

BOOK IT! A SPEEDY GUIDE TO TRADEMARK LAW AND *BOOKING.COM*
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Executive Summary: This memo gives a broad overview of trademark law in the United States. After briefly discussing the purpose and policy behind trademark law, the memo identifies three requirements of an enforceable trademark right. Next, several enforcement strategies are discussed. Finally, the memo summarizes the issues that arose in the recent Supreme Court case In re Booking.com and outlines the arguments in favor of and against the Court's decision.

I. WHAT IS TRADEMARK LAW?

Trademark law is the protection and enforcement of brand names used to sell goods and services.¹ Companies like Apple, Nike, and Disney use their brand names to create reputations that have their own value separate from the companies' products and services. Companies rely on the value of their reputation, or goodwill,² to compete in the global marketplace. In addition to protecting companies' goodwill from other entities' exploitation and illegal use, trademark law also prevents consumer confusion by ensuring that consumers do not purchase goods from one company when they intended to purchase goods from another company (for example, buying "6 Hour Power" when you really wanted "5 Hour Energy").³

Unlike copyright law and patent law, which protect intellectual property for a limited duration before forcing it to enter the public domain, trademark rights last indefinitely—as long as the mark owner is using the mark in commerce.⁴ This is because United States trademark law confers rights based on a company's use of a mark to sell goods or services, whereas copyright and patent law—enabled by the U.S. Constitution⁵—incentivize creativity and invention by providing a period of exclusive rights.⁶

As discussed below, the United States Patent and Trademark Office (PTO) grants federal registrations to parties whose trademarks meet the federal requirements for protectability. Federal registration confers a number of important rights under the Lanham Act,⁷ the federal codification of trademark law. However, trademark rights have their basis in common law: mark owners may enforce their trademark rights using the federal Lanham Act and state common law and trademark statutes (often called unfair competition statutes) to sue other mark owners for infringement, dilution, false

¹ Marks used in connection with services are often called "service marks." This memo will use the term "trademark" to refer to both trademarks and service marks.

² Goodwill is a term of art that refers to a business's reputational value. J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.17 (5th ed. 2020).

³ Innovation Ventures, LLC v. N.V.E. Inc., 694 F.3d 723, 726–27, 731 (6th Cir. 2012).

⁴ "Use in commerce" refers to a "sale or transportation of the trademarked goods in United States interstate or international commerce. McCarthy, *supra* note 2, at § 19:117.

⁵ U.S. CONST. art. I, § 8.

⁶ McCarthy, *supra* note 2, at § 6.3.

⁷ 15 U.S.C. §§ 1051 et seq. (2018).

advertising, right of publicity, and other unfair competition claims.⁸ Only parties whose own marks or likenesses have been exploited can sue under the Lanham Act, as the Lanham Act does not give disinterested consumers a right of action. If consumers wish to report a party for false advertising or for using a mark confusingly similar to another party's mark, they may file a complaint with the Federal Trade Commission.⁹

II. WHAT IS A TRADEMARK?

While trademarks are commonly thought of as words or logos, trademark law also protects “trade dress,”¹⁰ colors, image marks, and even sound marks.¹¹ In the United States, a trademark is a protectable (and thus enforceable) property right only if it is (1) distinctive of source, (2) non-functional, and (3) used in commerce.¹²

First, source distinctiveness simply means that a mark instantly communicates to consumers the source of a good or service.¹³ In a landmark case, the Second Circuit created a spectrum of distinctiveness from least distinctive (generic) to most distinctive (fanciful).¹⁴ At the least distinctive end of the spectrum are *generic* marks, which are never enforceable.¹⁵ These marks name the actual type of goods or services and do not serve any source-identifying function.¹⁶ Next on the spectrum are *descriptive* marks, which

⁸ Trademark common law dates back to medieval brandings used by merchants to distinguish their goods from one another. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1849–50 (2007).

⁹ See *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Sept. 18, 2020).

¹⁰ Trade dress is a product’s packaging and non-functional design. McCarthy, *supra* note 2, at § 8.4.

¹¹ For example, NBC’s peacock logo and three-note chime are registered marks. The mark consists of a stylized representation of a peacock, Registration No. 1,931,255; The mark comprises a sequence of chime-like musical notes which are in the key of C and sound the notes G, E, C, the “G” being the one just below middle C, the “E” the one just above middle C, and the “C” being middle C, thereby to identify applicant’s broadcasting service, Registration No. 0,916,522.

¹² BARTON BEEBE, *TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK* 33 (6th ed. 2019).

¹³ Note that “source” does not mean the literal factory where goods were manufactured, but rather the entity that provides the goods to consumers. A trademark cannot describe the goods or services—it must designate who a product comes from, and not what the product is. Additionally, a mark may be either *inherently* distinctive, or may have *acquired* distinctiveness if consumers have come to recognize the mark as referring to a particular source of goods even though the mark itself merely describes the goods. McCarthy, *supra* note 2, at § 4.14 (“secondary meaning”).

¹⁴ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). The Supreme Court endorsed Judge Friendly’s spectrum as the appropriate test for determining whether a mark is sufficiently distinctive in *Two Pesos, Inc. v. Taco Cabana, Inc.* 505 U.S. 763, 768 (1992). However, this spectrum is difficult to apply to non-word marks. See *generally* *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000) (discussing the *Abercrombie* spectrum applicability to trade dress). For a helpful chart depicting the spectrum, see *Is Your Brand “Distinctive” Enough to be Trademarked?*, PATROLA LAW (Oct. 10, 2019), <http://patrolalaw.com/is-your-brand-distinctive-enough-to-be-trademarked>.

¹⁵ See McCarthy, *supra* note 2, at § 12.1 (citing “[A] generic name of a product can never function as a trademark to indicate origin.”).

¹⁶ Examples include “Hotels.com” for making hotel reservations and “Serial” for an ongoing investigative reporting podcast. See *In re Hotels.com*, 573 F.3d 1300, 1304 (Fed. Cir. 2009); *In re Serial Podcast, LLC*, 126 U.S.P.Q.2d 1061, 1072 (T.T.A.B. 2018) (holding, that Serial’s logos had acquired distinctiveness and were allowed to register).

merely describe qualities or characteristics of the good or service without serving as a source-identifier.¹⁷ Descriptive marks are not enforceable unless they have acquired secondary meaning.¹⁸ The next spectrum category is *suggestive* marks, which are distinctive enough to be enforceable.¹⁹ A suggestive mark “requires imagination, thought and perception to reach a conclusion as to the nature of the goods,” therefore acting as an indicator of source rather than as a description of the goods themselves.²⁰ Finally, the most distinctive marks—*arbitrary* and *fanciful*—are unrelated to the actual goods or services, or are completely made-up words, respectively.²¹ Arbitrary and fanciful marks instantly refer to the source of the goods or services without describing the characteristics of the goods/services.²²

Second, trademarks cannot be functional. For trade dress in particular, the source-identifying purpose of the good (e.g. Coca-Cola’s recognizable glass bottle shape) must outweigh the functional purpose of the good (e.g. the flat bottom allowing the bottle to remain upright).²³ Third, trademarks must be used in commerce.²⁴ This means that the mark must be used to advertise, sell, or otherwise conduct commercial business regarding goods or services in the United States.²⁵

III. HOW ARE TRADEMARKS ENFORCED?

Mark owners have several means to enforce their trademark rights, including federal registration, ex parte and inter partes actions at the Trademark Trial and Appeal Board (TTAB), and federal district court litigation.

¹⁷ Examples include “Fish-Fry” for batter mixes to fry fish and “Supreme” for vodka. *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 793 (5th Cir. 1983); *Supreme Wine Co. v. Am. Distilling Co.*, 310 F.2d 888, 889 (2d Cir. 1962).

¹⁸ See *supra* note 12.

¹⁹ *Innovation Ventures, LLC*, 694 F.3d at 730.

²⁰ *Stix Prods., Inc. v. United Merchs. & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968). Examples include “Tide” for laundry detergent and “Streetwise” for street marks. *Wal-Mart Stores*, 529 U.S. at 210-11; *Streetwise Maps, Inc. v. VanDam, Inc.*, 159 F.3d 739, 744 (2d Cir. 1998).

²¹ Examples of arbitrary marks include “Gap” for apparel and “Omega” for watches (these terms have nothing to do with the actual goods and services). See *Gap, Inc. v. G.A.P. Adventures Inc.*, No. 07-cv-9614 (AKH), 2011 WL 2946384, at *13 (S.D.N.Y. June 24, 2011); *Omega S.A. v. Omega Eng’g, Inc.*, 228 F. Supp. 2d 112, 123 (D. Conn. 2002). Examples of fanciful marks include “Hobbit” for a character in books and movies and “Viagra” for an erectile dysfunction drug (these terms were coined for the sole purpose of identifying the source of the goods and services). See *Warner Bros. Entm’t v. Global Asylum, Inc.*, No. CV 12-9547 PSG (CWx), 2012 WL 6951315, at *5 (C.D. Cal. Dec. 10, 2012), *aff’d*, 544 Fed. Appx. 683 (9th Cir. 2013); *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 520 (S.D.N.Y. 2009).

²² *Two Pesos, Inc.*, 505 U.S. at 786 (Thomas, J., concurring).

²³ See generally *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332 (C.C.P.A. 1982) (creating a four-factor test to determine whether trade dress is functional). Note that the United States Court of Customs and Patent Appeals (C.C.P.A) has since become the Court of Appeals for the Federal Circuit.

²⁴ This is in contrast to many other countries that grant trademark registrations without evidence that the mark is used in commerce. See *McCarthy*, *supra* note 2, at § 16:1:50. See Tara M. Aaron & Axel Nordemann, *The Concepts of Use of a Trademark under European Union and United States Trademark Law*, 104 T.M.R. 1186, 1189 (2014) (stating that parties seeking trademark registration in the European Union do not have to prove use or intent to use before registering a mark).

²⁵ See *Couture v. Playdom, Inc.*, 778 F.3d 1379, 1382 (Fed. Cir. 2015) (establishing a bright-line rule that a company must actually render service using the mark to constitute use in commerce).

A. Federal Registration and TTAB Proceedings

The most important step in securing trademark rights is to secure a federal trademark registration. The PTO, an executive office within the Department of Commerce, is responsible for granting or refusing federal registration.²⁶ If the PTO refuses to register an applicant's mark, the applicant can appeal the refusal as an *ex parte* action to the TTAB, the administrative board responsible for adjudicating PTO disputes in the first instance.²⁷ If the TTAB affirms the refusal to register, the applicant can either (1) appeal to the Federal Circuit—the Article III court with appellate jurisdiction over TTAB decisions—or (2) appeal to any federal district court. All federal district court appeals go to the Federal Circuit, and Federal Circuit decisions are appealed to the Supreme Court.²⁸

Additionally, third parties may use *inter partes* TTAB proceedings to enforce their own trademark rights. A third party can (1) oppose registration of another mark, effectively stopping it from registering, and (2) petition to cancel a registered mark.²⁹ The grounds for opposing/petitioning to cancel a mark vary, but usually the petitioner asserts that there is a likelihood of confusion between its mark and the opposed mark.³⁰ As with *ex parte* actions, *inter partes* actions decide only whether a mark is registrable and do not allow the petitioner to seek remedies afforded by federal, state, or common law.

B. Federal Litigation

Parties can also enforce their trademark rights by bringing suit in federal court for trademark infringement, dilution, or any other cause of action enabled by the Lanham Act or common law.³¹ Parties can bring trademark causes of action in any federal district court with jurisdiction; appeals are heard by the respective circuit court.

²⁶ The PTO can refuse registration on several grounds, such as for a likelihood of confusion with any third-party mark, being deceptively misdescriptive, and being primarily geographically descriptive. 15 U.S.C. § 1052 (2018).

²⁷ This is an “*ex parte*” action because there is no claim of action between opposing parties—just a disagreement between an applicant and the PTO about whether a mark is registrable.

²⁸ Note that, as with the *Booking.com* case discussed *infra* note 32, all *ex parte* TTAB and appellate hearings decide only whether a mark is registrable, not whether a party's use of a mark infringes upon another party's mark.

²⁹ These are “*inter partes*” actions because the dispute is between two non-PTO parties: for opposition proceedings, the party opposing registration versus the applicant seeking registration; for cancellation petitions, the party petitioning to cancel a registration versus the registration owner defending the existing registration.

³⁰ Likelihood of confusion is also the test for whether a party has engaged in trademark infringement against another's mark and is decided by a multi-factor test. The TTAB and Federal Circuit use the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973), but each federal circuit has its own factor test.

³¹ Note that the Lanham Act confers upon both federally registered and unregistered trademarks the right to sue for infringement. 15 U.S.C. §§ 1114, 1125 (2018).

IV. IN RE BOOKING.COM³²

In 2011, Booking.com,³³ an online travel reservation service, sought to register the mark “Booking.com” on the Principal Register, but the PTO refused to register the mark on the ground that it was generic, arguing that the combination of the generic top-level domain name “.com” and the generic term “booking” for travel reservation services yielded an overall generic mark.³⁴ The TTAB affirmed the PTO’s refusal for genericness.³⁵ The United States District Court for the Eastern District of Virginia reversed the TTAB decision,³⁶ and the Fourth Circuit affirmed.³⁷ The Supreme Court granted certiorari to decide whether the addition of a generic top-level domain name, such as “.com”, transformed a generic, unprotectable mark into a distinctive, protectable mark.³⁸ The PTO urged the Court to adopt a *per se* rule that would establish that a generic term coupled with “.com” would still be generic, absent exceptional circumstances.³⁹ Booking.com countered that the mark could not be generic when customers and the general public understood “Booking.com” to refer only to itself as a company, and not to the general market of travel reservation services.⁴⁰

The Court’s 8-1 decision sided with Booking.com and held that under some circumstances, the addition of “.com” can transform a generic, unprotectable mark into a distinctive one, therefore declining to adopt the PTO’s bright-line rule on registering “.com” trademarks.⁴¹ In so deciding, the Court held that a “generic.com” mark is generic when the term, taken as a whole, signals to consumers the class of the relevant goods or services.⁴² Applying this rule to “Booking.com,” the Court stated that if “‘Booking.com’ were generic, we would expect consumers to believe that Travelocity was a

³² Booking.com B.V. v. U.S. Pat. & Trademark Off., 140 S. Ct. 2298 (2020). The Opinion of the Court was the last majority opinion authored by the late Justice Ruth Bader Ginsburg.

³³ See BOOKING.COM, <http://www.booking.com> (last visited Aug. 29, 2020) (explaining Booking.com is a company which maintains a travel-reservation website by the same name which offers reservations for hotels, homes, apartments, flights, car rentals, attractions, and other related services.)

³⁴ *Booking.com*, 140 S. Ct. at 2303.

³⁵ The TTAB held that even if the mark had been merely descriptive, it had not acquired the requisite secondary meaning. *Id.*

³⁶ The District Court for the Eastern District of Virginia stated that the mark was descriptive, not generic, and had acquired secondary meaning as to hotel reservation services. *Id.*

³⁷ *Id.* at 2304 (holding that the mark was not generic and was therefore registrable, rejecting the PTO’s argument that a “generic.com” mark was *per se* generic).

³⁸ *Id.* at 2301.

³⁹ *Id.* at 2305 (noting that the PTO had not followed its own rule, as “art.com” and “dating.com” both have trademark protection).

⁴⁰ *Id.* at 2303.

⁴¹ *Id.* at 2303-04 (explaining the distinctiveness spectrum); see also *supra* Part II. The Court also explains that a “generic” term names a “class” of goods or services rather than a particular feature or exemplification of the class. For a compound term, distinctiveness depends on the term’s meaning as a whole, not parts in isolation. Thus the test involves the “primary significance of the registered mark to the relevant public” *Id.*

⁴² *Id.* at 2306.

‘Booking.com.’”⁴³ Because consumers did not in fact perceive “Booking.com” that way, the mark could not be generic.⁴⁴

Not every justice agreed that “Booking.com” was sufficiently distinctive. Justice Breyer dissented, claiming that the mere addition of “.com” does nothing to identify and distinguish a source of goods and services.⁴⁵ Courts, he argued, ignore a “.com” suffix “when analyzing the likelihood of confusion.”⁴⁶ While some top-level domain names may interact with a generic second-level domain name to produce a distinctive meaning, Justice Breyer stated that “Booking.com” did not fall under such an exception.⁴⁷ The justices also disagreed over whether allowing a term like “Booking.com” trademark protection would hinder competition.⁴⁸ Though Booking.com agreed not to pursue challenges for similar names, Justice Breyer noted that nothing compels other similarly-situated parties to follow suit.⁴⁹ Where the majority believed traditional doctrines of trademark usage would protect against anticompetitive behavior,⁵⁰ Justice Breyer worried the opposite is true.⁵¹ Finally, both the dissent and Justice Sotomayor’s concurring opinion expressed concern over the majority’s reliance on customer surveys to determine whether a mark is generic, suggesting that survey data is only as reliable as the study design.⁵²

Our distinguished panelists have all participated in this case before the Supreme Court. Panelist David Bernstein and his co-counsel Jared Kagan, who were counsel to Booking.com before the U.S. Supreme Court in this case, wrote that this case was decided based on the importance of consumer survey data.⁵³ Referencing the PTO’s decision to grant Waffle House a trademark, Waffle House showed that 92% of survey respondents believed Waffle House is a brand, not a generic name. Other decisions, such as a Fourth Circuit decision from 2000, show that consumer survey can also go the other way by

⁴³ *Id.* at 2304-05.

⁴⁴ *Id.* at 2305 (“Because ‘Booking.com’ is not a generic name to consumers, it is not generic.”).

⁴⁵ *Id.* at 2312 (Breyer, J., dissenting)

⁴⁶ *Id.* (citing *Brookfield Commc’ns Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1055 (9th Cir. 1999)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 2306-07. Specifically, Justice Breyer and the majority disagreed on the applicability of *Goodyear’s Rubber Manufacturing Co. v. Goodyear Rubber Co.* 128 U.S. 598 (1888). The majority distinguished the case at bar from *Goodyear*—where the court held that a generic corporate designation such as “Company” added to a generic term does not confer trademark eligibility—by noting that only one entity can occupy a particular Internet domain name, making it capable of identifying a single source. *Id.*

⁴⁹ *Id.* at 2315 (Breyer, J., dissenting).

⁵⁰ *Id.* at 2308 (Breyer, J., dissenting).

⁵¹ *Id.* at 2315 (Breyer, J., dissenting). Justice Breyer’s concern was that “generic.com” domain names would be unfairly advantaged because those companies may be seen as more authoritative and do not need to educate the public on their services. Sotomayor’s concurrence hinted that the PTO may have properly concluded that “booking.com” is generic and that the district court may have been wrong in concluding to the contrary, but that issue was not brought before the court.

⁵² *See id.* at 2309 (Sotomayor, J., concurring) (explaining that surveys are dependent upon the methodology, so flawed methods result in flawed studies); *id.* at 2313 (Breyer, J., dissenting) (noting that surveys can have limited probative value because of a company’s exclusivity in the market or its significant spending to secure the public’s identification).

⁵³ David H. Bernstein & Jared I. Kagan, *What’s in a Name? Booking.com and Consumer Perception Evidence*, LAW JOURNAL NEWSLETTERS (Aug. 2020) <https://www.lawjournalnewsletters.com/2020/08/01/whats-in-a-name-booking-com-and-consumer-perception-evidence-2>.

proving a term is considered generic. Thus, Bernstien and Kagan stress the importance of consumer perception while trying to demonstrate that an arguably generic term is perceived as a brand by consumers. Panelist Professor Jake Linford co-authored an amicus brief before the court with other Trademark and Internet Law professors.⁵⁴ Consistent with Booking.com’s argument and David Bernstein’s brief, Professor Linford’s amicus brief argued that Booking.com should win, stressing that consumer perception is the “touchstone of trademark validity.”⁵⁵

Our other panelists Professor Rebecca Tushnet and Professor Mark McKenna, among other trademark law scholars, authored an amicus brief arguing in favor of neither party warning against adopting *per se* rules and instead evaluating trademarks on a case-by-case basis.⁵⁶ The brief warned against the Court from being too eager to issue a ruling in a space where it may not be fully aware of the context of the trademark registration,⁵⁷ and the brief advocated for reaffirmation of the principle that “de facto secondary meaning” does not mean protectability.⁵⁸

Following the decision, some have noticed that this may now force the PTO to reconsider and allow hashtags (#) followed by generic words to be registered.⁵⁹ Others note the flaw in the majority’s reasoning that only one company could possibly own its .com domain.⁶⁰ Still, commentators believe it would be unlikely to see more complex litigation following this case because the ruling was purposefully narrow, and that the Supreme Court is unlikely to see a significant increase in domain name disputes under traditional trademark infringement law, Uniform Domain-Name Dispute-Resolution Policy take-down actions, or other unfair competition claims.⁶¹

RECOMMENDED READING

- J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (5th ed. 2020). This treatise gives an excellent concise overview of all aspects of trademark and unfair competition law.

⁵⁴ Brief for Booking.com as Amicus Curiae Supporting Respondents at 1, United States Patent & Trademark Office v. Booking.com, *B.V.*, 140 S. Ct. 2298 (2020) (No. 19-46) [hereinafter Brief for Respondents].

⁵⁵ *Id.* at 5 (explaining the ever-changing nature of language and how trademark law requires the flexibility as it evolves).

⁵⁶ IP Watchdog, *Booking.com Case Heats Up at Supreme Court*, IP WATCHDOG (Feb. 19, 2020) <https://www.ipwatchdog.com/2020/02/19/booking-com-case-heats-supreme-court/id=119022>; *see also* Brief in Favor of Neither Party at 1, United States Patent & Trademark Office v. Booking.com *B.V.*, 140 S. Ct. 2298 (2020) (No. 19-46) [hereinafter referred to as Brief in Favor of Neither Party].

⁵⁷ *Id.* at 1.

⁵⁸ *Id.* at 2.

⁵⁹ Patricia Cotton & Paul E. Thomas, *Registrable? SCOTUS Says Booking.com-pletely!*, PILLSBURY LAW (July 1, 2020) <https://www.pillsburylaw.com/en/news-and-insights/booking-com-scotus-trademark.html>.

⁶⁰ *See* Doug Isenberg, *Understanding the Supreme Court’s Booking.com Domain Name Trademark Opinion*, GIGA LAW (July 1, 2020) <https://giga.law/blog/2020/7/1/supreme-court-booking-com> (explaining that scrabble.com and Playtex.com are not owned by the companies you would expect (Scrabble the game and Playtex the hygiene products) meaning that the rule that only one company could have a .com name and the same domain is flawed).

⁶¹ *Id.*

- Rebecca Tushnet, *Intellectual Property as a Public Interest Mechanism*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY (Rochelle Dreyfuss & Justine Pila eds., 2018).
- Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867 (2017).
- Jake Linford, *Democratizing Access to Survey Evidence of Distinctiveness*, in TRADEMARK LAW AND THEORY: REFORM OF TRADEMARK LAW (Grame Dinwoodie & Mark Janis eds., Edward Elgar Publishing, forthcoming 2020).
- Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731 (2017).
- Mark McKenna et al., THE LAW OF DESIGN: DESIGN PATENT, TRADEMARK, & COPYRIGHT (West 2017).
- Mark McKenna & Christopher J. Sprigman, *What's In, and What's Out: How IP's Boundary Rules Shape Innovation*, 30 HARV. J.L. & TECH. 491 (2017).
- David Bernstein, *IP Watchdog: Supreme Court 'FUCT' Case Ends With a Bang—Ban on 'Immoral or Scandalous' Marks Fails First Amendment Scrutiny*, IP WATCHDOG (June 25, 2019) <https://www.ipwatchdog.com/2019/06/25/fuct-case-ends-bang-ban-immoral-scandalous-marks-fails-first-amendment-scrutiny/id=110683/>.
- David Bernstein & Jeremy Feigelson, *An All-Star Decision: Federal Circuit Increases Predictability in Trademark Enforcement*, DEBEVOISE & PLIMPTON (Nov. 2, 2018) <https://www.debevoise.com/insights/publications/2018/11/an-all-star-decision>.