

Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

N. Rodgers: Morning, Aughie.

J. Aughenbaugh: Good morning, Nia. How are you?

N. Rodgers: I'm good. How are you?

J. Aughenbaugh: I'm good. You seem to be a little fired up.

N. Rodgers: I'm a little fired up because we have Hillary back. Hi, Hillary.

H. Miller: Hi, Nia. How are you doing?

N. Rodgers: I'm excellent. How are you?

H. Miller: I'm doing good.

N. Rodgers: Hillary Miller is the Copyright Librarian. That's the shorthand. I'm sure she's got a fancier title than that, but that's what I'm rolling with this morning because it's early. We've been saving up to talk about this because the last case that we're going to talk about for the, what is it, the October 2019 Term? Is that what it's technically called, Aughie?

J. Aughenbaugh: Yes.

N. Rodgers: The last case we're going to talk about is Booking, which I'm going to declare from the outset, the Supremes got wrong. They got it wrong. I completely disagree. It's the all bad channel, and I'm going down with the ship. That's what I've decided, but Hillary's back here to talk to us not only about that, but she's got a bunch of other really cool, interesting things to talk about with where this conceivably could take us, because this could be the first drip on a lot of dripping water on stones kind of thing to do since changing. Let's start with Booking. Aughie, can you brief the case for us briefly?

J. Aughenbaugh: Yeah. As many of you all might know, there is a company called Booking.com. Basically, it's a place where you can go ahead and book all facets of your travel, from rooms, to airlines, to Airbnb, to cars, etc.

N. Rodgers: It's funny that this case came up at a time when you couldn't do any of that.

J. Aughenbaugh: Any of that. Yeah.

N. Rodgers: That should be in that Alanis Morissette song, Ironic.

J. Aughenbaugh: Yeah. Very good. So Booking.com, like many companies, applied for a trademark, and you do this through the US Patent and Trademark Office. So in a previous podcast episode, Nia and I spoke with Hillary about patents and trademarks. We also do another one with copyrights. You guys got to listen to all three of these, because these are really cool together. Anyways. Gratuitous self plug. US Patent and Trademark Office. I'm just going to go by the acronym UPTO. I've always wanted to say that. UPTO.

N. Rodgers: Is that USPTO?

J. Aughenbaugh: Yes.

N. Rodgers: Okay. You're just going to call it UPTO. All right, I'll roll with it.

J. Aughenbaugh: But hey, for those of us who teach bureaucracies, acronyms are our life.

N. Rodgers: Don't even get me started. There ought to be a book of acronyms for every acronym in the government, because every agency has them.

J. Aughenbaugh: Oh, yeah.

N. Rodgers: That's a [inaudible], and you're like, "What the heck is a [inaudible]?" Then they'd give you some big long involved title for something. Okay, whatever.

J. Aughenbaugh: So anyways, the Trademark Office denied the request from Booking.com. Basically, it's because the office had a pretty well established policy that you don't get trademarks for generic terms for goods and services. Let's face it, most of us, when we are going to plan a trip or if we do so in the future, we say we are going to book the trip, right?

N. Rodgers: Well, yeah. You've booking agents. That's a thing.

J. Aughenbaugh: Yes. The company challenged the agency's decision, and the Federal District Court went ahead and held for the company. The Fourth Circuit Court of Appeals agreed. So the agency filed a writ of certiorari, an appeal with the US Supreme Court, because, basically, the lower courts overturned a long-standing policy. As we discussed in the previous podcast episode, there's a bureaucratic, if you will, pathology is the wrong word, but bureaucracies like to establish bright-line rules because they have to go ahead and deal with all kinds of similar situations. So to avoid being called arbitrary and capricious, they established a broad rule that applies to as many, if you will, people or situations that are similar in nature. There's also an underlying logic, which I believe both, Nia, you and Hillary, are going to explore. The underlying logic was booking is a generic, if you will, phrase, that no company should be able to get a trademark for. Again, just real briefly, trademarks serve the purpose of establishing a brand name. Think about Coca-Cola, or Amazon, or Apple, whatever the case may be. Now, if you think about Apple, for instance, Apple is a generic fruit word. On the other hand, in the business world, within the technology industry, it denotes a particular company and a whole list of products, right?

N. Rodgers: Right.

J. Aughenbaugh: Okay.

N. Rodgers: Well, and I think Hillary was talking about what consumers recognize as a brand, right?

H. Miller: Yeah. It seems like one of the core things that they found here, was that we're going to grant this exception here, because people say they know what Booking.com is. They recognize it, that's a place they go to, they know who the company is. Although, maybe the evidence that Booking.com used for that was a little bit sketchy.

N. Rodgers: Yeah, I'm going to use side-eye, which nobody can see because we're on the audio only, not video. But I'm giving side-eye to Booking.com because they put out a survey and said, "Hey do you recognize our name?"

H. Miller: They didn't get 100 percent, which is still funny.

N. Rodgers: Come on.

Hilary Miller: You're here on our website, probably. Do you know who we are?

J. Aughenbaugh: Yeah. So basically, the Supreme Court, in an 8-1 vote, ruled in favor of Booking.com.

N. Rodgers: Yes. Eight of them were wrong, and me and Breyer were right.

J. Aughenbaugh: Okay. The majority opinion was written by Justice Ginsburg. There was a concurrence, which Hillary has already mentioned, by Justice Sotomayor. Then there was one dissent by Justice Stephen Breyer. Now, in brief, Ginsburg just went ahead and said, "Historically, exceptions have been granted to the agency's policy, and the agency needs to back away from this broad rule." In particular, as Ginsburg points out, if you read Ginsburg's majority opinion, she makes it very clear, congress does not mandate in the law that generic words cannot be trademark. So it's entirely up to the agency. So unless the agency can go ahead and justify a bright-line rule against the use of generic words or phrases to be trademarked, then a company should be able to, at least in court, make the possible argument that a generic word is associated with their company, their products, their work, their services, right? Now, as Hillary pointed out, one of the difficulties now going forward for the agency is, how do you determine whether or not a generic word or phrase is associated with a particular company? Booking.com did a survey, they went ahead and showed that some people in the survey associated booking with the company.

N. Rodgers: Yeah, but like 33 percent didn't.

J. Aughenbaugh: Did not. Yeah, it's right.

N. Rodgers: I mean, or some number. They're like "We got more than half." Okay. Sorry, I interrupted. I'm feisty about this because I think there's an easy rule. I think there's an easy rule to be made, which is if that word appears in the OED, you cannot claim it as yours. Yes, it would apply to Apple, in your face, Apple. It would apply to Amazon, in your face, Bezos. It would apply to words that appear in the OED. If we all agree that's a word, which generally speaking, in the OED, in English, we agree that's a word in English, then you can't have it for yourself. You can't hoard it, you chucklehead, which is what I wish that I know that it's not what his dissents. I know his dissents did not call anybody at chucklehead, but they should have, he should have, because I'm appalled. I'm appalled by the idea that somebody can take a word and co-opt it to be a brand thing. Expedia, they didn't do that. They went out and made up a word. Now everybody goes, I know what that is. I don't know.

H. Miller: Everybody really needs to lean into what the pharmaceutical industry does where they make up these vaguely, real-sounding from a real word that implies some nice meaning, yeah.

N. Rodgers: Exactly. I take [inaudible] or whatever and you're like, "What the heck is that?" You're like, "It's for toes or whatever." Yeah. They just make up something that's vaguely toeish sounding. You're right. That's what they should do, instead of being able to say, I'm going to take a word like booking, or I'm going to take a word like beauty, or I'm going to take a word like pets. I don't know. Apple, at first, it did cause confusion. I know that people don't remember that because I'm 1,000 years old and a lot of people who listen to this podcast are not 1,000 years old. Aughie is 1,000 years old, so he probably remembers. But when Apple came out as these horribly chunky things that you sat on your desk and turned on, and an hour later, they actually had something on the screen. Remember those?

J. Aughenbaugh: Yes.

N. Rodgers: They caused confusion. The reason it's named Apple was because it was for education. It was what you give a teacher.

J. Aughenbaugh: Yes.

N. Rodgers: That was the theming of it.

J. Aughenbaugh: Yeah.

N. Rodgers: It was because back in the day, the trope was you took your teacher an apple as a gift. An apple a day keeps the doctor away, blah, blah, blah. But yeah, it was a thing. That's why there is an apple with a bite out of it. Theoretically, it's a teacher in an educational setting.

J. Aughenbaugh: Today, you're prohibited from giving teachers apples.

N. Rodgers: Well, yeah. I'm not surprised because who knows. But anyway, yes, that was back when you could give teachers gifts that weren't gift cards.

J. Aughenbaugh: Yeah. It was not seen as a form of economic transaction to court favor or to get a good grade.

N. Rodgers: Yeah. Exactly. I think there's an interesting question here to be dug in, Hillary, for you, is if you can trademark something so bland, then what's to stop someone from trademarking everything? You know what I mean? What if Aughie just sat around and looked in his house, and said, "I'm going to trademark microphone. I'm going to trademark desk. All these words.

H. Miller: Yeah.

N. Rodgers: What's to prevent him from doing that? Not that he would.

J. Aughenbaugh: I've got other things to do.

N. Rodgers: I was going to say there's a lot of forms to fill out, which I'm sure he's not interested in doing. But still, what if he decided to do that?

J. Aughenbaugh: I work at a university. I spend way too much time filling out late committee forms. So I'm not filling out a whole bunch more for the Patent and Trademark Office. But hypothetically, it's a really good question, right Hillary?

H. Miller: Yeah, because there's a rich history of doing what you talk about there, in a lot of other areas of intellectual property. Now, in relation to the Booking case, with like web domain names, just the idea of squatting or trolling, so like patent trolling, is one you'll hear about where people invent a small piece of something and they bring it to market, "just enough to show, yeah, this is a real thing," and they don't really have to keep selling it. They can just make other people pay them money when they want to incorporate that into their new invention or something. Patents are full of this kind of trolling, revenue-sharing, and you've got to know who invented every piece of your mouse trap and pay them some money for the part they contributed. Totally rife with it. Copyright, maybe not quite as much. Web domains, oh my gosh. This is interesting because this is a clashing area of these two giant spheres of trademark and web domain registration. People absolutely squat and sit on web domains for famous people, for businesses, for generic words that they think someone might want the leading website to sometime. But trademark law is designed to be different. It seems like it doesn't always work out like that in practice, but it's meant to prevent that kind of squatting. The idea behind a trademark is you're not going to get the trademark unless you can show that you are using it, you are actively using it as a part of your business. You are promoting yourself through it. You know what I mean. You are using it. You can't just trademark the thing, sit there, squat. You can lose your trademark. I think we've talked about this in the past, too. If you aren't using it, if you aren't protecting it, if other people start using it and it becomes watered down and no one would recognize it as a part of your business. In theory, trademark law should be different. You shouldn't be able to do this squatting, this trolling of things. But now that web domains are our open, adding a .com, a dot, who knows? A .org, a dot whatever to it makes it unique enough.

J. Aughenbaugh: Yeah, because you're talking about the intersection of a trademark, but then the registration of an Internet name, a specific location. Okay. Before we began recording this morning, Nia mentioned something that happens a lot in the political world. You actually have individuals, who will look at potential candidates for future elections, and then go ahead and claim their potential name or a website before the election, and force a candidate or candidates to pay them a sum of money to give up the domain name before they can become an announced elected official.

N. Rodgers: Yeah, a truly savvy person before they even put themselves up for a nomination, would buy all the variations of their name that they could get. The example I used this morning when we were chatting about it before we decided to start recording. I'm sorry, these guys were being interesting. I'm like, "Stop it, stop it, I haven't started recording yet." It's Rick Santorum. If you Google Rick Santorum, which I would say do not do at work, and do not do where anybody who is of delicate sensibilities, your mother, your grandmother, your children, your children can see the result. It used to be, and I haven't done it in a while. I'm not going to do it on my work computer. That will leave as a question. It would bring up something rather.

H. Miller: Unseemly.

N. Rodgers: Yes, that's a good way to put it. Another person who regularly does this is John Oliver. John Oliver almost always when he's trying to make a point, he gets some domain. He also does it with hashtags about it too. He develops them while he's developing this story. I wish that there was some way that there could be a regulation of you can't take somebody's name to force them to pay you for it. It's like you're talking about with the patents. "Oh, no, that little screw thing, I made that, and you're going to have to pay me in order to use it, or you're going to have to pay me every time a thing is made with that in there." I know that there's a lot of proprietary software that works that way as well. That just doesn't seem like it's in a spirit of capitalist entrepreneurialness. That's part of why I'm appalled overall by this ruling, is that it seems to me like it crushes competition. If you're allowed to use a word and have ownership of the word, and it's not that way with names, but it is that way were generic words. If they're the only people who get to say that they're booking something, then that could conceivably have a deleterious effect on other people's companies that book things.

J. Aughenbaugh: Well, I mean, a good way to think about this is that you have two elements of capitalism that are in competition here, and it goes on one hand, as Breyer points out in his dissent in this case, Booking.com effectively gets to go ahead and limit competition in regards to the use of that word for a rather significant industry. On the other hand, if you think back to our podcast episode where Hillary and I got into a somewhat theoretical discussion about, what is the purpose of patents and copyrights? Well, the framers wanted to encourage people to engage in innovative thinking, writing, creativity, etc. One of the ways you do that is to allow them to in the work of, for instance, a song, they get to copyright the song and make money off of it, give them an incentive to be artistic. A patent flows from the same logic. We want to encourage people outside of government to engage in innovative behavior and thinking. One of the ways, at least the framers thought about it was if we give them away to protect their creation and make money off of it, more people would be interested or willing to do it. Those, if you will, impulses are in competition here. A more recent example that we see in the news is

the team formerly known as the Washington Redskins Football Team decided to go ahead and change their nickname.

N. Rodgers: It's not a nickname, they decided to not have one. They're just called Washington.

J. Aughenbaugh: Washington Football Team. But one of the reasons why they haven't come up with a nickname yet is a guy a few years ago, when the team formerly known as the Washington Redskins was getting criticized for having an offensive nickname to Native Americans, decided to go ahead and claim trademarks for a whole bunch of potential names.

H. Miller: Yeah. This is interesting, he went a step further; he didn't just register domain names, he's been registering trademarks.

J. Aughenbaugh: Yes.

H. Miller: But as you know, you can't just squat on those, so he's actually done the work of registering them. He has spent money creating merchandise for all of these as of yet non-existent teams so that he can show that he is actually doing some business under these names. If they want any of those, they're going to have to come to him. Now, I think he's pretty much recognized that he's going to lose in court. They're very powerful and I think he's interested. He said, "I'll sell it to you for a good price. I'm not going to fight you on this. We don't have to go to court." But it's interesting, I mean dozens and dozens of names that he has just been waiting for this day.

N. Rodgers: Wow. Well, I guess that everybody plans ahead. Some people plan for retirement. But I have a question about that, isn't the other part of that that you could do that as a means to just prevent that company from having those names? Let's just say for the sake of argument that Redskins had not been the previous name of this team and someone out there wanted to prevent them from using a term that would potentially be offensive or that is offensive to Native Americans, so they simply took it to prevent other people from having it. Not to sell it to them but just to keep them from using the name.

J. Aughenbaugh: Yeah, they could do it.

N. Rodgers: Okay.

J. Aughenbaugh: Yeah. They could do it.

N. Rodgers: As long as they what? Make merchandise or keeps showing that they're using it in some way?

J. Aughenbaugh: Yes. Again, that's anti-competitive. On the other hand, it's very creative thinking. Which impulse are we going to go ahead and honor?

N. Rodgers: Well, I want you to know, listeners, that it's hard for me when I agree with Breyer. It's hard for me because we're just not wired up the same way most of the time, the way we think about things.

But I don't know. Hillary, I don't think you've said how you feel about it yet. I'm just stuck on the idea of normal words being now trademarked in some way that I'm going to have to care about? I don't know.

H. Miller: Yeah. Well, I found it interesting that I didn't know before this that Justice Sotomayor came from intellectual property, she was an intellectual property litigator. I actually didn't realize that we had someone on the court with that kind of experience. I thought at least her approach to this was interesting because she did agree with the majority opinion, but she also filed her own concurrence that was just a little bit more specific, a little bit more nuance to the situation. In some ways, I'm looking at her and trying to say she's got the experience, and that she's made it to the highest court in the land, did she make the right call here with her nuance? I'm with you. I think that trademark is already so messy. This just seems like it's going to make it even messier, and maybe that's my impulse. It stresses me out about this kind of thing where I'm like, "I don't know. Just make the bright-line rule. Just make it simple." The one reason I am sympathetic to Booking.com, and why I think that we're going to continue to struggle with this, is that we're now in this age of industry or whatever, where they are only a virtual company, they only exist on their website.

J. Aughenbaugh: Yes.

H. Miller: There's no physical product, there's no physical location. In that sense, they didn't pick a great name because they just wanted to be Booking.com, but what other protection would be available to them besides this, if you think about their website as the only location in inter-webs space where they exist? They have the domain name, is that enough for them to do everything they need to do as a business entity? We're only going to see more and more companies, businesses that only exist as a web page basically.

N. Rodgers: Okay. I have to ask a brief question, has Aughie coaching you on making me say, "Oh, man," about my arguments? Because that's a totally legit argument, which pisses me off. You're right. If the company is a virtual company, then they do have to protect their virtual presence, because they have no backup presence to protect. Unlike the formerly named Washington Redskins, they have a great big stadium, they have a big chunk of land here in Richmond.

H. Miller: They have a merchandise.

N. Rodgers: They have a bunch of layers, they have merchandise. They have physical presence in the world.

J. Aughenbaugh: Yeah. They have a tangible product, therefore, 16 games over 17 weekends, and if they're actually good enough, actually extends into the playoffs that you can actually point to. Right?

N. Rodgers: Right.

J. Aughenbaugh: But as Hillary points out, so much of e-commerce today only exists on the Internet. It's not like Amazon delivering products to everybody's front doors, booking.com, you can do a complete transaction. Trust me, I've used Expedia, I've used booking.com. Everything is on my phone. There is no

hard copy ticket, there's no hard copy reservation that I printed up from my printer. It's just all on my phone.

N. Rodgers: All right, Hillary, you've aggravated me now, because now I have to stop and think about that. That's a legitimate concern for those businesses. Amazon has warehouses, and it has people. Well, I'm sure Booking has people too, but it has physical objects and it has storage places, and now they have Whole Foods. They have an on the ground presence, but you're right. Booking.com is smart.

H. Miller: Do they even need to worry about a trademark for amazon.com? They've got a lot of other stuff going on. So is this only really going to apply to a business where their domain name is everything to them?

J. Aughenbaugh: Again, and I know Nia, you don't like this when I say this. If you read the case, you read the three different opinions. You're getting three different perspectives on, if you will, a government function, trademarking, which, by the way, is not required in the constitution. Congress went ahead and responded to a need exhibited by the business community, but also to help consumers, because as folks in business schools across the country will tell you, consumers frequently rely upon trademarked brand names in making decisions, good or bad.

N. Rodgers: Right. Well, loyalty. There's whole programs that talk about brand loyalty and how to build it, and train people to do that.

J. Aughenbaugh: But if you read the three opinions, you get three different perspectives. Ginsburg's, "Sorry, agency, you're going to have to come up with a more nuanced way of looking at trademarks that deal with, if you will, generic words and phrases." Sotomayor, who says, "Okay. Fine. Assume that we do force the agency to recognize generic words and phrases, what evidence denotes that the public has grown to rely upon that generic word or phrase and associated it with a company?"

N. Rodgers: Yeah, I like that she did the same thing I did. She gave Soto to booking.com in her concurrence by saying, "I'm not sure your evidence is what we would use to make this decision." She didn't actually call them out, but it's pretty close.

J. Aughenbaugh: If I'm in the leadership of the patent and trademark office, I would focus on Sotomayor's concurrence and come up with some rules and regulations that had been properly vetted through the informal rule-making process, because, again, the issue of reliance. We ought to come up with some rule because the Supreme Court pretty overwhelmingly said our previous regulation doesn't work. On the other hand, you got Breyer's dissent. Yes, I have joked before that there's not a rule issued by a federal government agency that Breyer doesn't like, but he raises a really good point here, which is, how does this promote competition? If one of the purposes of encouraging trademarks, patents, copyrights, etc., is to promote competition in our economic system, a really creative, innovative, either person or firm could go ahead and remove from potential trademark, from potential consideration for a brand simply by applying for and receiving a trademark.

N. Rodgers: Correct me if I'm wrong, but it benefits larger companies that are doing that.

J. Aughenbaugh: Sure, it does.

N. Rodgers: You guys are talking about the scholar who sunk all of this money into thwarting the Redskins management. He had to have money to do that. I think I could speak for the three of us and say, I don't think we together could probably put in the money that you would have to put in to have merchandise and pay all the domain fees and do all that stuff in the hope that at some point we force somebody into a corner. There's money involved in that. There's money involved in squatting and sitting on something. It's sunk costs.

J. Aughenbaugh: Yeah.

N. Rodgers: So that's not a thing that little businesses could do.

J. Aughenbaugh: Well, and you also have to have a lot of free time. You also need to have a level of creativity in your thought process that most of us who get ground down by the 8:00-5:00 and everything else going on in our lives. We're not staying up until two o'clock in the morning thinking of ways that we can go ahead and come up with new trademarks. That is not [inaudible]

N. Rodgers: You and I probably aren't, but Hillary probably is. Just like you were saying, there's nothing in the constitution about trademarks. I'm like, "She'd change that if she could." She'd put [inaudible] with trademarks, and copyright, and open access. She'd make everything open access by law, I'm assuming. Is that what you would do, Hillary?

H. Miller: If I were changing up copyright?

N. Rodgers: If you were changing the constitution to put an amendment in there about copyright.

H. Miller: Yeah. I would treat creative, well, that's a whole mess, where's the line? A spectrum. I would create a spectrum of protection for more creative works versus more factual works. Because when we talk about access to research articles and laws and things like this, I don't think it needs to be the life of the author plus 70 years for a lot of these works. To me, that does not encourage the stuff that the constitution set out to encourage, creation of new knowledge. Actually, this is interesting, you mentioned Breyer, because it made me go back and take a closer look at the Supreme Court decision about the last time they extended copyright law, and this is a similar breakdown. That decision, majority opinion was written by Ginsburg in a 7-2 decision with Breyer dissenting.

J. Aughenbaugh: Yeah.

H. Miller: Also saying, how is this extension of even more years for copyright actually fulfilling the purpose of encouraging more creativity? I agree with him there, and I'm similarly disappointed in Ginsburg in that decision for I think they just took publishers and lobbyists at their word and saying, "Yeah, more copyright is, that's good. It'll encourage creators to do more creative things because even though they'll be dead, people will still get to charge money for their, yeah."

N. Rodgers: Go ahead.

J. Aughenbaugh: Hillary, I'm aware of the case you're talking about in regards to Congress extending the copyright protection, the life of the author, plus, what is it, 70 years. I didn't read the oral argument transcript in that case. I did read the oral argument transcript in this case, and if anything, I think the lawyers for the government did a really bad job at explaining what would be some of the potential implications, or repercussions. I'm not entirely sure if they would have been able to peel away any of the votes from the majority. But nevertheless, there is an argument to be made that flows from [inaudible] descent. Again, are we to a point to where, and we talked about this previously, me and Hillary, when we talk about copyrights. We're talking about laws that in some cases were written 50, 60, 70, over a 100 years ago. It is time to go ahead and update them, because this is a changed landscape. If you think about trademarks, then you add domain name as an intervening variable, instead of relying upon folks in the Patent and Trademark Office interacting with the courts, perhaps the people's representatives ought to go ahead and come up with a new law that goes ahead and clarifies changed conditions on the ground. Just a humble suggestion.

N. Rodgers: We're in an entirely different world just in my lifetime. In my lifetime, computers were not a thing people had and now in my lifetime, they're on your wrist. They're so small, and Elon Musk is talking about sticking them directly into your brain, although he's Elon Musk. But I'm just saying that it's potential that in my lifetime that will actually be a thing. It's changing so quickly. I do want to ask a question though. I have a question, a base question here because I don't know the answer or I think I know the answer but I'm maybe wrong. There's an organization that decides what domain names will be, right?

J. Aughenbaugh: Yes.

N. Rodgers: That organization, for a long time it was .com, .org, .edu, .mil, .gov, and that was pretty much it. Those were the big e.net. Then I remember there was, to use Hillary's word, kerfuffle, which I do like. There was a kerfuffle about adding .xxx and then, has it just gone on from there where we've added dot, fill in the blank, Bob is your uncle word?

H. Miller: Yes. The organization is ICANN, which is, the Internet Corporation for Assigned Names and Numbers, which sprung out of the invention of the Internet and it was a guy's side project.

N. Rodgers: Somebody ought to organize this.

H. Miller: Yeah. Well, no, he had helped build the Internet and he was doing it on the side, and he eventually realized, "Oh wow, I cannot be the God of this Internet and name all of the creatures on the earth."

N. Rodgers: It's just one guy giving out all the names?

H. Miller: For a while. Yeah.

N. Rodgers: Wow.

H. Miller: What they did was that, I think it was under Department of Commerce or something. It was a semi-governmental thing. I think maybe even they just formed an independent organization that was contracting with the government for a really long time. Then decades, couple of decades ago, they moved out of the government. They became this independent California, I don't know if it's Silicon Valley or whatever, independent company whose giving out these domain names. But you're right, most of the time, when you think of it, you think of the .com, the .net and things like that. Then they have the country codes.

N. Rodgers: All right.

H. Miller: If you've seen it before.

N. Rodgers: .us.ru.fr

H. Miller: Yeah. You see people not just using those for countries but for creative uses. For example, Tuvalu has .tv as their domain. They have set up all kinds of revenue sharing agreements with companies that want to use a .tv domain. There's a lot of creative uses of that thing.

N. Rodgers: That's really smart. That's really cool of it. They got lucky with it really. Well we're .us. If you wanted to have a domain where it was like love us, L-O-V-E.us, because you were a match company or a florists company or whatever.

H. Miller: Yeah.

N. Rodgers: Something related to valentines. But anyway, that's really cool, tv. But I think we're stuck with really, ones that that wouldn't work, like France, fr, that's not going to work.

H. Miller: No. Nobody's going to want to use their site.

N. Rodgers: Except unless you had something where you wanted to sell furs. But that's it. That's pretty much it. They're very limited in these things they could set up. We're the company codes set up early on in the development of the web? Do you know?

H. Miller: I didn't actually know.

N. Rodgers: One would think that would need to be one of the earliest organizational things, or maybe not. Maybe the earliest organizational thing is, is it an organization or a company.

H. Miller: I think it probably started out that way.

J. Aughenbaugh: Also, there is a significant push back to any regulation of even domain names, because there are still folks who believe that the Internet should be completely unregulated.

N. Rodgers: Yes, those people are bonkers. That's the technical term. It's bonkers. The reason I say that is because there is enough darkness on the Internet, without taking off this veneer of, polite people don't do that sort of thing. I'm just saying that if I were writing that Supreme Court opinion, it would be like, "No, that's bonkers." There has to be regulation.

H. Miller: I will at least say I'm uncomfortable with the fact that it gets to be this independent American organization that gets to make all of these decisions for the whole world. If you remember, a few years ago there was the kerfuffle again over Amazon. The company wanted to create .amazon domain and a cooperative organization for the Amazon rainforest came forward and was like, "No, you can't do that. You can't have everything."

N. Rodgers: You can't have everything. I wonder if anybody says that to Jeff Bezos at this point, isn't he the wealthiest person in the universe? You can't have everything. Yes, I can.

H. Miller: They lost. They gave it to the company. He did get everything he wanted there. They're making pretty big decisions for the whole world and that always makes me uncomfortable when it just happens to be the US that's doing that.

J. Aughenbaugh: Earlier this week, was it two days ago? The week where you were all recording United States Congress held hearings.

H. Miller: With the Big Four?

J. Aughenbaugh: Yeah, with the Big Four. You're talking about Amazon, Google, Facebook, and one other Internet company?

N. Rodgers: Apple.

J. Aughenbaugh: Yeah. Okay. In part of the questioning was the extent to which these companies are now engaging in anti-competitive behavior. If you look at the holdings of these companies, Google just doesn't do searches. It's not just a search engine.

N. Rodgers: Its search business is the tiniest part of its money-making. I think data storage one of its bigger, larger chunks of what it does financially.

J. Aughenbaugh: If you think about Facebook applications, into advertising and other social media, Amazon, the company just doesn't deliver packages to your front door. They own newspapers. They do media now. It's pretty hard to disentangle Amazon in regards to the number of industries that they do have a hand in. If you think about, for instance, going back to Brier's dissent in the booking.com case, how does that promote competition?

N. Rodgers: Right. Well, there's a lot of questions about anti-trust, especially with Amazon and how Amazon operates, because little companies get on there, they sell something, then Amazon figures a way to undercut, and then little companies go out of business. We have colleagues at the library who when you bring up Amazon, their face does a whole thing, and then they're like, "I hate Amazon." I am, I think one of those people who wants to have my cake and eat it too, because I don't want Amazon's name to necessarily be protected as far as the rainforest and that kind of thing is concerned. But by the same token, I am guilty of buying things from Amazon. Part of the difficulty here, I think is the balance between convenience and protecting competition. It's easy enough for people to say, "Go to your local mom-and-pop store." But the reality is Walmart has put most of my mom-and-pop stores locally out of business. So I could go to a mom-and-pop store but I would have to drive a lot further. It's going to cost me more money. There's all these things that happen and so you have to make those decisions and be able to live with them. I think that's one of the complicating factors here. I'm a little appalled that it wasn't closer in the vote. You know what I mean, everybody's looking at Brier like, "What's wrong with you? Get onboard." I'm like, "No, he's got a point. If you take generalized words, if we take the word computer and you say computer.com, nobody else can use the word computer except me." That's, I go back to my word, bonkers. It's not a tenable situation. That's what I'm wondering, what the next lawsuit is going to do. I suspect, say, where is that line? Where is the line with what actually is recognized as copyrightable or trademarkable? I don't know. Maybe this did answer the question but it doesn't seem like it answered it for me.

J. Aughenbaugh: No. There are going to be some significant implications.

N. Rodgers: Can we talk about that a little bit? What do you see coming down the pike? Where do you both see coming down the pike after this?

J. Aughenbaugh: Well, Hillary, I think can go ahead and speak more specifically about trademarks. But this case, in some ways, was a proxy for another debate on the Supreme Court, and that is the extent to which courts should defer to agency rules and expertise. Again, going back to the authorizing legislation in regards to trademarks, that legislation was written I believe in the 1940s and 1950s, and it's remarkably vague and gives a lot of discretion to the Patent and Trademark Office. It would not have surprised me if a number of the conservatives who signed on to Ginsburg's majority opinion did so not because they necessarily cared about trademarks, but they liked the fact that the federal courts are being encouraged to openly scrutinize agency rules and regulations. So the case was, in some ways, I think for some of the conservatives on the court, a proxy for a larger debate as to the extent to which federal courts should defer to agency expertise. Now, to trademarks specifically, Hillary, what do you think some of the implications might be?

H. Miller: Well, from what I see in the IP community, people discussing this, A lot of people are saying based on the decision, and like you said, if UPTO starts thinking along the lines of Sotomayor's concurring opinion, that this doesn't necessarily mean it's just a free for all on domain names, that there's still a pretty high bar you're going to have to go through. Even if you do these surveys, these surveys aren't cheap, they can cost hundreds or thousands of dollars. So if you're going to start doing that as you're registering, it's not necessarily going to be something that every single person starting a company or a product and grabbing a domain name is going to be able to do. There's still a high bar for

proving that this is the case. But I think you can expect to see maybe an uptick just generally in a number of people trying this out, or they're just running an e-commerce site, like you said. I think it's interesting is in digging into this. I did not realize how many other types of top-level domains there are registered with ICANN that are not really being used or at least are not in people's minds as a possibility. I am super interested because it seems like over the last 10 years, there's been this huge surge in the number of these. So what I mean by that are things like Johnson and Johnson owns .baby.

N. Rodgers: No way.

J. Aughenbaugh: Yes.

H. Miller: Amazon owns as we saw, .amazon, they also own .book, they own .bought. They own all kinds of endings.

N. Rodgers: No.

H. Miller: Yeah. There's an amazing list on Wikipedia where you can find all these. So it's not just the country codes now. There's .camera, there's .cheap, there's .Christmas.

N. Rodgers: Wait, somebody owns Christmas?

H. Miller: Yeah.

N. Rodgers: Does Bill O'Reilly know this? Because I'm just going to say, that is a war on Christmas. Wow. So what you're telling me is that this quasi, well they're not even governmental, they're not even quasi governmental at this point, this private company can just pell-mell willy-nilly give you a domain dot because why?

H. Miller: It's not quite willingly. They've got representatives from I think hundreds of nations on some award thing. They've got really structured bylaws for how this works, but yeah, they decide what these are. Now, the interesting thing is the term for these are generic top-level domains. So by nature, they are just generic terms for a concept, a type of product, something or another. But when you add it into another generic term, does that make it unique enough? So there's .flowers. What if it was buyflowers.flowers?

J. Aughenbaugh: Wait a minute. Is that FTD?

H. Miller: That's Uniregistry. There's this company called doughnuts, that their whole thing is that they just own about 250 of these domains. That's what their company is.

N. Rodgers: So what you have to register with them to use that ending? If you wanted like buyredoses.flowers as a website, you would have to pay them to have that website, right?

H. Miller: Yeah.

N. Rodgers: You'd have to pay them to use the domain?

H. Miller: You register with them for their domain. So yeah, they've got a whole thing going there.

N. Rodgers: That's a crazy business, but it's very clever, I guess.

H. Miller: Yeah. So if you start adding in, combining generic terms together is that, basically, we thought it was bad enough by just adding .com to all of these words. What happens when you have a few hundred other generic words that you get to mix and match?

N. Rodgers: That's interesting to me on any number of levels. It's terrifying to me that somebody owns .baby. But it also is interesting. They're not being used. I've never had somebody say, go to our website, it's telecompowder.baby. It's always something.com. There's such a built habit for .com. People will put it in and type it because they would inevitably put .com at the end.

J. Aughenbaugh: Okay. But think about this, Nia. You talked about being old enough to remember when not everybody had computers.

N. Rodgers: Yes, when dinosaurs roamed the earth.

J. Aughenbaugh: Okay. Thank you very much. Dinosaurs like you and me, but nevertheless, think about it in terms of domain names. I remember when it was basically either .gov or .edu before the business community began to use the Internet.

N. Rodgers: Yeah. Way back when I was in high school.

J. Aughenbaugh: Then it became .com. You went ahead mentioned .xxx, which relates to a particular industry.

N. Rodgers: Yes.

J. Aughenbaugh: So theoretically, let's say Amazon does become the king and queen of everything and everybody's world, because they have the domain name, think about the kind of control they could go ahead and have over what goes on that domain site.

N. Rodgers: Right. Yeah, going out and buying .Baby is brilliant if you can get people to use it.

J. Aughenbaugh: That's right. That is the "sky is falling" scenario, right?

H. Miller: Yeah, just another middleman who is deciding who gets to have what may someday become the legitimate-seeming domain ending.

J. Aughenbaugh: Yes.

H. Miller: Yeah.

J. Aughenbaugh: Yeah.

N. Rodgers: Well, that's a happy thought to end on.

H. Miller: We can do better than that. Let's think of something else.

N. Rodgers: I'm just going to say that whenever I talk to you-all, I'm always like, "I'm optimistic. Well, I'm less optimistic. Okay, now I'm really worried about whatever it is," except that I do think that when you were saying that leaning on Sotomayor is probably the way the agency is going to go because it's going to be stricter, it's going to be a little more, you can't just pick a word. I'm going to do desk and prevent anybody from ever using desk in something, blah, blah, blah, whatever. I like that there's at least, I think, some guards in the system. I appreciate you both thinking that that's probably still going to be likely, that they're probably going to go more with her than they are with the broader Ginsburg treatment. It would keep them out of court, I would assume, which is why they would adopt it. I would assume they would adopt something a little more specific because they don't want to keep having these lawsuits over and over with, why won't you give me whatever name it is that I'm thinking that I want to trademark?

J. Aughenbaugh: Yeah. Nia, what I'm getting at here is a pretty well-established bureaucratic pathology, which is, agencies don't necessarily want federal courts to determine policy for them. They were hired because they are the experts, right?

N. Rodgers: Right.

J. Aughenbaugh: They have the authority given to them by Congress, to issue rules and regulations. If the court has ruled that companies may be able to go ahead and get trademarks for generic words and phrases, I got to think that there are folks in the patent and trademark office that are going to be like, "If this is a thing now, let's create a rule or regulation that provides, if you will, a framework for how we're going to process these kinds of trademark applications going forward." That's good governing. That's good policy implementation. You guys are librarians. If you get enough of a particular type of request at some point in time, you either say to your superior, or you bring it up at a staff meeting and say, "Hey, guys, is anybody else getting these kinds of requests, or are you in this kind of situation?" If enough people sitting around the table say yes, what do you do? You come up with a policy to deal with it. Likewise, if enough faculty members get enough of a certain type of request from a whole bunch of students, what do we come up with? Then in this case, in the best bureaucratic, if you will, sense, we're like, "Hey, we ought to have a policy."

N. Rodgers: There ought to be a law.

H. Miller: Yeah.

J. Aughenbaugh: Yeah. Let's face it. I think the three of us found a lot to like in Sotomayor's concurrence. We're all over the map in regards to the majority versus the dissent. Sotomayor pointed out, if you will, something that, not only the federal courts, but the agency can go ahead and say, "What would be all the evidence to suggest that a generic word or phrase is worthy of receiving a trademark?" How are we going to process this? This is one of those instances where I tell people who are anti-government, anti-bureaucracy, "No, folks. This is why we have the modern administrative state. These are smart people who've gone ahead and recognized, A, this is a thing." I know that you know that's broad and generic, if you will, but it's a thing. How are we going to do it? How are we going to address it? What's the government going to do?

N. Rodgers: How are we going to do it fairly and equitably, and make sure that each time this comes through, we're not being capricious and arbitrary?

J. Aughenbaugh: Yeah.

H. Miller: It seems like the time is right to start doing this. You might even say we're past time with how long this kind of e-commerce has been around because now looking at all of these other domain endings, they're going to come up with a rule that applies pretty well to .com, and then in 5, 10 years, we're going to see dozens of other common endings, and they're going to have to rework the rules again. It's just the same way that copyright or any other area works, where the context is constantly changing, and we can't let it get too outdated.

N. Rodgers: Or then you have these ginormous shifts, which is what you get in this kind of case. By the time it gets to the Supreme Court, it's an enormous shift. Hey, Hillary, is .library on that list?

H. Miller: Well, that's a great question. Hey, do you want to get it?

N. Rodgers: Yeah. Hello. How hard would it be to get it? It's probably only a couple hundred bucks.

H. Miller: I don't see it on there.

N. Rodgers: Okay. Well, we should get it before this airs.

J. Aughenbaugh: How about .coffee?

H. Miller: Oh, man. Surely someone has that. Now, this is Wikipedia, so it may not have everything, but .coffee. Donuts has .coffee. Donuts has everything.

N. Rodgers: Donuts.coffee. That makes sense. But they don't have library. Hillary, there's our opening.

H. Miller: What are we going to do with it?

N. Rodgers: We're going to make library merchandise. We're going to do something, cool libraries, I don't know. I'm going to think about this. I know that you can't do words together like that. At least I

think that there is a rule about that, that we can't do something .civildiscourse, it has to be one word. We should have thought about that before we named the podcast, but oh, well. Obviously, we were also thinking about, I don't know, civil discourse when we named the podcast.

J. Aughenbaugh: Yeah. We were just hoping that some people would listen to us.

N. Rodgers: Yes. We are grateful for the people who do. Thank you.

J. Aughenbaugh: Yes.

N. Rodgers: Thank you so much, Hillary, for coming and hanging out with us today and talking to us about this. I feel certain that there'll be more at some point, that this will come back up because this can't be the last thing.

J. Aughenbaugh: No.

N. Rodgers: There's no way that this is the end of the end. I can't wait. Maybe we can have you back when/and/or/if the Washington team decides what to do with themselves. You and Aughie could have a sports fest about how teams deal with all of their trademarking stuff. Because I know that they go after people who infringe hardcore.

J. Aughenbaugh: Oh, it's huge. Yes.

N. Rodgers: That will be interesting to listen to you guys talk about that, like me going to a baseball game without having to be outside. I love baseball, but I like it from inside my air-conditioned apartment. Anyway, thank you both so much, and we'll talk again soon.

J. Aughenbaugh: All right. Thanks, Nia. Thanks, Hillary.

H. Miller: Great. Thanks.

You've been listening to civil discourse brought to you by VCU Libraries. Opinions expressed are solely the speaker's own and do not reflect the views or opinions of VCU or VCU Libraries. Special thanks to the Workshop for technical assistance. Music by Isaak Hopson. Find more information at guides.library.vcu.edu/discourse. As always, no documents were harmed in the making of this podcast.