Kilpatrick

6 KEY TAKEAWAYS

Annual Review of Key Trademark & Unfair Competition Opinions

Kilpatrick partner **Ted Davis** recently presented his "Annual Review of Key Trademark & Unfair Competition Opinions" at the firm's **2024 Advanced Trademark Law Seminar** in New York.

Key takeaways from the presentation include:

1

The Supreme Court has accepted trademark cases for review at an uncommonly high rate, a development that encompasses:

- the Court's attention to the intersection of trademark rights and the right to Free Speech guaranteed by the First Amendment to the United States Constitution;
- abrogation of the pro-defendant *Rogers v. Grimaldi* test for liability in cases in which defendants use their alleged imitations of plaintiffs' marks as marks for their own goods and services;
- clarification of the noncommercial use "exclusion" from liability for likely dilution under Section 43(c)(3)(C) of the Lanham Act; and
- the strengthening of the presumption against extraterritorial applications of United States law, including extraterritorial applications of the federal Lanham Act.

2

The Third Circuit remained the graveyard of trade dress claims with its highly restrictive test for nonfunctionality.

3

Outside of the Third Circuit, aternative designs continued their comeback as evidence of nonfunctionality.

4

Claims of consumer standing fell flat in both false advertising litigation and inter partes litigation before the Trademark Trial and Appeal Board.

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The Board also confirmed that building exteriors can qualify as inherently distinctive service marks (although it also confirmed that not all exteriors so qualify).

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