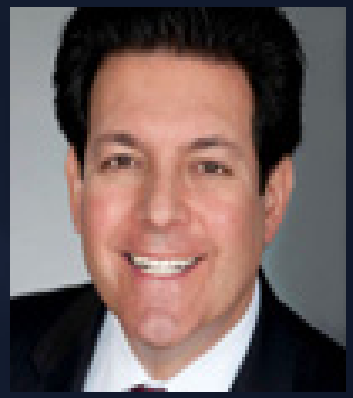
ACC INTERNET & MOBILE LAW YEAR IN REVIEW



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Year in Review….

- CASE ACT
  - Illicit digital transmission services (18 U.S.C. § 2319C)
  - Copyright small claims (voluntary) (17 U.S.C. §§ 1501 to 1511)
  - Trademark Modernization Act of 2020
    - Provisions for examination and reexamination
    - Rebuttable presumption of irreparable harm if a violation is shown (or likelihood of success for a preliminary injunction)
- Antitrust
  - Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019)
    - App store purchasers were direct purchasers who could state a claim under antitrust laws even though individual app providers set their own prices
    - Merely a motion to dismiss
  - DOJ, state AG and multiple private suits against tech companies
- Trademarks and domain names
  - United States Patent and Trademark Office v. Booking.com B. V., 140 S. Ct. 2298 (2020)
    - A generic term + a gTLD can be protected as a trademark
  - Romag Fasteners, Inc v. Fossil, Inc., 140 S. Ct. 1492 (2020)
    - Willfulness is not a precondition to awarding profits in a trademark infringement suit
- Links and embedded links – revisited
- AI, database protection, scraping, and data portability
- Cybersecurity and data privacy class action litigation and trends
- CCPA litigation after 1 year in force -- and what will change under the CPRA
- TCPA and text and mobile marketing
- Online and mobile contract formation and arbitration (including mass arbitration)
- Platform liability and UGC
  - The DMCA
  - The CDA

LINKING AND FRAMING REVISITED

Links, Frames, and In-line and Embedded Links

- Links vs. frames vs. in-line links vs. embedded links
- Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)
  - The *server test:* merely creating a link to another website does not create a *copy* within the meaning of *MAI v. Peak* and cannot result in direct liability for copyright infringement (although it plausibly could lead to secondary infringement based on the direct infringement of a user, if any)
  - The case involved reproduction, distribution, and public display of photos
- Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012)
  - Granting summary judgment for the defendant where its video bookmarking service, which created in-line links to videos on third party websites via frames, could not support a claim for contributory infringement because merely creating links is not a material contribution (and stating in dicta that direct liability could not be imposed)
- Live Nation Motor Sports, Inc. v. Davis, 81 U.S.P.Q.2d 1826, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007) (holding that a link to a stream of a live webcast of motor races that were shown in real time constituted a public performance or display because those terms encompass "each step in the process by which a protected work wends its way to the audience"). Definition of *fixation* is broader for public performances than for other copyright rights
- Recently, some district courts have held that a *prima facie* case for direct infringement made be made (subject to potentially applicable defenses) where in-line or embedded links create public displays of photographs
  - Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018) (holding that that an image displayed via embedded links in various publications, from the Twitter feed where it had been posted, constituted a public display under the Copyright Act; granting partial summary judgment to the plaintiff)
  - The Leader's Institute, LLC v. Jackson, Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514, at *10 (N.D. Tex. Nov. 22, 2017) (denying plaintiff's motion for summary judgment on defendant's counterclaim for copyright infringement, holding that plaintiff publicly displayed copyrighted content from defendant's website by framing it on its own website; distinguishing framing from ordinary linking)
  - Sinclair v. Ziff Davis, LLC, 2020 WL 3450136 (S.D.N.Y. June 24, 2020) (denying MTD on reconsideration; by agreeing to Instagram's Terms of Use, plaintiff authorized Instagram to grant API users, such as Mashable, a sublicense to embed her public Instagram content, but the complaint failed to establish that Instagram exercised that right)
  - McGucken v. Newsweek LLC, 19-CV-9617, 2020 WL 2836427, at *4–5 (S.D.N.Y. June 1, 2020)
  - But see Flava Works, Inc. v. Gunter, 689 F.3d 754, 761 (7th Cir. 2012) (holding that creating an in-line link to videos via frames from the defendant's website did not amount to a public performance)
- Free Speech Systems, LLC v. Menzel, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019) (reading *Perfect 10* as limited to search engines)
- Defenses – DMCA, fair use, implied license, *de minimis* infringement, *Sony* safe harbor
  - Boesen v. United Sports Publications, Ltd., 20-CV-1552 (ARR) (SIL), 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020) (dismissing the copyright infringement claim of a photographer against a sports news publisher, which had included an embedded link to an Instagram post by professional tennis player Caroline Wozniacki, announcing her retirements (which included a low-resolution, cropped version of a photograph taken by the plaintiff), in an article it published about Wozniacki's career, which also quoted the text of the Instagram post)
  - Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (dismissing, as fair use, a Paparazzi photographer's copyright infringement claim, brought against the publisher of XXL magazine, which had embedded a link to an Instagram post by hip hop artist Cardi B, which included a photograph taken by plaintiff of Cardi B at a Tom Ford fashion show, in an article entitled Cardi B Partners with Tom Ford for New Lipstick Shade, which was focused on the event and referenced the Cardi B Instagram post which featured the photograph).

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

Erin Schaff ✓
@erinschaff

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

6:24 AM - 13 Jan 2021

♥ 5,963 ↻ 2,193

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

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ARTIFICIAL INTELLIGENCE, SCREEN SCRAPING AND CONTENT – IP AND RELATED RIGHTS AND LIABILITY

AI/ Screen Scraping/ Database Protection

- **Privacy**
  - FTC
    - Businesses should consider: the representativeness of their data sets, whether their models account for biases, the accuracy of predictions based on their models, and whether their reliance on algorithmic models raises ethical or fairness concerns
- **AI and Property rights** (Cf. screen scraping/ database protection)
  - Licenses (contracts) – like a physical world agent, a software agent acts on behalf of a principal
    - To what extent is a principal liable for the unanticipated actions of an intelligent agent?
    - Indemnification / waivers
  - Ownership issues
    - If copyrighted – who owns the derivative works (address by license – valid assignments/WFH)
    - Sufficient creativity if created by the agent itself (the output of a program)
  - Rights of privacy and publicity (in connection with avatars)
  - Software agents
    - Smorgasbord of remedies (similar to database protection/ screen scraping)
    - Liability for failing to adhere to contract (TOU), trespass/CFAA, misappropriation, unfair competition, DMCA anti-circumvention

AI/ Screen Scraping/ Database Protection

- Contract/TOU/PP restrictions
- Copyright protection
  - Facts vs creative expression
    - Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 350 (1991)
    - Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010)
    - In re Literary Works in Electronic Databases Copyright Litig., MDL No. 1379 (S.D.N.Y. June 10, 2014)
  - Protection for compilations if originality in the selection, arrangement or organization of a database (but thin protection)
  - Data mining as a transformative fair use : Author's Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014)
  - VHT, Inc. v. Zillow Group, Inc., 918 F.3d 723 (9th Cir. 2019) (search function not a fair use)
- Common law claims, such as misappropriation to the extent not preempted by 17 U.S.C. § 301
  - International News Service v. Associated Press, 248 U.S. 215 (1918)
  - National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997)
- Interference with contract or prospective economic advantage
- Unfair competition
- Trespass and Conversion
  - trespass to chattels may be based on unauthorized access (plus damage)
    - Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32 (2003)
  - conversion usually requires a showing of dispossession or at least substantial interference
- Computer Fraud and Abuse Act - Federal anti-trespass computer crimes statute
  - Must establish $5,000 in damages to sue
  - Split of authority on whether exceeding authorized access could be based on access vs. use restrictions
    - United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (*en banc*)
    - WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199 (4th Cir. 2012)
    - U.S. v. Valle, 807 F.3d 508 (2d Cir. 2015)
    - United States v. Van Buren, 940 F.3d 1192 (11th Cir. 2019), cert. granted, 2020 WL 1906566 (2020)
    - U.S. v. John, 597 F.3d 263, 271 (5th Cir. 2010)
    - International Airport Centers, LLC v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006)
  - hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985 (9th Cir. 2019)
    - Affirming an injunction prohibiting LinkedIn from blocking hiQ's access, copying or use of public profiles on LinkedIn's website (information which LinkedIn members had designated as public) or blocking or putting in place technical or legal mechanisms to block hiQ's access to these public profiles, in response to LinkedIn's C&D letter
- Anti-circumvention provisions of the DMCA, 17 U.S.C. §§ 1201 *et seq.*
- Removing, altering or falsifying copyright management information (CMI) - 17 U.S.C. § 1202
- California BOT Law - Cal. Bus. & Prof. Code §§ 17940 *et seq.* prohibits the undisclosed use of bots to communicate or interact with a person in California online, with the intent to mislead the other person about the artificial identity of the bot, to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election

CYBERSECURITY BREACH AND DATA PRIVACY PUTATIVE CLASS ACTION LITIGATION

Cybersecurity and Data Privacy Class Action Litigation

- Cybersecurity claims
  - Breach of contract (if there is a contract)
  - Breach of the covenant of good faith and fair dealing (if the contract claim isn't on point)
  - Breach of implied contract (if there is no express contract)
  - Breach of fiduciary duty, Negligence, Fraud, unfair competition
  - State cybersecurity statutes (especially those that provide for statutory damages and attorneys' fees)
  - California (and potentially Oregon) IoT Law, CCPA
- Securities fraud
  - In re Facebook, Inc. Securities Litigation, 405 F. Supp. 3d 809 (N.D. Cal. 2019) (dismissing plaintiffs' putative class action suit alleging that defendants made materially false and misleading statements and omissions concerning its privacy and data protection practices in violation of federal securities laws)
- Data privacy claims
  - Electronic Communications Privacy Act
    - Wiretap Act (Title I); Stored Communications Act (Title II)
    - Campbell v. Facebook, Inc., 951 F.3d 1106 (9th Cir. 2020) (finding Article III standing)
    - In re Google Assistant Privacy Litig., 457 F. Supp. 3d 797 (N.D. Cal. 2020) (dismissing Wiretap Act claim)
  - Computer Fraud and Abuse Act - 18 U.S.C. § 1030
    - $5,000 minimum injury
    - United States v. Van Buren, 940 F.3d 1192 (11th Cir. 2019), cert. granted, 140 S. Ct. 2667 (2020) (holding that Van Buren exceeded authorized access by accessing the Georgia Crime Information Center database (which he was otherwise authorized to access) to run a license plate check for a third party for money)
  - Video Privacy Protection Act - 18 U.S.C. § 2710
  - State laws
    - Illinois Biometric Information Privacy Act (recently adopted in other states)
    - Michigan's Preservation of Personal Privacy Act
    - California laws including the California Consumer Privacy Act (CCPA)
  - Breach of contract/ privacy policies
    - In re Equifax, Inc., Customer Data Security Breach Litigation, 362 F. Supp. 3d 1295, 1331-32 (N.D. Ga. 2019) (granting defendant's motion to dismiss breach of contract claims premised on Equifax's Privacy Policy)
    - Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1037-38 (N.D. Cal. 2019) (dismissing claims for breach of contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, quasi contract, and breach of confidence in a putative data security breach class action suit, where Facebook's Terms of Service included a limitation-of-liability clause)
  - Regulatory enforcement – FTC and potentially state Attorneys General, including in California (under the CCPA)
    - Coordinate litigation and regulatory enforcement (usually confidential)

Defense Strategies for Data Privacy & Cybersecurity litigation

- Can you compel arbitration?
- If there are multiple suits – is MDL consolidation possible or desirable?
  - Security breach cases are often consolidated in the district where the defendant is located
- Motions to Dismiss
  - Rule 12(b)(1) standing – circuit split - 6th, 7th, 9th, DC vs. high threshold: 2d, 4th, 8th (3d)
  - Rule 12(b)(6) motion to dismiss for failure to state a claim
    - In re: Marriott Int'l, Inc. Customer Data Security Breach Litig., 440 F. Supp. 3d 447 (D. Md. 2020)
    - In re: Solara Medical Supplies, LLC Customer Data Security Breach Litig., _ F. Supp. 3d _, 2020 WL 2214152 (S.D. Cal. 2020)
- Summary judgment
- Class Certification
- Work Product Privilege
  - In re: Capital One Consumer Data Security Breach Litig., MDL No. 1:19md2915, 2020 WL 3470261 (E.D. Va. June 25, 2020) (Ordering production of the Mandiant Report)
    - Applied the 4th Circuit's "driving force" test – (1) was the report prepared when the litigation was a real likelihood (yes); (2) would it have been created anyway in the absence of litigation (yes)
    - Capital One had a preexisting contractual relationship with Mandiant for similar reports and could not show that, absent the breach, the report would have been any different in addressing business critical issues (and the report was widely distributed to 50 employees, 4 different regulators and an accountant)
    - Footnote 8: use different vendors, scopes of work and/or different investigation teams
  - In re: Capital One Consumer Data Security Breach Litig., MDL No. 1:19md2915, 2020 WL 5016930 (E.D. Va. Aug. 21, 2020) (Price Waterhouse – not produced)
  - The Ninth Circuit does not weigh motivations where documents may be used both for business purposes and litigation: In re Grand Jury Subpoena, 357 F.3d 900, 908 (9th Cir. 2004)
- Settlement

Cybersecurity Breach Class Action Litigation - Standing

- Circuit split on Article III standing – Low threshold: 6th, 7th, 9th, DC vs. high threshold: 2d, 4th, 8th (3d)
- **Remijas v. Neiman Marcus Group, 794 F.3d 688 (7th Cir. 2015)**
- **Lewert v. P.F. Chang's China Bistro Inc., 819 F.3d 963 (7th Cir. 2016)**
- **Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384 (6th Cir. 2016) (2-1)**
- Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011), cert. denied, 566 U.S. 989 (2012)
- **Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017)**
  - Allegation that data breaches created an enhanced risk of future identity theft was too speculative
    - Rejected evidence that 33% of health related data breaches result in identity theft
    - Rejected the argument that offering credit monitoring services evidenced a substantial risk of harm (rejecting *Remijas*)
  - Mitigation costs in response to a speculative harm do not qualify as injury in fact
- **Whalen v. Michael's Stores, Inc., 689 F. App'x. 89** (2d Cir. 2017)
  - The theft of plaintiff's financial information was not sufficiently concrete or particularized to satisfy *Spokeo*
  - Plaintiff made purchases via a credit card at a Michaels store on December 31, 2013; breach involved only credit card numbers but no other information such as a person's name, address or PIN
  - Plaintiff alleged that her credit card was presented for unauthorized charges in Ecuador on January 14 and 15, 2014, but she did not allege that any fraudulent charges were actually incurred by her prior to the time she canceled her card
- **Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 981** (2018)
  - following *Remijas v. Neiman Marcus Group, LLC* in holding that plaintiffs, whose information had been exposed but who were not victims of identity theft, had plausibly alleged a heightened risk of future injury because it was plausible to infer that a party accessing plaintiffs' personal information did so with "both the intent and ability to use the data for ill."
- **In re U.S. Office of Personnel Management Data Security Breach Litig.**, 928 F.3d 42 (D.C. Cir. 2019) (21M records)
- **In re SuperValu, Inc., Customer Data Security Breach Litig., 870 F.3d 763 (8th Cir. 2017)**
  - affirming dismissal for lack of standing of the claims of 15 of the 16 plaintiffs but holding that the one plaintiff who alleged he suffered a fraudulent charge on his credit card had standing
  - defendants experienced two separate security breaches, which they announced (in press releases) may have resulted in the theft of credit card information
  - **Rejected cost of mitigation (*Clapper*) (*Cf. P.F. Chang's*)**
- **In re Zappos.com, Inc.**, 888 F.3d 1020 (9th Cir. 2018), cert. denied, 139 S. Ct. 1373 (2019)
  - Merely having personal information exposed in a security breach constitutes sufficient harm to justify Article III standing in federal court, regardless of whether the information in fact is used for identity theft or other improper purposes
  - **Bootstrapping -** Because other plaintiffs alleged that their accounts or identities had been commandeered by hackers, the court concluded that the appellants in *Zappos* – who did not allege any such harm – could be subject to fraud or identity theft

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

CCPA Putative Class Action Litigation

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

Defense Strategies for CCPA & Other Cybersecurity litigation

- Many "CCPA claims" aren't actually actionable under the CCPA
- The CCPA creates a private right of action for
  - [1] consumers
  - [2] "whose nonencrypted or nonredacted
  - [3] personal information [within the meaning of Cal. Civ. Code §§ 1798.150(a)(1) and 1798.81.5] . . .
  - [4] is subject to an unauthorized access and exfiltration, theft, or disclosure
  - [5] as a result of the business's
  - [6] violation of the duty to implement and maintain reasonable security procedures and practices . . . ."
- Should you respond to a CCPA 30 day cure notice and if so how?
- Consider the same issues discussed earlier:
  - Arbitration?
  - MDL?
  - Motions to Dismiss
  - Summary judgment
  - Settlement
- How to avoid or anticipate CCPA claims?
  - Encrypt your data and comply with the CCPA (or make sure to avoid its application)….
  - Implement and maintain reasonable security procedures and practices
  - Craft a binding and enforceable arbitration provision and include it in every contract with consumers under the FAA (not state law), avoiding or complying with AAA requirements
  - Make sure your online and mobile consumer contract formation process conforms to the law in the worst jurisdictions
  - Where you don't have privity of contract, make sure you are an intended beneficiary of an arbitration clause in a contract with a business partner who does have privity (because you will be sued!)
  - Explore insurance coverage

How will litigation change under the CPRA?

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

TELEPHONE CONSUMER PROTECTION ACT

TCPA Suits

- Up to $500 "per violation" – trebled if the defendant violated the statute "willfully or knowingly"
- Fast track rules (S.D. Fla.)
- Potential defenses:
  - Consent (potentially raising issues of revocation of consent and reconsenting)
  - Arbitration
  - No grounds for class certification
  - No use of an ATDS
- ACA Int'l v. F.C.C., 885 F.3d 687 (D.C. Cir. 2018)
  - Invalidated 2003, 2008 and 2015 regulations to the extent they expand the definition of an ATDS
  - Invalidated the one call safe harbor for reassigned numbers
  - Upheld revocation procedures in 2015 Order
- Circuit split on what constitutes an Automatic Telephone Dialing System (ATDS) to be resolved by the U.S. Supreme Court in Duguid v. Facebook, Inc., 141 S. Ct. 193 (2020) (granting cert):
  - An ATDS is equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers
  - 3d, 7th, 11th Circuits: a system must have the capacity to generate numbers randomly or sequentially
    - Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018) (statute requires number generation; *present* capacity); Dominguez v. Yahoo, Inc., 629 F. App'x. 369, 373 & nn.1, 2 (3d Cir. 2015)
    - Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020)
    - Gadelhak v. AT&T Services, Inc., 950 F.3d 458 (7th Cir. 2020)
  - 2d, 6th, 9th Circuits: "using a random number generator" modifies only "produces" not "stores," and therefore broadly encompasses any system with the capacity to dial from a list of stored numbers
    - Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1289 (2019)
      - Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019), cert. granted, 141 S. Ct. 193 (2020)
    - Duran v. La Boom Disco, Inc., 955 F.3d 279 (2d Cir. 2020)
    - Allan v. Pa. Higher Education Assistance, 968 F.3d 567 (6th Cir. 2020)
- Human intervention test – what is *automatic?*
  - Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018)
  - Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020)

TCPA – Additional Case Law

- Barr v. American Association of Political Consultants, Inc., 140 S. Ct. 2335 (2020)
  - Striking down on First Amendment grounds the debt collection exception to the prohibition on autodialed calls set forth in section 227(b)(1)(A)(iii) because it impermissibly favored government debt-collection speech over political and other speech (Kavanaugh, J.)
- PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019) (remanding the case to determine, without addressing, whether district courts are bound by the Hobbs Act to defer to particular FCC determinations in construing the TCPA)
  - PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 982 F.3d 258 (4th Cir. 2020) (holding that the relevant FCC order was interpretive, and thus not binding, and remanding for further review of the appropriate standard of deference to give to the order)
- Reassigned/ recycled numbers
  - N.L. by Lemos v. Credit One Bank, N.A., 960 F.3d 1164, 1167-71 (9th Cir. 2020) (consent must be obtained from the person called, not the intended recipient)
- Consent/ Revocation and Class certification
  - FCC regulation: Consent and revocation by any reasonable means (affirmed by *ACC*)
    - *ACC*: Applies only to unilateral revocation; parties may be able to set binding revocation rules through a mutual agreement
    - Reyes v. Lincoln Automotive Financial Services, 861 F.3d 51, 56-59 (2d Cir. 2017) (applying common law principles in holding that the plaintiff could not unilaterally withdraw the consent to receive calls he had previously given by an express provision in a contract to lease an automobile from Lincoln)
    - Lucoff v. Navient Solutions, LLC, 981 F.3d 1299 (11th Cir. 2020) (affirming summary judgment for the defendant; the plaintiff was held to have reconsented to receive calls to his cellular phone after previously revoking consent)
- Standing
  - Salcedo v. Hanna, 936 F.3d 1162, 1166-73 (11th Cir. 2019) (holding that a law firm client did not establish a concrete injury in fact from receiving single unsolicited text message and, therefore, did not have Article III standing to sue in federal court)
  - Cordoba v. DirecTV, LLC, 942 F.3d 1259 (11th Cir. 2019) (holding that plaintiffs, whose phone numbers were not on the National Do Not Call Registry and who never asked Telcel not to call them again, lacked Article III standing for unwanted calls received from Telcel, under the TCPA, because the receipt of a call was not traceable to Telcel's alleged failure to comply with regulations requiring it to maintain an internal do-not-call list)
  - Grigorian v. FCA US LLC, _ F. App'x _, 2020 WL 7238392 (11th Cir. 2020) (no standing to assert a claim based on a "ringless" voicemail that otherwise didn't interfere with the plaintiff's ability to use her phone)
- Due process
  - Golan v. FreeEats.com, Inc., 930 F.3d 950, 962-63 (8th Cir. 2019) (holding that $500 minimum statutory damages totaling $1.6 Billion (based on 3.2 million phone calls allegedly placed in the course of one week) violated Due Process)
  - United States v. DISH Network, L.L.C., 954 F.3d 970, 980-81 (7th Cir. 2020) ($280 million award for 65 million violations, amounting to roughly $4 per violation, did not violate due process)

ONLINE AND MOBILE CONTRACT FORMATION

Online and Mobile Contract Formation

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

amazon.com

SIGN IN SHIPPING & PAYMENT GIFT OPTIONS PLACE ORDER

Review your order

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

Shipping address Change
[redacted]

Or try Amazon Locker
20 locations near this address

Payment method Change
VISA [redacted]
Gift Card

Billing address Change
Same as shipping address

Gift cards & promotional codes
Enter Code Apply

Place your order

Order Summary

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

How are shipping costs calculated?

FREE TWO-DAY SHIPPING

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

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

[redacted]

Choose a delivery option:

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

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

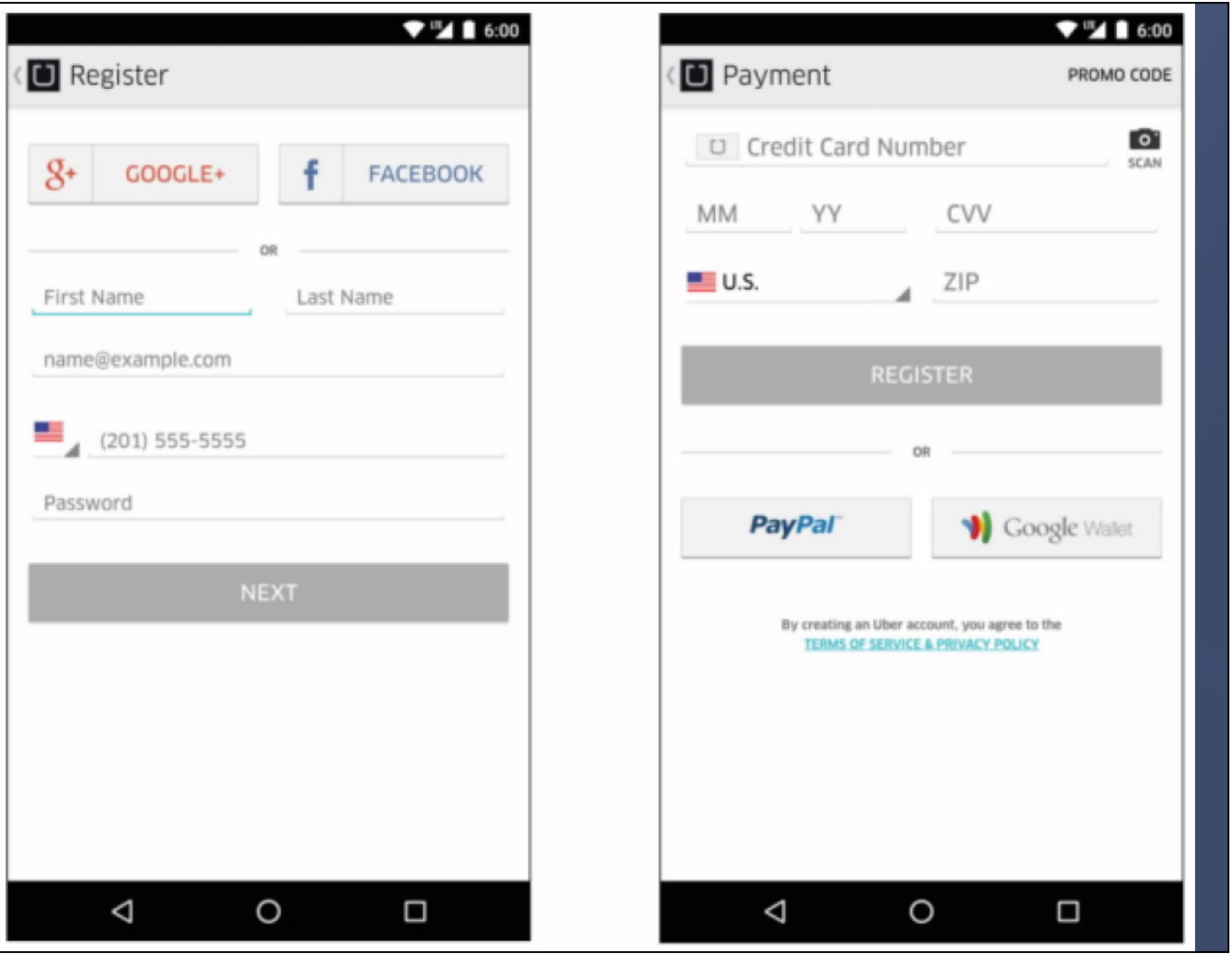
Do you need help? Explore our Help pages or contact us

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

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

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

Go to the Amazon.com homepage without completing your order.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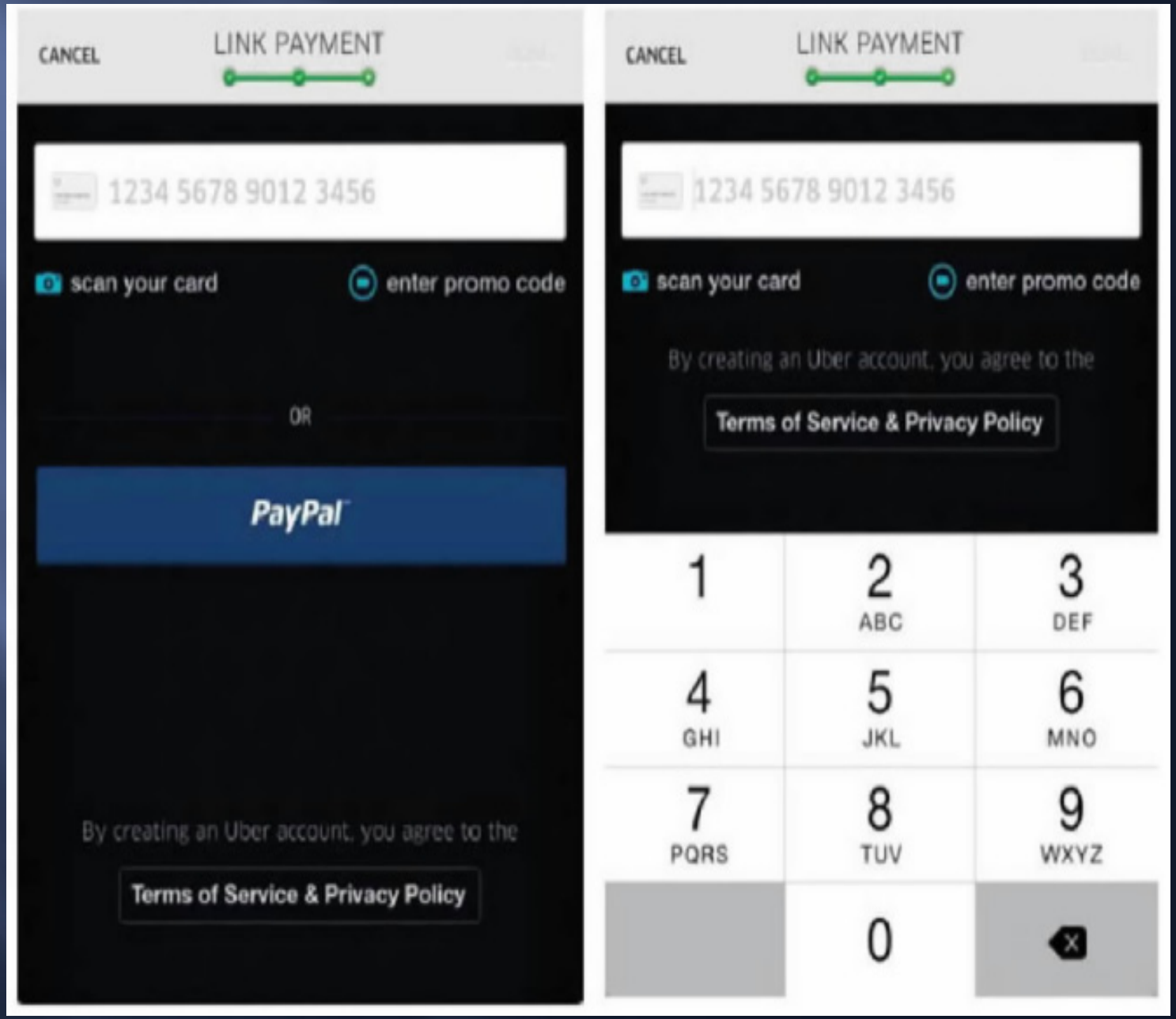
By creating an Uber account, you agree to the
TERMS OF SERVICE & PRIVACY POLICY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scan your card
enter promo code
OR
PayPal
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy
CANCEL
LINK PAYMENT
1234 5678 9012 3456
scan your card
enter promo code
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy
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2 ABC
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4 GHI
5 JKL
6 MNO
7 PQRS
8 TUV
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  - Stover v. Experian Holdings, Inc., 978 F.3d 1082 (9th Cir. 2020)
    - Visiting a website four years after agreeing to Terms of Use that permitted changes did not bind the plaintiff to the terms in effect on later visit
    - Ways to make future amendments enforceable

Arbitration, Contract Formation & Mass Arbitration

- Arbitration and Class Action Waivers
  - AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
  - Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019)
  - American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)
  - Tompkins v. 23andMe.com. Inc., 840 F.3d 1016 (9th Cir. 2016)
    - Abrogating or limiting earlier Ninth Circuit cases that applied pre-*Concepcion* California unconscionability case law, which had treated arbitration clauses differently from other contracts
    - Venue selection, bilateral attorneys' fee and IP carve out provisions not unconscionable
    - Enforcing delegation clause
  - Baltazar v. Forever 21, Inc., 62 Cal. 4th 1237, 200 Cal. Rptr. 3d 7 (2016) (abrogating earlier precedent that held certain provisions to be unconscionable when included in arbitration agreements)
  - Larsen v. Citibank FSB, 871 F.3d 1295 (11th Cir. 2017) (compelling arbitration; unilateral amendment provision modified by the duty of good faith and fair dealing under either Ohio or Washington law)
  - National Federation of the Blind v. Container Store, 904 F.3d 70 (1st Cir. 2018)
    - Holding T&Cs illusory under TX law, and declining to enforce the included arbitration clause
    - Rejecting the argument that a unilateral amendment clause was not illusory because modified by the duty of good faith and fair dealing or based on the severability clause
- Mass Arbitration
  - Postmates Inc. v. 10,356 Individuals, CV 20-2783 PSG, 2020 WL 1908302 (C.D. Cal. 2020) (denying injunctive relief)
- Drafting Tips
  - Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)
    - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
    - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable
  - Rahimi v. Nintendo of America, Inc., 936 F. Supp. 2d 1141 (N.D. Cal. 2013)
  - Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019)
  - Revitch v. DIRECTV, LLC, 977 F.3d 713 (9th Cir. 2020) ("affiliates" didn't extend to later affiliates; declining to enforce an arbitration agreement in a TCPA case)
  - Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) (holding that ambiguity in an arbitration agreement does not provide sufficient grounds for compelling classwide arbitration)
  - AAA – registration requirement
  - Address "mass arbitration" – JAMS vs AAA
  - Review and update frequently

UGC LIABILITY

HATEWATCH


Far-Right Insurrectionists Organized Capitol Siege on Parler

Comparative Liability and Safe Harbors for User Conduct & Content

- Copyright and the Digital Millennium Copyright Act
  - Direct, contributory, vicarious liability and inducement
  - The DMCA insulates "Service Providers" from liability for material "stored at the direction of a user"
  - *But for* analysis: UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013)
  - Shifting burdens of proof: Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78 (2d Cir. 2016)
  - Repeat infringer policy: BMG Rights Mgmt (US) LLC v. Cox Communications Inc., 881 F.3d 293 (4th Cir. 2018)
  - What is user storage? Mavrix Photographs, LLC v. LiveJournal, Inc., 853 F.3d 1020 (9th Cir. 2017)
    - Agency principles re volunteer moderators
      - Compare: BWP Media USA, Inc. v. Clarity Digital Group, LLC, 820 F.3d 1175 (10th Cir. 2016)
    - Fact question re whether the material was stored at the direction of a user because posted by moderators (misreads the plain terms of the statute– stored *at the direction* of the user, not *by* the user)
    - Ventura Content, Ltd. v. Motherless, Inc., 885 F.3d 597 (9th Cir. 2018)
      - Affirmed SJ for a UGC porn site
      - Reviewing for legal compliance is different from making discretionary decisions about what to post
      - Suggests that *LiveJournal* only applies where a site or service picks and chooses what to post
    - Downs v. Oath Inc., 385 F. Supp. 3d 298, 303-05 (S.D.N.Y. 2019) (granting summary judgment for Oath on its entitlement to the DMCA safe harbor; "cursory screening" by Oath for offensive and illegal content, and Oath's addition of content tags and related video links)
    - Compare – some pre-upload review but not all: shifting burdens of proof would apply
    - BWP Media USA, Inc. v. Polyvore, Inc., 922 F.3d 42 (2d Cir. 2019) (is storage *solely* to facilitate access)
    - ALS Scan Inc. v. Steadfast Networks LLC, 819 F. App'x 522 (9th Cir. 2020) (no contributory liability where website host forwarded plaintiff's notices to users and the material was taken down)
- Trademark Law
  - Direct, contributory , possibly vicarious (agency) and inducement liability
    - Likelihood of confusion or dilution (use is not enough)
  - No DMTA or *Sony* safe harbor but increasing *de facto* recognition for notice and takedown
    - Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93 (2d Cir.), cert. denied, 131 S. Ct. 647 (2010)
  - Publishers exemption - 15 U.S.C. § 1114(2)(B)-(C)
  - Print-on-Demand: Ohio State University v. Redbubble, Inc., 369 F. Supp. 3d 840 (S.D. Ohio 2019) (intermediary is not a seller)
  - YYGM SA v. Redbubble, Inc., 2020 WL 3984528 (C.D. Cal. 2020) (SJ for Redbubble on direct and vicarious liability claims)
- Patent Law
  - Blazer v. eBay, Inc., 2017 WL 1047572 (N.D. Ala. 2017)
  - Milo & Gabby LLC v. Amazon.com, Inc., 693 F. App'x 879 (Fed. Cir. 2017)

SECTION 230 UPDATE

230 Update – Intellectual Property

- 47 U.S.C. § 230 (the Communications Decency Act) and IP claims
  - 230(c)(1): No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider
  - Preempts inconsistent state laws (including defamation, privacy) and some federal claims
  - Excludes: FOSTA/SESTA
  - Excludes: federal criminal claims; claims under ECPA or "any similar state law"; "any law pertaining to intellectual property."
  - What is a law "pertaining to intellectual property"?
    - Perfect 10, Inc. v. Ccbill, 488 F.3d 1102 (9th Cir. 2007) (right of publicity)
    - Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008)
    - Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690 (S.D.N.Y. 2009) (Chin)
    - Enigma Software Group, LLC v. Malwarebytes, Inc., 946 F.3d 1040 (9th Cir. 2019) (Lanham Act false advertising - not a law "pertaining to intellectual property"), cert. denied, 140 S. Ct. 2761 (2020)
    - Marshall's Locksmith Service Inc. v. Google, LLC, 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Lanham Act false advertising claims of 14 locksmith companies, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located)
    - Hepp v. Facebook, Inc., 465 F. Supp. 3d 491 a(E.D. Pa. 2020) (right of publicity – following *Enigma Software*)
  - Defend Trade Secrets Act – not a "law pertaining to intellectual property"
  - Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018: 17 U.S.C. § 1401(a) is a "law pertaining to intellectual property" within the meaning of 47 U.S.C. § 230(e)(2)

230 Update

- Plaintiff friendly (9th and 10th Circuits and maybe the 7th Circuit):
  - Fair Housing Council v. Roommate.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (*en banc*)
  - FTC v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009)
- Defendant friendly (1st, 2d, 4th, 6th and D.C. Circuits):
  - Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016)
  - Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (affirming dismissal)
  - Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398 (6th Cir. 2014)
  - Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019)
  - Marshall's Locksmith Service, Inc., 925 F.3d 1263 (D.C. Cir. 2019)
    - Affirming dismissal of plaintiffs' Sherman Act I (conspiracy) and II (monopolization) claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located
- Fyk v. Facebook, Inc., 808 F. App'x 597 (9th Cir. 2020) (depublishing and republishing content is not development; monetary compensation is irrelevant under 230(c)(1))
  - But see Teatotaller, LLC v. Facebook, Inc., _ A.3d _ (N.H. 2020) (denying MTD a breach of contract claim premised on account deletion)
- National Association of the Deaf v. Harvard University, 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (granting judgment on the pleadings, holding that the CDA was applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms)
- Conduct as content
  - Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019)
    - Facebook is immune from claims under the Anti-Terrorism Act brought by victims of Hamas
  - Dyroff v. Ultimate Software Group, Inc., 934 F.3d 1093 (9th Cir. 2019)
    - No development where the decedent used defendant's neutral tools to discuss drug use and meet up with a dealer who sold him fentanyl laced heroin
  - HomeAway.com, Inc. v. Santa Monica, 918 F.3d 676 (9th Cir. 2019)
  - Herrick v. Grindr LLC, 765 F. App'x 586 (2d Cir. 2019) (product liability – app)
- Legislative change?

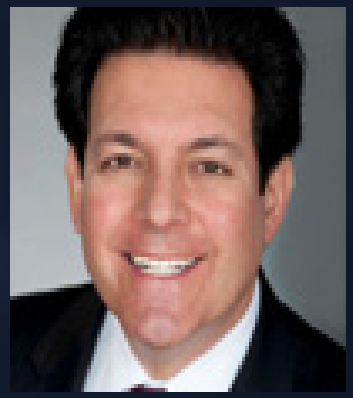
Marketplaces

- Erie Insurance Co. v. Amazon.com, Inc., 925 F.3d 125, 141-44 (4th Cir. 2019) (holding that, where Amazon did not obtain title to the headlamp shipped to its warehouse by Dream Light and Dream Light (the seller) set the price, designed the product description, paid Amazon for fulfillment services, and ultimately received the purchase price paid by the seller, Amazon was not "a seller — one who transfers ownership of property for a price — and therefore does not have the liability under Maryland law that sellers of goods have. To be sure, when Amazon sells its own goods on its website, it has the responsibility of a "seller," just as any other retailer, such as Home Depot, would have. But when it provides a website for use by other sellers of products and facilitates those sales under its fulfillment program, it is not a seller, and it does not have the liability of a seller.")
- Fox v. Amazon.com, Inc., 930 F.3d 415, 422-25 (6th Cir. 2019) (holding that Amazon was not a seller within the meaning of the Tennessee Products Liability Act – which the court defined as "any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain" – where Amazon.com "did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace.")
- Oberdorf v. Amazon.com, Inc., 930 F.3d 136 (3d Cir. 2019), vacated, 936 F.3d 182 (3d Cir. 2019) (vacating the opinion and granting *en banc* review)
  - Oberdorf v. Amazon.com, Inc., 818 F. App'x 138 (3d Cir. 2020) (certifying to the PA Supreme Court whether Amazon could be strictly liable for a defective product purchased on its platform from a third-party vendor)
- Bolger v. Amazon.com, LLC, 53 Cal. App. 5th 431 (4th Dist. 2020) (imposing strict product liability on a platform, rejecting the applicability of the CDA)
- Stiner v. Amazon.com, Inc., _ N.E.3d _, 2020 WL 5822477 (Ohio 2020) (Amazon was not a "supplier" within meaning of the Products Liability Act)
- Sen v. Amazon.com, Inc., Case No.: 3:16-CV-01486-JAH-JLB, 2018 WL 4680018 (S.D. Cal. Sept. 28, 2018) (granting summary judgment for Amazon.com on plaintiff's claim for tortious interference, premised on a user's product review on Amazon.com), aff'd in relevant part, 739 F. App'x 626 (9th Cir. 2020)

Miscellaneous speech cases

- Knight First Amendment Institute v. Trump, 928 F.3d 226 (2d Cir. 2019)
  - Knight First Amendment Institute v. Trump, 953 F.3d 216 (2d Cir. 2020) (denying *en banc* review) (petition for cert filed)
  - Trump's Twitter account was a public forum
  - Trump, as President, acted in a government capacity in blocking users, which amounted to unconstitutional viewpoint discrimination
- Clifford v. Trump, 818 F. App'x 746 (9th Cir. 2020) (granting the TCPA motion of President Trump, in a suit brought by his former paramour Stephanie Clifford (a/k/a/ Stormy Daniels), because Trump's Tweet ("A total con job, playing the Fake News Media for Fools (but they know it)!") – was protected under the First Amendment as rhetorical hyperbole)
  - Klocke v. Watson, 936 F.3d 240 (5th Cir. 2019) (holding that the Texas TCPA statute does not apply in federal court because its burden-shifting framework and heightened evidentiary standard for pretrial dismissal conflict with Fed. R. Civ. Proc. 12 and 56)
  - La Liberte v. Reid, 966 F.3d 79 (2d Cir. 2020) (Cal Anti-SLAPP statute is inapplicable in federal court)
  - FilmOn.com Inc. v. DoubleVerify Inc., 7 Cal. 5th 133, 246 Cal. Rptr. 3d 591 (2019)
- IMDB.Com, Inc. v. Becerra, 962 F.3d 1111 (9th Cir. 2020)
  - Affirming the lower court injunction prohibiting enforcement of a California statute that prohibited publication of the ages and birthdates of entertainment industry professionals, as violative of the First Amendment
- Wexler v. Dorsey & Whitney LLP, 815 F. App'x 618 (2d Cir. 2020)
  - A blog post stating that "TCPA Class Certification Denial Exposes Major Spousal Scheme" was an opinion and not actionable
- Automated Transactions, LLC v. American Bankers Ass'n, 172 N.H. 528 (2019)
  - holding that "ATL is a well-known patent troll" was a statement of opinion rather than fact
  - "the statement is an assertion that, among other things, ATL is a patent troll because its patent-enforcement activity is 'aggressive.' This statement cannot be proven true or false because whether given behavior is 'aggressive' cannot be objectively verified . . . ."

ACC INTERNET & MOBILE LAW YEAR IN REVIEW



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