

# The Counselor

The newsletter of the Illinois State Bar Association's Business Advice & Financial Planning Section

## Innovation and Protection: Why Manufacturers Can't Afford to Overlook IP in Annual Planning

BY GREG STONE

**IN TODAY'S FAST-PACED** manufacturing landscape, innovation isn't just a competitive advantage—it's a necessity. From advanced manufacturing technologies to proprietary processes and unique product designs, intellectual property (IP) underpins much of the value manufacturers create. Yet, many companies focus on operational efficiency, market expansion, and financial planning during their annual reviews while leaving their IP strategy on autopilot.

Overlooking IP planning isn't just a missed opportunity—it's a business risk. Innovations left unprotected can be exploited by competitors, expired patents can weaken market positions,

and underutilized IP assets can represent untapped revenue streams. As manufacturers gear up for a new year, it's time to ensure their IP strategy aligns with their broader business objectives.

Innovation without protection is a missed opportunity. When manufacturers fail to secure intellectual property rights for their innovations, they open the door for competitors to replicate, market, and profit from those advancements. Consider a scenario where a manufacturer introduces a groundbreaking process improvement but neglects to file a patent application. Within months, competitors can replicate

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## Read the Contract Before You Sign

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**IN THREE COURT DECISIONS** IN the past several months one can argue "read the contract before you sign" – and understand the law that applies – affected results. In one, a court needed to decide which of two contracts, controlled. In the second, the party seeking to enforce the contract was unable to do so – because they wrote it so the provision on which they relied was unenforceable. In the third,

an amendment so that the contract was enforceable, even decades later. Courts typically enforce contracts as written and agreed to by two parties. "Do-overs" are disfavored. A fourth decision dealt with inadequate evidence of consumer "clickwrap" Terms and Conditions – a failure to prove a particular contract was read and signed by a particular consumer.

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## Innovation and Protection

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the process, diluting the innovator's market advantage and undermining their investment in research and development. Every significant innovation—whether a new product, design, or method—should trigger an IP assessment. Manufacturers must make it standard practice to evaluate the patentability, trademark significance, or trade secret value of every new development as part of their research and development workflows.

Effective annual planning starts with asking the right questions about intellectual property. What new innovations has the company developed in the past year, and have they been adequately protected? Are there patents or trademarks set to expire in the coming year, and do they still align with the company's business objectives? Is ownership of IP created by employees, contractors, and third parties properly documented and secured? Lastly, are competitors' IP activities being actively monitored to identify risks and opportunities? These questions are not administrative burdens; they are essential to safeguarding and leveraging innovation. Manufacturers who approach annual planning with these questions in mind are far less likely to encounter unpleasant surprises in the form of IP disputes or missed filing deadlines.

Integrating IP considerations into annual planning requires clear and actionable steps. The first is ensuring collaboration with an IP attorney happens early and proactively. Too often, intellectual property counsel is brought into conversations only when a problem arises—after an opportunity has been missed or a risk has materialized. A better approach involves including IP counsel in annual strategic meetings to identify both threats and opportunities before they become urgent. Regular IP audits are another essential tool for manufacturers. These audits go beyond simple portfolio reviews; they uncover gaps in protection, clarify ownership issues, and highlight opportunities for commercialization. Finally, intellectual property goals must align with broader business objectives. If a company plans to enter new markets, expand product lines, or

form strategic partnerships, the IP strategy should support those goals through the timely filing of patents, trademarks, and other protections.

While many manufacturers view IP protection primarily as a defensive tool—a shield against infringement or competition—it can also be a powerful lever for growth. Patents, trademarks, and other IP assets aren't just static legal rights; they are dynamic tools that can generate revenue and drive strategic partnerships. Licensing dormant patents to other businesses can create new income streams. Strong trademark portfolios can open doors to franchising or global brand recognition. Well-managed IP portfolios also instill confidence in investors, partners, and stakeholders by demonstrating a commitment to protecting and maximizing the value of core innovations. Manufacturers who take a growth-oriented view of IP are far better positioned to capitalize on both market opportunities and unforeseen challenges.

Intellectual property isn't just a box to check—it's a cornerstone of sustainable growth and resilience in manufacturing. By making IP planning an integral part of annual strategic reviews, manufacturers aren't just protecting past innovations—they're creating opportunities for future success. This approach requires discipline, but the return on investment is significant. The start of a new year is the perfect time to set this discipline in motion.

Manufacturers should begin by scheduling a comprehensive IP strategy review with their legal and executive teams. This is more than an administrative task; it's an investment in long-term success. In an era where innovation drives market leadership, overlooking IP strategy isn't just risky—it's a missed opportunity that competitors will be all too happy to seize. ■

*Greg Stone is an intellectual property and licensed patent attorney at Whiteford, Taylor & Preston in Baltimore, where he co-chairs the firm's Technology & Intellectual Property Practice Group. As a former U.S. Patent Examiner, he represents clients in a wide variety of industries in obtaining, enforcing, and commercializing patent, trademark, copyright, and trade secret rights.*

## The Counselor

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## Read the Contract

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1) *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186 (2024)

*Coinbase v. Suski* involved two contracts and the dispute was about which of two contracts controlled. “The first contained an arbitration provision with a delegation clause; per that provision, an arbitrator must decide all disputes under the contract, including whether a given disagreement is arbitrable. The second contract contained a forum selection clause, providing that all disputes related to that contract must be decided in California courts.” While the ruling in the Supreme Court was that it is a court that should decide contract enforceability, hindsight permits the observation: if there were two contracts, why was not the second contract clear that it replaced the first contract? Read the first contract when writing the second – and make it clear. Another solution could be “boilerplate” that clarifies generally what happens if there are conflicting contracts.

2) *Rodgers-Rouzier v. American Queen Steamboat Operating Company, LLC*, 104 F.4th 978 (7<sup>th</sup> Cir. 2024)

In the *Rodgers-Rouzier* case it appears American Queen Steamboat outsmarted themselves in exercising control over labor disputes. The contract specifically included an arbitration clause that said the Federal Arbitration Act applied. The drafter of the contract, unfortunately for them, apparently failed to either understand the business or to look up the statute said to control. A “steamboat” company chose to have controlling a law that excluded maritime contracts. The argument “we didn’t mean just Federal, we meant Indiana, too” was unsuccessful. Knowing what law applies, when the contract invokes that law is a fundamental. Similarly to the above, “boilerplate” might be written to save the intent – “Federal Arbitration applies, but if it doesn’t the law of the forum state applies ...”.

3) *Zimmer Biomet Holdings, Inc. v. Insall*, 108 F.4th 512 (7<sup>th</sup> Cir. 2024)  
Zimmer has become a very successful

company in the medical field. An important part of the business is making and selling implants for joint replacement. Innovation in the certain joint replacement implants was led by Dr. Insall, to the point where Zimmer took ownership of his patents and provide for royalties until “the expiration of the last to expire of the patents licensed hereunder or so long as Product is sold by ZIMMER, whichever is last to occur.” The contract was in 1991. Three years later “[t]he parties amended the agreement in 1994. Among other things, Insall promised to work exclusively for Zimmer through January 1, 2011.” The amendment included calculation of 0.05% for “future knee systems.” A 1998 amendment added 1% royalties “on all sales of the NexGen Knee and all subsequently developed articles, devices or components marketed by Zimmer as part of the NexGen Knee family of knee components and not at the rate provided for sales of “future knee systems.”” (*Zimmer Biomet Holdings, Inc. v. Insall* No. 22-cv-02575, Docket 47 (ND Ill April 11, 2023)). Zimmer continued to sell Insall developed knee systems, but decided to stop paying royalties in 2018 resulting in litigation to recover the unpaid money. While the decision does not reveal whether awareness of the law was specifically a factor in the 1994 and 1998 amendments, there was an argument that patent royalties were not permitted after a patent expired, but when royalties were based on a patent plus some other rights, they could continue. The format of the amendments is consistent with having some royalties continue after patent expiration. (*Brulotte v. Thys Co.*, 379 U.S. 29 (1964) as clarified in *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446 (2015) (“... all the decision [i.e., *Brulotte*] bars are royalties for using an invention after it has moved into the public domain.” *Id.* at 453 – 54; “post-expiration royalties are allowable so long as tied to a non-patent right — even when closely related to a patent.” *Id.* at 454.”). Zimmer agreed to the amendments,

presumably because they were good for business. Whether the original contract was, or not, the amendments brought the deal within the limits of the law. Someone read the contracts and applied the law.

4) Proof of Reading and Signature as a Corollary

*Gaines v. Ciox Health, LLC*, 2024 IL App (5th) 230565 (5<sup>th</sup> Dist., 2024) dealt with a corollary: for there to be an enforceable contract there must be a meeting of the minds. The proponent of the contract has the burden to introduce evidence to show that meeting of the minds. Internet Terms and Conditions are ubiquitous, particularly for consumer transactions.

There are different types of online consumer agreements. These include clickwrap agreements, browsewrap agreements, and hybrid versions of those agreements. Regardless of the type of online agreement, the circumstances of the transaction must provide the offeree with reasonable notice that the terms of an agreement are being offered and that certain acts or conduct by the offeree will constitute acceptance of the offer. See *Arbogast*, 2021 IL App (1st) 210526, ¶ 27 (citing *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983-84 (2005)). The conduct of a party is not effective as a manifestation of assent, unless that party knows or has reason to know that the other party may infer from his conduct that he assents. *Arbogast*, 2021 IL App (1st) 210526, ¶ 27. Determining whether an Internet user has agreed to online terms of service is a “fact-intensive” inquiry. See *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7<sup>th</sup> Cir. 2016) (applying Illinois contract law). Courts may consider whether the web pages adequately communicated all the terms and conditions of the agreement and whether the circumstances support the assumption that the purchaser received reasonable notice of those terms and conditions. *Sgouros*, 817 F.3d at 1034. Thus, courts should look closely at the law and the facts to see if a reasonable person in the plaintiff’s shoes would have realized that he was assenting to the terms and conditions of the website when he registered for an online service. *Sgouros*, 817 F.3d at 1035.

There are practical and administrative issues in proving these contracts – ignoring the rhetorical question of “do consumers<sup>1</sup>



really read” them. The question is whether the company seeking to enforce the contract has evidence to show that the particular consumer in the case was presented the particular version of the contract and that consumer’s later conduct manifested assent to the contract. Recording “clicks” might be fine, but who did that clicking after what steps indicating reading (or at least scrolling past and having the opportunity to read!) needs to be proven. It is not enough to show business practices to support the proposition that “everybody did it.”

Ciox failed to produce competent evidence that the plaintiff agreed to the Terms and Conditions for Ciox eDelivery when he registered to use the online portal. By all accounts, online self-registration for the Ciox eDelivery system, as it existed in 2019, was a multi-step process. Ciox did not produce any documents or screen shots to replicate the self-registration process. Ciox did not describe or attach screenshots to show the number of screens that a registrant would have had to “click through” to locate the screen containing the Terms and

Conditions for Ciox eDelivery. According to the record, Ciox eDelivery portal was updated and renamed in 2022. There is no indication of whether Ciox archived or preserved online records from the 2019 self-registration process.

General ideas of record keeping were unable to prove “offer, acceptance, and consideration” of particular terms and conditions by a particular party at a particular time.

## Conclusion

Experience and skill, considering all relevant facts, coupled with writing contract terms consistent with the law, can go a long way towards ensuring that contract terms comport with what the parties imagined they were doing – the writing and intent evidence therein should reflect that imagination. Read the contract and make sure it accomplishes what the parties have in mind. And if you are the party wishing to enforce a contract, keep a copy and be able to prove that the party on

the other side read and signed it.

## Cases

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<i>Gaines v. Ciox Health, LLC</i> , 2024 IL App (5th) 230565 (5 <sup>th</sup> Dist., 2024) .....	1
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<i>Winters v. AT&amp;T Mobility Servs., LLC</i> 20172017 U.S. Dist. LEXIS 105804 (CD Ill., 2017) .....	1
<i>Zimmer Biomet Holdings, Inc. v. Insall</i> 108 F.4th 512 (7 <sup>th</sup> Cir, 2024) .....	1

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1. Or non-consumers dealing with electronic contracts. *Winters v. AT&T Mobility Servs., LLC* 20172017 U.S. Dist. LEXIS 105804 (CD Ill., 2017)



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# Leveraging Generative AI: Transforming the Practice of Law

BY GEORGE “GEO” BELLAS

## IN THE MODERN LEGAL

**LANDSCAPE**, the exponential growth of information—from client-specific data to statutes, regulations, and caselaw—has elevated the complexity of practicing law. While the challenge of managing this deluge of information is pervasive across professions, the legal industry is uniquely positioned to capitalize on the efficiencies and insights offered by generative AI and large language models. For practitioners attuned to both the opportunities and limitations of these tools, generative AI represents a paradigm shift and a corresponding adjustment in how we practice.

## Evolving the Fact-Gathering Process

The foundation of legal advocacy lies in meticulous fact-gathering. While straightforward cases, such as drafting a will, may require minimal effort, complex matters often involve navigating vast quantities of electronically stored information (ESI), including emails, databases, and digital correspondence. Generative AI enhances traditional e-discovery tools by expediting the extraction and summarization of relevant information, thereby reducing the time and cost associated with large-scale document review. The efficiency gained here allows attorneys to allocate resources toward strategic decision-making rather than administrative tasks.

## Advancing Legal Research Capabilities

Legal research—already a domain significantly enhanced by AI over the past few decades—has been further revolutionized by generative AI. These tools, equipped with sophisticated natural language processing, can perform deeper

analyses, suggest nuanced interpretations, and surface arguments tailored to specific issues. However, their utility comes with a caveat: the potential for “hallucination,” or the generation of incorrect or non-existent legal authorities. Given this limitation, attorneys must rigorously vet AI-generated outputs against primary sources and ensure alignment with ethical obligations to provide competent and diligent representation.

## Strategic Case Analysis and Predictive Insights

Analyzing the intersection of facts and applicable law is central to crafting a persuasive argument and assessing case viability. Generative AI’s predictive capabilities enable attorneys to model potential outcomes by considering variables such as jurisdiction, case type, and judicial tendencies. These tools assist in identifying case strengths, potential vulnerabilities, and optimal strategies. Yet, the indispensability of human judgment remains paramount, particularly when interpreting subtle factual nuances or calibrating the tone and substance of advocacy.

## Precision in Document Drafting

Document generation, from pleadings to transactional agreements, is an area where generative AI excels in creating initial drafts. However, sophisticated practitioners recognize that these drafts are merely starting points. A lawyer’s expertise is essential to refine these outputs, ensuring precision, contextual relevance, and compliance with jurisdictional norms. Delegating the critical final review to human oversight preserves the integrity of the client-attorney relationship and upholds professional standards.

## Ethical and Privacy Imperatives

The integration of generative AI into legal workflows necessitates

heightened awareness of privacy and ethical considerations. Protecting client confidentiality, understanding the data governance practices of AI tools, and ensuring that technology complies with ethical obligations are non-negotiable priorities. Attorneys must remain vigilant about the potential risks posed by third-party AI providers, including inadvertent disclosure of privileged information.

## Redefining the Lawyer’s Role

Generative AI is not a replacement for the human-lawyer, but a powerful augmentation. It enables practitioners to shift focus from routine, time-intensive tasks to the higher-order work of legal analysis, strategy, and client advocacy. Those who embrace this technology responsibly and integrate it thoughtfully into their practice will find themselves at the forefront of a profession undergoing profound transformation.

By leveraging generative AI, the legal profession can balance tradition with innovation, preserving the ethical and intellectual rigor that defines the field while embracing tools that enhance its capabilities. For the sophisticated legal audience, this is not merely an evolution of practice—it is an invitation to reimagine the future of law. ■

*Geo was the first chair of the ISBA Artificial Intelligence Committee and is currently a member of the Standing Committee on Artificial Intelligence. Geo also served on the Illinois Supreme Court Task Force on Artificial Intelligence which announced its Policy on Artificial Intelligence on December 18, 2024.*

*Disclaimer: This article was prepared with the assistance of AI.*

*This article was originally published in The Prompt (January 2025, Vol. 1, No. 1), the newsletter of ISBA’s Standing Committee on Artificial Intelligence & the Practice of Law.*

# Recent Amendments to the Illinois Biometric Information Privacy Act

BY NIKHIL A. MEHTA

## IN AUGUST 2024, ILLINOIS

**GOVERNOR** J.B. Pritzker signed Senate Bill 2979 (SB 2979) into law, amending the state's Biometric Information Privacy Act (BIPA). BIPA regulates the collection, use, and storage of biometric data like fingerprints and facial recognition, and has long been recognized as one of the more unique and restrictive biometric privacy laws in the U.S. The recent amendments bring significant changes, particularly with respect to liability and consent procedures, which will impact businesses, privacy advocates, and legal professionals alike. The amendments are codified in Illinois Public Act 103-0666 (the "Amendment").

### 1) Limitation of Liability

One of the more notable changes introduced by the Amendment is a limitation of liability for any violations under BIPA. Under the original law, businesses faced substantial financial

penalties for each instance of biometric data collection which were conducted without proper consent. These "per-scan" damages, could result in potentially significant uncapped liability for businesses. The Amendment changes this by limiting liability to only a single violation per individual, regardless of the number of biometric scans collected for that individual. This change reduces the risk of excessive financial penalties for businesses, while still protecting consumers.

### 2) Electronic Consent

The Amendment also modified the consent requirements for biometric data collection. Previously, BIPA required businesses to obtain a written release from individuals before collecting their biometric data. The Amendment expands the definition of "written release" to include "electronic signature," which allows for individuals to provide digital consent. This change aligns BIPA with current business practices, especially with

respect to online transactions or remote interactions, and makes it easier for businesses to comply with the law without needing to rely on traditional paper-based consent forms.

### 3) Scope of Applicability and Compliance Clarity

The Amendment also provides greater clarity regarding BIPA's scope and the overall compliance obligations for businesses. By more clearly defining when biometric data collection will trigger consent requirements under the act, the Amendment helps businesses better understand the circumstances under which consent must be obtained from individuals. This clarification reduces potential ambiguity and the likelihood of BIPA violations in the future.

### 4) Enforcement and Penalties

Despite these changes, private individuals and the Illinois Attorney General still have the right to pursue enforcement actions for any violations of BIPA. However, due to the limitation of liability provisions and more convenient consent requirements, the volume of litigation is expected to decrease.

### Conclusion

The BIPA Amendment strikes a balance between protecting individual privacy and accommodating the needs of businesses that utilize biometric data. By limiting liability to a single violation per person and allowing for electronic consent, the law reduces potential financial burdens on businesses while maintaining its core mission of safeguarding the biometric information of consumers. ■

*Nikhil A. Mehta is an associate with Saul Ewing LLP.*

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LAWPAC's purpose is simple—to support the legislative goals of the ISBA and the legal profession of Illinois. It is administered by an independent, bi-partisan Board of Trustees of four Republicans and four Democrats. LAWPAC makes contributions to candidates for nomination or election to the Illinois General Assembly. The determination of the political contributions to be made in furtherance of the purposes of Illinois LAWPAC are at the discretion of the Board of Trustees. LAWPAC does not support or oppose candidates based on their positions on policy matters that ISBA members may reasonably disagree on unrelated to the legal profession. LAWPAC's focus is on candidates whose positions would have positive or negative impacts on the practice of law, the independence of the judiciary, or the efficient administration of the courts. We want to support candidates that care about the ISBA's interest in maintaining the integrity of the legal profession and recognize the needs and changing issues facing attorneys today.

The legislative positions of the legal profession often are opposed by highly organized and well-funded special interest groups and other professions who are not vested in our positions as attorneys. It is unrealistic for the legal profession to expect to be truly effective with its legislative program to protect your practice and the independence of the judicial system unless it is willing to be a full participant in the legislative process.

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## ILLINOIS BAR FOUNDATION

*Champions*

### ***Dear Future Champions,***

At least twice a year at ISBA Annual and Mid-Year Meetings, we are pitched by colleagues and the Illinois Bar Foundation to become a “Champion.” But what is a Champion really, and what’s in it for us?

A **champion**, by definition, is a person who fights or argues for a cause or on behalf of someone else. As lawyers, we have the unique opportunity to make a positive impact on society by upholding justice and advocating for those in need. We have the power to shape laws, defend the innocent, and ensure fair resolution of disputes. By definition, we are champions, for our clients, our legal system and for our communities, but through the statewide reach of the Illinois Bar Foundation, we have the opportunity to increase our impact even more.

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