ANA/BAA Consumer Protection Monthly Update

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Regulatory and Litigation Developments for Advertisers and Marketers

D.C. Tax on Advertising

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D.C. Tax on Advertising

- Last week, the D.C. Council passed their proposed 2021 budget, which includes a 3% tax on advertising, on a first reading. (Bill 23-760, Section 7121)
  - Would impose a 3% tax on advertising services and the sale of personal information.

- Second reading on the bill is scheduled for July 21.

- ANA is working to defeat the bill and needs business – particularly those with a D.C. presence – to help.

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U.S. Supreme Court Cases

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Can the FTC Obtain Monetary Relief?
Securities and Exchange Commission v. Liu

- Defendants argued that the Securities and Exchange Commission lacked the authority to obtain "disgorgement" under statutory authority to obtain "equitable relief," 15 U.S.C. §78u(d)(5), because disgorgement is punitive and equity historically excludes punitive sanctions.
- The Supreme Court held that in a Securities and Exchange Commission enforcement action, a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under 15 U.S.C. § 78u(d)(5).
  - Total revenues is not the proper measure of restitution under "longstanding principles of equity" and "courts must deduct legitimate business expenses before ordering disgorgement," unless the agency can prove that the "entire profit of a business … results from the wrongdoing." Thus, restitution is limited to the "net *profits* from unlawful activity."
  - The disgorged funds must be returned to investors, where feasible.
  - The Court indicated that seeking joint and several liability for disgorged funds from certain parties may transform otherwise equitable disgorgement into an unauthorized penalty.

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Can the FTC Obtain Monetary Relief?
Securities and Exchange Commission v. Liu

- **Section 13(b):**
  - **TEMPORARY RESTRAINING ORDERS; PRELIMINARY INJUNCTIONS.** Whenever the Commission has reason to believe—**(1)**that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and **(2)** that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

    the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest,

- **Section 78u(d)(5):**
  - **EQUITABLE RELIEF.—**In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

- The decision is limited to the relief available under the Securities Act, but there are potential implications to the available remedies under Section 13(b).

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Can the FTC Obtain Monetary Relief? SCOTUS Grants Certiorari in *AMG Capital* and *Credit Bureau*

- The Supreme Court granted certiorari in the two cases.
  - *AMG Capital v. FTC* : Whether § 13(b) of the Act, by authorizing "injunction[s]," also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief.
  - *FTC v. Credit Bureau Center*: Whether Section 13(b) authorizes district courts to enter an injunction that orders the return of unlawfully obtained funds.

- FTC's General Counsel Alden F. Abbott issued the following statement after the U.S. Supreme Court's Order:
  - "We look forward to proving to the Supreme Court that the FTC Act empowers us to fully protect consumers by ensuring that money unlawfully taken from them is rightfully returned."

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Supreme Court Rulings on the Telephone Consumer Protection Act: *Barr* and *Duguid*

- *Barr v. American Association of Political Consultants, Inc.*: The Court struck down and severed the 2015 Government Debt Exception to the TCPA but held that the balance of the TCPA was constitutional.
  - The exception was a content-based restriction that violated the First Amendment.
  - The exception must be severed from the TCPA rather than declaring the entire statute unconstitutional because: the exception and the TCPA fall under the Communications Act of 1934, which has a severability clause, and even if the Communications Act severability clause did not apply, the presumption of severability applies where the TCPA could function adequately and independently as it did prior to 2015.
- Supreme Court granted certiorari in another case to resolve a circuit split and decide the issue of whether an "automated telephone dialing system" encompasses any device that can "store" and "automatically dial" telephone numbers, ***even if the device does not*** "us[e] a random or sequential number generator."
  - The Court will determine whether a caller uses an autodialer to place a call or send a text message if the platform being used merely dials without human involvement from a stored list of telephone numbers, or whether the platform itself must randomly or sequentially generate the telephone numbers that it dials.

California Consumer Privacy Act ("CCPA")

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CCPA Enforcement

- On July 1, the California Attorney General began enforcement of the California Consumer Privacy Act (CCPA).
  - The AG's final regulations and statement of reasons were not publicly released until June 2, well after the CCPA's effective date and less than a month prior to the official enforcement date.
  - The validity of these proposed regulations is uncertain, as California's Office of Administrative Law has yet to determine whether they comply with the California Administrative Procedure Act.
- California Attorney General sent initial wave of notice letters to companies it believed were in violation of the CCPA on July 1.
  - Initial round focused on online-only businesses.
  - Customer complaints were one of the factors in the AG's decision on which companies to investigate.
  - Under the law, companies have a thirty-day period to "cure" violations and come into compliance.

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CCPA 2.0: California Privacy Rights Act

- The California Privacy Rights Act (CPRA) has qualified for the November 2020 ballot.

- If passed, CPRA would modify the CCPA to provide additional protections.
  - Correct inaccurate information and the right to limit first-party use of sensitive categories of informational.
  - Provide clarifications on the consumer right to opt out of all sale or sharing of data for purposes of online behavioral advertising, and include a clearer "purpose limitation" obligation into the text of the statute.

- Operative date: January 1, 2023.

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Federal Communications Commission

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FCC Rulings

- **P2P Alliance**
  - The FCC's Consumer and Governmental Affairs Bureau ruled that an automatic telephone dialing system ("ATDS") is not determined by whether the equipment has the capability to send a large volume of calls or texts in a short period of time, but whether human intervention is involved.
  - The Commission's official interpretation of the ATDS definition remains pending.

- **Anthem, Inc.**
  - The Consumer and Governmental Affairs Bureau denied a petition to exempt certain healthcare-related calls from the TCPA's consent requirements.
    - Prior express consent must be obtained before a call (or text) is made. The supposed value or "urgency" of the communication does not necessarily make it permissible.

NAD & NARB

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NAD Fast-Track SWIFT Cases: Clif Bar & Co (Case #6738)

- NAD issues first substantive decision under the Fast-Track SWIFT program.
- Kind, LLC challenged the claim "A Better Performing Bar--Clif Bar For Sustained Energy," which appeared as the top Adword result for internet keyword searches for "Kind Bars" and "energy bars."
- Clif argued that the claim was not appropriate for SWIFT treatment because the claim was too complex and expert testimony and a consumer perception survey were necessary to determine whether the word "better" conveyed a comparative performance message.
- NAD concluded that the claims were appropriate for SWIFT treatment because they did not require NAD to evaluate complicated product testing (the advertiser did not argue that it had product testing to support a comparative performance claim), and any legal arguments were limited because the challenge involved a single claim in a single context

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NAD Fast-Track SWIFT Cases: Clif Bar & Co (Case #6738)

- "A Better Performing Bar--Clif Bar For Sustained Energy"
  - NAD rejected the argument that the "better" claim was puffery because the claim, when viewed as a whole, tied the word "better" to the objectively measurable performance attribute "sustained energy."
  - The claim appeared in search results, without additional context or visual cues.
    - The express message was that Clif Bars are better than Kind Bars or other energy bars at providing sustained energy.
  - Given that the statement appeared in response to online searches for the phrase "Kind Bars," NAD found that this increased the likelihood that consumers searching for information about Kind bars will reasonably take away a comparative message when Clif claims it is a "better performing bar."
- The advertiser provided evidence that Clif bars helped optimize performance during intense sustained activity.
- **Conclusion**: NAD concluded that this did not support the unqualified comparative claim.

SmileDirectClub, LLC (Smile Direct Club Clear Aligners), Align Technology, Inc. (Invisalign Clear Aligner System)

- Align advertised that its Invisalign clear aligners are “more comfortable and better-fitting” and “easier to put on and take off.”
  - The claim included a disclosure stating the comparison was against “aligners made from single layer .030 inch (Ex30) material.” [a previous Align product].

- **Conclusion**: NAD recommended the advertiser modify the claims to disclose that the object of the comparison is limited to the previous version of Invisalign brand clear aligners made with the ST30 material, either within the express claims or via a clear and conspicuous disclosure.
  - The disclosures were ineffective because they appear far removed from the claims they modify and they were too small for consumers to easily notice, read, and understand.
  - The disclosures were too technical. Consumers would not realize that the comparison was against the company’s previous product. In absence of any clarification, consumers are likely to believe the claims to be a comparison against competing products.

- SmileDirectClub was challenged by the American Association of Orthodontists for the claims “3x times sooner than braces”, “the same level of care from a treating dentist or orthodontist as an individual visiting a traditional orthodontist or dentist for treatment”, and pricing claims.
  - NAD concluded that the express performance claims were not supported.

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Native Advertising: Amerisleep (SleepJunkie.org and SavvySleeper.org) (Case #6369)

- **Arguments**
  - **Challenger**: Amerisleep failed to adequately disclose that two mattress-ranking and review websites, SleepJunkie.org and SavvySleeper.org, were owned by Amerisleep.
  - **Advertiser**: A website disclosure stated that "we may receive financial compensation" and the websites are "owned by Healthy Sleep, LLC, which is affiliated with Amerisleep, LLC."
- **Conclusion**: The NAD found Amerisleep's websites conveyed the message that the sites were independent through their use of a ".org" domain name, zero Amerisleep branding, and text and images that implied an unbiased and independent site.
  - The disclosure was also obscured when a consumer clicked on a drop-down menu, was in very small type size, and was occasionally sandwiched between prominent large-type headlines and a prominent header displaying the site's name.
  - NAD recommended that the advertiser discontinue the sites in their current form or modify them to ensure that consumers clearly understand the websites' contents are advertising for Amerisleep.

FTC Developments

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FTC Files Lawsuit against SuperGoodDeals.com

- FTC filed a lawsuit charging an online marketer with falsely promising consumers next-day shipping of facemasks and other personal protective equipment (PPE).
  - "Pay today, ships tomorrow"

- FTC alleged that the defendants' next-day shipping promises were false and that the defendants frequently waited weeks to provide "next-day" shipping, failed to inform consumers of the delay, and ignored persistent consumer questions and refund demands.

- FTC alleged that the company received hundreds of complaints about the shipping delays through emails, phone calls, and website chat messages.

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FTC Files Lawsuit against SuperGoodDeals.com

- The FTC alleged that this violated the FTC Act and the Mail Order Rule, which requires that companies advertising that they can ship merchandise within a certain timeframe have a reasonable basis for the promised timeframe.
  - The Rule also requires that, if companies find they cannot meet the promised timeframe, they must seek the customer's consent to the delayed shipment, or refund their money. SuperGoodDeals did not notify consumers, seek their consent to delayed shipments, and they did not refund their money.

- The FTC also alleged that some of the other merchandise sold through the SuperGoodDeals' website, such as Yeti tumbler mug, were falsely advertised as "authentic" or "certified."

- Online shopping problems like the ones cited in the FTC's complaint against SuperGoodDeals are the largest source of coronavirus-related complaints the Commission has received from consumers since the pandemic began, according to the FTC.

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FTC Settlement with Whole Leaf Organics, the Marketer of Thrive Supplement

- Under an administrative settlement with the FTC, the defendant is barred from making unsubstantiated claims that it can treat, prevent, or reduce the risk of COVID-19.

- The FTC proposed order also bars the marketer of Thrive, Marc Ching, from making similarly unsupported cancer treatment or prevention claims for products containing CBD. The case against Ching is the FTC's first against a marketer of a supposed COVID-19-related health product.

- In April 2020, the FTC announced that Ching agreed to a preliminary federal court order that imposed similar terms.

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FTC Sends Warning Letters about COVID-19 Claims

- The FTC continues to send letters targeting “treatments” advertised for COVID-19.

- In all, the Commission has sent similar letters to more than 160 companies and individuals, including companies that sold products advertised to prevent or treat COVID-19, multi-level marketing companies, VoIP service providers, and other third-party service providers.

Consumer Financial Protection Bureau

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Selia Law v. CFPB: Supreme Court Rules Restrictions on Removal CFPB Director Unconstitutional

- Supreme Court ruled that these restrictions on the removal of the CFPB director are unconstitutional.

- The Supreme Court did not strike down the rest of the act creating the CFPB.

- "We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will."
  - No further structural challenges? "The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal."

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CFPB Rolls Back Regulations on Payday Lenders

- Final Rule: Payday, Vehicle Title, and Certain High-Cost Installment Loan

- CFPB announced that payday lenders will not have to verify whether people coming in to take out short-term, high-interest loans are likely to be able to pay them back.
  - Revoking provisions of those regulations that: provide that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon payment loan, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay those loans according to their terms; prescribe mandatory underwriting requirements for making the ability-to-repay determination; exempt certain loans from the mandatory underwriting requirements; and establish related definitions, reporting, recordkeeping, and compliance date requirements.
- The rule reverses one written under the previous administration that would have required lenders to look at income and other monthly payments before giving a loan.

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Class Actions

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Automatic renewal programs (*Arnold v. Hearst Magazine Media* (S.D. Cal.))

- Plaintiffs alleged that Hearst Magazine Media used a negative option model for renewal of its magazine subscriptions and that defendants "solicit orders for magazine subscriptions that purport to be fixed for a period of time," then enroll customers in a program which automatically renews the subscription with charges being posted to the consumer's payment account.
- Plaintiff received an email from defendants promoting a sweepstakes to win a trip and a link in the email took plaintiff to Defendants' webpage, which directed her to "[f]ill in the fields below to get 1 FREE issue of Food Network Magazine and be automatically entered for your chance to win."
  - Plaintiff alleged that she submitted the sweepstakes entry and received an issue of Food Network Magazine and later received an email that was an invoice for a subscription to defendant's magazine but did not explain that no money was due, so she paid the invoice with her credit card.
  - Plaintiff alleged that defendants' promotional email, sweepstakes entry form, and credit card authorization did not contain "clear and conspicuous disclosure of automatic renewal offer terms"
  - If plaintiff had known that defendants were going to treat her submission of a sweepstakes entry as enrollment into an automatic renewal subscription, she would not have entered the sweepstakes, would not have requested the magazine issue from defendants, and would not have paid any money to defendants for that magazine.

Automatic renewal programs (*Arnold v. Hearst Magazine Media* (S.D. Cal.))

- Plaintiffs alleged that the defendant violated California's False Advertising Law and Unfair Competition Law based upon alleged violations of California's Automatic Renewal Law, and the California's Consumer Legal Remedies Act by making false or misleading statements regarding the automatic renewal of defendants' magazine subscriptions.
- The court granted defendant's motion to dismiss, holding that plaintiff failed to state a claim.
  - Plaintiff's allegations that defendants failed to "present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner" are conclusory and therefore failed to allege facts from which the court can infer that defendants made any representations to plaintiffs that were false or misleading.

Lanham Act and Other Unfair Competition Cases

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Warren Technology, Inc. v. UL LLC, (11th Cir.) (June 22, 2020)

- *Plaintiff*: Warren Technology, a manufacturer of heaters for HVAC systems.
- *Defendants*:
  - Tutco, a competing manufacturer of heaters for HVAC systems.
  - UL, an accredited testing laboratory that certifies products' compliance with safety standards.
- *Arguments*:
  - Warren alleged that despite UL having certified Tutco's heaters as compliant, Tutco's heaters did not comply with the relevant safety standards.
  - Warren also argued that UL misapplied the safety standards, which resulted in UL's certification and Tutco's claim of compliance in misrepresentation in violation of the Lanham Act, among other unfair competition laws.
- *Holding*:
  - The Court of Appeals held that Warren failed to sufficiently allege that Tutco or UL made misrepresentations as to compliance of competitor's heaters with lab standards.
    - Determining the conformance of a product with a UL standard requires UL to interpret the standard. Even a misinterpretation of a standard is not a "deceptive act" within the meaning of the Lanham Act, but rather a "matter of opinion."

Upper Deck Co. v. Panini Am, Inc., (S.D. Ca.) (June 29, 2020)

- *Plaintiff*: Upper Deck, sports entertainment company that produces sports memorabilia products, including trading card products. Upper Deck has an exclusive license with Michael Jordan to produce trading cards bearing his image, likeness, and name.
- *Defendant*: Panini, a competitor in the trading card market.
- *Background*: Panini printed a trading card featuring Scottie Pippen which did not include Jordan. A few months later, Panini released a more expensive trading card set, which included the same image of Scotty Pippen but it included a small image of Jordan in the bottom right corner. Panini then released another set of cards that included a card of Dennis Rodman where Jordan was featured prominently in the background.
- *Arguments*:
  - Upper Deck alleged that Panini deliberately added Jordan's image onto these cards and sued for a number of actions including false advertising under the Lanham Act. Specifically, Upper Deck argued that including the image of Jordan in Panini's cards is a false and misleading statement about Panini's products and commercial activities. Panini filed a motion to dismiss.
- *Holding*:
  - The Court denied Panini's motion to dismiss this complaint because it found that Upper Deck's allegations stated an actionable false statement, that there is a presumption of actual deception by Panini, and the deception influenced consumers' decisions to purchase the cards.

Davis v. The Fresh Market, (S.D. Fl.)(June 26, 2020)

- *Plaintiffs*: purchasers of "Chairman's Reserve Prime Pork," a product produced and sold by Defendants.
- *Defendants*: The Fresh Market, a grocery store chain, and Tyson Fresh Meats, pork and meat producer.
- *Arguments*:
  - Under the Florida Deceptive and Unfair Trademark Practices Act (FDUTPA), Plaintiffs alleged that Defendants' promotional materials touting "Chairman's Reserve Prime Pork" deceived them into believing that the pork used in the product was certified by the United States Department of Agriculture (USDA) as prime in the same way that the USDA certifies beef as prime – the USDA does not grade pork. Plaintiffs supported the allegation by submitting statement made by the Defendants, including:
    - A social-media post describing "Prime Pork!" as being of "the same high-caliber as our Premium and Prime Beef."
    - A quotation of a Tyson's Brand Manager reading, "Our USDA Prime quality grade beef keeps in step with the exacting standards of our Prime Pork counterpart."
    - A picture of a website displaying images of prime pork next to prime beef.
- *Holding*:
  - The Court granted Defendants' Motion to Dismiss because Plaintiffs did not plausibly allege that Defendants have made actionable misrepresentations under the FDUTPA. Specifically, Plaintiffs did not allege that Defendants included language or imagery on promotional material which explicitly indicates that the USDA even grades pork, not to mention as prime. Plaintiffs also didn't allege that the term "USDA" appears on the product's labeling or that the product is graded.

Communications Decency Act of 1996

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Turo Inc. v. City of Los Angeles (C.D. Ca.)(June 19, 2020)

- *Plaintiff*: Turo, dubbed the "Airbnb of cars," is a self-described online platform to connect car owners to other individuals within their community seeking to rent a car for a short or extended period of time. It has no physical presence at the Los Angeles, CA airport, LAX.
- *Defendants*: The City of Los Angeles.
- *Background:* Los Angeles claims that Turo has been violating Los Angeles administrative code and the ground transportation rules and regulations in effect at LAX by not getting the appropriate license, lease or permit to run its car exchanges at or near the airport.
- *Arguments*:
    - Turo argued that as an Internet company, Section 230 of the Communications Decency Act (CDA) shields it from the city's claim that Turo enabled unlawful rental car transactions at LAX.
        - Section 230 of the CDA establishes broad federal immunity to any cause of action that would make services providers liable for information originating with a third-party user.
- *Holding*:
    - The Court blocked Turo from operating near or at LAX, noting that Turo is operating as an unauthorized car rental business and trespassing on airport property. With respect to Section 230 of the CDA, the Court noted that the immunity it provides doesn't apply here because the city's claims do not involve the publication of content, but rather Turo's conduct to facilitate care rental transaction.

USPTO

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Can a generic word combined with ".com" create a federally protectable trademark? U.S. Patent & Trademark Office v. Booking.com B.V.

- Booking.com, a travel reservation company that operates a website of the same name, sought to register BOOKING.COM as a trademark on the U.S. Principal Register with a claim of secondary meaning (i.e., that it had acquired distinctiveness by virtue of long-standing use and recognition).
- Both the examining attorney and the Trademark Trial and Appeal Board refused registration of the term as generic. On appeal to the U.S. District Court for the Eastern District of Virginia and subsequently to the Court of Appeals for the Fourth Circuit, both courts sided with Booking.com, finding that the combination of the generic word and the domain extension was not generic. To make this determination the courts relied on Booking.com's evidence of consumer perception, concluding that the consuming public did not identify BOOKING.COM as generic, or as the name of a class of services.
- *Holding*:
  - In affirming the lower courts' decisions, the Supreme Court emphasized the role of consumer perception, concluding that "if 'Booking.com' were generic, we might expect consumers to understand Travelocity—another such service—to be a 'Booking.com.'" Since consumers did not use the phrase "booking.com" to reference online hotel reservation services, it was not a generic name to consumers. However, not surprisingly, the Court cautioned that the same consumer perception principle may also dictate that a similarly styled mark is generic. That is, if consumers perceive a so-called generic.com name as the name of a class of goods or services, then it may be refused as generic.
  - The Court ruled that there is no *per se* rule against registrability of a generic.com trademark, but there is also no per se rule that such a trademark is registrable.

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USPTO Prioritizes Certain COVID-19-Related Trademark and Service Mark Applications

- The USPTO will typically examine applications in the order in which they are received, but, in very special circumstances, the applicant may file a Petition to the Director to expedite examination of their application. The petition to "Make Special," as it's called, requires
  - (i) a $100 fee payment
  - (ii) an explanation of why special action is requested, and
  - (iii) a statement of facts that shows that special action is justified.
- *Holding*:
  - In affirming the lower courts' decisions, the Supreme Court emphasized the role of consumer perception, concluding that "if 'Booking.com' were generic, we might expect consumers to understand Travelocity—another such service—to be a 'Booking.com.'" Since consumers did not use the phrase "booking.com" to reference online hotel reservation services, it was not a generic name to consumers. However, not surprisingly, the Court cautioned that the same consumer perception principle may also dictate that a similarly styled mark is generic. That is, if consumers perceive a so-called generic.com name as the name of a class of goods or services, then it may be refused as generic.
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