KILPATRICK TOWNSEND

5 KEY TAKEAWAYS

Annual Review of Key Trademark & Unfair Competition Opinions

Kilpatrick Townsend partner Ted Davis recently presented his "Annual Review of Key Trademark & Unfair Competition Opinions" at the firm's 2019 Advanced Trademark Law Seminar in San Francisco.

Key takeaways from the presentation include:

1. In granting cert. in *Romag Fasteners, Inc. v. Fossil, Inc.*, 139 S. Ct. 2778 (2019), the Supreme Court agreed to address the most significant split in the circuits over the past twenty years, namely, whether a prevailing plaintiff must demonstrate willful misconduct as a prerequisite for an accounting of the defendant's profits under Section 35(a) of the Lanham Act;

2. The proper relationship between trademark law and the First Amendment proved fertile ground for litigation in cases in addition to *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), in which the Supreme Court invalidated the Lanham Act's prohibition on the registration of immoral or scandalous marks;

3. Although two sections of the Lanham Act provide that a registration on the Principal Register that has not yet become incontestable is "prima facie evidence" of validity of the underlying mark, courts continued to differ as to whether that evidence results in a shift in the burden of proof on the issue or just the burden of production;

4. Courts also remained far more receptive than the Trademark Trial and Appeal Board to claims that registrations had been fraudulently procured or maintained; and

5. Practitioners and trademark owners alike reasonably should expect new initiatives by both the USPTO and Congress aimed at eliminating "deadwood" from the USPTO's registers.

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