

AI WORKSHOP: PROPERTY RIGHTS, OWNERSHIP AND PRIVACY COMPLIANCE AND LITIGATION



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



Eulonda Skyles
Skyles Law Firm PLLC
Founder



Doug Smith
Executive Director,
Cybersecurity and Privacy
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E-Commerce & Internet Law

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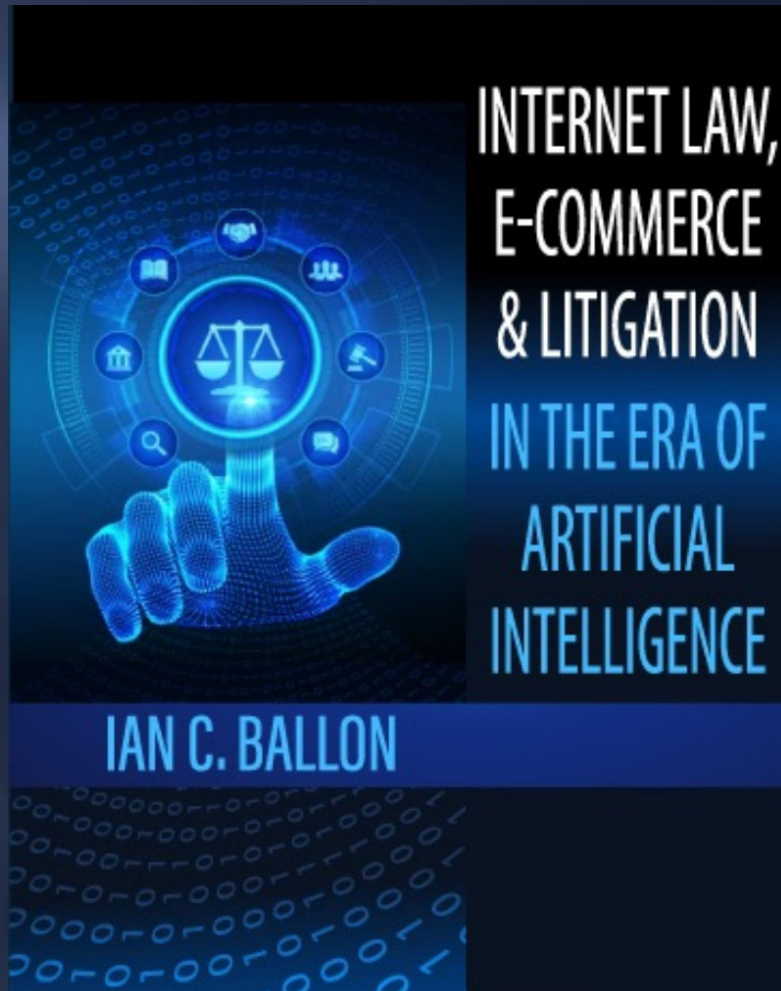
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IN THE ERA OF
ARTIFICIAL
INTELLIGENCE

IAN C. BALLON

YEAR IN REVIEW

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AI LAW
YEAR IN
REVIEW

AI Law 2026

- ▣ IP protection for the output of generative AI
- ▣ Liability for inputs: using content and data sets to train algorithms for ML/ AI/Generative AI
 - Your own content or data
 - Content or data freely available for use
 - Content or data licensed for training
 - Third party content or data that may be accessible but not freely available
 - The owner may claim proprietary rights (under IP or other laws)
 - Third party data may be incomplete (due to privacy opt-out laws)
- ▣ Privacy laws, including state laws governing automated decision making (and opt out, access and notice rights) and AI-specific state laws
 - Preemption of state laws per Trump's Executive Order on National Policy Framework for AI (12/25)?
 - California Transparency in Frontier AI Act (risk assessments and disclosures, public training data summaries, whistleblower provisions)
 - NY Responsible AI Safety and Education Act (safety protocols, reporting obligations, oversight structures for AI systems)
 - TX Responsible AI Governance Act (govt use of AI and prohibited practices)
 - Utah Artificial Intelligence Policy Act (disclosure of high-risk AI interactions; safe harbor)
- ▣ Ethical Issues in training algorithms
- ▣ SEC enforcement against AI Washing
- ▣ International regulation: EU, US, Japan
- ▣ Using AI in your legal practice
 - *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023)
 - Fact gathering and evidentiary issues
 - Legal strategy from LLMs
 - Privilege and confidentiality

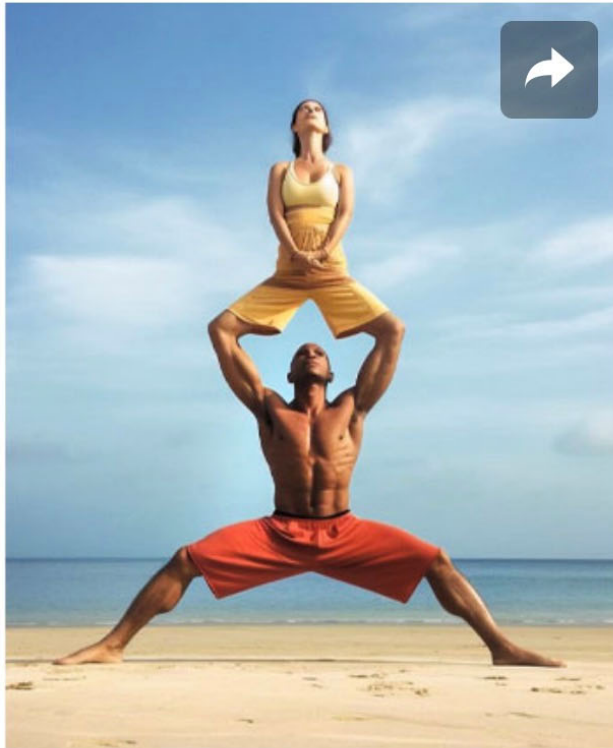
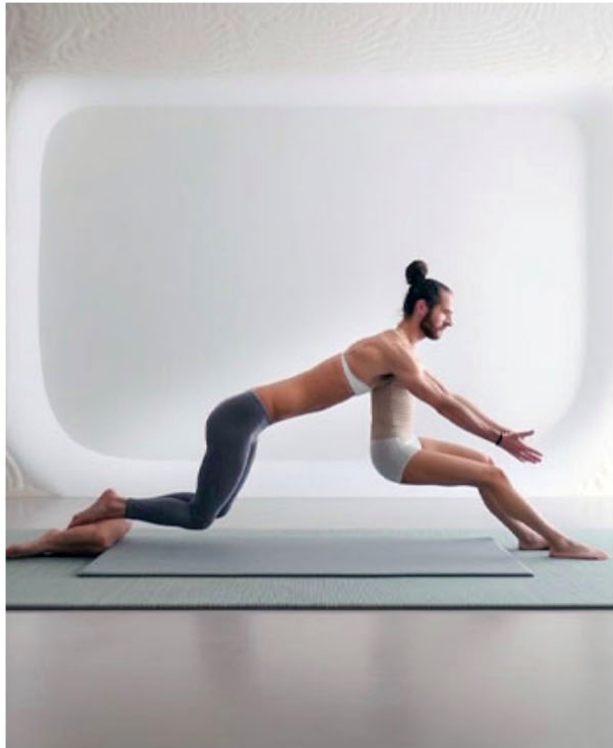






Daniel Fox

Desert





"Cocky Expression"



The AI prompt was "Salmon in the river" so majestic. 



r/196

Report

Final score:187

AI Output-- Copyrightability and Patent Law

- ▣ Machines can't obtain patents
- ▣ Machines can't create works
 - Copyright Office position
 - ▣ *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025) (holding that the Copyright Office did not act arbitrarily or capriciously in denying registration of an autonomously-generated work; on appeal)
 - *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) (holding that “animals other than humans . . . lack statutory standing to sue under the Copyright Act.”)
- ▣ U.S. Copyright Office Copyright and Artificial Intelligence, Part 2: Copyrightability (Jan. 2025)
 - Copyright protects the original expression in a work created by a human author, even if the work also includes AI-generated material.
 - Copyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.
 - Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.
 - Based on the functioning of current generally available technology, prompts do not alone provide sufficient control.
- ▣ Can the output of generative AI result in liability? (*i.e.*, can “works” created by machines be infringing or a fair use?)
 - Look at the algorithm and the content or data used to train it
 - How many photos/songs/other creative works are used to train the algorithm
 - Does the algorithm replicate a specific creator's style?
 - What if the algorithm is so good that it independently creates a work that appears to be infringing?



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

Liability for Training Inputs and Output

- **Contract/TOU/PP restrictions**
 - *Meta Platforms, Inc. v. BrandTotal Ltd.*, _ F. Supp. 3d _ , 2022 WL 1990225 (N.D. Cal. 2022) (automated access violated TOU)
 - *X Corp. v. Bright Data Ltd.*, No. C 23-03698 WHA, 2024 WL 2113859 (N.D. Cal. May 9, 2024)
- **Copyright protection (statutory damages and potentially attorneys' fees if a work is timely registered)**
 - Facts vs creative expression: *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991)
 - Protection for compilations if originality in the selection, arrangement or organization of a database (but thin protection)
 - Output vs. intermediate copying
 - Data mining as a transformative fair use: *Author's Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
 - *Concord Music Group, Inc. v. Anthropic PBC*, 2025 WL 1487988 (N.D. Cal. Mar. 26, 2025) (MTD)
 - *Concord Music Group, Inc. v. Anthropic PBC*, 2025 WL 904333 (N.D. Cal. Mar. 25, 2025) (denying PI)
 - *Thomson Reuters Enterprise Centre GMBH v Ross Intelligence Inc.*, 765 F. Supp. 382 (D. Del. Feb. 11, 2025) (granting plaintiff partial SJ on keynote copyright claims)
 - *Tremblay v. OpenAI, Inc.*, 742 F. Supp. 3d 1053 (N.D. Cal. July 30, 2024) (MTD)
 - *Tremblay v. OpenAI, Inc.*, 716 F. Supp. 3d 777 (N.D. Cal. Feb. 12, 2024) (MTD)
 - *Kadrey v. Meta Platforms, Inc.*, 2023 WL 3640501 (N.D. Cal. Nov. 20, 2023)
 - *Andersen v. Stability AI Ltd.*, 700 F. Supp. 3d 853 WL 7132064 (N.D. Cal. 2023)
 - *Andersen v. Stability AI Ltd.*, 744 F. Supp. 3d 983 (N.D. Cal. Aug. 12, 2024)
 - *Andersen v. Stability AI Ltd.*, 2024 WL 536279 (N.D. Cal. Feb. 8, 2024)
- **Common law claims**, such as misappropriation to the extent not preempted by 17 U.S.C. § 301
 - *International News Service v. Associated Press*, 248 U.S. 215 (1918)
 - *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997)
- **Interference with contract or prospective economic advantage**
- **Unfair competition**
- **Trespass and Conversion**
 - Trespass to chattels may be based on unauthorized access (plus damage)
 - *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32 (2003)
 - *Best Carpet Values, Inc. v. Google, LLC*, 90 F.4 962 (9th Cir. 2024) (no trespass claim for frame displayed on copy of website)
 - conversion usually requires a showing of dispossession or at least substantial interference
- **Computer Fraud and Abuse Act** - Federal anti-trespass computer crimes statute
 - Must establish \$5,000 in damages to sue
 - Exceeding authorized access may not be based on use (vs. access) restrictions: *Van Buren v. United States*, 141 S. Ct. 1648 (2021)
 - *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180 (9th Cir. 2022)
 - *Meta Platforms, Inc. v. Voyager Lab\$ Inc.*, Case No. 23-cv-00154-AMO, 2024 WL 2412419 (N.D. Cal. May 23, 2024) (denying MTD CFAA, CCDAF and breach of contract claims where Voyager scraped user profiles and sold the data to third parties)
 - *Ryanair DAC v. Booking.com B.V.*, 2025 WL 266631 (D. Del. Jan. 22, 2025)
- **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

Training AI algorithms/ Screen Scraping/ Data Portability

□ Direct Liability

- If you directly scrape or otherwise copy third party data you could be held liable under the theories noted on the prior slide

□ Secondary Liability

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

POTENTIAL
SECONDARY
COPYRIGHT LIABILITY
FOR USING THIRD
PARTY AI PROGRAMS

□ Copyright Inducement

- (1) intent to bring about infringement, (2) distribution of a device suitable for infringing use, and (3) evidence of actual infringement by recipients of the device *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Columbia Pictures Industries, Inc. v. Fung.*, 710 F.3d 1020 (9th Cir. 2013).

□ Direct Liability

- Volitional conduct (causation): *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

□ Contributory Infringement

- Imposed where a person or entity “induces, causes or materially contributes to the infringing conduct of another. . .” *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679, 686 (N.D. Cal. 1994); *see also UMG Recordings, Inc. v. Bertelsmann*, 222 F.R.D. 408 (N.D. Cal. 2004)(must show (1) direct infringement by a third party, (2) actual or constructive knowledge by the defendant, and (3) substantial participation by the defendant in the infringing activities); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (reasonable knowledge; knew/should have known on system; failed to act to prevent viral dist’n); *Perfect10, Inc. v. Amazon.com*, 487 F.3d 701 (9th Cir. 2007) (actual knowledge that specific infringing material is available where the service could have taken simple measures to prevent further damage but did not do so); *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (Contributory liability is “predicated upon ‘the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor.’”) (quoting *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966)).

□ Vicarious liability

- May be imposed where the defendant (1) has the right and ability to supervise the infringing activity, and (2) has a direct financial interest in such activities. *E.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001);

Entertainment, 146 S. Ct. 959 (2026)

- ▣ Liability for contributory infringement may be imposed on a service provider for a user's infringement *only* if it intended that the provided service be used for infringement (which can be shown only if the party induced the infringement (*i.e.*, actively encouraged infringement through specific acts, as in *Grokster*) or if the provided service is tailored to infringement (*i.e.*, if it cannot meet the *Sony* safe harbor by showing the service is capable of substantial noninfringing uses)
 - The opinion is based on prior USSCT *Grokster* and *Sony* cases, without regard to lower court case law
 - No liability for merely providing a service with knowledge that it will be used by some to infringe copyrights
 - Overruled without discussing 100 years of copyright case law holding companies liable where they knew (or in some cases, should have known) about the infringement
 - Notice + failure to act is no longer enough to state a claim for contributory infringement
 - Likely eliminates vicarious liability (right and ability to control + financial interest) since not based on inducement or providing a service tailored to infringement
 - Casts doubt on willful blindness cases because willful blindness is deemed equivalent to *knowledge*, not intent

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

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

Copyright damages for the Use of AI

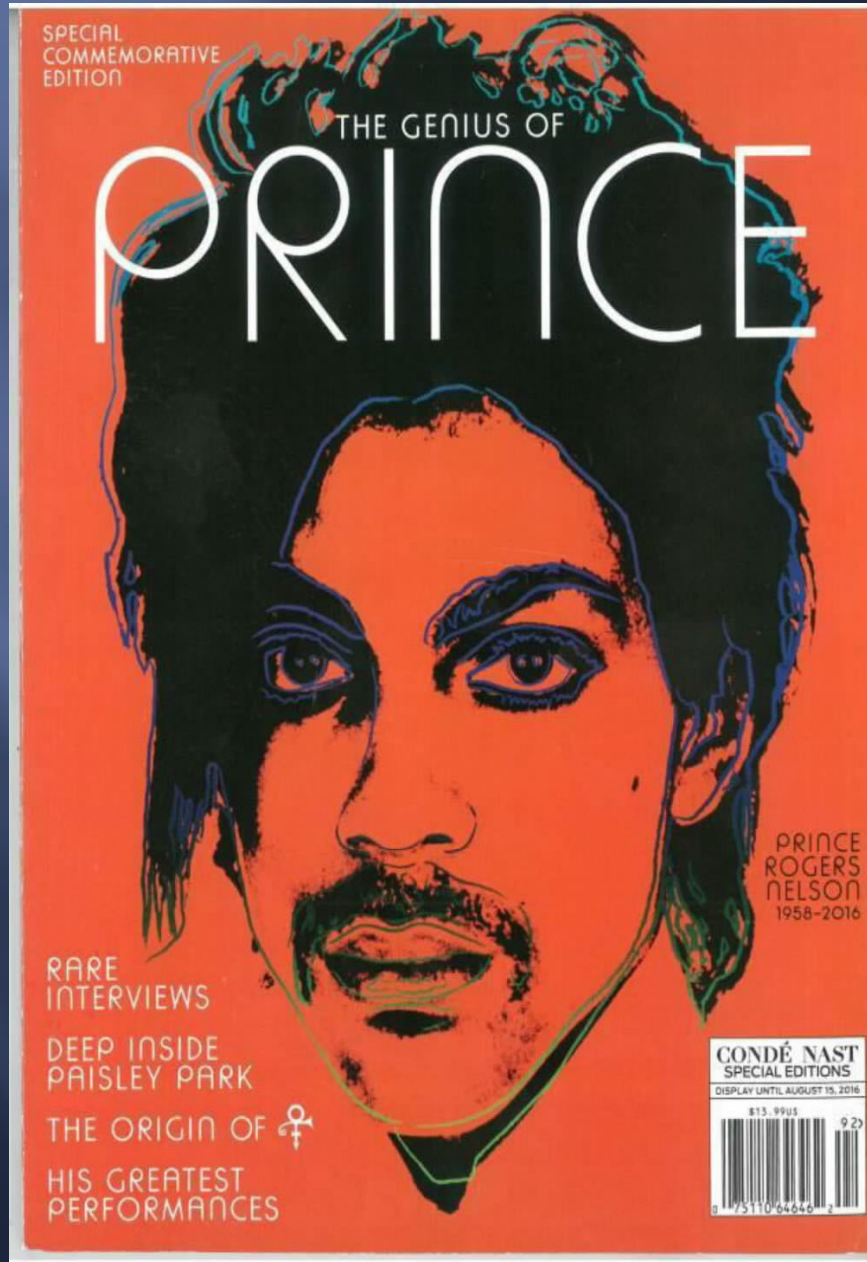
- Copyright owners may elect actual or statutory damages at any time prior to a jury verdict
 - The amount of damages is determined by the jury if a jury trial is selected
 - Statutory damages are recoverable even if actual damage cannot be shown: *Top Tobacco, L.P. v. Star Importers & Wholesalers, Inc.*, 135 F.4th 1344 (11th Cir. 2025)
- Statutory damages (1 award per work infringed):
 - Usual range: \$750-\$30,000
 - Increased to \$150,000 if plaintiff proves willfulness
 - Decreased to \$200 if the defendant proves innocence
 - **What is a work?** *UMG Recordings, Inc. v. Grande Communications Networks, L.L.C.*, 118 F.4th 697, 720-24 (5th Cir. 2024) (holding that a registered compilation is eligible for only one award of statutory damages, rather than for multiple awards for each song in an album registered as a compilation)
 - **Circuit split:** Majority apply a functional test that looks to “where the market assigns value” in deciding whether the parts of a compilation are individually eligible for statutory damages because they have “independent economic value.” See, e.g., *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117-18 (1st Cir. 1993); *Sullivan v. Flora, Inc.*, 1936 F.3d 562, 572 (7th Cir. 2019); *VHT, Inc. v. Zillow Group, Inc.*, 69 F.4th 983 (9th Cir. 2023) (holding that a photography studio’s registration of a database of 2,700 photos amounted to a registration of each photo, and not just of the database as a compilation, thus entitling the plaintiff to statutory damages on each individual photo used by a real estate search engine); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996); *Walt Disney Co. v. Powell*, 897 F.2d 565, 570 (D.C. Cir. 1990).
- Actual Damages:
 - Actual damages suffered as a result of the infringement and, to the extent not duplicative,
 - Defendant’s wrongful profits attributable to the infringement
 - May include indirect (or noninfringing) profits attributable to the infringement.
- Timely Registration:
 - Statutory damages and attorneys fees are not recoverable if a plaintiff failed to timely register its work (but actual damages and injunctive relief may be available)
 - A registration certificate is deemed sufficient even if it contains inaccurate information unless (a) the inaccurate information was included on the application with knowledge that it was inaccurate, and (b) the inaccuracy, if known, would have caused the Registrar of Copyrights to refuse registration. *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, 595 U.S. 178 (2022)
- Timing – Damages for 3 years prior to filing suit
 - *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014)
 - **Except if the discovery rule applies:** *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135 (2024)
- Attorneys’ fees:
 - Reasonable attorneys’ fees, where a copyright has been timely registered, may be awarded to the prevailing party as part of the costs of a case; the decision to award fees is in the sound discretion of the court
 - *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 543 n.19 (1994) (Frivolousness, Motivation, Objective unreasonableness (both in the factual and legal components of a case), the need in particular circumstances to advance considerations of compensation and deterrence)
 - *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016) (a court should give substantial weight to the objective reasonableness of the losing party’s position (while an important factor it is not controlling) , may not award fees to a prevailing plaintiff as a matter of course, and may not treat prevailing plaintiffs and prevailing defendants differently (both should be encouraged to litigate meritorious claims or defenses)

AI & COPYRIGHT
FAIR USE POST-
WARHOL

Copyright Fair Use

- Multipart balancing test available when a work is used “for purposes such as criticism, comment, news reporting, teaching . . . Scholarship or research”
 - Courts must consider:
 - The purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes;
 - Commercial
 - Transformative
 - The nature of the work (creative works are closer to the core of intended copyright protection than informational or functional works)
 - The amount and substantiality of the portion used in related to the copyrighted work as a whole
 - The effect of the use upon the potential market for or value of the copyrighted work
 - Courts may consider other criteria
 - VCR recordings
 - *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)
 - Data mining/ Google books
 - *Author’s Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
 - *Author’s Guild, Inc. v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 578 U.S. 941 (2016)
- *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021) (6-2) (Breyer)
 - Google’s reimplementations of 37 of 166 of Java SE application programming interfaces (APIs) in the Android mobile operating system was a fair use
 - Declined to address software copyrightability but provided some guidance
 - *Apple Inc. v. Corellium, Inc.*, 2023 WL 3295671 (11th Cir. May 5, 2023) (finding virtualization software to run various operating systems (including iOS) with tools to that enable security researchers to gain deeper insights into the operating system a fair use because the virtualization software was transformative, the iOS is functional software, Corellium didn’t “overhelp itself” to Apple’s software, and there was no substantial harm to the genuine market)
- *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023)
 - *Philpot v. Independent Journal Review*, 92 F.4th 252 (4th Cir. 2024) (use of a copyrighted photo of Ted Nugent in connection with an article on signs you might be a conservative was not transformative)

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



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

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

Fair Use – Generative AI

- ▣ *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025) (granting partial summary judgment for Anthropic, holding that the use of plaintiff's works for training and the print-to-digital format change were fair uses, but that the use of pirated library copies was not fair) (June 23, 2025) (J. Alsup)
 - *Bartz v. Anthropic PBC*, No. C 24-05417 WHA, 2025 WL 1993577 (N.D. Cal. July 17, 2025) (preliminarily approving a \$1.5 Billion class settlement and certifying a narrow class)
 - *Bartz v. Anthropic PBC*, No. C 24-05417 WHA, 2025 WL 2961371 (N.D. Cal. Oct. 17, 2025) (amending notice)
- ▣ *Kadry v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026 (N.D. Cal. 2025) (granting summary judgment for defendants, holding that copying of the plaintiff-authors' works to train AI models was a fair use) (June 25, 2025) (Judge Chhabria)
 - *Kadry v. Meta Platforms, Inc.*, Case No. 23-cv-03417-VC, 2025 WL 1786418 (N.D. Cal. June 27, 2025) (granting partial SJ for Meta on plaintiffs' DMCA claim)

ONLINE AND
MOBILE CONTRACT
FORMATION



Online and Mobile Contract Formation

Trend: Continued hostility to implied contracts

- *Godun v. JustAnswer LLC*, 135 F.4th 699 (9th Cir. 2025) (advisals on payment pages were insufficiently conspicuous to put consumers on inquiry notice of contractual terms, to explicitly advise users of what action would constitute assent, or to put consumer on inquiry notice of proposed terms)
- *Chabolla v. ClassPass, Inc.*, 129 F.4th 1147 (9th Cir. 2025)
- *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005 (9th Cir. 2024) (enforceable)
- *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. 2024) (holding that a hyperlinked agreement provided inquiry notice of arbitration agreement)
- *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023) (reversing order denying MTC arbitration because under the totality of the circumstances Klarna's checkout widget provided reasonably conspicuous notice of contractual terms, including arbitration)
- *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023) (affirming MTC arbitration because California law does not require that corporate parties to a contract use their full legal names & Live Nation's ToS included repeated references to its common trade names such that a reasonable user could have identified Ticketmaster's full legal name)
- *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 2022)
 - *Sifuentes v. Dropbox, Inc.*, 2021 WL 2673080 (N.D. Cal. June 29, 2022)
- *Austin v. Experian Information Solutions, Inc.*, 148 F.4th 194 (4th Cir. 2025) (user enrollment page placed consumer on reasonable notice)
- *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1 (1st Cir. 2021) (enforcing ToS and arbitration provision under Mass law where plaintiff selected 'Accept' in a mobile app)
 - *Toth v. Everly Well, Inc.*, 118 F.4th 403 (1st Cir. 2024) (enforcing clickwrap)
- *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014)
 - declining to enforce an arbitration clause
 - "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice"
 - *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019) (declining to enforce arbitration clause in mobile ToS)
- *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016)
 - Reversing the lower court's order dismissing plaintiff's complaint, holding that whether the plaintiff was on inquiry notice of contract terms, including an arbitration clause, presented a question of fact where the user was not required to specifically manifest assent to the additional terms by clicking "I agree" and where the hyperlink to contract terms was not "conspicuous in light of the whole webpage."
- *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017)
 - (1) Uber's presentation of its Terms of Service provided reasonably conspicuous notice as a matter of California law and (2) consumers' manifestation of assent was unambiguous
 - "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found."
 - "[T]here are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories."
- *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018)
- Displaying a notice of deemed acquiescence and a link to the terms is insufficient to provide reasonable notice to consumers
- Ways to make future amendments enforceable

6:00


Register

 **GOOGLE+**  **FACEBOOK**

OR

First Name _____ Last Name _____

name@example.com

 (21) 555-5555



Password _____

NEXT


6:00

Payment

PROMO CODE



 Credit Card Number 

MM _____ YY _____ CVV _____

 U.S. _____ ZIP _____

REGISTER

OR

By creating an Uber account, you agree to the [TERMS OF SERVICE & PRIVACY POLICY](#)

CANCEL LINK PAYMENT

1234 5678 9012 3456

scan your card enter promo code

OR

PayPal

By creating an Uber account, you agree to the

[Terms of Service & Privacy Policy](#)

CANCEL LINK PAYMENT

1234 5678 9012 3456

scan your card enter promo code

By creating an Uber account, you agree to the

[Terms of Service & Privacy Policy](#)

1	2 ABC	3 DEF
4 GHI	5 JKL	6 MNO
7 PQRS	8 TUV	9 WXYZ
	0	⌫

Welcome back, stephanie!



Confirm your ZIP Code Below:

93930

I understand and agree to the [Terms & Conditions](#) which includes mandatory arbitration and [Privacy Policy](#)

I AGREE To receive daily emails from Samples & Savings and SweepstakesAlerts

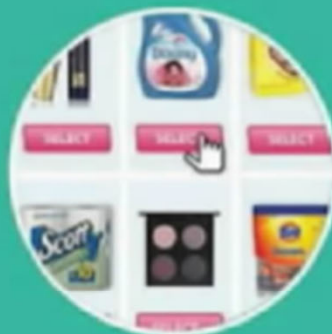
This is correct, Continue! »

Getting Free Stuff Has Never Been Easier!



JOIN US!

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



EXPLORE!

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



SAVE BIG!

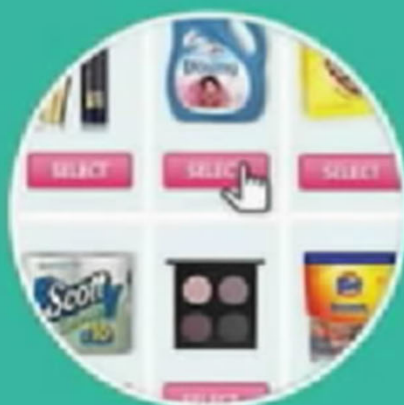
Let us provide you with freebies, trials, and samples that you'd typically be spending hard earned money on.

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SAVE BIG!

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

There is no purchase necessary to access our list of links for samples but you do need to provide personal information, respond to survey questions and agree to be contacted by our marketing partners to qualify for a sample collection. By visiting the website and participating, you agree to the Terms & Conditions, which includes mandatory arbitration, and our Privacy Policy under which you allow us to share your personal information with our marketing partners who may also contact you via email, or if you separately consent, by telephone or text message. Message and Data rates may apply. Reply "STOP" to cancel. For customer service, reply "HELP". Sign up to receive deals via text from Samples and Savings. You may request up to a maximum of 10 offers on selected days of the week, with no more than 4 text messages in one day. We may be compensated for connecting our marketing partners with consumers who may be interested in their products or services. We may substitute other products.

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American Prize Center LLC
128 Court Street, 3rd Floor
White Plains, NY 10601

Shipping Information Required



Item #5160300095421



Complete your shipping information
to continue towards your reward

First Name _____

Last Name _____

Street Address _____

ZIP Code _____

Telephone _____

Date of Birth:

MM - DD - 1923 -

Select Gender:

Male Female

I understand and agree to the [Terms & Conditions](#)
which include mandatory arbitration and [Limitation of Remedies](#).

Continue »



NATIONAL CONSUMER CENTER

Program Requirements - Updated March 27, 2017. To see an incentive, you must: 1) be a U.S. resident 18 years or older; 2) provide accurate and complete registration information; 3) complete the survey questions; 4) view relevant offers; and 5) complete the requisite number of Share, Click and Playback offers which are split into two tiers based on the incentive value. For Tier 1 incentives with a value of \$100 or less, complete 1 Share, 1 Click and 2 Playback offers. For Tier 2 incentives with a value of more than \$100, complete 1 Share, 1 Click and 3 Playback offers. You must complete all offers within 20 days from when you complete your first offer. Completion of offers readily equates a purchase or ordering into a paid subscription program for goods or services. Incentives are limited to one incentive of any kind per household (same billing of the same address) within any given calendar month period (provided you must wait 24 calendar months after you start a Tier 2 incentive before you can claim another Tier 2 incentive). The [Terms & Conditions](#) (T&Cs) document has a series of related offers including a description of the offer, the initial commitment, ongoing obligations and how to cancel. You reserve the right to withdraw a set limit of goods or monetary value for any incentive. Failure to submit accurate registration information, complete the survey questions or comply with claim verification process will result in disqualification. SOLVING A PUZZLE. SHEDDING YOUR REGISTRATION INFORMATION. COMPLETE THE SURVEY OR VIEWING OPTIONAL OFFERS WITHOUT COMPLETING THE NUMBER OF REQUIRED OFFERS SPECIFIED ABOVE DOES NOT QUALIFY YOU FOR AN INCENTIVE. We verify your registration information and if it is incorrect, the program with the Click, Share and Playback offers may not be displayed. If that happens, you won't be eligible to earn an incentive.

By participating, you agree to the [Terms & Conditions](#), which include mandatory arbitration and [Limitation of Remedies](#), which includes your consent to our sharing your personal identification information with our Marketing Partners for which we may be compensated.

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Version: Success - Item Status - Express Policy - Terms & Conditions - FAQ

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Password

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First Name

Last Name

Country of Residence

Zip/Postal Code

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< Back to Stored Cards

Name on Card

Please enter your first and last name.

Card Number

Expiration Date

Security Code



3-digits on back of card

Address

Please enter your billing address.

+ Add Unit # / Address Line 2

City

Please enter your billing city.

State

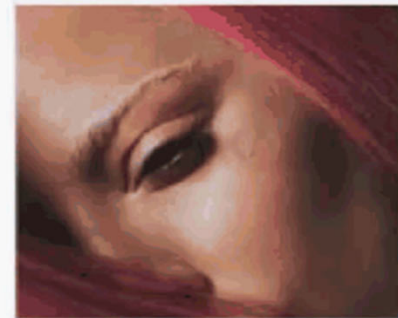
Postal Code

Please enter your billing postal code.

Phone Number

SEC
427R

ROW
9



LADY GAGA
THE CHROMATICA



Order Details

Cancel Ord

2 Resale Tickets

\$250.00
(\$125.00 x 2)

Notes From Seller
XFER

Fees

\$28.06 (Service Fee) x 2
Order Processing Fee

\$28.06
\$28.06

Delivery Update delivery

FREE

Total

\$301.00

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

Place Order

You're invited to join ClassPass!

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

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



Exclusive deal for friends of ClassPass


\$40 OFF FIRST MONTH

Enter your email to continue

Email address

Continue

or

 Sign up with Facebook

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

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

I'm in **San Francisco**

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

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



Exclusive deal for friends of ClassPass

\$40 OFF FIRST MONTH

What's your name?

First name

Last name

By signing up you agree to our [Terms of Use](#) and [Privacy Policy](#).

Continue

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

I'm in San Francisco

INCLUDED IN YOUR OFFER



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



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



No commitments. Cancel anytime.

45-Credit Plan
Due today

\$35.00 + Tax
\$35.00

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

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

Gift can be applied towards monthly subscription rates only and not to other fees, such as late cancellation/missed class fees you incur or optional add-on classes/packs. Gifts recipient is responsible for the difference if gift is less than monthly fee and for applicable taxes. I agree to the ClassPass ["Gift Terms"](https://cdn8.classpass.com/dist/classpass_gift_terms.pdf)

Your saved billing information

Why do you need my credit card info?

Name on card

Jane Smith

Card number

..... 4242

Exp date

2 / 22

CVC

...

Postal code

11101

Powered by  stripe

 VISA



 AMERICAN EXPRESS

Received a ClassPass gift card?

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

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Get your answer in minutes

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★★★★★ 60,318 Satisfied customers



PayPal

Please enter your email address

Card number



CVV



Exp.MM ▼

Exp.YY ▼

ZIP/postal

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JustAnswer

Get your answer in minutes

Unlimited conversations—one-time \$5 join fee and \$46/month.
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Connect now

Tell Us About Yourself

First Name

Last Name

Current Street Address

Apt, Unit

ZIP Code

City

State

Have you lived at this address for 6 months or more?

Yes

No

Create Your Account

Email Address

This will be your username

Password

What is the main reason you visited Experian today?

*Experian Boost results may vary. Some may not see improved scores or approval odds. Not all lenders use Experian credit files, and not all lenders use scores impacted by Experian Boost

Credit score calculated based on FICO® Score 8 model. Your lender or insurer may use a different FICO® Score than FICO® Score 8, or another type of credit score altogether. [Learn more.](#)

By clicking "Create Your Account": I accept and agree to your [Terms of Use Agreement](#), as well as acknowledge receipt of your [Privacy Policy and Ad Targeting Policy](#).

I authorize ConsumerInfo.com, Inc., also referred to as Experian Consumer Services ("ECS"), to obtain my credit report and/or credit score(s), on a recurring basis to:

- Provide my credit report (and/or credit score) to me for review while I have an account with ECS.
- Notify me of other products and services that may be available to me through ECS or through unaffiliated third parties.
- Notify me of credit opportunities and advertised credit offers.

I understand that I may withdraw this authorization at any time by [contacting ECS](#).

Create Your Account

Online and Mobile Contract Formation

Trend: Continued hostility to implied contracts

- *Godun v. JustAnswer LLC*, 135 F.4th 699 (9th Cir. 2025) (advisals on payment pages were insufficiently conspicuous to put consumers on inquiry notice of contractual terms, to explicitly advise users of what action would constitute assent, or to put consumer on inquiry notice of proposed terms)
- *Chabolla v. ClassPass, Inc.*, 129 F.4th 1147 (9th Cir. 2025)
- *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005 (9th Cir. 2024) (enforceable)
- *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. 2024) (holding that a hyperlinked agreement provided inquiry notice of arbitration agreement)
- *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023) (reversing order denying MTC arbitration because under the totality of the circumstances Klarna's checkout widget provided reasonably conspicuous notice of contractual terms, including arbitration)
- *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023) (affirming MTC arbitration because California law does not require that corporate parties to a contract use their full legal names & Live Nation's ToS included repeated references to its common trade names such that a reasonable user could have identified Ticketmaster's full legal name)
- *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 2022)
 - *Sifuentes v. Dropbox, Inc.*, 2021 WL 2673080 (N.D. Cal. June 29, 2022)
- *Austin v. Experian Information Solutions, Inc.*, 148 F.4th 194 (4th Cir. 2025) (user enrollment page placed consumer on reasonable notice)
- *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1 (1st Cir. 2021) (enforcing ToS and arbitration provision under Mass law where plaintiff selected 'Accept' in a mobile app)
 - *Toth v. Everly Well, Inc.*, 118 F.4th 403 (1st Cir. 2024) (enforcing clickwrap)
- *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014)
 - declining to enforce an arbitration clause
 - "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice"
 - *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019) (declining to enforce arbitration clause in mobile ToS)
- *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016)
 - Reversing the lower court's order dismissing plaintiff's complaint, holding that whether the plaintiff was on inquiry notice of contract terms, including an arbitration clause, presented a question of fact where the user was not required to specifically manifest assent to the additional terms by clicking "I agree" and where the hyperlink to contract terms was not "conspicuous in light of the whole webpage."
- *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017)
 - (1) Uber's presentation of its Terms of Service provided reasonably conspicuous notice as a matter of California law and (2) consumers' manifestation of assent was unambiguous
 - "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found."
 - "[T]here are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories."
- *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018)
- Displaying a notice of deemed acquiescence and a link to the terms is insufficient to provide reasonable notice to consumers
- Ways to make future amendments enforceable



Arbitration & Mass Arbitration

- ▣ Strategies – mass vs. individual arbitration
- ▣ Drafting Tips
 - *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010)
 - ▣ Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
 - ▣ Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable
 - *Rahimi v. Nintendo of America, Inc.*, 936 F. Supp. 2d 1141 (N.D. Cal. 2013)
 - *Mondigo v. Epson America, Inc.*, 2020 WL 8839981 (C.D. Cal. Oct. 13, 2020)
 - *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)
 - *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (holding that ambiguity in an arbitration agreement does not provide sufficient grounds for compelling classwide arbitration)
 - AAA – registration requirement
 - Address “mass arbitration” – JAMS vs AAA vs. FedArb vs. Others
 - Review and update frequently
 - Consider the interplay between mass arbitration and multi-district litigation




Ian Ballon

Dec 9, 2022 · 🌐

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AI WORKSHOP: PROPERTY RIGHTS, OWNERSHIP AND PRIVACY COMPLIANCE AND LITIGATION



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



Eulonda Skyles
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Founder



Doug Smith
Executive Director,
Cybersecurity and Privacy
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