

# The Latest in Cyberlaw

## TIKTOK

We've been hearing a lot about TikTok this year. What exactly is it, and what are the security concerns?

TikTok is a social networking app that allows users to create short videos of 3 to 15 seconds (or looping videos of up to 60 seconds). Users often use the service to create videos of themselves dancing or lip-syncing to music.

The service is owned by ByteDance Ltd., a Beijing-based company founded in 2012. According to Wikipedia, "TikTok was launched in 2017 for iOS and Android in most markets outside of mainland China; however, it only became available worldwide, including the United States, after merging with another Chinese social media service Musical.ly on 2 August 2018...TikTok has been downloaded more than 80 million times in the United States, and has reached 2 billion downloads worldwide..."

TikTok has had a big impact on social media and entertainment. Some users, such as Connecticut teenage dancer Charli D'Amelio, have become huge celebrities via TikTok, amassing tens of millions of followers. Various songs, such as "Old Town Road" by Lil Nas X, have become hits in large part because of their popularity on TikTok. Big corporations have taken notice of TikTok and looked for ways to promote their brands, including the NFL's launch of its own TikTok channel at the start of the 2019 football season.

In June 2020, TikTok made the news when users claimed to have ordered thousands of tickets to attend a President Trump political rally in Tulsa, resulting in empty seats at the event. And in early October 2020, Kellyanne Conway's teenage daughter used TikTok to let the world know that her mother had contracted COVID-19.

Many of the news stories about TikTok have focused on data privacy concerns. In February 2019, TikTok entered into a consent decree with the Federal Trade Commission pursuant to which TikTok agreed to comply with the Children's Online Privacy Protection Act (COPPA) and pay a \$5.7 million fine to settle FTC allegations that the company illegally collected personal information from children.

The privacy concerns extend well beyond COPPA issues. Like many major social networks, TikTok collects substantial data on its users. The concern is that ByteDance, being a Beijing-based company, could share user data with the Chinese government. TikTok claims that data from US users remains exclusively in TikTok's servers located in America. However, Treasury Secretary Mnuchin recently stated in an interview that "TikTok cannot



Anne F. Downey

stay in the current format because it risks sending back information on 100 million Americans...the president can either force a sale or the president can block the app."

Starting in late 2019 and continuing in early 2020, a number of federal agencies, including the Department of Homeland Security, Transportation Security Administration, and US military, banned the use of TikTok on federal government phones.

On August 1, 2020, ByteDance announced that it was seeking to divest TikTok to avoid a ban in the US and certain other countries where restrictions are being considered. On August 6, 2020, President Trump issued an executive order banning TikTok's US operations effective in September absent a sale of the company. Another executive order followed on August 14, 2020, giving ByteDance 90 days to sell or spin off its TikTok operations in the US.

ByteDance Ltd. and TikTok Inc. filed a lawsuit on August 24, 2020 in the U.S. District Court for the Western District of California against the President, the Secretary of Commerce, and the U.S. Dept. of Commerce. Plaintiffs subsequently dismissed this case and filed a new lawsuit against the same defendants on September 18, 2020 in the U.S. District Court for the District of Columbia. *TikTok Inc. v. Trump*, Case 1:20-cv-02658-CJN. The complaint alleges that the government's actions violate the Administrative Procedure Act, the First Amendment, and the Due Process Clause of the Fifth Amendment; exceed the President's and Secretary's authority under the International Emergency Economic Powers Act (IEEPA); and violate the Takings Clause of the Fifth Amendment. Among other things, plaintiffs claim that the ban on the TikTok app is arbitrary and capricious, deprives the companies of an opportunity to be heard, and violates the companies' free speech rights.

On Sunday, September 27, 2020, just hours before the ban was to take effect, Judge Carl Nichols (a Trump appointee) held an emergency hearing and granted plaintiffs a preliminary injunction blocking the relevant portion of the executive order from taking effect. The court found that plaintiffs had demonstrated a likelihood of success under IEEPA and declined to analyze the other statutory and constitutional claims. The case now moves forward, with a second deadline for TikTok's US operations looming in November 2020.

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Meanwhile, in mid-September, it was announced that ByteDance had ended discussions about a possible deal with Microsoft and was instead looking to partner with Oracle and Walmart. The transaction would involve TikTok's creating a new company called TikTok Global, headquartered in the US, to provide TikTok services to users in the US and most of the world. At the time of this article, the deal is still in flux, with conflicting information about what is being proposed and what is likely to be accepted by the US government. Key issues include what stake Oracle and Walmart will hold in TikTok Global. Even if the US government signs off on the deal, it appears that the transaction will also require approval by the Chinese government, and that approval is uncertain given China's recent adoption of new rules governing the sale of technology to foreign buyers. And so the drama continues.



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Vice President  
**Ryan Gill, CFP® CIMA®**  
 Certified Financial Planner™  
 Professional\*  
 Certified Investment  
 Management Analyst™  
**(716) 626-2582**  
[ryan.gill@theblackoakgroup.com](mailto:ryan.gill@theblackoakgroup.com)

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350 Essjay Rd, Ste 300  
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### James P. Renda, Esq.

69 Delaware Ave., Suite 1006, Buffalo, NY 14202 | (716) 885-4335 | [JRenda@rendalaw.com](mailto:JRenda@rendalaw.com)

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