



# Trademark Law in Review: Key Developments and Litigation Trends from 2025

January 21, 2026



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# Speakers

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# Agenda

**1 | Barriers to Relief for Infringement**

**2 | Barriers to Registration**

**3 | TTAB Claims: Timing is Everything**

**4 | The (Near) Future**

**5 | Questions**



# Barriers to Relief for Infringement

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# *Dewberry Group, Inc. v. Dewberry Engineers Inc.*

604 U.S. 321 (2025)



# ***Dewberry Group, Inc. v. Dewberry Engineers Inc.***

604 U.S. 321 (2025)

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- Liability not at issue
  - Plaintiff Dewberry Engineers owns incontestable registration for DEWBERRY for real estate development and related services
  - Sole named Defendant Dewberry Group owned by John Dewberry; also offers real estate development services under DEWBERRY
    - Services offered to approx. 30 separate Dewberry-owned companies
    - Defendant not profitable; but affiliates who receive financial, legal, operational, and marketing services from Defendant profit significantly from commercial leases
    - Promised not to use DEWBERRY in 2007 settlement, but resumed use
- Damage awarded based on affiliates' profit
  - District court found willful infringement; treated all entities as a single corporate entity for purpose of calculating profit award
  - Fourth Circuit affirmed award of nearly \$43 million

# Dewberry (cont.)

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## 15 U.S.C. § 1117(a)

...the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover:

- (1) **defendant's** profits
- (2) any damages sustained by the plaintiff, and
- (3) the costs of the action...

In assessing damages, the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. ***If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case...***

## ***Dewberry (cont.)***

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**“[T]he ‘defendant’s profits’ are the *defendant’s* profits,  
not its plus its affiliates”**

- Open questions

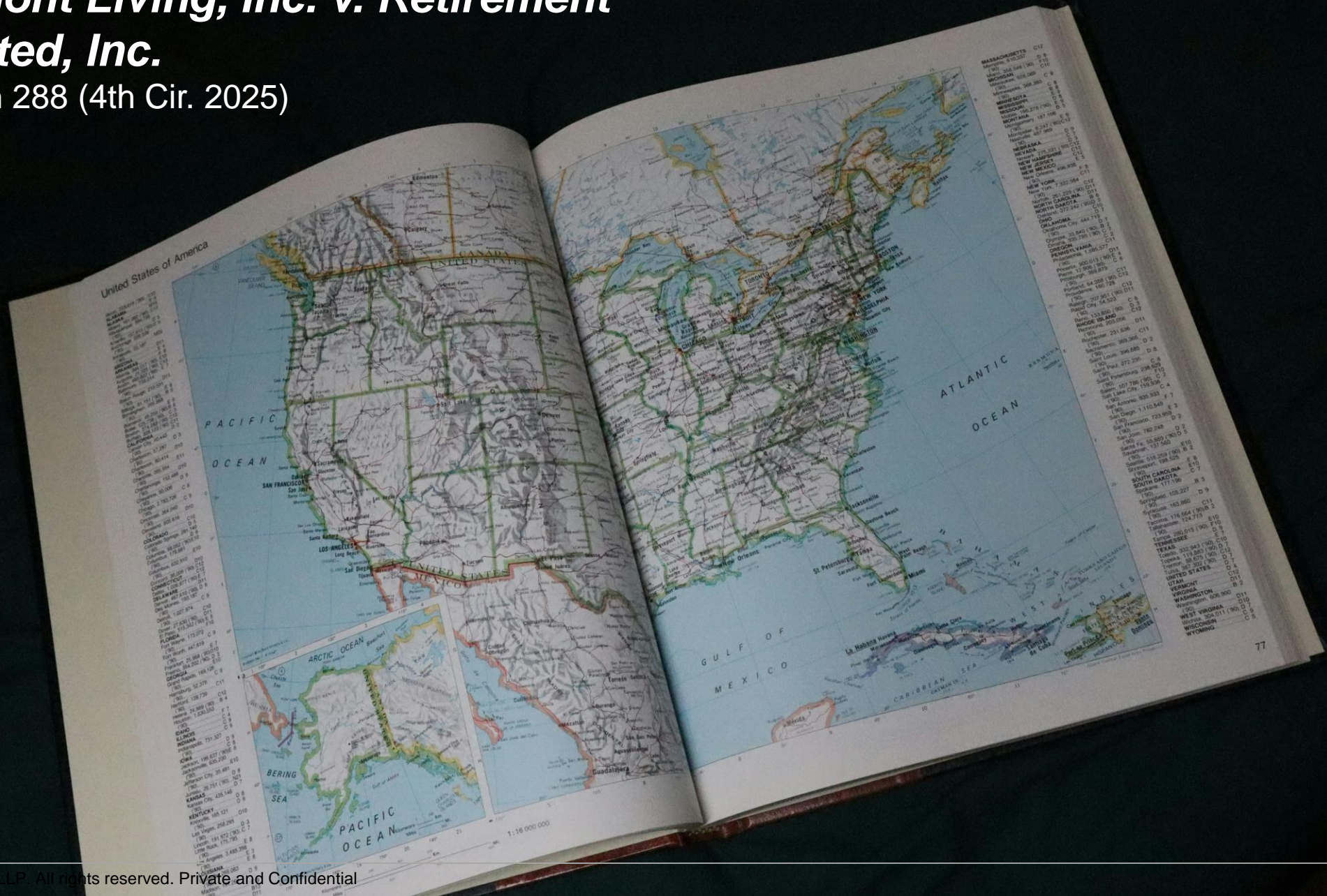
- whether or how courts could use the “just-sum” provision to support a profits award
- whether or how courts can look behind a defendant’s tax or accounting records to consider true financial gain (without “just-sum” provision)
- whether veil-piercing remains an available option

- Takeaways

- Name all defendants (including corporate affiliates) that might be liable for damages, pursuant to traditional corporate law principles
- Be prepared to demonstrate circumstances under which corporate veil should be pierced
- Point to other applicable statutory language: “subject to the principles of equity”

# Westmont Living, Inc. v. Retirement Unlimited, Inc.

132 F. 4th 288 (4th Cir. 2025)



# ***Westmont Living, Inc. v. Retirement Unlimited, Inc.***

132 F. 4th 288 (4th Cir. 2025)

- *Dawn Donut Co. v. Hart's Food Stores* (2d Cir. 1959)
  - If the use of the marks are “confined to two sufficiently distinct and geographically separate markets” with no plans of expansion, no confusion.
- 1993 – The World Wide Web is created – impact on *Dawn Donut*
- Westmont owns 17 facilities in California and 2 in Oregon, most called “WESTMONT OF [location]”
- RUI owns facilities in Virginia, North Carolina and Florida, applied for:




# ***Westmont Living, Inc. v. Retirement Unlimited, Inc.***

132 F. 4th 288 (4th Cir. 2025)

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- Simply having a website does *not* confer national rights.
- “Knowledge among persons in the territories in issue must be proven by evidence, not assumed just because the Internet is national and global.”
  - *McCarthy*, § 26:30.50
- Westmont:
  - Evidence that retirement living choices are not made locally (e.g. family, friends, economics)
  - Evidence of 10,000s of responses from its Internet advertising, from all 50 States
- Takeaway:
  - When claiming priority based on Internet marketing, need evidence of actual market penetration, not simply website.



***Plumrose Holding Ltd. v. USA Ham LLC***  
2025 USPQ2d 116 (TTAB 2025)

# ***Plumrose Holding Ltd. v. USA Ham LLC***

2025 USPQ2d 116 (TTAB 2025)

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USA Ham, LLC filed ITU application at USPTO on Dec. 11, 2020 for:

- Ham; Meat; Pork; Cold cuts; Cold cuts, namely, mortadella, pork loin, ham, bologna, salami, chorizo; Pork tenderloin; Processed meat; Sausage meat; Smoked sausages; Snack food dips in Class 29
- Product sales in Florida under mark



Plumrose Holding LTD opposed on Nov. 17, 2021, citing:

- Use of LA MONTSERRATINA word mark for “a wide range of prepared, pre-packaged meat products” by wholly-owned subsidiary in Venezuela since 1949
- Use of design mark since 2011



## ***Plumrose (cont.)***

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- Approx. \$340 million in sales in Venezuela since 2012
- Distributed to more than 3,200 restaurants, hotels, and supermarkets throughout Venezuela since 2012
- Widespread digital and print advertising
- Weekly events
- Operates stores where only LA MONTSERRATINA products are sold
- Ownership of multiple trademark registrations in Venezuela, Colombia, Peru, and Ecuador for pre-packaged meat products in Class 29
- Reputation among Venezuelan community in U.S. (nearly 500,000 immigrants, more than 100,000 of whom live in Florida)
- Plans to enter U.S. market
- ITU applications filed in 2021; Applicant's prior-filed application is blocking

# Plumrose (cont.)



*Applicant's Specimen*



*Plumrose's Label*

## ***Plumrose* (cont.)**

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- Elements
  - Interest falling within the zone of interests protected by the opposition statute
  - Proximate causation
- Distinguishable from *Meenaxi Enterprise, Inc. v. Coca-Cola Co.*, 38 F.4th 167 (Fed. Cir. 2022)
  - U.S. consumers asking about availability of products
  - Actual confusion in Florida
  - Unsolicited inquiry re: serving as U.S. distributor
  - Evidence of copying linked to reputation
    - Familiar with mark / chose identical typeface
    - Targeted certain stores

## ***Plumrose (cont.)***

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- Entitlement to Statutory Cause of Action
  - “[T]he harm generated by loss of control over one’s reputation falls within the purview of the Lanham Act.”
  - Refusal of applications = secondary basis
- Section 14(3) claim meritorious based on previous findings
  - Present use of challenged mark by defendant
  - Specific acts or conduct by the defendant that are deliberately aimed at passing-off its goods as those of the plaintiff
  - Nature of the injury to plaintiff as a result of defendant’s deliberate conduct (i.e. damage to reputation or lost sales)
- Source misrepresentation/passing off as a workaround for no actual use?



***Curtin v. United Trademark Holdings, Inc.***  
137 F.4th 1359 (Fed. Cir. 2025)

# ***Curtin v. United Trademark Holdings, Inc.***

137 F.4th 1359 (Fed. Cir. 2025)

- UTH Applied to register RAPUNZEL for “dolls; toy figures”



Robert Weise (1870-1923)

- Opposed by Professor Rebecca Curtin
  - Professor of IP Law
  - Doll collector and mother to a young daughter
  - Consumer who participates in market for dolls of fairytale characters

# ***Curtin v. United Trademark Holdings, Inc.***

137 F.4th 1359 (Fed. Cir. 2025)

- Asserted entitlement based on *Ritchie v. Simpson* (1999)
  - “real interest” in the proceedings and “reasonable” basis for damage belief
- TTAB and Federal Circuit used *Lexmark* (2014):
  - Interest must “fall within the zone of interests protected by the law invoked”
  - Claim dependent – not necessarily commercial interest
  - Genericness, descriptiveness, failure to function = commercial
- Petition for Certiorari filed October 10, 2025
- Fun fact: UTH owns Reg. No. 5027339 for ZOMBIE RAPUNZEL



# *El Roblar Investment Property LLC v. Bianca Roe*

2025 USPQ2d 1210 (TTAB 2025)



# ***El Roblar Investment Property LLC v. Bianca Roe***

2025 USPQ2d 1210 (TTAB 2025)

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- Applicant sought registration of “THE HOTEL EL ROBLAR”



- Hotel opened 1919, became The Oaks in 1977, closed in 2017
- Opposer purchased the land with intent to rebuild and reopen as THE HOTEL EL ROBLAR

# ***El Roblar Investment Property LLC v. Bianca Roe***

2025 USPQ2d 1210 (TTAB 2025)

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- Opposer asserted lack of bona fide intent and false suggestion of a connection
- Following *Curtin*, for entitlement to a statutory cause of action, Opposer was required to show:
  - Its interests are within the zone of interests protected by the statute, and
  - It has a reasonable belief in damage that would be proximately caused by registration
- Opposer asserted three grounds for entitlement:
  - it is a “potential competitor to Applicant’ in the market for hotel services”
  - it “owns the Hotel El Roblar”
  - it “has a present or prospective interest’ in using the proposed Mark ‘in its business””

# ***El Roblar Investment Property LLC v. Bianca Roe***

2025 USPQ2d 1210 (TTAB 2025)

- Evaluated based on claims asserted – lack of bona fide intent and false suggestion of an association
- “Opposer does not have to assert a proprietary interest in the mark THE HOTEL EL ROBLAR”
- “Reasonable belief of damage” based on intent to use mark in its business
- If entitlement to bring one claim, can assert any other basis for refusing registration
- Opposer prevails based on lack of bona fide intent



# ***Curtin v. United Trademark Holdings, Inc.***

## ***El Roblar Investment Property LLC v. Bianca Roe***

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- Takeaways:
  - Focus on entitlement to assert a statutory cause of action
  - While “low threshold,” raises a potential pitfall
  - Evaluate entitlement based on specific claims asserted
  - Must be both pleaded *and* proved
  - Ensure supporting evidence is from opposer, not counsel

The background features a teal-colored grid pattern. A white circle is positioned on the left side, and a vertical white line runs through the center of the image. The text 'Barriers to Registration' is written in white, bold font on the right side of the image.

# Barriers to Registration

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# ***In re Ye Mystic Krewe of Gasparilla***

2025 USPQ2d 1291 (TTAB 2025)



# ***In re Ye Mystic Krewe of Gasparilla***

2025 USPQ2d 1291 (TTAB 2025)

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- Applicant sought registration of GASPARILLA (on Supplemental Register)
  - Class 21: Cups; mugs; beer mugs; coffee cups; glass mugs; drinking glasses; insulated cups and mugs; insulating sleeve holders for beverage cans and bottles; insulating containers for beverage cans and bottles; bottle openers
  - Class 25: Clothing, namely, shirts, polos, pullovers, quarter-zip outerwear, fishing shirts, jerseys; tshirts; hats; headwear; scarves; bandanas
- Examining Attorney refused based on prior registration of GASPARILLA TREASURES (with GASPARILLA disclaimed)
  - Class 21: Beverage glassware
  - Class 25: Hats; Shirts; Sweatshirts; Tank tops

## ***Gasparilla* (cont.)**

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- Consent agreements “may or may not tip the scales in favor of registrability, depending upon the entirety of the evidence.” *In re Mastic Inc.*, 829 F.2d 1114, 1117 (Fed. Cir. 1987)
- Reviewed in context of tenth *DuPont* factor: market interface between Applicant and Registrant
- Factors to assess sufficiency:
  - Whether the consent shows an agreement between both parties;
  - Whether the agreement includes a clear indication that the goods and/or services travel in separate trade channels;
  - Whether the parties will make efforts to prevent confusion, and cooperate and take steps to avoid any confusion that may arise in the future; and
  - Whether the marks have been used for a period of time without evidence of actual confusion.

# Gasparilla (cont.)

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1. Consent to Use and Registration.

(a) Registrant hereby consents to: (i) registration in the USPTO of Applicant's Mark in the listed International Classes 021 and 025 for Applicant's Goods, and (ii) Applicant's use of Applicant's Mark in the United States and worldwide; and

(b) Registrant hereby consents to and agrees that it shall not challenge Applicant's use or registration of Applicant's Mark for Applicant's Goods, and shall not challenge the validity of any resulting registration for Applicant's Mark or of Applicant's ownership thereof.

2. No Likelihood of Confusion. The parties each acknowledge and agree that there has not been, currently is no, and will likely be no, likelihood of consumer confusion resulting from the simultaneous use and registration of the Applicant's Mark and the Registrant's Mark.

3. Cooperation in the Event of Actual Confusion. In the unlikely event that either party becomes aware of any actual consumer confusion resulting from the simultaneous use of the marks as permitted by this Agreement: (a) such party shall advise the other party of the details of such confusion and (b) the parties shall take commercially reasonable steps to address the confusion and prevent its future occurrence.

4. Further Assurances. Each of the parties hereto shall, and shall cause its respective Affiliates to, execute and deliver such additional documents, instruments, conveyances, and assurances, and take such further actions as may be reasonably required to carry out the provisions hereof.

# ***Gasparilla* (cont.)**

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## **WHAT TO DO**

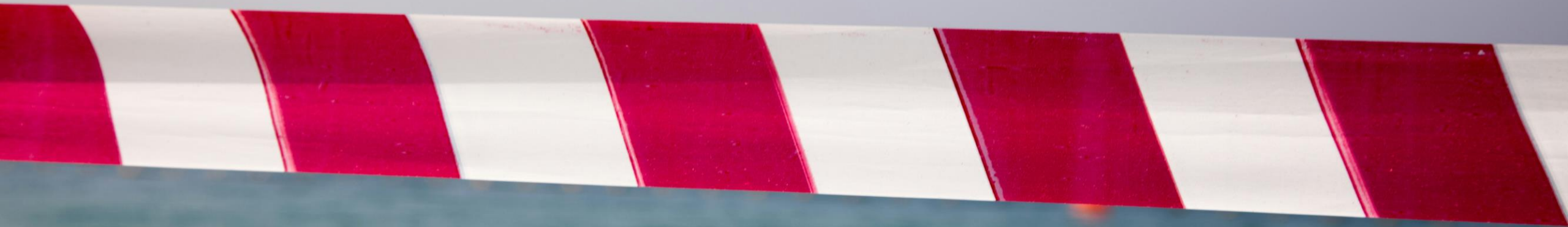
- Include specific agreements about use of the parties' respective marks
  - sell in separate trade channels
  - market to different consumers
  - geographic restrictions
  - no use on the other party's goods
  - manner of display (e.g., certain distinctive design elements, use with house mark)
- More than a bare bones recitation of a commitment to reduce confusion
- Indicate length of coexistence without confusion (if applicable)

## **WHAT NOT TO DO**

- Remain silent on channels of trade and classes of consumers (especially when goods overlap!)
- Remain silent on other means of reducing likelihood of confusion
- Recite boilerplate language
- Rely on attorney argument

***In re Erik Brunetti***

151 F.4th 1367 (Fed. Cir. 2025)



# ***In re Erik Brunetti***

151 F.4th 1367 (Fed. Cir. 2025)

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*Iancu v. Brunetti*, 588 U.S. 388 (2019)

– USPTO erred in refusing registration of FUCT as “immoral or scandalous”



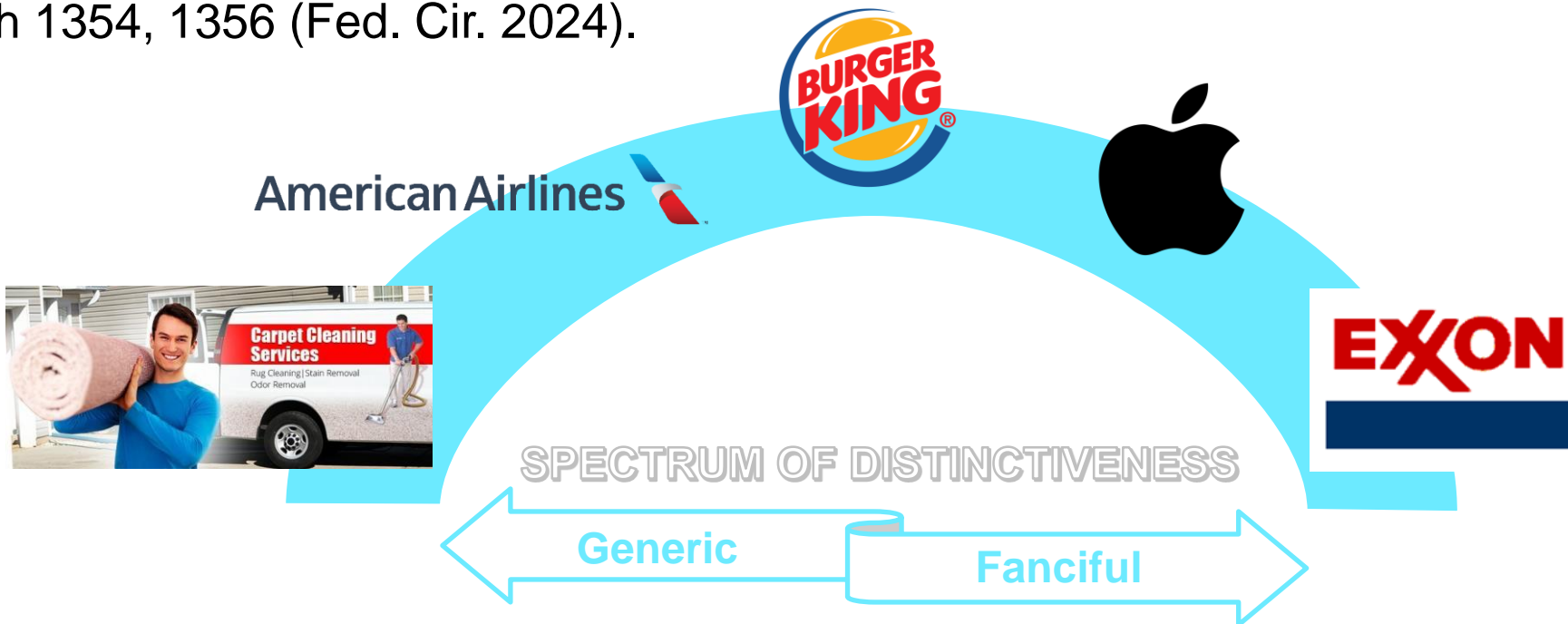
U.S. Reg. No. 6230977



Brunetti appeals rejection of new applications for FUCK for a variety of consumer goods, accusing Board of retaliation and constitutional violation

## Brunetti (cont.)

- Failure-to-function goes beyond distinctiveness spectrum
  - “[A] trademark is not a trademark unless it identifies a product’s source (this is a Nike) and distinguishes that source from others (not any other sneaker brand).” *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023).
  - The source-identifier inquiry “typically focuses on how the mark is used in the marketplace and how it is perceived by consumers.” *In re GO & Assocs., LLC*, 90 F.4th 1354, 1356 (Fed. Cir. 2024).



## ***Brunetti* (cont.)**

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- Board reasoning
  - Commonality is not the test
  - Failure-to-function vs. informational matter refusal
  - Fallibility of trademark examiners
- Fed. Circuit: “The Board’s reasoning sounds in fact very much as though it has taken an ‘I know it when I see it’ approach to failure-to-function refusals.”
  - Lacked guidance on context required to evaluate third-party marks
  - Lacked guidance on sufficient evidence of consumer perception
  - When can all-purpose word marks be registered vs. those that are “inherently incapable” of serving as a source identifier?



**TTAB Claims:  
Timing is  
*Everything***

# ***Bullshine Distillery LLC v. Sazerac Brands LLC***

130 F.4th 1025 (Fed. Cir. 2025)



# ***Bullshine Distillery LLC v. Sazerac Brands LLC***

130 F.4th 1025 (Fed. Cir. 2025)

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- Bullshine applied to register BULLSHINE FIREBULL
- Sazerac opposed based on FIREBALL
- Bullshine counterclaimed for cancellation that “FIREBALL” is generic for an alcoholic drink containing “a spicy flavoring element such as cinnamon or hot sauce.”
- TTAB: Everybody lost.
- Question presented: When is genericness determined:
  - At any time prior to registration
  - At time of registration
- The Board said not generic at time of trial, not appealed

# ***Bullshine Distillery LLC v. Sazerac Brands LLC***

130 F.4th 1025 (Fed. Cir. 2025)

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- Section 2(e) prevents registration of generic terms
- Section 14(3) allows cancellation if mark becomes generic
- Court therefore rejects “once generic, always generic”
- Affirmed finding that FIREBALL was not generic when registered
- Court also affirmed that FIREBALL was
  - commercially strong but not famous based on evidence below
  - conceptually weak because of third party uses of “fireball”
- Takeways:
  - Ensure that evidence is tethered to relevant point in time
  - Bear in mind both commercial (fame) and conceptual (inherent distinctiveness) strength of marks



***In re Thomas D. Foster, APC***

136 F.4th 1090 (Fed. Cir. 2025)

# ***In re Thomas D. Foster, APC***

136 F.4th 1090 (Fed. Cir. 2025)

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- March 13, 2018 – President Trump proposes formation of sixth military branch called “Space Force”
- March 19, 2018 – Applicant files application for US SPACE FORCE
- June 2018 – President issues directive to create SPACE FORCE
- December 2019 – Congress establishes branch of military
- Application refused under Section 2(a)
- When is the appropriate time to determine an association?
  - At time of application
  - At time of examination



# ***In re Thomas D. Foster, APC***

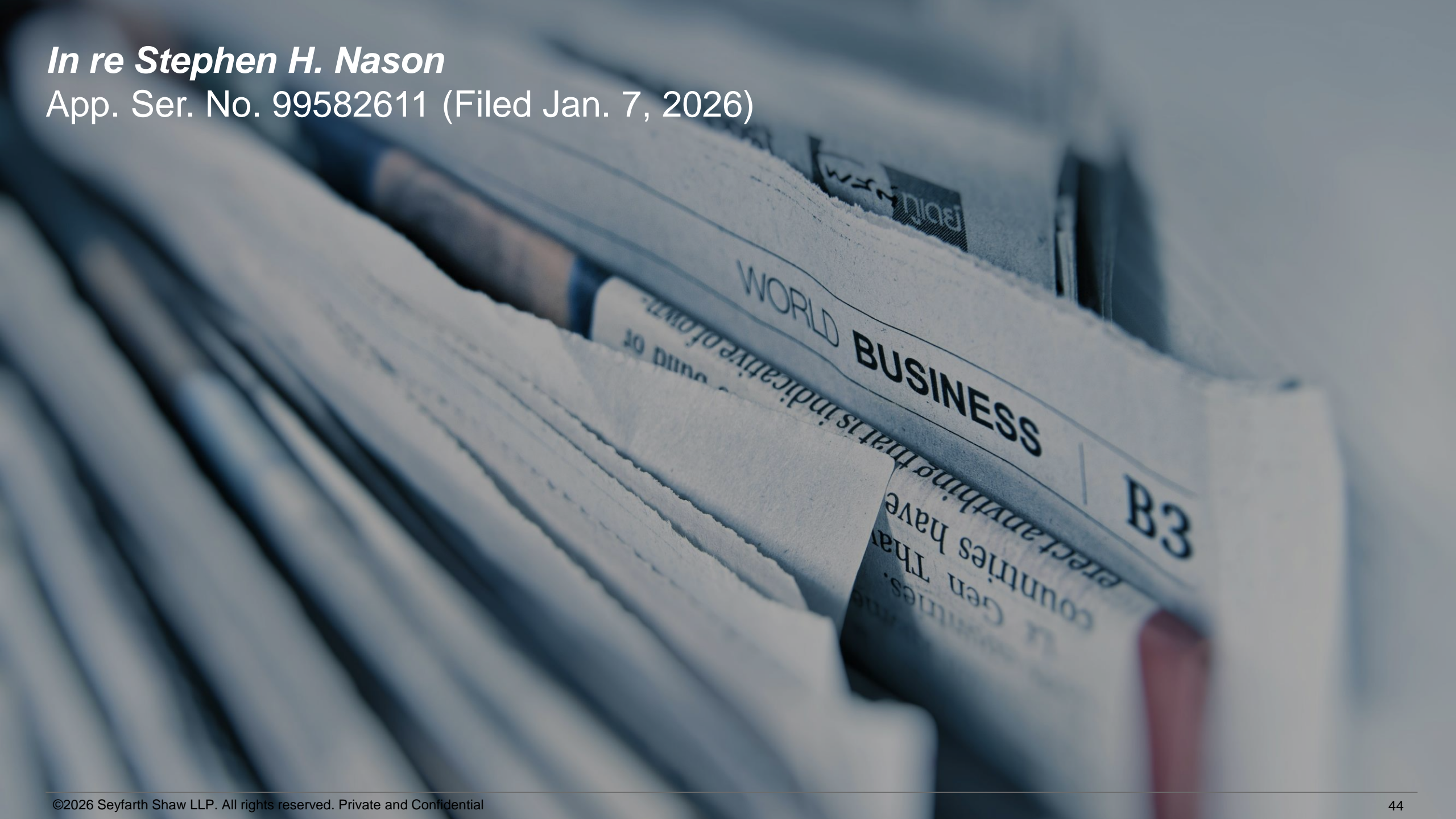
136 F.4th 1090 (Fed. Cir. 2025)

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- Section 2(a) Cancellation
  - “The Board is required to assess the facts as of the time the mark was registered.”  
*Piano Factory Group, Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 1379 (Fed. Cir. 2021)
- Section 2(d) Opposition
  - Evidence can be considered “through the latest date permitted” to introduce evidence  
*R. J. Reynolds Tobacco Co. v. Am. Brands, Inc.*, 493 F.2d 1235, 1238 (C.C.P.A. 1974)
- Section 2(e) Refusal
  - “[A]t least to the time the application is acted on in the Patent Office”  
*Application of Thunderbird Prods. Corp.*, 406 F.2d 1389, 1392 (C.C.P.A. 1969)
- Section 2(f) Refusal Appeal
  - Evidence showing distinctiveness can be considered through “the date of the Board’s decision.”  
*In re Chippendales USA, Inc.*, 622 F.3d 1346, 1354-56 (Fed. Cir. 2010)
- Holding: Evidence can be considered through date of refusal was affirmed (December 2022)
- **Takeaways:**
  - Close of evidence in oppositions.
  - Possibly date of registration in cancellations

***In re Stephen H. Nason***

App. Ser. No. 99582611 (Filed Jan. 7, 2026)



# ***In re Stephen H. Nason***

App. Ser. No. 99582611 (Filed Jan. 7, 2026)

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- DONROE DOCTRINE Mark
- November 17, 2025: Used in headline in New York Times by Jack Nicas.
- January 7, 2026: ITU Application filed.
  - “Imprinting messages on tee-shirts.” – Class 40.
- January 13, 2026: Wikipedia entry created.
- Rhetorical Question:
  - Who would be entitled to a statutory cause of action?
  - Name that claim!



# The (Near) Future

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***Louis Poulsen A/S v. Lightzey***

Case No. 25-2048 (7th Cir.)

# “Schedule A” Litigation

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- An increasing problem: foreign sellers hiding behind online aliases getting to U.S. consumers with counterfeit, infringing, and/or “dupe” products
- An increasingly popular solution: “Schedule A” cases
  - Defendants named as “The Partnerships and Unincorporated Associations Identified on Schedule ‘A’” (sealed exhibit)
  - Can name hundreds of defendants in single case
  - Seeks removal of marketplace listings, freezing of seller accounts, expedited discovery re: identifying information, financial accounts, contact information
  - Court often allows alternative service on defendants via email; default is likely
- Law360 reports that filings increased from 573 in 2020 to 2,023 in 2024

# The Trajectory of a Schedule A Case

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- 1) **Plaintiff files Complaint + sealed Schedule A**
- 2) **Plaintiff files Ex Parte Motion for TRO**
- 3) **TRO served on online marketplace**
  - Defendants typically learn of the suit when their accounts are frozen
- 4) **Plaintiff seeks preliminary injunction**
  - Defendants served (likely electronically)
  - Court holds hearing, but most defendants do not appear
  - If unopposed, PI issued
- 5) **Default judgment and damages**
  - Statutory damages
  - Permanent injunctions
  - Release of frozen assets

# Emerging Questions

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- U.S. District Court for the Northern District of Illinois has been extremely friendly to these cases – *until recently*
- Constitutionality questions re: due process
  - Website available in Illinois generally not sufficient
  - As recently as December 2024, N.D.Ill. allowed personal jurisdiction based on test buy by plaintiff’s investigator
  - August 2025: District Court judge in N.D.Ill. filed opinion expressing concern over “stretching applicable procedural rules past their breaking point”
  - September 2025: District Court judge in D.N.J. issued standing order tightening rules around this type of litigation

# Procedure is Being Tested in *Louis Poulsen*

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- Danish lighting manufacturer Louis Poulsen sued 400+ defendants
- Later dismissed Lightzey, a U.K.-based e-commerce platform, based on jurisdictional grounds
  - Louis Poulsen had relied on printout from interactive website available in Illinois
- Lightzey appealing order denying legal fees to Seventh Circuit
  - Arguing case is “exceptional” under 15 U.S.C. § 1117(a)
  - Attacks “abusive” “cottage industry” of Schedule A cases in N.D.Ill.
- Oral argument scheduled for **February 20, 2026**
  - Will court issue narrow ruling on fee issue, or speak to larger due process issue looming over the case?

***VIP Prods. LLC v. Jack Daniel's  
Props. Inc.***

Case No. 25-2027 (9th Cir.)



# VIP Prods. LLC v. Jack Daniel's Props. Inc.

Case No. 25-2027 (9th Cir.)

- VIP's Position:
  - Dilution by tarnishment (15 U.S.C. §1125(c)(2)(C) amounts to unconstitutional viewpoint discrimination by enjoining the use of a mark that “harms the reputation” of a famous mark.
    - *Matal v. Tam*, 582 U.S. 218 (2017)
    - *Iancu v. Brunetti*, 588 U.S. 388 (2019)
- District court found argument waived because no amendment of pleadings.
- Appellant's and Appellees' brief filed, reply brief due March 2, 2026
- To be argued (tentatively) in April-May, 2026



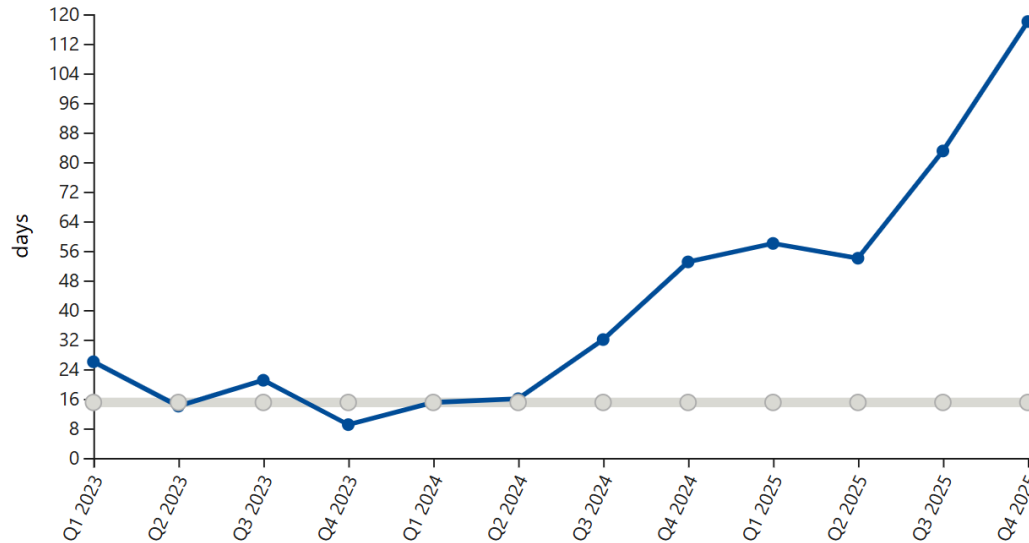
# ***State of the USPTO***

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- TTAB
  - Jan. 1, 2025: 29 judges
  - Jan. 1, 2026: 22 judges
  - Consequences:
    - Pendency of motions / final decisions do not appear statistically significant
    - 2024: 30 precedential decisions
    - 2025: 11 precedential decisions
- USPTO
  - Pendency is improving
  - Quality is maintaining
  - BUT...

# State of the USPTO

Statement of Use (SOU) pendency in days, last three years



- Consequence:
  - Can file one “insurance” extension of time with or after SoU filed. 37 C.F.R. §2.89(e)
    - If filed with SoU (e.g., last day to file) run risk of office action toward end of period
    - But can file SoU day *after* extension – e.g., first day of 6-month period – and then file “insurance” extension. Result would be about 12 months to perfect SoU.

# *thank you*

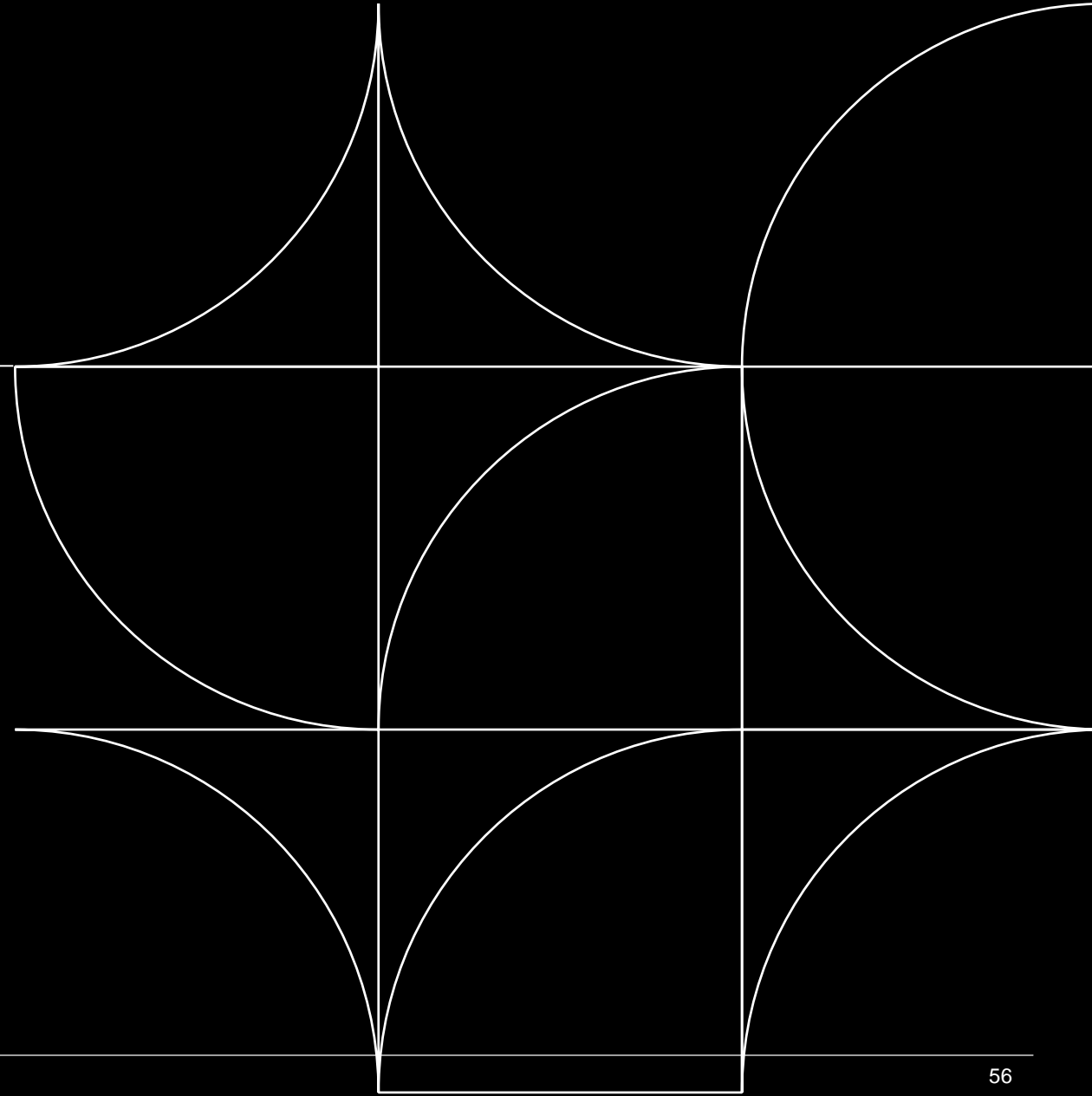
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