

Letter From the Editor



The streets are filling up and the colors are changing, signaling that it's fall in New York. As always, we look forward to what is in store for the fashion world and the legal world for the remainder of the year. The Olympics wrapped up in August, so we have an article examining trademark law as it pertains to the United States Olympic Committee; and we have another article exploring trademark infringement litigation involving geographic scope of business. We also are excited to feature my friend, Bill Lienhard. Bill is the executive director at Volunteers of Legal Service—a non-profit organization that connects lawyers from New York's leading firms, including Katten, with low income New Yorkers in need of legal counsel and representation. I have been a Board member at VOLS for ten years and currently serve as its Vice President. We hope you enjoy this issue, and if you need anything, please feel free to reach out.

Karen Artz Ash

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Company Fights Back Against the USOC

by **Karen Artz Ash** and **Bret J. Danow**

Bolstered by a federal statute which gives the Olympic names and symbols special protections beyond the basic principles of trademark law and entitles the United States Olympic Committee (USOC) to broader enforcement rights than ordinary trademark owners, the USOC has long pursued an aggressive enforcement position against attempts by third parties to associate themselves with the Olympic games without permission.

Under US law, the USOC does not need to prove a likelihood of confusion in order to prevail on a claim for trademark infringement and certain statutory defences are not available to an alleged infringer of rights belonging to the USOC. Moreover, US law grants the USOC the ability to seek an injunction and treble damages in a civil action against any third-party uses of the Olympic marks and logos without permission for purposes of inducing the sale of any goods or services.

With the extensive power and scope of rights granted to it by federal statute, the USOC sends out a great deal of cease and desist letters asserting positions against businesses that are not official sponsors of the Olympics. Many of the letters sent by the USOC relate to social media postings and the use of hashtags. Indeed, as per the USOC's Brand Usage Guidelines, the USOC has taken the position that commercial entities other than news media outlets and Olympic sponsors may not make social media postings, which include Olympic imagery, terminology, images of athletes in Olympic Games competition or Olympic medals, and may not use any of the USOC's trademarks in hashtags. These limitations include re-tweets and even wishing an Olympic athlete good luck.

In August, an entity called HSK LLC, d/b/a Zeroez, believing that the USOC's enforcement position was overly broad, decided to take the fight to the courts and filed a complaint in the US District Court in Minnesota seeking declaratory judgment regarding its rights to discuss the Olympics in social media. In its com-



plaint, Zeroez asked the Court to rule that businesses that are not official Olympic sponsors can mention the Olympics in social media without violating the rights of the USOC. Zeroez argued that the USOC's actions violate the First Amendment and "have the effect of chilling, silencing and censoring Zeroez's speech about the Olympics on social media".

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In response to the complaint, the USOC filed a motion to dismiss, arguing that declaratory judgment was not appropriate in the case at hand because there was no dispute between the parties. The USOC pointed out that the Zeroez did not make any statements about the Olympics in social media and had not had any contact with the USOC prior to filing its complaint.

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Although a decision may not ultimately be issued on the merits of Zeroez's arguments, this case potentially opens the door for parties to fight back against the demands of the USOC. The case will be hotly monitored, as it has a great deal of significance with respect to the USOC's ability to pursue enforcement efforts against the use of Olympic imagery in social media in future games.

Proper Geographic Scope for Injunctive Relief

by **Karen Artz Ash** and **Bret J. Danow**

In *Guthrie Healthcare System v ContextMedia, Inc.*, the Court of Appeals for the Second Circuit issued a decision regarding the appropriate geographic scope of an injunction in a trademark infringement case.

Guthrie Healthcare System, which operates medical facilities, hospitals and clinics, primarily in the Twin Tiers region of New York and Pennsylvania (which the court termed the "Guthrie Service Area"), and owns a federal registration for its stylized logo mark, filed a complaint in the Southern District of New York against ContextMedia alleging trademark infringement based on ContextMedia's use of a similar logo in connection with its delivery of health-related content to physician practices. The district court found that there was a likelihood of confusion between the logos at issue in the Guthrie Service Area but not outside of the Guthrie Service Area. Therefore, the District Court granted a limited injunction, preventing ContextMedia from using

its logo in the Guthrie Service Area, but allowing it to continue to use the logo everywhere else, including on its websites, in social media and in internet transmissions.

Both parties appealed the decision, ContextMedia contesting the finding of liability and Guthrie Healthcare System objecting to the narrow scope of the injunction. The Second Circuit affirmed the finding of a likelihood of confusion, determining that the logos are “jaw-droppingly similar” and overruled the district court with respect to the scope of the injunction, holding that the district court had misinterpreted the law. The Court held that while it is correct that the senior user of a mark must prove a probability of confusion in order to obtain injunctive relief, such injunctive relief should not only extend to those geographic areas for which a probability of confusion has been shown.

In evaluating the scope of the injunction, the Court held that “once the senior user has proven entitlement to an injunction, the scope of the injunction should be governed by a variety of equitable factors— the principal concern ordinarily being providing the injured senior user with reasonable protection from the junior user’s infringement.” In this connection, the Court held that the district court’s ruling was problematic because it allowed ContextMedia to continue to use its marks on the internet where there would also be a likelihood of confusion. Further, the limited injunctive relief provided by the district court could harm the plaintiff by preventing it from expanding its business beyond the geographic area to which the injunction applied without subjecting it to consumer confusion.

The Court specifically noted that “every case turns on its particular facts,” indicating that senior users who demonstrate a likelihood of confusion with a junior user’s use of a mark in a particular area of operation are not necessarily entitled to injunctions that extend beyond the senior user’s geographic area of operation. To the contrary, a junior user has the ability to demonstrate that there will be no likelihood of confusion in a particular geographic area such that an injunction in that area will not serve any useful purpose.

AR•VR

Doron Goldstein Comments on Investor Questions for Start-Ups

Intellectual Property partner **Doron Goldstein** commented to *AR/VR Magazine* on what IP challenges augmented reality and virtual reality start-ups need to prepare for before going to market. In addition to protecting their own work product, consideration needs to be given to third-party rights, such as music or brand rights. Doron noted that how third-party rights are managed is a standard due diligence question of investors. “Investors will normally raise the issue as part of their due diligence review (whether during the start-up pitch or in follow-up diligence), as they are trying to get a handle on the operations, risk, and company sophistication.” (“[Litigation: The Friendly Reminder AR/VR Start-Ups Ain’t Ready](#),” September 26, 2016)





Through
the Lens

Bill Lienhard



Gustavo Bahena, former client
of VOLS' Immigration Project,
legal permanent resident



Bill Lienhard

Executive Director at Volunteers of Legal Service

-----[devotion]-----

Can you tell us about your organization, **Volunteers of Legal Service**?

Volunteers of Legal Service (VOLS) enables lawyers from New York City's leading law firms and corporate legal departments to provide pro bono (free) legal assistance to the city's neediest residents. For more than 30 years, VOLS has led the movement to make pro bono legal assistance an established part of every reputable law firm's and legal department's practice. During this time, tens of thousands of volunteer lawyers have provided legal assistance to New Yorkers due to VOLS' efforts.

By focusing on recruiting, training and supporting volunteers, we are able to have an exponentially greater impact. Currently, each year, VOLS' ten-person staff organizes a small army of about 1,000 volunteer lawyers from 50 different law firms—including Katten—to provide 18,000 hours of free legal assistance to about 3,000 low-income New Yorkers through VOLS' pro bono projects. With the help of our staff, our volunteer lawyers tackle issues that are absolutely vital to our clients, including winning government benefits like unemployment insurance, resolving serious immigration problems, drafting wills and advance directives for elderly people, stopping evictions and forcing landlords to make repairs, and keeping families together.

As the Executive Director of VOLS, I have the honor of helping talented lawyers give back to the city. It's a humbling and rewarding vantage point. I get to see some of New York's most powerful professionals volunteering their valuable time to support some of the city's most vulnerable residents. It's New York at its best.

-----[vision]-----

Do professionals other than lawyers also volunteer for VOLS?

Yes, absolutely. For example, the fashion photographer Hugo Arturi, whose clients have included Hugo Boss, Rebecca Minkoff and Bloomingdales, and Milk Studios are collaborating with VOLS' Immigration Project on a volunteer basis. Since 2011, Immigration Project staff and volunteer lawyers have been

helping immigrant high school students at city public schools to resolve immigration issues so that they can attend college, work legally and pursue the “American Dream.”

Under Hugo’s leadership, we are producing a short documentary film featuring some former clients of the project, including:

- Fabio Gomez, 21, an artist from East New York, has two part-time jobs, and is studying mechanical engineering. With VOLS’ help, Fabio became a legal permanent resident.
- Gustavo Bahena, 19, a tattoo artist from East New York, works two jobs and is designing his own line of clothing; also became a legal permanent resident.
- Teonia Fitte, 22, studies international law, acts as a peer mentor at Bronx Community College, and is starting a new job at Amnesty International. Another legal permanent resident who achieved this status with our help.
- Lubna Batool, 17, won a full scholarship to pursue the pre-med program at St Joseph’s College. She intends to study epidemiology with the hope of providing medical care to underserved communities. Thanks in part to VOLS, Lubna is now a US citizen.

During filming, Hugo took these beautiful portraits of Fabio, Gustavo, Teonia and Lubna. By volunteering their creative prowess, Hugo and Milk Studios are helping others see the faces of immigrants who are having a positive impact on our city.

When I first saw Hugo’s portraits, I was struck by how much these young adults reminded me of my own teenage daughters, ages 15 and 17. My oldest daughter is applying to college now, and I can’t imagine how insurmountable that process would seem to her if she also had to deal with complex immigration problems that could disqualify her for financial aid, prevent her from ever working legally, or even result in her deportation.

Hugo and Milk Studios couldn’t have picked a more important time to volunteer their creative talents. The Presidential election has exposed tremendous ignorance, prejudice, and downright cruelty toward immigrants in our country. Now more than ever, we need to make sure that when we talk about “immigrants,” we are discussing the lives of real human beings like Fabio, Gustavo, Teonia, and Lubna.

We plan to hold a screening of the documentary soon.



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How has Katten been involved with VOLS?

Katten’s relationship with VOLS spans almost 30 years. The firm has been a bulwark of support for VOLS—providing us with volunteers, board leadership, and even temporary office space for our organization when we were forced to move last summer.

Starting in the late 1980s, our long-serving Executive Director Bill Dean mobilized the city’s trusts and estates bar to provide pro bono estate planning to HIV positive people during the height of the AIDS epidemic. Katten Partners Joshua Rubenstein and Ronnie Davidowitz led the firm’s contribution to this effort. In 1995 alone, Katten provided free estate planning to 196 people with HIV. Mr. Rubenstein served on the VOLS Board for many years, and Katten continues—to this day—to work with clients at South Brooklyn Legal Services who are HIV positive.

Currently, Katten Partner Karen Artz Ash serves as our Board Vice-President, and has led the firm’s participation in VOLS’ Microenterprise Project along with Katten Special Counsel David Sherman.

In the Microenterprise Project, lawyers volunteer in areas such as intellectual property, corporations, and contracts for low-income entrepreneurs and small business owners. It’s a wonderful project, and for me, really encourages what I love most about New York City: the creativity, energy, and drive of people who come here from all over the world to improve their lives and the lives of others. Clients of the Microenterprise Project have included a gin distiller, a bicycle-parts manufacturer, a

rugelach baker, a dance cooperative, a visionary who wanted to promote extreme skiing in Kashmir . . . you name it.

The pro bono assistance Katten has offered through our Microenterprise Project has gone beyond helping individual business owners. After Hurricane Sandy, Katten eagerly assisted with an effort to revitalize the Rockaways. Queens Economic Development Corporation (QEDC) had come up with a brilliant ad campaign idea to persuade New Yorkers to return to Rockaway Beach. Recognizing the power of punk, QEDC wanted to use the Ramones’ hit song “Rockaway Beach,” in an ad campaign that would run through the summer, but they had no idea how to obtain the rights or even find the people who controlled the rights.

QEDC contacted VOLS, and I immediately called Katten. The Ramones are one of my favorite bands, so the idea of a pro bono project involving one of their great songs made me very happy. Even though we were on a very short timeline, Katten was able to secure the rights at no cost to QEDC, and the radio ad campaign was a huge success.

-----{ insight }-----

Can you tell us why you became a public interest lawyer and how you got to VOLS?

I grew up in a family of artists, musicians, researchers, and inventors. I haven’t invented anything, and I definitely don’t have a talent for art or design (my wife says I need an extreme wardrobe makeover, starting with my shoes), but I did internalize the idea that I should devote my professional life to trying to create a better world.

When I graduated from college, I wanted to work for social justice, but I was clueless about how to do this. I joined Teach for America in its first year of existence and tried teaching in Compton in south-central Los Angeles. I was only there for a few months, but the experience galvanized my desire to work for justice. I witnessed extreme poverty for the first time, saw two stabbings, and heard about shootings near the school every week. The older brother of one of my second grade students was killed in gang-related crossfire during my first week on the job.

When I came back East, I interned for Bernie Sanders during his first term in Congress as a socialist/independent from Vermont. With no party affiliation and no



Teonia Fitte, former client of VOLS’ Immigration Project, legal permanent resident

committee membership, he didn't have much pull. Once, when I called another Congressperson's office to ask for support on a bill and introduced myself as "intern for Bernie Sanders," the staffer who answered just burst into laughter and hung up. Nobody's ignoring Bernie's calls now!

I really hit my stride during when I interned at New Haven Legal Assistance in a small basement office in Derby, Connecticut after my first year of law school. Director Mary-Christy Fisher and the other lawyers I worked with were compassionate, tenacious and smart. I felt like I had found my people. More importantly, I discovered the joy of providing direct services to clients in need.

Since then I have represented the Flint Chapter of the NAACP against the State of Michigan and a giant power company, represented vulnerable tenants in Queens housing court, and worked at the Urban Justice Center with teams of lawyers and social workers to advocate for low-income and homeless people with severe and persistent mental illness. While winning cases was nice, I took the most satisfaction from moments when we were able to use the justice system to force powerful institutions and people to face our clients as equals, and not ignore them or treat them as subordinate.

In 2009, my family and I left the city to carry out a life-long dream, and lived in a tiny rural village in southern France for a year. When we returned, I learned that the legendary Bill Dean was retiring as Executive Director of VOLS. VOLS had a 30-year track record, an all-star staff, and a Board of Directors that included champions of pro bono service and leaders of the New York City Bar. I was honored when the Board offered me the position, and eager to work with the dedicated team at VOLS to give volunteer lawyers the chance to level the playing field through zealous legal advocacy.

----- [motivation] -----

What keeps you focused and motivated?

Whenever I need motivation, I get out and observe VOLS' expert staff in action—helping elderly people with wills at senior centers, meeting with mothers in jail and prison, representing clients at unemployment hearings, training volunteer lawyers, discussing difficult immigration cases with teenagers, and patiently answering questions from



Fabio Gomez, former client of VOLS' Immigration Project, legal permanent resident

both clients and volunteers all day long. Our Project Directors and staff have dedicated their lives to helping others and supporting volunteers, and they do both with grace, intelligence, and compassion. It's a beautiful thing to see.



----- [inspiration] -----

Who has inspired you in your life?

I am inspired by the love and support of my family members. They have always encouraged me to do good work in the world, even when it feels impossible.

I am also inspired by the hundreds of lawyers and others who volunteer for VOLS every year. Our volunteers are not career public interest lawyers, and they derive no financial gain from working with VOLS. Like all New Yorkers, they lead busy lives, and their time is precious. And yet, as a group, they choose to spend a total of 18,000 hours each year devoting their expertise to serve low-income New Yorkers. They travel to jails, prisons, hospitals, schools, senior centers and struggling neighborhoods to make a difference. In our Elderly Project, some even make home-visits so that they can help homebound seniors.

They do all of this in service to one idea—that our laws and system of justice exist to serve everyone, not just the wealthy few.



Keeping Your Cybersecurity Affairs in Order: How to Avoid Becoming the Next Ashley Madison

In late August, the Privacy Commissioner of Canada and the Australian Privacy Commissioner published the [results of their joint investigation](#) into the hack of notorious infidelity site, Ashley Madison, and its parent company, Avid Life Media (ALM).

The Privacy Commissioners found that ALM's information safeguards were inadequate at the time hackers exposed information from approximately 36 million user accounts. Among other things, the Privacy Commissioners found that ALM failed to create and implement a documented information security program that adequately protected the sensitive personal information stored on Ashley Madison's servers, and they highlighted misrepresentations that ALM made with regard to its security practices. As a result, the Commissioners put together a list of remedial and proactive measures ALM is required to take in order to comply with Canadian and Australian data privacy laws.

As data protection expectations become more standardized globally, the report from the Privacy Commissioners provides useful lessons on the basic data protection and information security requirements with which companies are expected to comply.

Lesson One: Never Cheat on Your Information Security Program

Unfortunately, the Privacy Commissioners' findings reflect an all-too-common organizational failure: many businesses do not have appropriate information security procedures and programs in place.

In their report, the Privacy Commissioners found that, despite handling deeply sensitive personal information of millions of users, ALM failed to implement some of the most fundamental components of an information security program, such as developing and documenting adequate policies and procedures, conducting appropriate risk assessments and properly training its personnel.

Takeaway: Informal, oral, unwritten or ad hoc information security policies and practices do little to protect sensitive data and are insufficient to mitigate or reduce an organization's exposure from security incidents.¹ Organizations that store critical or personal data electronically should, at a minimum:

- implement detailed written information security policies, processes, procedures and systems;

- regularly assess security risks, and implement appropriate corrective actions (including revision to existing policies/procedures or adoption of new ones) as part of a formal risk management program. This process should be repeated on a periodic basis (i.e., at least annually) and in response to changes in the threat environment or business operations; and
- provide appropriate privacy and security training for all personnel.²

Lesson Two: Always Use Appropriate Protection

ALM's poor information security practices and procedures led the Privacy Commissioners to find that ALM provided inadequate protection for the sensitive consumer information stored on its servers.³ The Privacy Commissioners noted that security measures should be reasonable and adequate in light of the organization's size and capacity, the amount of stored personal information and the potential for harm associated with the disclosure of the stored personal information.⁴

ALM collected and stored users' billing information, email addresses and information about users' sexual fantasies and preferences.⁵ Further, Ashley Madison's infidelity-related business model meant that even a passing association with the site could be damaging to the site's users if disclosed. When user information was posted publicly in August 2015, the consequences were severe for those named: reputations and relationships were damaged, and some reportedly even [committed suicide](#).

Notwithstanding ALM's rapid growth immediately preceding the breach, the Privacy Commissioners found that the quantity, nature and sensitivity of the information stored by ALM, combined with the foreseeable harm to individuals that would result from its disclosure, meant that ALM's less-than-comprehensive information security program was simply inadequate to protect its customers.⁶

Takeaway: When developing and implementing a cybersecurity program, an organization should weigh its resources, size and sophistication against the amount and types of personal information stored. The greater the potential harm from loss or disclosure of stored personal information, the greater the obligation to protect that information. Finally, organizations undergoing rapid growth need to take extra care that their security program keeps pace.

Lesson Three: Keep Your Word

ALM marketed discretion and security to its users as a central part of its services, but failed to implement fundamental information security practices. As a result, the Privacy Commissioners found that ALM deceived and materially misled its users about its security policies and practices.⁷

Users who visited the home page of the Ashley Madison webpage viewed a number of “trust mark” icons that suggested a high level of security and discretion. These included an award-style icon labeled “Trusted Security Award,” a lock icon next to “SSL Secure Site,” and a statement in which Ashley Madison promised that it provided a “100% discreet service” for its users. Even the image on its home page was that of a woman holding a finger to her lips in the universal gesture for secrecy.⁸

The Privacy Commissioners, however, determined ALM’s inadequate information security program failed to fulfill these representations. In addition to lacking a documented, comprehensive information security program, ALM employees stored passwords in online Google drives and in plaintext emails and text files on their systems.⁹ Access to servers containing sensitive data only required single-factor authentication and one server had an unprotected SSH key, which would allow a hacker to access other servers through it without providing a password.¹⁰

Takeaway: Organizations must ensure that any representations made about privacy and information security practices, including those described in any privacy policies and terms of use, are accurate and reflect actual practices. Further, organizations should be particularly wary of making difficult-to-verify representations such as “exceeds industry standards” as those statements are difficult to defend in the event of a false advertising or unfair or deceptive practices claim.

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Key Takeaways

- Maintain written information security policies, processes, procedures and systems.
- Assess your security risk profile and implement appropriate corrective actions as part of a comprehensive risk management program. Regularly re-assess risks and update your program accordingly.
- Ensure that your protections are appropriate for the data that you hold.
- Provide appropriate privacy and security training for all personnel.
- Understand and comply with the legal requirements in each jurisdiction in which you operate.
- Make sure that your cybersecurity practices match your marketing promises.



Launch of New Generic Top Level Domains *.store* and *.shopping*

From time to time, new generic top-level domains (gTLDs) become available for registration.

Among the many gTLDs newly available is *.store*. This gTLD is intended to provide brand owners with a domain that is instantly recognized as an online destination where products and services are offered and sold. The *.store* gTLD is potentially most relevant for retailers. For trademark holders who have already verified their mark with the Trademark Clearinghouse, the "Sunrise Period" provides an advance opportunity to register the *.store* domain before it becomes available to the general public. The Sunrise Period is currently open and will expire on June 5, with registration pricing beginning at \$1,500 per domain.

Similarly, the *.shopping* domain will shortly become available, and can provide another online platform for retail sales, giving brand owners and retailers the ability to create a digital community with their customers. A timeline and pricing schedule are not yet available for this new gTLD.



Keeping Your Cybersecurity Affairs in Order: How to Avoid Becoming the Next Ashley Madison *continued from page 9*

Lesson Four: Privacy and Cybersecurity is an International Affair

ALM marketed Ashley Madison worldwide and collected information and money from individuals in many jurisdictions. This enabled Ashley Madison to reach a much wider audience and generate correspondingly greater profits. These multinational benefits, however, subjected ALM to a range of privacy and data security notification obligations around the world.

As a result of this international exposure, ALM faces global liability arising from the breach. Class action lawsuits have been filed in multiple jurisdictions. Privacy authorities in Canada and Australia investigated ALM and obtained a compliance agreement and enforceable undertaking, respectively.¹¹ The US Federal Trade Commission has also [begun an investigation](#).

Takeaway: Organizations that operate in multiple countries have to consider the privacy and cybersecurity laws of those jurisdictions and comply with applicable laws. In addition to legal and regulatory compliance, it is critical for organizations to have incident/breach response plans and crisis communications plans that help them respond quickly and effectively in all relevant jurisdictions.

Conclusion

While it is impossible to prevent every security incident or data breach, there are still steps that organizations can and should take to limit the risks presented by such incidents. These basic measures highlighted by the Privacy Commissioners can help reduce both the likelihood of an incident and the potential for harm in the event of a breach, allowing organizations to better protect their customers and themselves.

- ¹ OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, PIPEDA REPORT OF FINDINGS #2016-005: JOINT INVESTIGATION OF ASHLEY MADISON BY THE PRIVACY COMMISSIONER OF CANADA AND THE AUSTRALIAN PRIVACY COMMISSIONER/ACTING AUSTRALIAN INFORMATION COMMISSIONER ¶ 10 (August 22, 2016), available [here](#). [hereinafter Report].
- ² Report, ¶ 9.
- ³ Report, ¶ 80.
- ⁴ Report, ¶¶ 54–55.
- ⁵ The types of information collected by Ashley Madison would be considered “sensitive” under the privacy and data protection laws of many jurisdictions. For example, the EU considers information “specifying the sex life of the individual” to be a category of “sensitive information” subject to heightened protections. Australia similarly defines “sensitive information” to include information about an individual’s “sexual preferences or practices.”
- ⁶ Report, ¶¶ 54–55.
- ⁷ Report, ¶¶ 50, 194.
- ⁸ Ashley Madison’s Terms of Service contained a disclaimer warning customers that the security and privacy of information could not be guaranteed and they accessed or transmitted content through Ashley Madison websites at their own risk. The Privacy Commissioners found that this disclaimer was not enough to absolve ALM of its obligations under applicable privacy laws. Report, ¶ 52.
- ⁹ Report, ¶ 75.
- ¹⁰ Report, ¶¶ 72, 75.
- ¹¹ Report, ¶ 12.



Doron S. Goldstein

co-head of the firm’s Privacy, Data and Cybersecurity practice



Megan Hardiman

co-head of the firm’s Privacy, Data and Cybersecurity practice



Matthew R. Baker

Associate



Joshua A. Druckerman

Staff Attorney



For more information, contact: Karen Artz Ash

Partner and National Co-Chair | Intellectual Property Department | Katten Muchin Rosenman LLP
+1.212.940.8554 | karen.ash@kattenlaw.com | 575 Madison Avenue | New York, New York 10022

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