

A nighttime photograph of the U.S. Capitol building in Washington, D.C. The building is illuminated, and its dome is prominent against a dark sky with some clouds. The text is overlaid in a yellow, serif font.

Litigation/Legislative Update

CPTWGC Meeting #141

April 13, 2016

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In Memory of
Dr. Alan E. Bell
A Colleague and
a Friend

Quiet Political Season

The Boston Globe

SUNDAY, APRIL 9, 2017

DEPORTATIONS TO BEGIN

President Trump calls for tripling of ICE force; riots continue

Curfews extended
in multiple cities

PRESIDENT TRUMP has set in motion one of his most controversial campaign promises, calling on Congress to fund a "massive deportation force" by tripling the number of federal Immigration and Customs Enforcement agents.

The president made the announcement in a nationally televised address last night from the Old Post Office building in Washington, D.C., now a Trump International Hotel. In a surprise move after the speech, Trump invited Attorney General Jeff Sessions to stand right next to him at the podium to field questions. "Was, uh, yes for Christie this time," tweeted Fox News Channel reporter Megyn Kelly, who was covering the speech from a spot just near Rockefeller Center because she has been placed on a White House blacklist.

Although Trump reiterated his promise to deport some 11.2 million illegal workers on a two-year timetable — "so fast that your head will spin" — he also promised to "do it humanely." He did not immediately offer details but said he intends to flesh out the policy with special adviser George Papadopoulos, just as soon as the 2018 college graduation from a prominent Model UN session in Geneva.

The \$400 billion deportation program promises to be one of the most disruptive government actions attempted since desegregation. Economists estimated ICE would need more than 400,000 agents to complete the deportations in the next two years.



the White House. Singing and chanting have been audible inside the executive mansion day and night for weeks. The worst of four gas parades Saturday night. After Trump vowed to strip federal funding from sanctuary cities during his campaign, round-the-clock protests in Cambridge, Mass., shut down the Red

take the MBTA's #1 Bus across the Charles River to an alternate site in Boston.

Already in California, armed ICE agents confronted 30 illegal strawberry pickers on a Santa Barbara County farm and forced them to a detention center to await prosecution and a government-chartered flight back to their

"dishes go unserved in the kitchens of San Francisco restaurants and if our \$3 billion strawberry crop is ultimately left to rot."

Trump downplayed fears that the deportations would hurt industries that rely on illegal workers. "Don't forget... you have millions of people that are waiting to be in some line

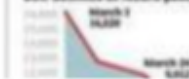
Markets sink as trade war looms

WORLDWIDE STOCKS plunged again Friday, completing the worst month on record as trade wars with both China and Mexico seem imminent.

Markets from the Dow to the FTSE to the Nikkei have sunk on speculation that China is dumping some of its US Treasury holdings after the Trump administration announced tariffs as high as 45 percent for all Chinese imports and 25 percent for some Mexican goods.

"I don't mind trade wars when we're losing \$50 billion a year," the president said last year. But Chinese officials have made it no secret that they will not let tariffs go unreciprocated. The Asian giant is the largest holder of US debt, owning some

Dow declines at record pace



Litigation



- *Simmons v. Stanberry* (2d Cir.) (Jan. 15, 2016)
- *Kirtsaeng v. John Wiley & Sons.* (U.S.) (March 2016)
- *Alliance of Artists and Recording Companies v. General Motors* (DC DC) (Feb. 22, 2016)
- *Paramount v. Axanar* (C.D. Cal) (Mar. 21, 2016)
- *Foundation for Lost Boys and Girls of Sudan, Inc. v. Alcon Entertainment, LLC* (N.D. GA) (Mar. 22, 2016)
- *Gen. Motors LLC v. Autel.US Inc.* (E.D. Mich.) (Mar. 29, 2016)
- *Cambridge Univ. Press v. Becker* (N.D. GA) (Mar. 31, 2016)
- *Update on Monkey Selfie Case (Naruto, a Crested Macaque, v. David John Slater) and PETA* (March)

Simmons v. Stanberry (2d Cir.)



- Copyright Act: three-year statute of limitations
- Simmons (writer and performer of hip-hop music) appealed copyright-infringement dismissal
- Suit against hip-hop producer William C. Stanberry, Jr., 50 Cent, and others re: 2007 song “I Get Money,”; Simmons claimed exclusive license to song
- The Second Circuit affirmed dismissal:
 - More than three years prior to filing, Stanberry rejected Simmons’ asserted copyright
 - Stanberry then exploited work, Simmons on notice
 - Thus, Simmons’ claim time-barred

Kirtsaeng v. John Wiley & Sons. *(SCOTUS)*



- Supreme Court granted cert in *Kirtsaeng v. John Wiley & Sons*
- Kirtsaeng won first sale case against Wiley
- Wiley lost claim of copyright infringement for distribution of “grey market” textbook
- 2nd Circuit rejected Kirtsaeng’s request for attorneys’ fees
- Supreme Court argument set for April 25, 2016

Alliance of Artists and Recording Companies v. General Motors (DC DC)



- Audio Home Recording Act decision (AHRA)
 - AARC (AHRA collecting entity) sued auto manufacturers and suppliers
 - “Infotainment systems” also ripped CDs; thus, allegedly covered by the AHRA as a Digital Audio Recording Device (DARD)
- Bad news for manufacturers? Not so fast...
 - Judge agreed with defendants’ interpretation of the statute
 - DARDs must make a Digital Audio Copied Recording (DACR), which must also be a Digital Musical Recording (DMR)
 - a reproduction in a digital recording format of a [DMR], whether that reproduction is made directly from *another* [DMR]
 - Because it can’t be a DMR if it is recorded to a hard drive with programs other than music or to playback music
 - Computer industry effectively exempted from AHRA
- Judge, however, denied the manufacturers’ motions
 - But the devices’ exact nature at issue question of fact for next stage

Paramount v. Axanar (C.D. Cal)



- Paramount sued crowd-funded effort to produce a Star Trek prequel, claiming infringement
- Amended complaint details alleged infringing elements, including:
 - Made up Klingon language
 - Warp Drive
 - Klingon High Council
 - A uniform with Gold Shirt

Foundation for Lost Boys and Girls of Sudan, Inc. v. Alcon Entertainment, LLC (N.D. GA)



- Could interviews about experiences fleeing genocide be a joint work?
- Defendants file motion to dismiss:
 - P failed to register their copyright
 - No intent to form a joint venture
- Registration: P argued defendants should be equitably estopped
 - Couldn't file for © because defendants wouldn't handover material
 - Court sympathetic but not swayed: no precedent for equitable estoppel
 - But injunction still possible
- Other grounds for dismissal discarded:
 - Not fixed? “Plausible allegation” interviews were taped and thus fixed
 - Original work of authorship? Interviews were a creative act
 - “Joint work” intent? Relevant ‘intent’ is that parties’ contribution be merged. Citing the pleadings, merger could have occurred

Gen. Motors LLC v. Autel.US Inc. *(E.D. Mich.)*



- General Motors complex case against Autel.US, Gary DeLuca, and others – motion to dismiss
 - Autel produces vehicle diagnostic and repair tools
- GM alleged Autel (and Chinese parent) accessed, copied & distributed software
 - Customers could recalibrate vehicle controls on GM vehicles
 - GM made claims of personal liability against Autel's VP for misappropriation
- Court denied procedural motions to dismiss GM's claims
 - GM adequately established personal jurisdiction, and properly pled its claims
- Court did not entertain Autel's interoperability arguments
 - Corporate officers not per se liable, but could be with deliberate, culpable intent to infringe
- Court appeared sympathetic to GM

Cambridge Univ. Press v. Becker (N.D. GA)



- Publishers' case against Georgia State University's e-reserve
- In 41 of 48 cases, no copyright infringement took place
- Complicated decision that won't be of much help to universities
- Still, win for proponents of fair use and another loss for the publishers

Update on Monkey Selfie Case



- In *Naruto, a Crested Macaque, v. David John Slater* a federal judge ruled against PETA monkey not capable of being copyright owner
 - No evidence Congress intended to extend copyright protections to animals
- PETA notified Federal District Court it will appeal

Late Breaking News



- 'We Shall Overcome' Copyright Challenged
- Calif. Art Resale Law Preempted By Copyright, Judge Says

Administrative – Legislative Developments



Copyright Office 1201, 512 and IoT Hearings



- Office earlier solicited comments on the 1201 process
 - Comments noting problems with three year cycle and comments supporting current process
 - Washington, DC hearing on May 19th/20th, San Francisco hearing on May 25th/26th
- Also comments filed on 512 notice & take-down
 - Similarly comments supporting and comments noting issues with the process
- Office earlier announced Software-Enabled Consumer Products Study:
 - Public roundtables in Washington, DC May 18th and San Francisco, CA on May 24th
 - Requests to participant in the hearings due by April 18th

Internet Policy Task Force White Paper



- Commerce Department's Internet Policy Task Force released a White Paper on Remixes, First Sale, and Statutory Damages
- The Task Force conclusions:
 1. legal framework for creation of remixes;
 2. relevance and scope of "first sale doctrine"; and,
 3. appropriate calibration of statutory damages, individual file sharers and secondary liability for large-scale infringement
- Task Force mindful of protecting copyrights, promoting innovation on the Internet

Copyright Office Report: “right of making available”



- Covers “the right of making available” under copyright
- Concludes “making available right” exists within:
 - The distribution,
 - Public performance, and
 - Public display rights
- No additional legislation required
- She also says that a digital transmission of bits is a distribution of a copy or phonorecord

USPTO Proposed Draft Legislation



- US Patent and Trademark Office forwarded to Senate proposed draft legislation to implement Beijing Treaty on Audiovisual Performances
- Without consent of performers, unauthorized to
 - Fix live performance or reproduce from unauthorized fixation;
 - Transmit live performance; or
 - Distributes copies for unauthorized fixation
- §§107 & 108 limitations apply
- Bit of time travel involved:
 - Subsection (c) allows you to record a live performance 95 years after it occurs
 - Substantively, the PTO proposes changing §1101(a)(1)

International



Update on Ancillary Copyright in Germany



- VG Media sues Google again over Google News
- German ancillary copyright implicated
- Would require payment of royalties for showing snippets of news and hyperlinking

GEMA v. YouTube (Higher Regional Court Munich)



- YouTube not liable for infringing videos posted to its website in Germany.
 - Copyright owners must go after the uploaders instead
- GEMA represents the copyright of more than 70,000 members in Germany, more than 2 million copyright owners globally (including composers, lyricists and music publishers)
 - Brought suit against YouTube for piracy on its website
- Court: YouTube not liable for copyright infringement
 - This is despite the commercial nature of YouTube
 - Reverses a lower court decision from last July

Tobias Mc Fadden v Sony Music Entertainment Germany GmbH



- Advocate General opinion on businesses offering free Wi-Fi to public
 - Cannot (on that basis alone) be held indirectly liable for copyright infringement
- Regional Court of Munich case pending
- Uncertainty over the application of the EU's E-Commerce Directive (2000/31/EC)
- AG opinion: public Wi-Fi providers not liable for copyright infringements
 - Opinion did not bar injunctions to end specific infringements
- Germany's Third-Party Liability Law, Störerhaftung
- Advocate General usually followed by the CJEU

Dutch Government Complicity in Breaches?



- Movie distributor group threatening to sue Dutch government for allowing online infringement
- Dutch Film Distributors' Association (NVF)
- Claim losses of more than a billion euros (\$1.1 billion) in part due to a lack of legal sanctions
- Feb. 1 letter threatens action.
- “Widespread tolerance of file sharing”, letter claims.
- A shift in cultural attitudes is now “desperately needed,” the NVF says

Shenzhen Shengyin Network Technology Co. v. Wuxi Qiaosheng Entertainment Ltd. (Jiangsu High People's Court)



- Five collective management societies, designated by National Copyright Administration of China (NCAC), have legitimate authority in China
- Shenzhen Shengyin unlawfully acting as a collecting society
 - Wrongfully collecting license fees from karaoke bars
 - Unlawfully filing lawsuits across China to enforce “rights”
- Also allegations Shenzhen Shengyin fraudulently obtained copyright certificates
- Highlights a larger problem of copyright fraud in China

Criminal Copyright Infringement in the U.K.



- Policy recommendation to increase maximum sentence for online copyright infringement
 - Two years to ten years
- Met with opposition from some advocacy groups
- Open Rights Group (ORG) campaign against measure

Vladimir Putin and Piracy

- Chief Internet Advisor to Russian President Vladimir Putin owns a Russian torrent site: Tornado.ru
- Some have criticized this as a conflict of interest
- Mr. Klimenko has publicly advocated against blocking torrent sites in the past

Czech Pirate Party

- The Czech Pirate Party reportedly opened its own movie download site, Pirateskefilmy.cz,
- Carried 20,000 links
- The Pirate Party claims attempt to prod Czech authorities to prosecute it
- Doing this because of their conviction that linking is not/should not be a crime
- It was actually hand-curating the website, not just linking!

New Strong Norwegian Copyright Amendment



- Norway's Copyright Act may soon toughen up
 - The bill responds to technological developments, harmonizes with EU's IP Enforcement Directive (2004/48/EC)
- Draft law would punish viewers of infringing content
 - Streaming copyrighted movies and music would become punishable
 - "Obviously infringing" content only
 - Burden on infringer (or viewer)
- The law could exacerbate the natural tension between rightsholders, free speech
- Other effects:
 - Strengthening employer's right to employee-created content
- Public opportunity to comment until August 8, 2016

Copyright Protection in Myanmar



- Myanmar governed under 1914 Copyright Act
- No foreign copyright protection
- Myanmar obligated to provide for such protection under treaty
- New government and parliament set up in March
- Expectation that new government will address issue

Thank You

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