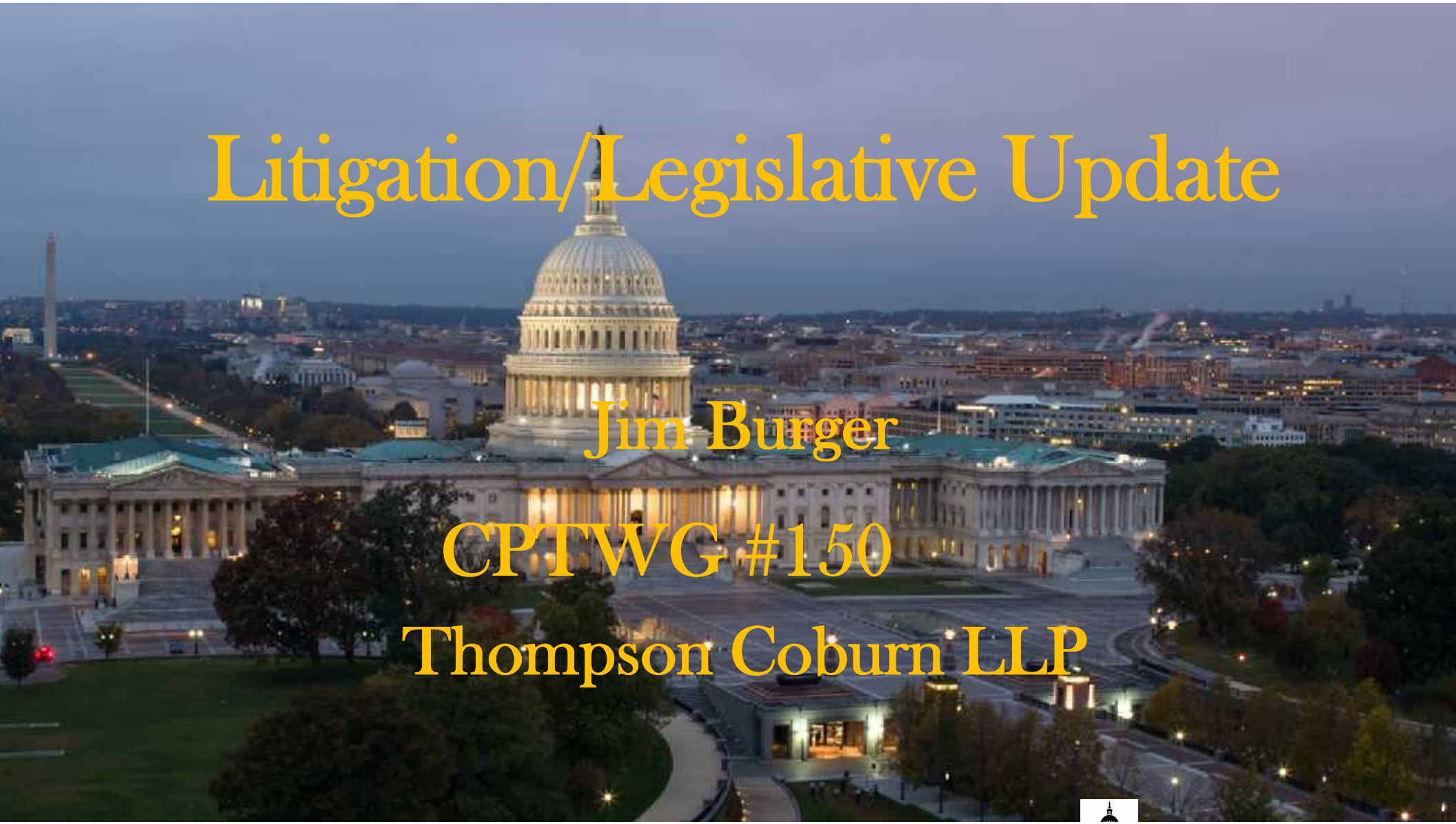


Litigation/Legislative Update

Jim Burger

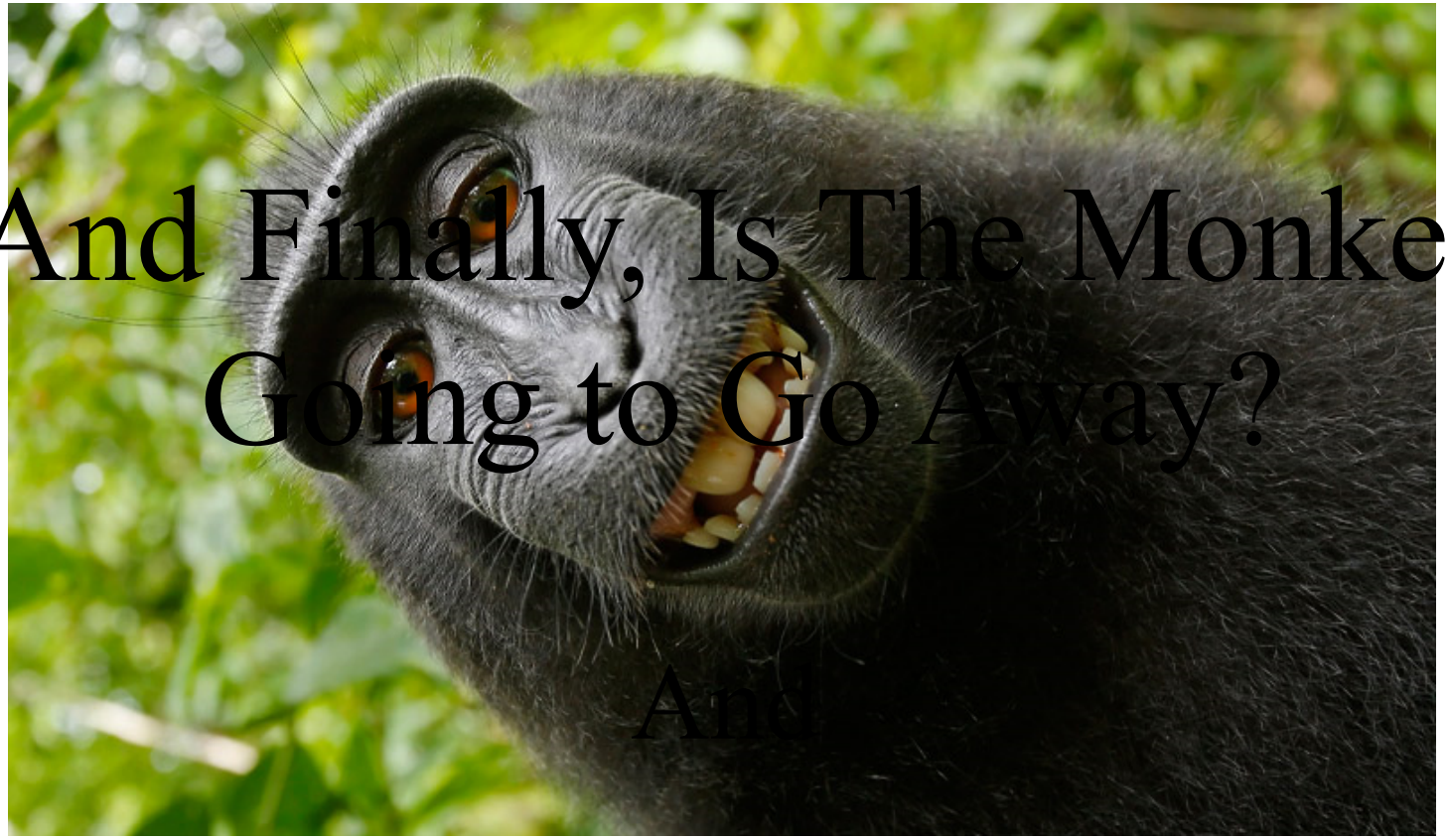
CPTWG #150

Thompson Coburn LLP

Litigation

- *Naruto v. David John Slater (9th Cir. 2018)*
- *Experian Information Solutions, Inc. v. Nationwide Marketing Services Inc. (9th Cir. 2018)*
- *Clos v. Sotheby's Inc.* (9th Cir. 2018)
- *Lombardo v. Dr. Seuss Enterprises, LP (2d Cir. 2018)*
- *Allen v. Cooper (4th Cir. 2018)*
- *Gayle v. Home Box Office, Inc. (S.D.N.Y. 2018)*
- *Russell Brammer v. Violent Hues Productions, LLC (E.D. VA 2018)*
- *Rearden LLC v. The Walt Disney Company* (N.D. CA 2018)
- *Robert S. Davidson v. The United States* (Fed. Ct. Clms 2018)
- *Ticketmaster LLC v. Prestige Entertainment West, Inc.* (D.C. C.D. CA 2018)
- *Triple Up Limited v. Youko Tudou Inc.* (DC Cir. 2018)
- *American Society for Testing and Materials v. Public.Resources.Org, Inc.* (DC Cir. 2018)

Monkey Selfie



And Finally, Is The Monkey Going to Go Away?

And

Naruto v. David John Slater (9th Cir. 2018)

- PETA and Slater "settled"
- Asked 9th Circuit to dismiss case and vacate District Court decision
- Refused: Isn't this about the monkey?
- Couldn't find anything in Copyright Act authorizing animals to sue (humans and legal entities only)
- Awarded Slater appellate-stage attorneys' fees
- Unidentified Judge asks for en banc hearing

Experian Information Solutions, Inc. v. Nationwide Marketing Services Inc. (9th Cir. 2018)

- Experian sued Nationwide for infringing copying of its ConsumerView Database (CVD) 97% match
- Sophisticated vetting of 2,200 sources and filtering of consumer information
- Post-*Feist* principles: (1) facts not protectable, but creative selection and arrangement are; (2) creativity minimal; and, (3) protection limited ("bodily appropriation")
- Held Experian's CVD is protectable
- Because Nationwide copied no more than 80% insufficient to establish infringement

Clos v. Sotheby's Inc. (9th Cir. 2018)

- California Resale Royalties Act grants artists unwaivable right to 5% royalty on any future sale of their artwork (*Droit de Suite* – Berne optional)
- Artists sued resellers for royalties due after CRRA effective date: 01-01-77
- Defendants argued preempted by the Copyright Act: express & conflict preemption '76 Act and conflict under 1909 Act (§301(a) not in 1909 Act)
- Express requires (1) state law subject matter to fall within copyright subject matter and (2) state law rights asserted equivalent to §106 rights
- Court held that CRRA was preempted by 76 Act and given limitation of §109(a) – First Sale – claims barred after effective date 01-01-78
- Based on 9th Circuit precedent found that CRRA did not conflict with 1909 Act, therefore CRRA covered one year of sales – 1977

Lombardo v. Dr. Seuss Enterprises, LP (2d Cir. 2018)

- Author of *Who's Holiday* play sought DJ against *How the Grinch Stole Christmas* (Grinch) copyright holder
- Know *Grinch* story
- Play features down-and-out 45 year old, Cindy Lou Who, Grinch impregnated her, kills him when he abuses her, was incarcerated, alcohol and substance abuser, and lives in a trailer on Mt. Crumpet
- 2nd Circuit upheld District Court finding a fair use parody
  - 1st – transformative parody
  - 2nd – while fiction: infringing goats/fair use sheep
  - 3rd – taking reasonably related to purpose of copying
  - 4th – doesn't usurp current market and no impact on potential "traditional, reasonable, or likely to be developed markets"

Allen v. Cooper (4th Cir. 2018)

- Involved video and other copyrighted works chronicling salvage of Blackbeard the pirate's *Queen Anne's Revenge* on NC website
- Plaintiffs accused NC of *pirating* their video copyrights
- NC claimed sovereign immunity, Plaintiffs argued Copyright Remedy Clarification Act abrogated state's immunity
- Court held the CRCA not a valid exercise of Congress' power:
  - Congress relied on Article I authority, not §5 of the 14th Amendment (clear in CRCA & legislative history), and
  - Did not ensure that any abrogation was "congruen[t] and proportional" to the 14th Amendment injury to be prevented
- Congress failed to demonstrate sufficient willfulness of state officials amounting to a due process violation (future doesn't count)

Gayle v. Home Box Office, Inc. (S.D.N.Y. 2018)

- Gayle sued HBO for infringement based on brief background depiction in film *Vinyl* of an "art we all" graffiti tag he claimed as his work
- HBO defense – *de minimis* use, *i.e.*:
  - Copying occurred to such a trivial extent as to fall below quantitative threshold of substantial similarity
  - *Gottlieb – What Women Want* – 3.5 minutes in background
  - Three seconds, barely visible, behind actor walking down street
- Judge held Plaintiff's claims border on frivolous – grants motion to dismiss

Russell Brammer v. Violent Hues Productions, LLC (E.D. VA 2018)

- Fair use decision – used cropped photo in film festival information website, believed not copyrighted, took down after notice
- Purpose/character – "transformative in function or purpose" site provides information, not commercial use and acted in "good faith"
- Nature – while expressive, used for factual content, also previously published so favors D
- Amount – favored D as he cropped picture in half and used not more than necessary for "informational purpose"
- Adverse Effect – found none, P compensated six times, twice after D's publication and "transformative and non-commercial"
- Held a fair use

Rearden LLC v. The Walt Disney Company (ND CA 2018)

- Earlier decision – subcontractor infringed MOVA, but Disney owned the movie
- Here Rearden sues studios for vicarious and contributory infringement
- Studios move to dismiss (motion to dimiss criteria: accept facts plead by Plaintiff and pleading must raise a right to relief above speculative level)
- Vicarious – exercise control (right and ability) and direct financial gain
  - Given Disney contract, more like swap meet operators than *YouTube*
  - Found improvement in believability of movie sufficient on financial benefit
- Contributory – (1) knowledge and (2) induces, causes or materially contributes
  - Rearden notes Disney due diligence of it and alleges of subcontractor (thin)
  - Alleged studios directed use of the MOVA software, studios said no knowledge of subcontractor loading software – court says pleading passes muster now, but Disney free to argue at the summary judgment or trial stage of the proceedings

Robert S. Davidson v. The United States (Fed. Ct. Clms 2018)

- Looking for new "workhorse" stamp, USPS settled on Statue of Liberty's face in Getty Image licensed photo; unaware it was statute outside NY NY Casino
- Davidson sued for infringement
- USPS argued (1) architectural work exempted by §102(a); (2) replica not protected by copyright; and (3) fair use
- Court held: (1) Because not "part of" casino, no exemption; (2) sufficiently creative (see photos) entitled to copyright protection; and (3) as to fair use:
  - 1. Use clearly commercial; 2. favored neither party while creative a replica; 3. stamp captured creative nature almost entirely; and, 4. use as "workhorse" stamp selling $4 billion worth overwhelming favors a finding of infringement
- Damages –USPS says we only pay $5,000 for licenses; court no you made millions on stamp collector sales, use willing buyer/willing seller test – $5K for money-losing delivery, but 5% for collectors, total: $3,554,946.95

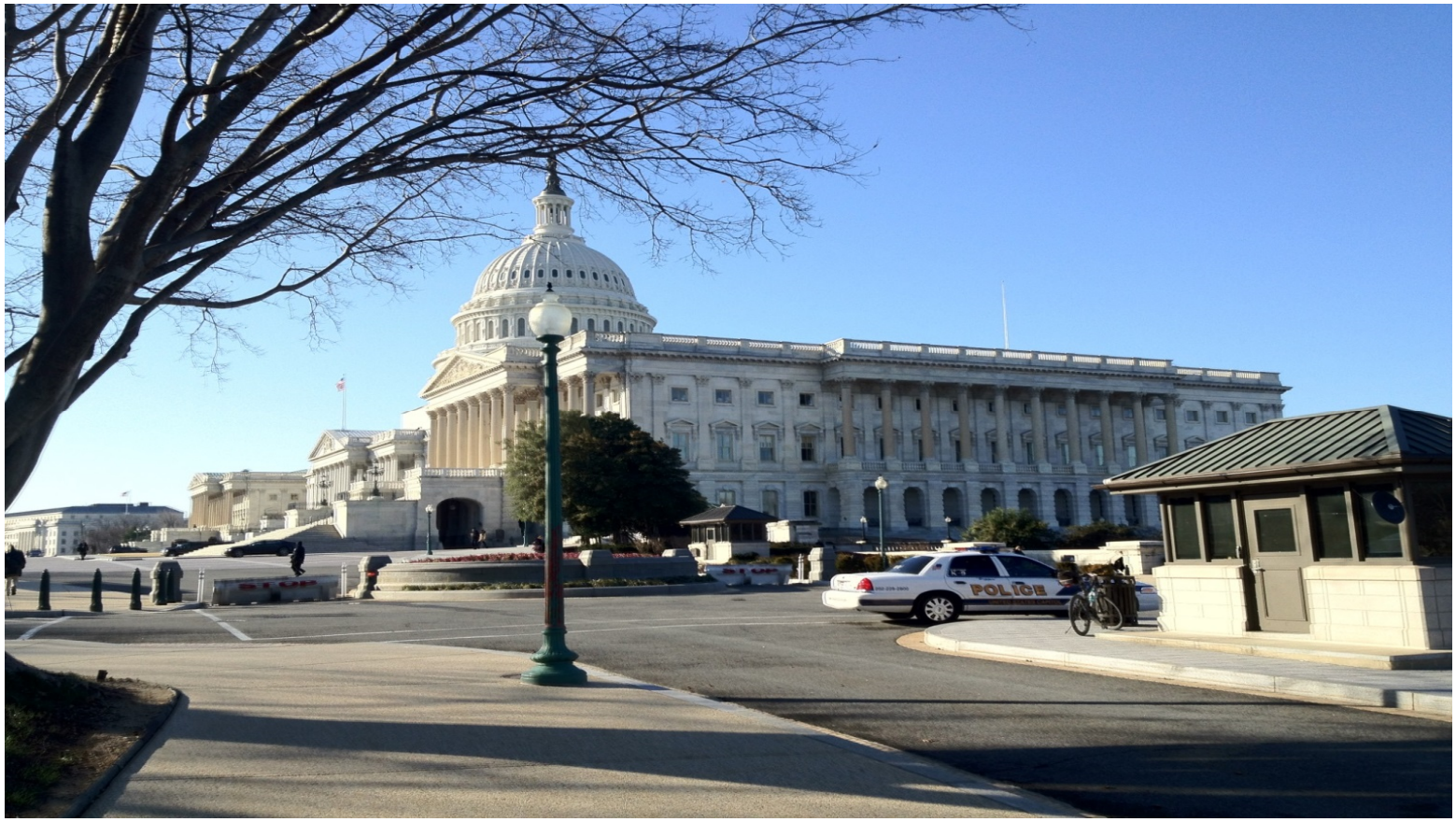
Triple Up Limited v. Youko Tudou Inc. (DC Cir. 2018)

- Defendant Alibaba subsidiary Chinese streaming company providing user-uploaded and licensed video
  - Plaintiff had exclusive US rights to broadcast three Taiwanese movies, lawyer streamed them in US
  - Defendant took down upon notice, US views .25%
  - Sued for infringement in US
- Court held no jurisdiction plausible
  - Does not target US users
  - No US viewer, including Triple Up's attorney, paid for or otherwise engaged in a business transaction with Youku when viewing the videos
  - Nor are any facts alleged suggesting that Youku acted intentionally or in bad faith in a manner that led to the three films being viewed in the US

American Society for Testing and Materials v. Public.Resources.Org, Inc. (DC Cir. 2018)

- Copyrighted standards incorporated into law, PRO published on website sued by SDOs
- District Judge ruled infringement neither fair use nor constitutional defense
- DC Cir. reverses avoids constitutional issues
- Lays out fair use analysis – Judge must use four factors on case-by-case basis
- Court suggests where published only referenced portion of a mandatory standard, it would be fair use

Administrative – Legislative Developments



Music Modernization Act

- Reported out of House Judiciary Committee 32-0
- Amazing: passed House unanimously
- Senate Judiciary reported out amended Senate version
- Bills would
  - Create new collective royalty system for interactive digital music services (e.g., Spotify)
  - Establish performance royalties for AM/FM stations
  - Extend coverage of the Copyright Act to pre-1972 sound recordings
  - Provide new royalty for music producers, mixers, and sound engineers

Exemptions to Permit Circumvention of Access Controls on Copyrighted Works

- Since last Update Copyright Office held roundtables
- DOJ Computer Crime and IP Section (CCIPS) filed comments in Class 10 (Computer Programs – Security Research)
  - Notes DMCA protection for §106 rights TPMs, not car safety or voting machines
  - Device Limitation: eliminate current language for three classes of devices
  - Controlled environment – change to consider risk of harm
- AACS/DVD CCA filed answer - read in context of CCIPS statement re DMCA protects TPMs used for © content
  - Bruce …

JULIA REDA

search ...

My Vision for Europe: Borderless | EU copyright reform | Projects | Events | Transparency | Press | Contact

Green light for upload filters: EU Parliament's copyright rapporteur has learned nothing from year-long debate

EU Copyright Directive

- Parliament's Legal Affairs Committee approved a Directive with two hotly debated provisions:
  - Article 11 – require websites to pay publishers fees to link to their news sites or to use snippets linking to their website, the so-called link tax – see e.g., Spain and Germany's failed link license requirements
  - Article 13 – Online Content Sharing entities either get licenses or, in "cooperation" with rightsholders use technical measures to filter content
- On July 5th, the EU Parliament rejected the proposal with 318 lawmakers voting against, 278 voted in favor, and 31 abstained
- EC VP (Digital Single Market), in view of Sept. 12 vote on possible amendments: "tone down their tough lines on copyright reform"

Australia – Copyright Amendment

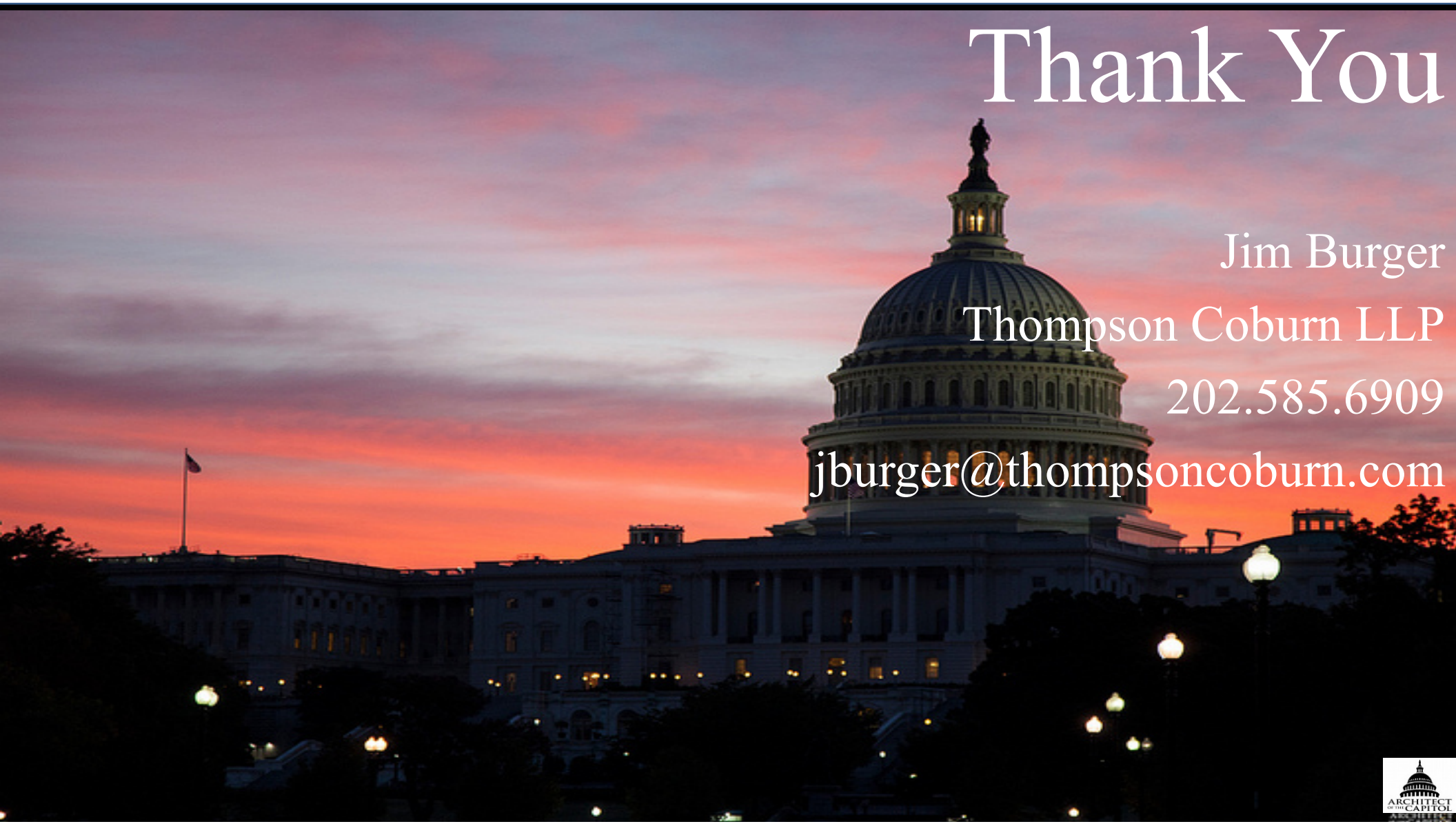
- Parliament passed measure adopting a safe harbor expansion for educational, cultural, and disability organizations using a service provider
  - "The changes will ensure these sectors are protected from legal liability where they can demonstrate they have taken reasonable steps to deal with copyright infringement by users of their online platforms."
- Reaffirmed won't deal with geo-blocking reform
- Didn't extend safe harbor to all OSPs, incremental approach
- Still consulting as to whether to adopt a "fair use" provision

Telenor A/S v. Copyright Management Services (Eastern High Court Denmark 2018)

- Ruled Danish ISPs not obligated to provide copyright enforcement group customers' Personally Identifiable Information who are suspected of infringement
- Case raised issues of EU law and EU Convention on Human Rights
- Court weighed copyright holders rights against individuals' right to privacy
- Copyright holders' rights do not trump individuals' rights to privacy
- Danish Administration of Justice law allows providing PII only when a "serious offense" is under investigation
- The provision of 4,000 bulk IP addresses, doesn't indicate a serious offense at any one IP address

Puls4 v. YouTube, Inc. (Vienna Commercial Court 2018)

- Initial order held YouTube not (1) a technical service or (2) a host provider under EU E-Commerce Directive
  - Either of the two are intermediaries and not liable for user-posted content
  - Therefore, YouTube directly liable for users' infringement
  - Distinguished YouTube's acts to organize, index, and optimize videos
  - Thus, the court held, YouTube left the role of a neutral intermediary
  - Not final until the court confirms the judgment



Thank You

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