuit reversed the district court’s decision and held that the clause was severable.<sup>128</sup> The court first established that severability is a matter of state law, and in California, an invalid provision can be severed as long as it does not affect other valid ones.<sup>129</sup> Specifically, an invalid provision can be severed if it is “grammatically, functionally, and volitionally separable.”<sup>130</sup>

Applying California’s rule of severance, the court determined that the revised statute would read: “Whenever a work of fine art is sold and . . . the sale takes place in California, the seller or the seller’s agent shall pay to the artist of such work of fine art or to such artist’s agent 5 percent of the amount of such sale” (severed clause replaced with ellipsis).<sup>131</sup> The court reasoned that (1) grammatical separability exists because the invalid part can be removed without affecting the wording or coherence of what remains, (2) functional separability exists because the remainder of the statute is complete in itself, and (3) volitional separability exists because the remainder would have been adopted by legislature had it foreseen the partial invalidation of the statute.<sup>132</sup> The Ninth Circuit therefore held that the offending provision was severable from the remainder of the Act.<sup>133</sup> It then returned the case back to the circuit court’s three-judge panel for further review of the remaining issues.<sup>134</sup>

In a concurring opinion, Judge Berzon agreed that the Act was unconstitutional as applied to out-of-state art sales conducted by out-of-state agents, but questioned the majority’s decision on whether the Act is unconstitutional as applied to out-of-state art sales conducted by California residents.<sup>135</sup> A partial concurrence, partial dissent by Judge Reinhardt suggested that the majority was beyond scope in its decision by addressing a “question unnecessary to the resolution of the case,” given

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127. *Id.*

128. *Id.* at 1325.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1325–26.

133. *Id.* at 1325.

134. *Id.* at 1326.

135. *Id.* at 1334 (Berzon, J., concurring).

that the auction houses were not Californian, and further dissented that the clause obligating California residents to pay royalty on out-of-state transactions remains constitutional.<sup>136</sup>

B. *FOX NEWS NETWORK, LLC V. TVEYES, INC.*<sup>137</sup>

The United States District Court for the Southern District of New York held that TVEyes, a media-monitoring service company, engaged in fair use only within a certain subset of its complementary services.<sup>138</sup> Fair use is an affirmative defense to copyright infringement, which permits a user to use copyrighted materials without permission of the copyright owner when “necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful arts.’”<sup>139</sup> Based on the four guiding factors for a fair use defense, provided by the Copyright Act,<sup>140</sup> the court determined that TVEyes’s archiving function is fair use; its e-mail function, if provided with certain protective measures, may be fair use; but its downloading and “Date-Time Search” functions are not fair use.<sup>141</sup>

In 2012, Fox News Network, LLC (“Fox News”) brought an action against TVEyes under the Copyright Act, claiming infringement of its copyrighted content and seeking damages and an injunction barring TVEyes from copying and distributing clips of Fox News programs.<sup>142</sup> Particularly, Fox News alleged that, by making its content available to TVEyes subscribers, TVEyes was diverting potential licensees, website visitors, and therefore revenue, from Fox News.<sup>143</sup> TVEyes asserted the affirmative defense of fair use and, in 2014, the parties cross-moved for summary judgment.<sup>144</sup> The court upheld TVEyes’s fair use defense for its core function, but reserved judgment with respect to the four aforementioned features.<sup>145</sup>

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136. *Id.* at 1326 (Reinhardt, J., dissenting).

137. 124 F. Supp. 3d 325, 327 (S.D.N.Y. 2015).

138. *Id.*

139. *Id.* at 330.

140. The Copyright Act provides four guiding factors for evaluating a fair use defense: (1) the purpose and the character of the use, and whether the new work is “transformative;” (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in the relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. ch. 1.

141. *Fox News*, 124 F. Supp. 3d at 337.

142. *Id.* at 327.

143. *Id.* at 330.

144. *Id.*

145. *Id.*

To resolve the parties' renewed cross-motions for summary judgment regarding TVEyes's four complimentary services, the court requested additional discovery and renewed briefing from each party to address whether each function in question (1) was integral to TVEyes's transformative purpose, and (2) threatened Fox News's derivative business.<sup>146</sup>

With regard to TVEyes's archiving function, the court reasoned that it was transformative because it "convert[ed] copyrighted works into a research tool to further learning," allowing its subscribers to "research, critici[ze], and comment."<sup>147</sup> The court found that TVEyes's ability to archive video clips is integral to its service, because requiring users to go through repeated searches every time they want to view previously identified clips would place "needless obstacles" in the path of prospective users, and would "sharply curtail" the value of TVEyes's service.<sup>148</sup> Further, the court found that TVEyes's practice of archiving video clips to remain stored beyond thirty-two days and to facilitate successive reference was integral to its service and its "transformational purpose of media monitoring."<sup>149</sup> Finally, the court noted that Fox News had failed to identify any actual or potential market harm arising from TVEyes's archiving services.<sup>150</sup>

Next, the court found that TVEyes's e-mailing feature may be essential for its users to realize the benefits of its transformative service, but there is also substantial potential for abusive.<sup>151</sup> The court acknowledged that e-mailing of URL links allows information to reach the individuals who are about to engage in news reporting, commentary, criticism, teaching, scholarship, research, and other fair uses permitted by the Copyright Act under § 107.<sup>152</sup> However, TVEyes's e-mailing feature did not effectively discriminate between sharing with co-workers and sharing with friends.<sup>153</sup> Further, the court reasoned that this type of indiscriminate sharing may result in TVEyes becoming a substitute for Fox's own website, which would deprive Fox of its advertising revenue.<sup>154</sup>

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146. *Id.* at 327.

147. *Id.* at 334 (citing *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 394 (S.D.N.Y. 2014)).

148. *Id.* at 333.

149. *Id.* at 334.

150. *Id.*

151. *Id.* at 335.

152. *Id.*

153. *Id.*

154. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

Therefore, the court held that, unless TVEyes meets its burden by developing necessary protections, its e-mailing function cannot be considered fair use.<sup>155</sup>

The court then held that TVEyes's downloading function was not fair use because it went well beyond its transformative services of searching and indexing.<sup>156</sup> Although TVEyes claimed that downloading was "absolutely critical" because it allowed for offline use and improved efficiency by enabling the subscribers to organize related clips into their computers,<sup>157</sup> the court found the downloading function was not "sufficiently related" to TVEyes's valuable functions and poses undue danger to content-owners' copyrights.<sup>158</sup> Moreover, the court commented that, although the downloading function is convenient, "convenience alone is not ground for finding fair use."<sup>159</sup>

Finally, the court found that TVEyes's "Date-Time Search" function was also not fair use because it duplicates Fox's existing functionality and is thereby likely to be detrimental to Fox News's website traffic and sales by its licensing agents.<sup>160</sup> Specifically, this function allows users to retrieve videos from a specific network based on the date and time of the broadcast. The court dismissed TVEyes's contention that its "Date-Time Search" was a necessary complement to its keyword search, and instead held that it was a content delivery tool because users need to know in advance what they seek.<sup>161</sup> The court therefore held that TVEyes's Date-Time Search function was not transformational, and users should thus purchase the desired clip from Fox News or its licensing agents.<sup>162</sup>

Based on the analysis above, the court concluded that TVEyes' archiving function did qualify as fair use; its e-mailing feature, with specific protective measures, may qualify as fair use; whereas its downloading and "Date-Time Search" functions did not qualify as fair use.

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155. *Id.*

156. *Id.* at 336 (citing *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 498, (2001); *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 651 (S.D.N.Y. 2013); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 337.

161. *Id.*

162. *Id.*



C. *SQUARE RING, INC. V. DOE*<sup>163</sup>

The United States District Court for the District of Delaware denied UStream's motion for summary judgment under the DMCA's safe harbor provisions against Square Ring, Inc. ("Square Ring"). The court denied the motion because the following three questions of fact still existed: whether UStream was "willfully blind" to the infringement, whether notices provided by Square Ring to Ustream were "red flag knowledge," and whether UStream's delayed response violated its need to "act expeditiously" under the Digital Millennium Copyright Act.<sup>164</sup>

Square Ring, a promoter of boxing events, filed suit against John Does 1–10, UStream.TV Inc., and UStream.TV.COM ("UStream"), seeking damages and injunctive relief for copyright infringement.<sup>165</sup> Square Ring alleged that UStream transmitted a boxing broadcast to which Square Ring owned the copyright.<sup>166</sup> Square Ring further alleged that UStream did not immediately remove or disable access to that broadcast after being notified of infringement.<sup>167</sup> UStream filed a motion for summary judgment under the DMCA's safe harbor provisions.<sup>168</sup>

Square Ring is a boxing promotional company that acquires the rights of boxing matches and licenses distribution rights to third parties such as television networks, bars, and restaurants.<sup>169</sup> Square Ring thus acquired the copyright of a complete March 21, 2009 boxing broadcast.<sup>170</sup> UStream is a user-generated live-streaming website that allows its users to view and share content through its site and services.<sup>171</sup> UStream requires its users to agree to its Terms of Service, has a designated copyright agent pursuant to the DMCA, and has a Content Monitoring Team that processes infringement notices.<sup>172</sup> UStream's Terms of Service expressly prohibit users from transmitting infringing content and were in place at the time of the broadcast.<sup>173</sup>

Anticipating possible infringing uses of its March 21 broadcast, Square Ring sent an infringement notice to UStream on March 17, 2009,

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163. No. CV 09-563 (GMS), 2015 WL 307840 (D. Del. Jan. 23, 2015).

164. *Id.* at \*6–7.

165. *Id.* at \*1.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at \*1–2.

173. *Id.*

demanding all access to the broadcast be blocked.<sup>174</sup> In the alternative, Square Ring demanded its own content takedown tool or appropriate staffing be made available to promptly remove infringing material upon notice.<sup>175</sup> UStream responded and asked for specific information in order to accurately identify the possibly infringing stream.<sup>176</sup> Square Ring reiterated its demands on March 18, 2009. As a result, UStream employees searched through all content on the website, removing or disabling material identified in response to Square Ring's notices.<sup>177</sup> Square Ring sent an additional email on March 20, 2009 titled "FOURTH INFRINGEMENT NOTICE," claiming UStream had not provided an adequate response to Square Ring's requests for a content takedown tool or appropriate staffing.<sup>178</sup>

On March 21, Square Ring's third party monitoring agent detected three URLs streaming the boxing broadcast and sent UStream a takedown notice.<sup>179</sup> On the evening of March 23, UStream disabled all three identified channels.<sup>180</sup> UStream asserted that it should be awarded summary judgment because there was no genuine issue of material fact whether UStream met the safe harbor requirements under the DMCA.<sup>181</sup> Square Ring asserted, instead, that a reasonable juror could conclude that UStream did not meet the safe harbor requirements because the March 21 broadcast was not expeditiously removed.<sup>182</sup>

To determine whether a reasonable juror could conclude that UStream did not meet the DMCA's safe harbor requirements, the court relied on precedent from the Second Circuit.<sup>183</sup> The court found that Congress enacted the DMCA to enforce copyrights on the Internet.<sup>184</sup> The court also rejected Square Ring's assertion that Congress had not intended the DMCA's safe harbor provisions to apply to live streaming.<sup>185</sup> Finally, the court found that UStream met all three threshold requirements needed to qualify for protection under the DMCA's safe harbor provisions.<sup>186</sup> The

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174. *Id.* at \*2.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at \*2.

179. *Id.* at \*3.

180. *Id.*

181. *Id.* at \*4.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at \*5.

court concluded that UStream was a service provider, had reasonably implemented a policy against repeat infringers, and allowed copyright holders to use standard technical means to identify protected copyright works.<sup>187</sup>

The court held that questions of fact still existed regarding the requirements for specific safe harbor protection under 17 U.S.C. § 512(c) for user-generated content.<sup>188</sup> Under these requirements, even if ISPs do not have actual knowledge of infringing content, they can lose their safe harbor protections if they are aware of a high probability of infringement and do not confirm that fact; this is known as willful blindness.<sup>189</sup> If ISPs obtain actual knowledge of claimed infringement, they must work “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”<sup>190</sup> ISPs can only obtain knowledge of infringement with DMCA-compliant takedown notices.<sup>191</sup> The court held that material questions of fact still existed with respect to whether UStream was willfully blind or had actual red flag knowledge.<sup>192</sup> Furthermore, because of a complete lack of legal precedent for this factual situation, the court was not willing to make a factual determination on summary judgment as to whether UStream acted expeditiously as required by the DMCA.<sup>193</sup> Therefore, the court denied UStream’s motion for summary judgment.<sup>194</sup>

### III. TRADEMARK DEVELOPMENTS

#### A. *B&B HARDWARE, INC. v. HARGIS INDUSTRIES, INC.*<sup>195</sup>

The Supreme Court held that, so long as the ordinary conditions for issue preclusion are met, Trademark Trial and Appeal Board (TTAB) decisions may ground issue preclusion in trademark infringement proceedings.<sup>196</sup>

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187. *Id.* at \*5–6.

188. *Id.* at \*7.

189. *Id.* (citing *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012)).

190. 17 U.S.C. § 512(c)(1)(C).

191. *Square Ring*, 2015 WL 307840, at \*6 (citing *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 746–47 (S.D.N.Y. 2011)).

192. *Id.*

193. *Id.* at \*7.

194. *Id.*

195. 135 S. Ct. 1293 (2015).

196. *Id.* at 1299.

In 2002, B&B Hardware (“B&B”), owner of the registered Trademark “SEALTIGHT,” opposed the registration of Hargis Industry’s (“Hargis”) proposed “SEALTITE” trademark on the grounds that Hargis’s trademark was confusingly similar to its own.<sup>197</sup> B&B manufactures metal fasteners for the aerospace industry, whereas Hargis manufactures metal fasteners for the construction industry.<sup>198</sup> In addition to filing before the TTAB an opposition to Hargis’s trademark registration, B&B also filed a trademark infringement suit in district court.<sup>199</sup>

In both proceedings, the central question was whether there was a likelihood of confusion between B&B’s “SEALTIGHT” and Hargis’s “SEALTITE.”<sup>200</sup> At trial, Hargis argued that the companies “sell different products, for different uses, to different types of consumers, through different channels of trade,” and therefore the similarity of the proposed trademarks was not likely to cause confusion.<sup>201</sup> B&B, on the other hand, argued that Hargis’s “SEALTITE” trademark could not be registered because it was extremely similar to their own “SEALTIGHT” trademark.<sup>202</sup> This similarity, they argued, was of grave significance because their products were distributed by the same online distributors and consumers had a history of occasionally calling the wrong company.<sup>203</sup>

Before the district court ruled on the issue of likelihood of confusion, the TTAB proceeding concluded that “SEALTITE” was confusingly similar to “SEALTIGHT,” and therefore ruled in favor of B&B.<sup>204</sup> Subsequently, B&B argued in district court that Hargis should be enjoined from arguing on the issue of likelihood of confusion because the TTAB finding should be given preclusive effect.<sup>205</sup> The district court declined to apply issue preclusion because the TTAB was not a court created under Article III of the Constitution.<sup>206</sup> In contrast to the TTAB ruling, the trial jury found no likelihood of confusion and returned a

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197. *Id.* at 1301.

198. *Id.*

199. *Id.* at 1302.

200. *Id.*

201. *Id.*

202. *Id.* at 1301.

203. *Id.* at 1301–02.

204. *Id.* at 1302.

205. *Id.*

206. *Id.*

verdict in favor of Hargis.<sup>207</sup> In response, B&B appealed to the United States Court of Appeals for the Eighth Circuit.<sup>208</sup>

The Eighth Circuit affirmed the lower court's decision, but declined to apply issue preclusion.<sup>209</sup> Unlike the trial court, the circuit court's holding was not based on the fact that the TTAB was not an Article III court, but rather that the TTAB applies different standards than the federal courts in determining likelihood of confusion.<sup>210</sup> Specifically, the Eighth Circuit noted that (1) the TTAB placed "too much" emphasis on the appearance and sound of the marks, and (2) Hargis had the burden of persuasion before the TTAB, whereas B&B had the burden of persuasion before the district court.<sup>211</sup>

In evaluating whether issue preclusion should apply in this case, the Supreme Court explored the history of trademark law and the Lanham Act.<sup>212</sup> The Court specifically noted the Lanham Act's roots in protecting exclusive rights for trademark holders by allowing them (1) to register trademarks with the PTO and to oppose registration through the TTAB, and (2) to sue for infringement in federal district court.<sup>213</sup> The Court also found that both case law and the Restatement make clear that issue preclusion applies not only to issues before two courts, but also to issues before a federal court and an administrative tribunal such as the TTAB.<sup>214</sup>

Further, the Court dismissed Seventh Amendment concerns based on precedent, noting that it "has already held that the right to a jury trial does not negate the issue-preclusive effect of a judgment, even if that judgment was entered by a juryless tribunal."<sup>215</sup> Similarly, with respect to Article III concerns, the Court pointed to its prior holding that "absent a contrary indication, Congress presumptively intends that an agency's determination . . . has preclusive effect."<sup>216</sup> The Court also examined the text and structure of the Lanham Act, and found no express reason why the Act itself would prohibit issue preclusion between TTAB findings and trademark infringement proceedings in courts.<sup>217</sup> Further, the Court

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207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 1299–1301.

213. *Id.* at 1299–1300.

214. *Id.* at 1303.

215. *Id.* at 1304 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)).

216. *Id.* at 1304–05 (citing *Univ. of Tenn. v. Elliot*, 478 U.S. 788 (1986)).

217. *Id.* at 1305.

distinguished the present case from *Astoria Federal Savings and Loan Ass'n v. Solimino*,<sup>218</sup> where a plaintiff first sought relief from an agency and then sued in court for the same alleged conduct.<sup>219</sup> The Court reasoned that, because registration is not a prerequisite for a trademark infringement action, TTAB analysis on overlapping issues can be preclusive to a court's judgment.<sup>220</sup>

After dismissing these initial concerns, the Court then addressed the findings of the Eighth Circuit.<sup>221</sup> First, the Court found that the standards used for likelihood of confusion for registration and infringement were substantially the same.<sup>222</sup> The Court also found that the two proceedings were substantially similar from a procedural standpoint, such that the TTAB proceeding could be said to meet the standard for issue preclusion of a trial of "quality, extensiveness, and fairness."<sup>223</sup> Next, with regard to the issue of over-emphasis on the appearance and sound of the marks, the Court held that such emphasis, which may have led to a wrongly decided case, had no bearing on issue preclusion insofar as both rightly and wrongly decided issues are subject to preclusive effect in subsequent hearings.<sup>224</sup> Lastly, the Court found that B&B had the burden of persuasion in both the TTAB proceeding and the Eighth Circuit proceeding.<sup>225</sup>

Based on the above reasoning, the Supreme Court concluded that the Eighth Circuit had erred in denying preclusive effect to the TTAB finding on likelihood of confusion and remanded the case.<sup>226</sup> Further, the Court held that issue preclusion should be applied in future proceedings when the standard elements of issue preclusion are present, and the issue tried by the TTAB is substantially the same as that before the district court.<sup>227</sup> It is possible that this decision will also influence issue preclusion in patent cases.<sup>228</sup>

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218. 501 U.S. 104 (1991).

219. *B&B Hardware, Inc.*, 135 S. Ct. at 1305.

220. *Id.* at 1305–06.

221. *Id.* at 1306.

222. *Id.* at 1307.

223. *Id.* at 1309.

224. *Id.* at 1308.

225. *Id.* at 1309.

226. *Id.* at 1310.

227. *Id.*

228. For a discussion on preclusion and finality in patent proceedings, see Peggy Ni, Note, *Rethinking Finality in the PTAB Age*, 31 BERKELEY TECH. L.J. 557 (2016).

B. *HANA FINANCIAL, INC. v. HANA BANK*<sup>229</sup>

On January 21, 2015, the Supreme Court affirmed the Ninth Circuit's holding that when a jury trial has been requested and the facts of a trademark dispute do not warrant entry of summary judgment or judgment as a matter of law, the question of whether tacking is warranted must be decided by a jury.<sup>230</sup> Under the "tacking" doctrine, U.S. courts have provided that trademark holders may "clothe a new mark with the priority position of an older mark," so that they can make modifications to their marks over time without losing priority.<sup>231</sup> The Supreme Court granted certiorari in order to resolve a circuit split on whether the tacking inquiry should be resolved by a judge or jury.<sup>232</sup> While the Ninth Circuit held that tacking should be a question left to the jury, both the Federal and Sixth Circuits evaluated tacking as a question of law to be resolved by judges.<sup>233</sup>

Petitioner, Hana Financial, originally filed suit against Respondent, Hana Bank, in 2007 in the District Court for the Central District of California, alleging that Hana Bank infringed its "Hana Financial" mark.<sup>234</sup> Both parties provide financial services to individuals in the United States.<sup>235</sup> Hana Financial was established in 1994 in California.<sup>236</sup> By 1996, Hana Financial obtained a federal trademark registration for the pyramid logo it utilized in marketing its financial services.<sup>237</sup> Hana Bank, originally established as Korea Investment Finance Corporation in 1971, began representing itself in Korea under the "Hana Bank" moniker in 1991.<sup>238</sup> In 1994, Hana Bank created Hana Overseas Korean Club and used the name in advertisements in the United States.<sup>239</sup> The company changed its name to Hana World Center in 2000 and began operating a bank in the US under the name Hana Bank in 2002.<sup>240</sup>

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229. 135 S. Ct. 907 (2015).

230. *Id.* at 911.

231. *Id.* at 909.

232. *Id.* at 910.

233. *See id.* (citing *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 1159 (Fed. Cir. 1991); *Data Concepts, Inc. v. Digital Consulting, Inc.*, 150 F.3d 620, 623 (6th Cir. 1998)).

234. *Id.* at 910.

235. *Id.* at 909.

236. *Id.* at 910.

237. *Id.*

238. *Id.* at 909.

239. *Id.*

240. *Id.*

The district court granted summary judgment for Hana Bank on the infringement claim, but the Ninth Circuit reversed, holding that there were genuine issues of material fact as to the priority of the mark.<sup>241</sup> On remand, the claim was tried before a jury, which returned a verdict for Hana Bank.<sup>242</sup> On appeal, the Ninth Circuit affirmed the lower court's decision and held that while tacking is only applicable in "exceptionally narrow circumstances," it requires "a highly fact-sensitive inquiry" that is "reserved for the jury."<sup>243</sup> The Supreme Court then granted certiorari to address the circuit split.<sup>244</sup>

In trademark dispute cases, tacking can be available if the original and revised marks are "legal equivalents" that "create the same, continuing commercial impression" so that consumers "consider both as the same mark."<sup>245</sup> The Court noted that the determination of whether a mark leaves the same commercial impression is based on consumer perspective, particularly an "ordinary purchaser of these kinds of goods or services."<sup>246</sup>

The Court noted that the individual impression of an ordinary person or community is a jury-based assessment as "the jury is generally the decisionmaker that ought to provide the fact-intensive answer."<sup>247</sup> While a judge is not precluded from ruling on a tacking inquiry, a decision from the bench is not permitted when a jury trial is requested and the facts do not warrant summary judgment or judgment as a matter of law.<sup>248</sup>

The Court also found unpersuasive the four arguments offered by Hana Financial as to why tacking should be an inquiry resolved by a judge.<sup>249</sup> First, the Court reasoned that Hana Financial had no grounds to criticize the district court's instruction to the jury in applying the "legal equivalents" standard, because it was essentially the same instruction Hana Financial had proposed to the court.<sup>250</sup> Second, the Court found no reason why a tacking determination would create new law more than any other types of cases left to the determination of a jury verdict.<sup>251</sup>

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241. *Id.* at 910.

242. *Id.*

243. *Id.* (citing *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1160 (9th Cir. 2013)).

244. *Id.* at 910.

245. *Id.* (citing *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 1159 (Fed. Cir. 1991)).

246. *Id.* at 910–11.

247. *Id.* at 911.

248. *Id.*

249. *Id.*

250. *Id.* at 912.

251. *Id.*



Third, the Court found that juries are normally assigned the role of factfinder and saw no persuasive reason from Hana Financial as to why tacking as a fact-intensive inquiry should be made an exception.<sup>252</sup> The Court reasoned the argument of jury unpredictability is unpersuasive as such concerns have never halted the use of juries in similar inquiries.<sup>253</sup> Finally, the Court noted that its holding in this case does not preclude judges from making a tacking determination as the petitioner contended.<sup>254</sup> Instead, the holding is limited to jury trials whereas the petitioner presented only cases that involved tacking disputes in bench trials.<sup>255</sup>

Based on its finding that the application of the “tacking” doctrine is a fact-intensive inquiry, and because it found Hana Financial’s arguments unpersuasive, the Supreme Court affirmed the Ninth Circuit’s judgment that, in the absence of summary judgment or judgment as a matter of law, tacking disputes in jury trials should be resolved by juries.<sup>256</sup>

C. *IN RE LOUISIANA FISH FRY PRODUCTS, LTD.*<sup>257</sup>

The United States Court of Appeals for the Federal Circuit affirmed a Trademark Trial and Appeal Board decision denying the registration of the mark “LOUISIANA FISH FRY PRODUCTS BRING THE TASTE OF LOUISIANA HOME!” without a disclaimer of “FISH FRY PRODUCTS.”<sup>258</sup>

The appellant Louisiana Fish Fry (“Company”) filed a use-based application for the mark, identifying seven products for the mark.<sup>259</sup> The examining attorney found elements of the mark to be generic, equating the public understanding of “FISH FRY PRODUCTS” to the dictionary, or generic, definition of the phrase: goods used with fried fish meals, such as “sauces, marinades and spices.”<sup>260</sup> Due to this finding, the examining attorney stipulated a disclaimer of “FISH FRY PRODUCTS” for registration of the composite mark.<sup>261</sup> Under Section 6(a) of the Lanham Act, the Patent and Trademark Office (PTO) is authorized to require a

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252. *Id.*

253. *Id.*

254. *Id.* at 913.

255. *Id.*

256. *Id.*

257. 797 F.3d 1332 (Fed. Cir. 2015).

258. *Id.* at 1333.

259. *Id.* at 1334.

260. *Id.*

261. *Id.*

disclaimer of “an unregistrable component of a mark otherwise registerable.”<sup>262</sup> Moreover, the examining attorney provided alternative grounds for the requirement, noting that the term was “at least, ‘highly descriptive’” and that the Company failed to rebut this finding by meeting its burden of demonstrating acquired distinctiveness.<sup>263</sup> The Company contested the requirement and later appealed to the Trademark Trial and Appeal Board (“Board”).<sup>264</sup>

The Board determined that because the words “fish fry” and “products” retained their dictionary definitions when combined, “FISH FRY PRODUCTS” was generic.<sup>265</sup> The Board further affirmed the examining attorney’s alternative argument that even if the phrase was highly descriptive, not generic, the Company had failed to demonstrate the acquired distinctiveness of the phrase in question, finding that the appellant had only submitted evidence relating to the mark as a whole, rather than evidence related specifically to “FISH FRY PRODUCTS.”<sup>266</sup>

On appeal, the Company did not challenge the Board’s finding that the term was highly descriptive, instead arguing that the Board had erred in finding the term to be generic and in its consideration of acquired distinctiveness.<sup>267</sup> The Federal Circuit reviewed the Board’s findings for substantial evidence, because “[g]enericness and acquired distinctiveness are factual determinations.”<sup>268</sup> The Federal Circuit recognized the PTO’s burden to “prove genericness by clear evidence”<sup>269</sup> and noted its obligation to “take this heightened burden into account.”<sup>270</sup> However, the Federal Circuit declined to reconsider the Board’s ruling on genericness, finding that the Company could not meet the lower threshold of demonstrating the acquired distinctiveness of a highly descriptive mark.<sup>271</sup> The standard for showing acquired distinctiveness is a demonstration “that in the minds

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262. *Id.* at 1339 (citing *In re Hiromichi Wada*, 194 F.3d 1297, 1301 (Fed. Cir. 1999)).

263. *Id.* at 1334–35.

264. *Id.* at 1335.

265. *Id.*

266. *Id.*

267. *Id.* at 1336.

268. *Id.* at 1335 (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344 (Fed. Cir. 2001)).

269. *Id.* (citing *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 1571 (Fed. Cir. 1987)).

270. *Id.* at 1339 (citing *In re Hotels.com, L.P.*, 573 F.3d 1300, 1302 (Fed. Cir. 2009)) (internal quotation marks omitted).

271. *Id.* at 1336.

of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.”<sup>272</sup>

While evidence such as advertising sales and “length and exclusivity of use” may be cited as support, the Company submitted only two declarations from its president and “five registrations that include the term FISH FRY PRODUCTS.”<sup>273</sup> In his declarations, the president noted that the appellant demonstrated “‘substantially exclusive and continuous use’ of the mark for at least the last five years.”<sup>274</sup> The Board did not accept the declaration of continuous use as proof of acquired distinctiveness, and the Federal Circuit affirmed, noting that while Section 2(f) of the Lanham Act allows the PTO to “accept five years of ‘substantially exclusive and continuous’ use as *prima facie* evidence of acquired distinctiveness, the statute does not require the [PTO] to do so.”<sup>275</sup> The highly descriptive nature of the phrase in question further supported the PTO’s decision to exercise its discretion and refuse the purported use as *prima facie* evidence of acquired distinctiveness.<sup>276</sup> Moreover, the Company’s reliance on prior registrations was dismissed on the grounds that the Board had thoroughly considered the registrations and rejected them as evidence of acquired distinctiveness.<sup>277</sup>

Based on the above, the Federal Circuit held that the Board had sufficient evidence to determine that the Company had failed to meet its burden of showing that FISH FRY PRODUCTS had acquired distinctiveness and affirmed the PTO’s decision to refuse to register the composite mark without a disclaimer.

In a concurring opinion, Judge Newman argued that the majority should have first considered whether the mark was generic, as genericness completely bars registration.<sup>278</sup> Further, he found that the Board did not err in determining that the phrase “fish fry products” is indeed generic and therefore “does not have trademark status and cannot acquire trademark status.”<sup>279</sup> Despite diverging from the majority’s rationale, Judge Newman

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272. *Id.* (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1379 (Fed. Cir. 2012)).

273. *Id.* at 1336.

274. *Id.*

275. *Id.* at 1336–37.

276. *Id.* at 1337.

277. *Id.*

278. *Id.* at 1338 (Newman, J., concurring) (citing 15 U.S.C. § 1052(f)).

279. *Id.* at 1340.

agreed with the holding that the disclaimer of “FISH FRY PRODUCTS” had been properly required by the Board.<sup>280</sup>

#### IV. CYBERLAW AND VENTURE LAW DEVELOPMENTS

##### A. *MARTIN V. GOOGLE, INC.*<sup>281</sup>

The Superior Court of California dismissed a lawsuit against Google, establishing that Google has discretion over the content of its search results and the placement of advertisements.<sup>282</sup> Google met its burden of showing that these activities constitute protected expressions of its First Amendment free speech rights.<sup>283</sup> Consequentially, the burden of demonstrating a probability of success on the merits shifted to plaintiff S. Louis Martin.<sup>284</sup> Since Martin failed to file an opposition rebutting Google’s argument, the Complaint was dismissed.<sup>285</sup>

S. Louis Martin brought an action against Google, Inc., alleging that Google committed antitrust violations and engaged in a “deceptive business practice.”<sup>286</sup> Specifically, Martin maintained that Google knowingly discriminated against the website CoastNews.com by not listing it among the search results when relevant keywords were entered.<sup>287</sup> While search engines such as Bing and Yahoo! often placed CoastNews.com first on their respective lists when users typed the words “San Francisco Restaurant Guide North Beach,” Google did not list the site among its results.<sup>288</sup> Martin claimed that Google favored Google-owned companies and advertisers, thereby hurting small businesses and misleading consumers.<sup>289</sup> Additionally, Martin protested that after falsely classifying CoastNews.com as a pornographic website, Google

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280. *Id.* at 1341.

281. No. CGC-14-539972, 2014 WL 6478416 (Cal. Super. Ct. 2014).

282. Order Granting Defendant Google Inc. to Strike Plaintiff’s Complaint Pursuant to Civ. Proc. Code § 425.16 at 1, *Martin v. Google, Inc.*, No. CGC-14-539972, 2014 WL 6478416 (Cal. Super. Ct. Nov. 13, 2014) (“Order”).

283. *Id.*

284. *Id.*

285. *Id.*

286. Complaint at 2, 6, *Martin v. Google, Inc.*, No. CGC-14-539972 (Cal. Super. Ct. June 17, 2014), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1761&context=historical> [<https://perma.cc/6PHM-YZTC>].

287. *Id.* at 2–3.

288. *Id.* at 1.

289. *Id.* at 2–4.

discontinued ad delivery to the site, leaving blank sections on webpages and detracting from the site's visual appeal.<sup>290</sup>

Defendant Google, Inc. argued that the court should apply the anti-SLAPP (strategic lawsuit against public participation) statute<sup>291</sup> to this case.<sup>292</sup> Under the statute, a court may grant a special motion to strike a cause of action if it arises from acts that assert the right of petition or free speech and are therefore protected under the United States Constitution or the California Constitution.<sup>293</sup> In order for the court to strike the cause of action, the defendant's act must also be connected with a public issue, and the plaintiff must not have established a probability of success on the claim's merits.<sup>294</sup>

Google provided examples of cases where federal courts held that search engine rankings were effectively "opinions," and that they therefore constituted expressions of the constitutionally protected right to free speech.<sup>295</sup> These cases follow the precedent set by *Blatty v. N.Y. Times Co.*,<sup>296</sup> where the California Supreme Court held that the New York Times's selection of books for its best-seller list constituted an expression protected under the First Amendment.<sup>297</sup> Based on *Blatty* and its progeny, Google successfully supported its position that the "editorial discretion" it employed when electing whether or not to place advertisements on a particular website was meritorious of First Amendment protection.<sup>298</sup>

On the issue of whether its act is connected with a public issue, Google relied on the plaintiff's own complaint; Google used Martin's allegation that Google's practices negatively affect many websites and small businesses to establish that Google's conduct therefore "took place in a public forum and is connected with issues of public interest," satisfying the anti-SLAPP statute's "public issue" requirement.<sup>299</sup> Further strengthening its claim that the suit involved a public issue, Google classified its placement of advertisements on websites as "public speech"

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290. *Id.* at 9.

291. CAL. CIV. PROC. CODE § 425.16 (West 2014).

292. Memorandum of Points and Authorities in Support of Defendant Google Inc. to Strike Plaintiff's Complaint, *Martin v. Google, Inc.*, No. CGC-14-539972, 2014 WL 6478945 (Cal. Super. Ct. Aug. 29, 2014) ("Def.'s Mem.").

293. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2014).

294. *Id.*

295. Def.'s Mem.

296. 42 Cal. 3d 1033 (1986).

297. Def.'s Mem.

298. *Id.*

299. Complaint at 2, 11; Def.'s Mem.; CAL. CIV. PROC. CODE § 425.16(b)(1).

and maintained that search engines' search results affected "millions" of users.<sup>300</sup>

In addition to maintaining that the First Amendment protected Google's conduct, Google cited the Communications Decency Act of 1996,<sup>301</sup> which "precludes state law claims based on an Internet Service Provider's restrictions of use of its services for objectionable purposes," as support for dismissal.<sup>302</sup> Moreover, asserting a contract-based defense, Google maintained that the Terms and Conditions, to which Martin agreed, validated Google's conduct towards CoastNews.com following the site's uploading of a photo containing nudity.<sup>303</sup> Martin explained that the photo was featured in an article about a nudist colony in the Santa Cruz mountains and therefore had no pornographic value.<sup>304</sup> Further, per Google's request, Martin removed the ad code from that page within three days, but Google still refused to place advertisements on the site's additional pages.<sup>305</sup>

The court held that Google has met its burden of showing that Martin's claims arose from Google's constitutionally protected free speech rights, and that, in so doing, Google shifted the burden of establishing a probability that the plaintiff will prevail on its causes of action to Martin.<sup>306</sup> As Martin neither filed an opposition to Google's motion, nor produced evidence demonstrating a probability of success, the plaintiff failed to meet this burden.<sup>307</sup> Therefore, upon accepting that Google's ranking of search results and placement of advertisements constituted expressions of constitutionally protected rights, the court struck Martin's complaint.<sup>308</sup>

B. *MATTOCKS V. BLACK ENTERTAINMENT TV LLC*<sup>309</sup>

On August 20, 2014, the District Court for the Southern District of Florida granted Black Entertainment TV LLC ("BET")'s motion for summary judgment, holding that "likes" on a Facebook Fan Page ("Page")

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300. Def.'s Mem.

301. 47 U.S.C. § 230 (1996).

302. Def.'s Mem.

303. *Id.*

304. Complaint at 7.

305. *Id.*

306. Order at 1, *Martin v. Google, Inc.*, No. CGC-14-539972, 2014 WL 6478416 (Cal. Super. Ct. Aug. 29, 2014).

307. *Id.*

308. *Id.*

309. 43 F. Supp. 3d 1311 (S.D. Fla. 2014).

are not the property of the creator of the Page.<sup>310</sup> The court reasoned that if anyone can claim to own the “likes,” it is the individuals who “like” the Page.<sup>311</sup>

In 2008, Plaintiff Stacey Mattocks created a Facebook Fan Page for The Game (“Series”), a television series broadcasted by the CW Network.<sup>312</sup> Due to Facebook’s Terms and Conditions for unofficial Pages, Mattocks did not post any third-party-owned content from the Series.<sup>313</sup> In 2009, BET acquired the syndication and exclusive licensing rights to the Series.<sup>314</sup> In 2011, BET hired Mattocks part-time to manage the Page she created.<sup>315</sup> Shortly thereafter, BET displayed its trademarks and logos on the Page, encouraged viewers to “like” the Page, provided Mattocks with exclusive content, and regularly instructed her on what to post.<sup>316</sup> Mattocks posted most of the content on the Page, but BET members also had the ability to post.<sup>317</sup> While Mattocks worked for BET, the Page grew from two million “likes” to over six million.<sup>318</sup>

In 2011, BET and Mattocks entered into a Letter Agreement.<sup>319</sup> BET agreed not to exclude Mattocks from the Page, and in exchange, Mattocks granted BET administrative access to the Page.<sup>320</sup> In June 2012, while BET and Mattocks were negotiating full-time employment status at BET, Mattocks restricted BET’s administrative access to the Page until the parties could reach an “amicable and mutually beneficial resolution” concerning her employment.<sup>321</sup> As a result, BET could no longer post content on the Page.<sup>322</sup> BET formally requested that Facebook migrate the six million “likes” from the Page to an official Series Page created by BET.<sup>323</sup> Facebook granted BET’s request and shut down the Page originally created by Mattocks.<sup>324</sup>

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310. *Id.* at 1321.

311. *Id.*

312. *Id.* at 1315.

313. *Id.*

314. *Id.* at 1314.

315. *Id.* at 1315–16.

316. *Id.* at 1316.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 1317.

Mattocks alleged five claims in her complaint: BET tortiously interfered with her contractual relationships with (1) Facebook and (2) Twitter; (3) BET breached the Letter Agreement; (4) BET breached its duty of good faith and fair dealing towards Mattocks; and (5) BET converted Mattocks' business interest in the Facebook Page.<sup>325</sup> In response, BET filed a motion for summary judgment.<sup>326</sup>

The court held that under Florida law, BET could not be liable for tortious interference.<sup>327</sup> By revoking BET's administrative access to the Page, Mattock deprived BET of control over its intellectual property on the Page.<sup>328</sup> The court further concluded that BET terminated the Page at least partly in response to the revocation of BET's administrative access.<sup>329</sup> Finally, the court held that Mattocks provided no substantial evidence that Facebook's decision to shut down the Page was based on anything other than Facebook's policy of protecting brand owners' rights.<sup>330</sup>

On the claim of breach of contract, BET claimed that their prior agreement with Mattocks was effectively terminated by Mattocks' breach of contract.<sup>331</sup> Florida law states that a material breach by one party excuses performance by the other party.<sup>332</sup> The court held that in revoking BET's administrative access to the Page, Mattocks engaged in a material breach of the contract first, thereby excusing BET from its obligations.<sup>333</sup> The material breach of contract was also found to undercut Mattock's third claim, breach of good faith and dealing.<sup>334</sup>

On the issue of conversion, Mattocks alleged that the transfer of Facebook "likes" from the Page she created to BET's new Page converted her business interest in the "likes" and willfully deprived her of business opportunities created through the significant number of "likes" she helped generate.<sup>335</sup> Under Florida law, "conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time."<sup>336</sup> To prove a conversion claim, the plaintiff must provide facts sufficient to

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325. *Id.*

326. *Id.*

327. *Id.* at 1319.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 1319–20.

333. *Id.* at 1320.

334. *Id.*

335. *Id.* at 1321.

336. *Id.*



show 1) ownership of the property, and 2) the wrongfully “asserted dominion” by other party.<sup>337</sup> Here, the court rejected Mattocks’s conversion claim because she could not show a property interest in the Facebook “likes.”<sup>338</sup> The court noted that the individual user has the ability, at any time, to revoke the “like” by clicking the “unlike” button.<sup>339</sup> Thus, if anyone could claim ownership over the “likes,” it would be the individual users responsible for the “likes.”<sup>340</sup> The court therefore held that because of the tenuous relationship between the likes on the Page and Mattocks, the “likes” could not be converted in “the same manner as goodwill or other intangible business interests.”<sup>341</sup> Interestingly, the court did not distinguish between the two million “likes” accumulated by Mattocks before the BET arrangement and allowed all six million “likes” to be transferred to BET’s new Page.

In finding that BET met its burden under FRCP Rule 56(a) by showing all five claims lacked a genuine issue of material fact, the court granted summary judgment to BET.<sup>342</sup>

C. *PLANNED PARENTHOOD OF THE HEARTLAND, INC. V. IOWA BOARD OF MEDICINE*<sup>343</sup>

On June 19, 2015, the Iowa State Supreme Court held that the Iowa Administrative Code Rule 653—13.10(2-4), which effectively prohibits telemedicine abortions, is unconstitutional.<sup>344</sup>

Planned Parenthood, one of the nation’s largest abortion providers, has performed telemedicine-assisted abortions in Iowa since 2008.<sup>345</sup> Telemedicine allows a doctor to speak with a patient at a satellite facility through a secure connection, review her lab results and ultrasound images, and provide counseling for the abortion procedure. A trained staff member examines the patient and performs an ultrasound to assess risk of complications. The doctor then dispenses the abortion-inducing drugs and oversees buccal administration of the first via live video.<sup>346</sup> Planned

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337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. 865 N.W.2d 252 (2015).

344. *Id.* at 269.

345. *Id.* at 255.

346. *Id.* at 255–56.

Parenthood applies the same protocol to both telemedicine and in-person abortion procedures.<sup>347</sup>

On June 25, 2013, the Board of Medicine received a petition proposing changes to the standard of care for abortion providers.<sup>348</sup> After a public meeting, solicitation of comments, a hearing, and a final vote, the Board implemented the changes, which it justified based on patient safety and promotion of physician-patient relationships.<sup>349</sup> The new regulations require the physician to (1) conduct a physical examination of the patient, (2) be physically present when the abortion-inducing drugs are provided, and (3) personally schedule a follow-up appointment.<sup>350</sup> These requirements would effectively ban telemedicine abortions in Iowa.<sup>351</sup>

Planned Parenthood of the Heartland and Dr. Jill Meadows, M.D. challenged the Iowa Board of Medicine's new standards of care in an Iowa District Court on constitutional grounds, claiming that the rules are invalid as "substantial rights of the person seeking relief have been prejudiced" and the rules are "[u]nconstitutional on [their] face or as applied."<sup>352</sup>

The court examined the constitutionality of the amended standards under both the Iowa and U.S. Constitutions. The court had never determined whether the Iowa Constitution affords women an independent right to terminate pregnancy.<sup>353</sup> However, the Board recognized the existence of such a right coexistent with that afforded by the federal Constitution.<sup>354</sup> Thus, should the standards impinge on the federal right, they also impinge on the Iowa right.

To evaluate the standards under the U.S. Constitution, the court turned to the "undue burden" test set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>355</sup> Generally, a state regulation places an undue burden on a woman's right to terminate a pregnancy if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."<sup>356</sup> As the right to abortion is limited, the

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347. *Id.* at 256.

348. *Id.*

349. *Id.* at 258.

350. *Id.* at 256–57.

351. *Id.* at 253.

352. *Id.*

353. *Id.* at 262.

354. *Id.*

355. *Id.* at 254 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878–79 (1992)).

356. *Id.* at 263.

*Casey* test requires balancing “a woman’s right to terminate her pregnancy against the legitimate interests of the state.”<sup>357</sup>

The court looked to the professed purpose of the new regulations to determine the state’s interest. It found that the Board aimed to “promote the health . . . of a woman seeking to terminate her pregnancy.”<sup>358</sup> Thus, the *Casey* test required balancing the gains in safety against the burden placed on women seeking abortions.

The court found record evidence suggesting that the new rules provide negligible health benefits to patients. First, medical evidence shows that a pelvic exam “does not provide any measurable gain in patient safety.”<sup>359</sup> Further, the physician’s conduct and examination remain identical to that of an in-person exam.<sup>360</sup> Secondly, the court found that the physician community maintained the safety of telemedicine abortions without compromising physician-patient relationships.<sup>361</sup> Moreover, the court found that a properly equipped clinic could perform the necessary follow-up procedures and examination without the personal assistance of a physician.<sup>362</sup> It cited the “increasing number of medical procedures” performed by telemedicine and recent studies showing that “telemedicine abortions pose no further risk of complication to the woman” than abortions done with the physician present.<sup>363</sup> Finally, the court identified that the Iowa Board of Medicine has adopted a rule generally approving of telemedicine, citing the increased convenience and efficiency of the technologically assisted practice.<sup>364</sup> Here, the amended rules carve out an exception to the general acceptance of the practice for no medically viable reason.<sup>365</sup>

Conversely, the court found that the new standards impose significant burdens on patients. Mandatory face-to-face meetings with the physician would necessitate previously unnecessary travel to one of three Planned Parenthood clinics with present clinicians, causing financial, personal, and emotional stress to patients, especially those from rural areas.<sup>366</sup> This would result in missed work, as well as a “greater possibility that an

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357. *Id.*

358. *Id.* at 264.

359. *Id.* at 265.

360. *Id.* at 256.

361. *Id.* at 266.

362. *Id.* at 267.

363. *Id.* at 266.

364. *Id.* at 269.

365. *Id.*

366. *Id.* at 267.

abusive spouse, partner, or relative . . . find out the woman is terminating her pregnancy,” thus harming the woman’s ability to make the abortion decision “privately and discreetly.”<sup>367</sup> The court further rejected the Board’s argument that the burden may be placed without being “undue”<sup>368</sup> because the minimal medical justification for the rules here distinguish the circumstances from *Casey*.<sup>369</sup>

In applying the balancing test provided in *Casey*, the court held that the amended standards of care posed an undue burden on women seeking abortion. The weight of medical and record evidence suggested the new rules provided negligible gains in patient safety, while imposing a significant burden on patients through increased travel time, expense, and exposure. As such, the Iowa State Supreme Court held that the rules prohibiting telemedicine abortions are unconstitutional under both the state and federal Constitutions.<sup>370</sup>

D. *UNITED STATES V. LIZARRAGA-TIRADO*<sup>371</sup>

The United States Court of Appeals for the Ninth Circuit held that a Google Earth satellite image and its computer-generated tack placement and automatic coordinate labeling are not “hearsay,” and thus are admissible evidence.<sup>372</sup>

In 2003, border patrol agents Garcia and Nunez arrested defendant, Lizarraga-Tirado, near the United States-Mexico border for illegal reentry under 8 U.S.C. § 1326.<sup>373</sup> At trial, Lizarraga-Tirado contended that he was actually in Mexico when he was arrested, and insisted that the agents must have accidentally crossed into Mexico before arresting him.<sup>374</sup> The agents testified that they were very familiar with the area and were certain they had arrested him north of the border.<sup>375</sup> In addition, Agent Garcia testified that, at the scene of the arrest, she had used a handheld Global Positioning System (GPS) device to record the coordinates of the arrest.<sup>376</sup> For illustrative purposes, the government produced a Google Earth satellite image that included a digital tack labeled with GPS coordinates

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367. *Id.*

368. *Id.* at 267–68.

369. *Id.* at 269.

370. *Id.*

371. 789 F.3d 1107, 1109–10 (9th Cir. 2015).

372. *Id.*

373. *Id.* at 1108.

374. *Id.*

375. *Id.*

376. *Id.*

that, according to Garcia's testimony, matched the coordinates she recorded the night of the arrest.<sup>377</sup> In response, Lizarraga-Tirado urged the trial court to suppress the image, claiming it was inadmissible hearsay.<sup>378</sup> The court overruled his objection based on the image and the agents' testimony, and admitted the image as evidence.<sup>379</sup>

Google Earth is a computer program that displays satellite images taken from high-resolution cameras and superimposes certain markers, or tacks, onto the images.<sup>380</sup> There are two ways for a tack be added: (1) by typing GPS coordinates, which automatically places a tack at the appropriate spot on the map and labels the coordinate; or (2) by manually adding a tack and personally labeling the coordinate.<sup>381</sup>

On appeal, Lizarraga-Tirado argued that (1) the satellite image is hearsay because it asserted that it "accurately represented the desert area where the agents worked," and (2) the tack and coordinates are hearsay because they asserted "where the agents responded and its proximity to the border."<sup>382</sup> Hearsay is defined as an out-of-court statement by a person—whether in the form of "a person's oral assertion, written assertion, or nonverbal conduct"—that is intended to assert the truth of a disputed matter before the court.<sup>383</sup> Essentially, Lizarraga-Tirado claimed that both the satellite image and the digitally added tack-coordinates were impermissible hearsay because they were out-of-court statements by Google Earth used to assert that he had been arrested north of the border.<sup>384</sup>

First, in addressing the novel question of whether a satellite image without the tack is hearsay barred by Federal Rules of Evidence 801(c)(2) and 802, the court analogized a Google Earth satellite image to a photograph.<sup>385</sup> Based on precedent, the court held that "a photograph isn't hearsay because it makes no 'assertion,'" and instead "merely depicts a scene as it existed at a particular time."<sup>386</sup> Accordingly, the court held that

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377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* at 1109.

383. *Id.* (citing Fed. R. Evid. 801(a)).

384. *Id.*

385. *Id.*

386. *Id.* (citing *United States v. May*, 622 F.2d 1000, 1007 (9th Cir.1980); *United States v. Oaxaca*, 569 F.2d 518, 525 (9th Cir.1978)).

a satellite image, like a photograph, makes no assertions, and thus is not hearsay.<sup>387</sup>

Next, in determining the “more difficult question” of whether the addition of tack placement and coordinate labeling are hearsay, the court distinguished computer-generated tacks and automatic coordinate labeling from manually placed tacks and personal coordinate labeling.<sup>388</sup> The court held that while the former are not considered hearsay, the latter are.<sup>389</sup> The court made the distinction that although automatically labeled markers do make the assertion that the tack is actually placed at the labeled GPS coordinates, the assertion is not made by a person, but by the Google Earth program itself.<sup>390</sup> In this way, there is no “statement” as defined by the hearsay rule.<sup>391</sup> In joining other circuit courts, the court concluded that “machine statements are not hearsay.”<sup>392</sup>

The court then noted that machine statements might present evidentiary concerns, such as malfunction or tampering, but that those concerns are addressed by rules of authentication, which the defendant did not raise at trial.<sup>393</sup> As such, the Ninth Circuit held that a tack placed on the satellite image by the Google Earth program and automatically labeled with GPS coordinates without any human intervention is not hearsay, and affirmed the district court’s conviction.<sup>394</sup>

E. *GOOGLE V. HOOD*<sup>395</sup>

In March 2015, the United States District Court for the Southern District of Mississippi granted Google’s motion for a temporary restraining order and preliminary injunction against a high-ranking public official who wanted Google to censor content on its search engine.<sup>396</sup>

On October 27, 2014, Mississippi Attorney General Jim Hood served Google with a 79-page subpoena under the Mississippi Consumer Protection Act (MCPA) after months of demanding information on

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387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* at 1110.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. 96 F. Supp. 3d 584 (S.D. Miss. 2015).

396. *Id.* at 601.

Google's practices as they relate to websites, YouTube videos, or advertisements that promote illegal or dangerous content.<sup>397</sup>

According to Google, the Attorney General had been pressuring Google to block objectionable third-party content from its search engine for eighteen months before the subpoena and had made several public statements about it.<sup>398</sup> For instance, in a July 2013 public speech, the Attorney General accused Google of "taking advantage of our country and the pain of our people . . . [with the sale of] counterfeit items and counterfeit drugs over the Internet that harm our consumers."<sup>399</sup>

Once it received the subpoena, Google asked the Attorney General to withdraw it for being "overly burdensome and largely unlawful," but the Attorney General declined this request.<sup>400</sup> As a result, Google brought an action seeking declaratory judgment that Attorney General Hood's subpoena violated its rights under the Communications Decency Act of 1996 (CDA) and the First, Fourth, and Fourteenth Amendments of the Constitution.<sup>401</sup> Google further sought a declaration that the subpoena's demands were preempted by the Copyright Act, including the Digital Millennium Copyright Act (DMCA), and by the Food, Drug, and Cosmetic Act (FDCA).<sup>402</sup> Google also filed a motion for a temporary restraining order and preliminary injunction to ban the Attorney General from enforcing his subpoena and from filing charges against Google for making third-party content accessible to Internet users.<sup>403</sup>

"To be entitled to a preliminary injunction or temporary restraining order, a movant must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury, which would occur if the injunction is denied, outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest."<sup>404</sup>

Regarding the first element of the test, the court recognized a substantial likelihood that Google would prevail on the merits of its claim under the CDA.<sup>405</sup> The Fifth Circuit had previously upheld the immunity

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397. *Id.* at 589.

398. *Id.* at 589, 593.

399. *Id.* at 593.

400. *Id.*

401. *Id.* at 589.

402. *Id.* at 590.

403. *Id.* at 591.

404. *Id.* at 596 (citing *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001); *Ladd v. Livingston*, 777 F. 3d 286, 288 (5th Cir. 2015)).

405. *Id.*

the CDA extends to web-based service providers of third-party content, as in this case.<sup>406</sup> The court also held that Google demonstrated a substantial likelihood that it would prevail on its claim under the First Amendment, as the Attorney General's subpoena would likely create "a chilling effect" on Google's protected speech.<sup>407</sup> In addition, the court found that Google's Fourth Amendment claim has substantial merit because said Amendment prohibits overbroad subpoenas.<sup>408</sup>

Furthermore, the court was convinced that Google's preemption claims are substantially meritorious.<sup>409</sup> First, the Copyright Act preempts part of the subpoena because it contains various requests for information regarding copyright infringement, which state attorneys lack the authority to enforce.<sup>410</sup> Second, pursuant to the DMCA, which provides a safe harbor for online service providers who remove or disable access to allegedly infringing material upon proper request, many of the Attorney General's requests were "improper" because Google had put in place a "mechanism by which aggrieved content may be contested."<sup>411</sup> Third, the FDCA—which governs the importation and introduction of prescription drugs into interstate commerce—may also preempt the Attorney General's investigation since the subpoena demands information about Google's dealings with Canadian online pharmacies.<sup>412</sup> The court temporarily enjoined the Attorney General's enforcement of the subpoena and left this last preemption issue for resolution at a later stage.<sup>413</sup>

Concerning the second element of the test, the court believed that Google faced a "substantial threat of irreparable injury" because the company alleged violations of its First Amendment rights.<sup>414</sup> According to the Fifth Circuit, "[t]he loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction."<sup>415</sup>

With respect to the third element of the test, the court held that as compared to the harm Google faces because of the Attorney General's

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406. *Id.* at 597.

407. *Id.* at 598.

408. *Id.* (citing *United States v. Miller*, 425 U.S. 435, 445 (1976)).

409. *Id.* at 599.

410. *Id.* (citing *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995)).

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* at 600.

415. *Id.* (citing *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009); *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).



subpoena, the latter would suffer little harm from complying with a temporary restraining order and preliminary injunction.<sup>416</sup> If the Attorney General is not allowed to enforce the subpoena, he still retains his ability to “conduct an investigation and file an action regarding other matters that are within his jurisdiction.”<sup>417</sup>

As to the fourth element, the court determined that the issuance of an injunction will not disserve, and may even benefit, the public interest because, according to the Firth Circuit, “injunctions protecting First Amendment freedoms are always in the public interest.”<sup>418</sup>

Since all four elements of the test were established, the court granted Google’s motion for a temporary restraining order and preliminary injunction.<sup>419</sup> The court also denied the Attorney General’s motion to dismiss based on lack of subject matter jurisdiction, finding that the Declaratory Judgment Act was applicable and that the claims set forth by Google were of a federal nature.<sup>420</sup> The Attorney General was therefore forbidden from enforcing his subpoena or filing charges against Google for allowing third-party creators of objectionable content to publish such content on its search engine.<sup>421</sup>

## V. PRIVACY DEVELOPMENTS

### A. *IN RE HULU PRIVACY LITIGATION*<sup>422</sup>

On April 28, 2014 the U.S. District Court for the Northern District of California granted summary judgment in favor of Hulu, finding that the company did not violate the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710.<sup>423</sup>

Hulu provides on-demand streaming of television shows, movies, and other content through its website.<sup>424</sup> The class action brought against Hulu alleged that the company wrongfully disclosed the streaming video viewing selections of their users as well as personally identifiable

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416. *Id.*

417. *Id.*

418. *Id.* at 601 (citing *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012); *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)).

419. *Id.*

420. *Id.* at 592–94.

421. *Id.* at 601.

422. No. C 11-03764 LB, 2014 WL 1724344 (N.D. Cal. Apr. 28, 2014).

423. *Id.*

424. *Id.*

information (PII) to third parties, such as advertising metrics companies and social networks.<sup>425</sup> The VPPA “prohibits a ‘video tape service provider’ from knowingly disclosing ‘personally identifiable information of a consumer of the provider’ to third parties.”<sup>426</sup> The plaintiffs represent two proposed classes of registered Hulu users.<sup>427</sup> The first proposed class, a comScore disclosure class, consists of registered Hulu users in the United States whose information was disclosed to comScore, a third party metrics company providing verified metrics to Hulu for purposes of pricing advertisement spaces sold for commercials shown during video playback.<sup>428</sup> The second proposed class, a Facebook disclosure class, consists of users whose information was disclosed to Facebook for purposes of targeted marketing.<sup>429</sup>

The court noted that Hulu interacts with comScore and Facebook in two distinct ways.<sup>430</sup> With comScore, Hulu utilized “beacon” technology, which is activated during viewing events such as the start of a video, advertisements, and the end of a video. The technology transmits information including a user’s seven digit Hulu User ID, a unique browser ID, an advertisement ID, and the name of the video.<sup>431</sup> Hulu’s interaction with Facebook comes from Hulu’s choice to include a Facebook “Like” button on a video’s watch page, which automatically transmitted the webpage URL and, in some cases, the user ID to Facebook.<sup>432</sup> The plaintiffs’ expert opined that the disclosure of video information along with data from the Facebook cookies would allow for Facebook to link an identified Facebook user with particular video choices on Hulu.<sup>433</sup>

First, the court addressed whether the information disclosed by Hulu to third parties like comScore and Facebook was PII. Citing a Senate Report on the legislative history of the VPPA,<sup>434</sup> the court held that the VPPA encompasses PII in a form that identifies a specific person and “ties

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425. *Id.*

426. *Id.*

427. *Id.* at \*2.

428. *Id.* at \*2–3.

429. *Id.* at \*2–4. The court subsequently denied the motion for certification of a Facebook disclosure class. It also denied the motion for certification of a comScore disclosure class as moot given its grant of summary judgment to Hulu on its comScore disclosures. *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2014 WL 2758598 (N.D. Cal. June 17, 2014).

430. *In re Hulu Privacy Litig.*, 2014 WL 1724344 at \*16.

431. *Id.* at \*3–4.

432. *Id.* at \*5.

433. *Id.* (citing *Calandrino Decl.*, ECF No. 160–5, ¶¶ 57–81).

434. *Id.* at \*7–8.

that person to particular videos,” as was the case with both comScore and Facebook.<sup>435</sup>

The court next addressed whether the disclosures made by Hulu to comScore were merely anonymized IDs, or whether they were closer to connecting specifically identified persons with the videos they watched.<sup>436</sup> The plaintiffs’ case mainly rested on the “theoretical possibility” of comScore using the anonymous Hulu User IDs to reverse engineer the identity of a specific Hulu user from a Hulu user ID and video title from the user’s “watch page.”<sup>437</sup> The court, however, found that there was no evidence to suggest that comScore actually did reverse engineer the identity of specific users with specific video choices.<sup>438</sup> Hulu also contended that wrongful PII disclosure has to be limited to a user’s “actual name” in order to constitute a VPPA violation.<sup>439</sup> The court opined that Hulu’s position “paints too bright a line,” but nonetheless found that a “unique identifier—without more” does not violate the VPPA.<sup>440</sup> The court further noted that the Plaintiff failed to demonstrate or dispute as a matter of fact how comScore utilized this data, especially in view of comScore’s “interest in recognizing users” as part of its desire to properly target advertising towards certain users based on their viewing choices.<sup>441</sup> Based on the reasoning above, the court granted summary judgment in favor of Hulu.<sup>442</sup>

Conversely, the court noted that Hulu’s disclosures to Facebook resulted in a link between user and video that was more “obvious” than the alleged link in Hulu’s comScore disclosures.<sup>443</sup> The result was a factual issue requiring the court to focus on whether Hulu made a “knowing” disclosure to Facebook.<sup>444</sup> Given the presence of email evidence suggesting that Hulu was aware that “cookies with identifying information were sent” and that third parties like Facebook “could collect data and use it for other purposes to build a profile or identify a user in the real world,” the court

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435. *Id.* at \*8.

436. *Id.* at \*12.

437. *Id.*

438. *Id.*

439. *Id.* at \*11.

440. *Id.* at \*12.

441. *Id.*

442. *Id.*

443. *Id.* at \*14.

444. *Id.* at \*14–15.

denied the motion for summary judgment and allowed the trial to proceed regarding the Facebook disclosure.<sup>445</sup>

The court subsequently held in a later opinion that Hulu's disclosures to Facebook were also not in violation of the VPPA.<sup>446</sup> The decision on Hulu's disclosures to Facebook was initially appealed to the U.S. Court of Appeals for the Ninth Circuit, but the appeal was later voluntarily dismissed.<sup>447</sup>

B. *TERRACOM, INC., & YOURTEL AMERICA, INC.*<sup>448</sup>

On July 9, 2015 the Enforcement Bureau of the Federal Communications Commission ("Bureau") resolved its investigation into whether two wireless eligible telecommunication carriers ("ETCs"), TerraCom, Inc. and YourTel America, Inc. ("Companies"), violated the Communications Act of 1934 ("Act") by storing customers' proprietary information ("PI")<sup>449</sup> on a publicly accessible server that lacked password protection and encryption.<sup>450</sup> Based on its investigation, the Bureau entered into a compromise settlement ("Consent Decree") with the Companies and issued a \$3.5 million civil penalty.<sup>451</sup>

The Companies are common carriers that provide telephone services as ETCs to qualifying low-income consumers at a discount as part of the federal Universal Service Fund Lifeline program.<sup>452</sup> Applicants to the service were required to provide their names, addresses, Social Security numbers, and driver's license numbers or State IDs in their applications.<sup>453</sup> Additionally, applicants were required to provide proof of participation in federal government assistance programs or any other official documents that would establish the applicants' income level or participation in the

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445. *Id.* at \*15.

446. *In re Hulu Privacy Litig.*, 86 F. Supp. 3d 1090, 1104–05 (N.D. Cal. 2015) (finding there was no evidence that Hulu knew that Facebook would link identified users with their video viewing selections).

447. *Garvey v. Hulu, LLC*, No. 15-15774 (9th Cir. Oct. 28, 2015) (order granting voluntary dismissal).

448. 30 F.C.C. Rcd. 7075 (2015).

449. The FCC's definition of "PI" includes, but is not limited to, consumer's first and last name, address, email address or other online contact information, telephone number, Social Security Number, tax identification number, passport number, driver's license number, account numbers, credit card numbers, Uniform Resource Location or Internet Protocol address, or any combination of the above. *Id.* at 7079.

450. *Id.* at 7075.

451. *Id.*

452. *Id.* at 7078–80.

453. *Id.* at 7079.

relevant program.<sup>454</sup> The Companies were independent entities that jointly owned BrightStar Global Solutions, LLC (“BrightStar”), a third-party company that processed and stored the Companies’ customer applications between September 30, 2012 and April 26, 2013.<sup>455</sup>

After learning that a news reporter discovered a data breach exposing customers’ personal information to unauthorized individuals, the Companies notified the Bureau regarding the breach.<sup>456</sup> The Bureau subsequently launched an investigation.<sup>457</sup>

The Bureau’s investigation revealed that the Companies failed to provide reasonable data-security protection, resulting in a data breach that exposed the PI of over 300,000 customers to unauthorized individuals.<sup>458</sup> This data breach resulted from BrightStar’s failure to implement password protection for some of its stored data during a server update, which made customer PI accessible in clear, readable text over the Internet.<sup>459</sup> Specifically, the Bureau found that the Companies violated Section 201(b) of the Act by (1) “failing to employ reasonable data security practices;”<sup>460</sup> (2) representing to their customers in the Companies’ privacy policies that they protected customers’ PI “when in fact they did not;”<sup>461</sup> and (3) failing to notify all customers of the data breach.<sup>462</sup> The Bureau further found that the Companies violated Section 222(a) of the Act in failing to adequately protect their customers’ PI by storing the data in “clear, readable text” on servers “accessible over the Internet.”<sup>463</sup> The Companies admitted to violating Sections 201(b) and 222(a) of the Act.<sup>464</sup> The investigation also found that YourTel violated the Commission’s rules that prevent ETCs from seeking reimbursement for ineligible customers to the Lifeline service, by failing to de-enroll such customers in the allotted timeframe.<sup>465</sup>

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454. *Id.* at 7081.

455. *Id.* at 7080; Federal Communications Commission, *Notice of Apparent Liability for Forfeiture* (Oct. 24, 2014) at 2, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-14-173A1.doc](https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1.doc) [<https://perma.cc/KH6Y-DL94>].

456. *In re* Terracom, F.C.C. Rcd. at 7081.

457. *Id.*

458. *Id.*

459. *See id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.* at 7075, 7081.

464. *Id.* at 7084.

465. *See id.* at 7083, 7090.

As a result of the investigation, the Bureau ordered a Consent Decree assessing on the Companies a civil penalty of \$3.5 million, for which they were jointly and severally liable.<sup>466</sup> The Consent Decree further required the Companies to implement a compliance plan that addressed the Bureau's concerns.<sup>467</sup>

The key elements of the compliance plan are as follows. First, within thirty days, the Companies must perform a risk assessment to identify internal risks of PI breaches by employees and vendors, and to "evaluate . . . the sufficiency of existing policies, procedures, and other safeguards in place to control risks."<sup>468</sup> Second, within sixty days, the Companies must establish a written information security program to protect against PI breaches by employees and vendors.<sup>469</sup> For eight years, the Companies must keep this program up-to-date and address deficiencies and gaps as they appear.<sup>470</sup> And third, within sixty days, the Companies must develop and distribute a compliance manual and implement a training program to relevant employees and vendors explaining Sections 201(b) and 222(a) of the Act, the FCC's Customer Proprietary Network rules, the terms of the Consent Decree, and all operating procedures that employees and vendors' employees must follow.<sup>471</sup> The Companies must also notify all affected customers of the breach and provide one year of complimentary credit monitoring services, as well as a toll-free number for customer support concerning the breach.<sup>472</sup>

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466. *Id.* at 7093.

467. *Id.* at 7075.

468. *Id.* at 7085.

469. *Id.*

470. *Id.* at 7093.

471. *Id.* at 7088.

472. *Id.* at 7087.