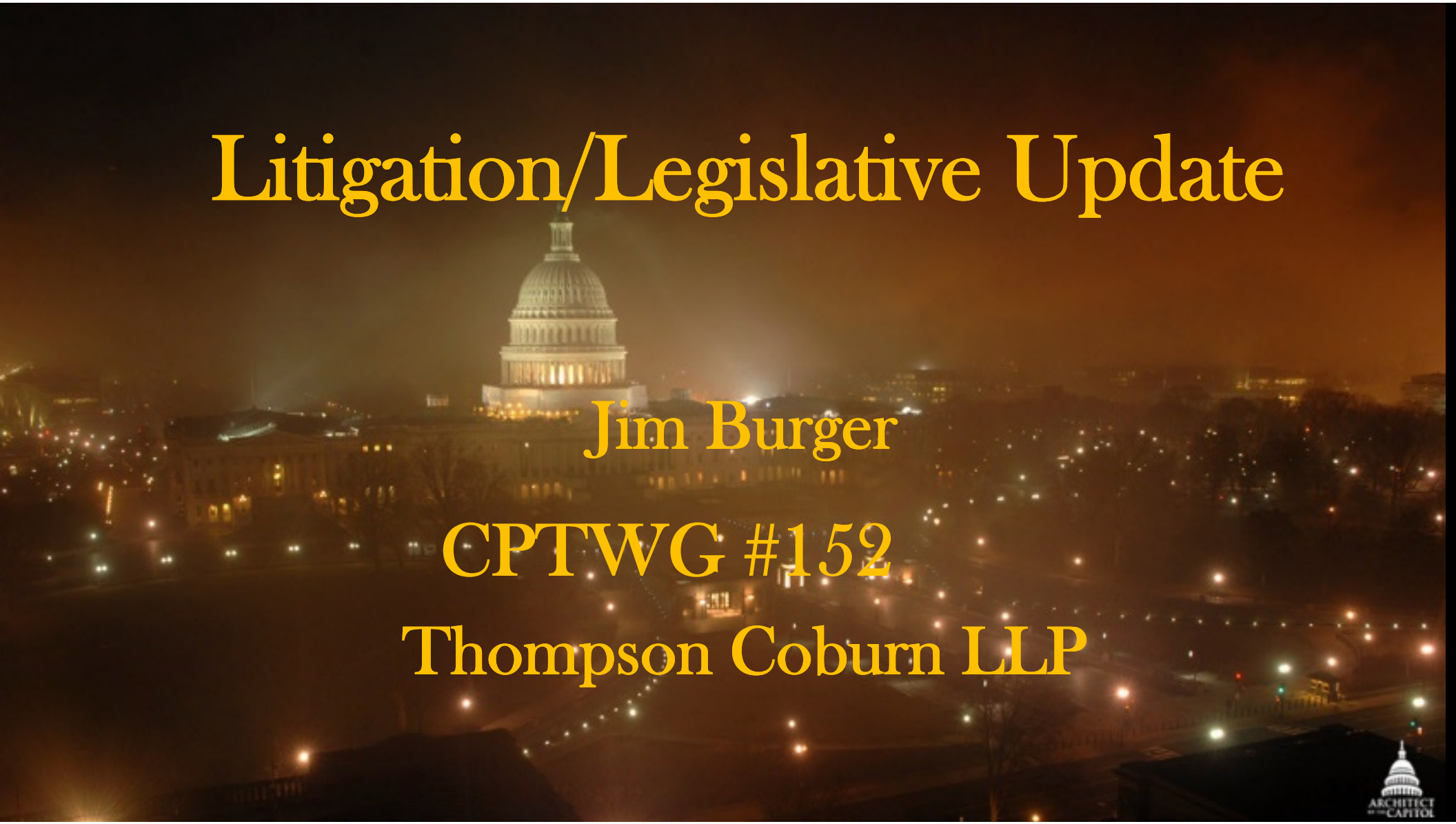


Litigation/Legislative Update

Jim Burger

CPTWG #152

Thompson Coburn LLP

Litigation

- *Capitol Records, LLC V. ReDigi Inc.* (2d Cir. 2018)
- *Code Revision Commission v. Public.Resource.Org, Inc.* (11th Cir. 2018)
- *Cambridge University Press v. Albert* (11th Cir. 2018)
- *In re VidAngel, Inc.* (Bankr. D. UT 2018)
- *Otto v. Hearst Communications, Inc.* (S.D.N.Y. 2018)
- *Smith v. Thomas* (6th Cir 2018)
- *UMG Recordings, Inc. v. Kurbanov* (DC ED VA 2019)
- *McDermott v. Monday Monday, LLC* (S.D.N.Y. 2018)
- *Pereira v. 3072541 Canada Inc.* (S.D.N.Y. 2018)
- *Bell v. Vauforce, LLC* (7th Cir. 2018)

Capitol Records, LLC V. ReDigi Inc. (2d Cir. 2018)

- Scheme to allow consumer "resale" of iTunes songs
  - Software checked to make sure legitimate iTunes file
  - Upload to ReDigi servers – make 4K buffer copy – deleted as block recorded in server so two complete copies never exist
  - User could stream from server or "sell" the song
- Labels sued Redigi, trial court found infringement, 2d Cir Judge Leval upheld
- Redigi claimed protected by First Sale doctrine but provision talks about "that copy or phonorecord"
  - Leval notes when user downloads from iTunes creates a new phonorecord – physical object hard drive or thumb drive
  - ReDigi makes a new phonorecord on server or on purchaser's hard drive, i.e., can't transfer bits
- Leval rejects fair use defense/invitation to create new policy

Code Revision Commission v. Public.Resource.Org, Inc. (11th Cir. 2018)

- Legislation and judicial decisions public domain because bodies "speak on behalf of the people" who are the authors
- What about annotations, Commission claimed copyrighted
  - Private author normally holds copyright
  - Here created by private entity under Commission contract giving Commission final editorial control
  - Commission primarily legislators, staffed by legislative personnel, Georgia legislature reenacts entire code with annotations, governor signs
  - Annotations cited by court decisions interpreting Georgia law
- Court looked at (1) who created annotations, (2) authoritativeness, (3) process to create
- Yes for all three, as work of the people, annotations cannot be copyrighted

Cambridge University Press v. Albert (11th Cir. 2018) Round One

- Long running Georgia State University digital course-pack case
- Allowed profs to upload excerpts of scholastic works for students
- Trial Court used mechanistic fair use test finds 43 fair use, 5 not
- 11th Cir. Rejects analysis of factors two (informational) and three (<chapter or <10% of work), but affirms one and four; however, reverses giving equal weight to factor four in mechanical test
- Instructs trial court to correct erroneous application of factors two and three, and mechanistic weighing of factor four
- Weigh factors holistically for each work, do not use a mechanical test

Cambridge University Press v. Albert (11th Cir. 2018) Round Two

- 11th Cir. finds trial court misinterpreted its instructions
- Trial court altered its fourth factor test to weigh for fair use in all but six instances
  - Cannot alter earlier reasoning under "the law of the case" – only instructed to change weight
- Trial court adjusted percentage weight for each factor assigned to determine fair use
- Again said trial court needed to weigh all four factors "holistically" for each use and not employ a "simple mathematical formula" to all instances of copying

In re VidAngel, Inc. (Bankr. D. UT 2018)

- In an effort to find a sympathetic judge, VidAngel suffered a number of defeats for their disc sale-filter-stream-repurchase model
  - Lost preliminary injunction motion in CD CA
  - Lost appeal to 9th Cir.
  - Filed DJ case in Utah DC – no jurisdiction
  - Obtained stay of DC CA summary judgment case, but …
  - Bankruptcy judge lifted stay, saying aware and sensitive to Family Movie Act and DMCA, but "there is a right way and wrong way to comply"
- Studios filed with CD DC CA motion for summary judgment under DMCA and Copyright Act – damages claim: $950,000 to $152.5 million
- VidAngel claims fair use and seeks protection for "new model"
- Studios reject VidAngel's arguments

Otto v. Hearst Communications, Inc. (S.D.N.Y. 2018)

- Otto snapped candid of Trump crashing a wedding at his National Golf club, texted to a friend
- Otto discovered photo on news outlets, hired lawyer, registered and sued, Hearst claimed fair use
- First factor – using photo for precise reason created doesn't support fair use
- Fourth factor – clear market for reason created – show Trump at wedding, wide distribution showed market harm
- Judge found for Otto even though rejected Plaintiff's "bad faith" argument as part of first factor, "not determinative of first factor's outcome."

Smith v. Thomas (6th Cir 2018)

- Plaintiff Bigg Robb, southern soul artist wrote and recorded *Looking for Country Girl*
- Defendant Bishop Bullwinkle used first 12 seconds in *Hell 2 da Naw Naw*
- As the Bishop's fame grew, refused to settle saying: "Let's go to court …. If I did something wrong, why ain't I in copyright court? … [T]ake me to court."
- Bigg Robb obliged, both pro se but the Bishop didn't participate
- Court awarded statutory damages of $30k and injunction
- Defendant's sole appeal was that Smith didn't properly "elect" statutory damages
- 6th Cir. said no "magic words incantation" found Bigg Robb's multiple written and oral statements to trial court clearly indicated intent to seek statutory damages: "said he looked at the law, which said the court could award damages up to $150,000 and was 'certainly asking for that much'"

UMG Recordings, Inc. v. Kurbanov (DC ED VA 2019)

- Rips content from streaming sites – 263 million visits/month
- Sued by labels, challenges jurisdiction
- Located in Russia, free to user, no sign-in, revenue from Ukrainian Ad broker
- Issue: whether jurisdiction here comports with due process – minimum contacts test
  - Directs electronic activities into the state, with intent of engaging in business in the state, and activity creates a potential cause of action
  - I.e., purposeful targeting of a state with the "manifest intent to engage in business there"
- Here contacts "points to the absence of personal jurisdiction" because of the lack of "purposeful targeting" of users in the US

McDermott v. Monday Monday, LLC (S.D.N.Y. 2018)

- In order denying the Defendant attorney's fees, the Judge labeled Plaintiff a "copyright troll"
- Plaintiff filed motion objecting to the term
  - Asked court to redact the term
- In addition to saying no cognizable relief (wasn't asking court to reverse and impose fees on itself), the Judge said the term troll applied
  - Filled over 700 cases, settled 500
  - Cited other "troll-like" conduct

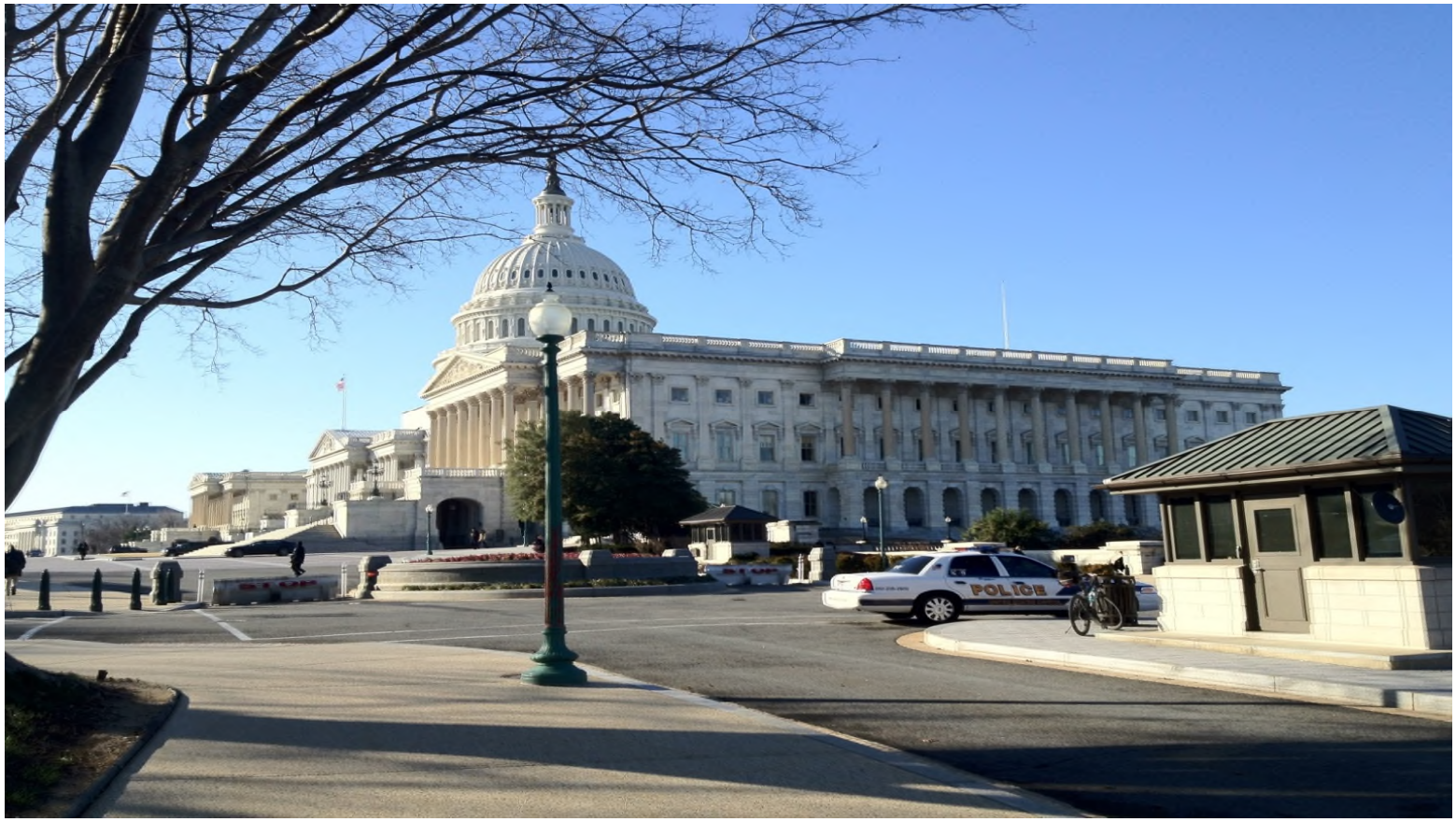
Pereira v. 3072541 Canada Inc. (S.D.N.Y. 2018)

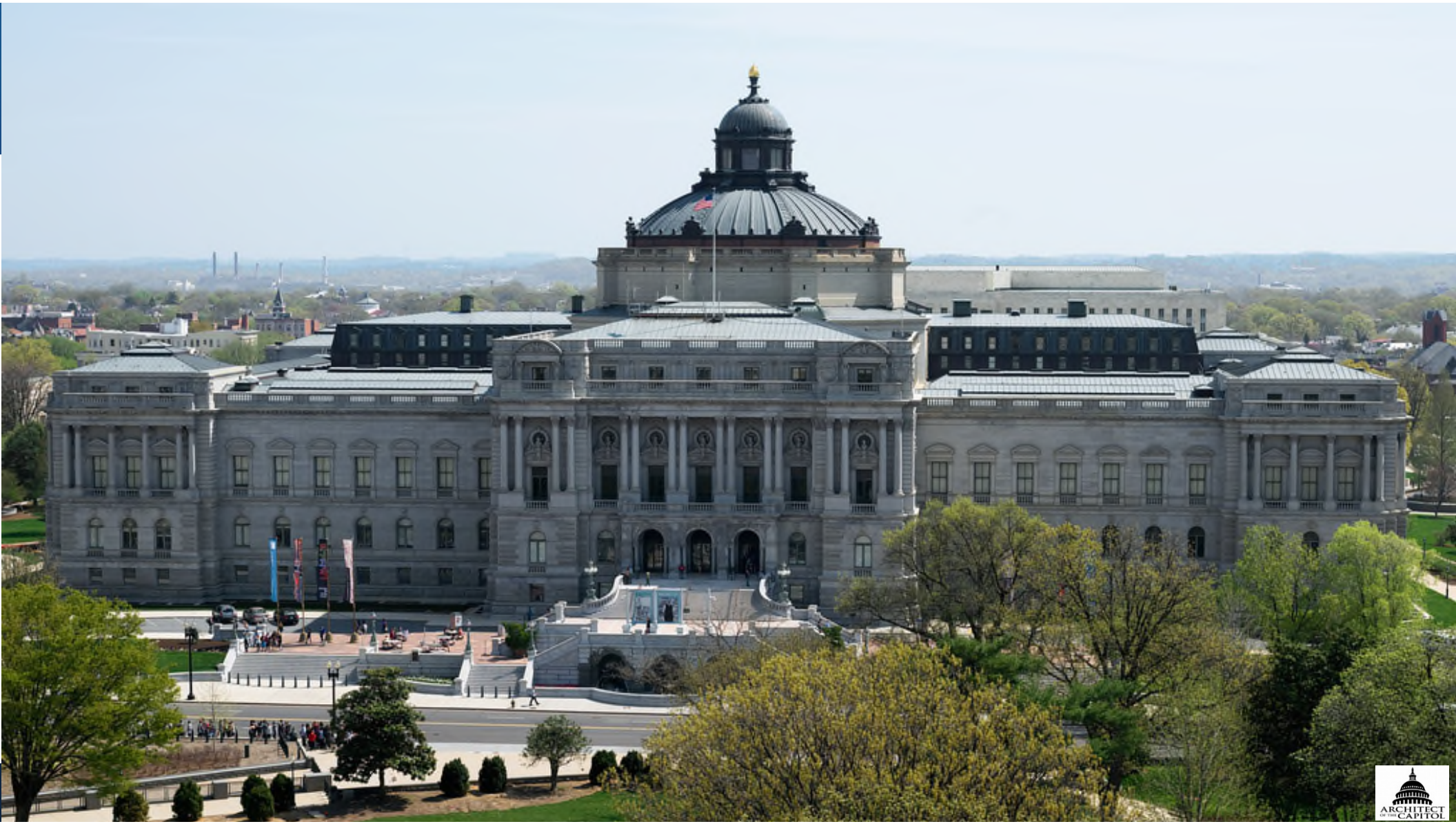
- Another case where the Judge labeled Plaintiff's attorney a troll
- Cited Mr. Liebowitz' conduct in this case and others
- In denying sanctions the Judge said
  - "…does not give Mr. Liebowitz … the right to vexatiously prolong litigation and thereby force his opposing counsel to incur needless expenses, particularly where damages awards are likely to pale in comparison to those costs and fees."
- Warned in the future "would not hesitate to impose sanctions"

Bell v. Vauforce, LLC (7th Cir. 2018)

- 7th Cir affirmed sanctions where Defendant's attorney went too far
- Defendant settled quickly and case dismissed with prejudice
- Defendant's attorney moved for attorney's fees claiming client was "prevailing party," failing to mention settlement and only cited the dismissal
- Trial court rejected his argument as frivolous and misleading and "entered a modest but symbolic $500 sanction …."
- 7th Cir affirmed

Administrative – Legislative Developments




ARCHITECT OF THE CAPITOL

EU Copyright Directive

- As noted last CPTWG, Parliament approved Directive On Copyright with two controversial 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
  - Critics: will shut down search in EU and publisher can block today
  - Proponents: should share revenue attributable to their content and doesn't forbid linking, just snippets

latest news

All News Videos Shopping Images More Settings Tools

About 16,320,000,000 results (0.75 seconds)

Top stories

Liverpool Echo
4 hours ago

The Telegraph
9 hours ago

Daily Star
54 mins ago

EU Copyright Directive

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- Article 13 – Online Content Sharing entities either get licenses or, in "cooperation" with rightsholders use technical measures to filter content
  - Critics will eliminate smaller competitors and filtering doesn't work
  - Proponents argue must protect content
- "Trilogue" negotiations between European Parliament, European Commission, and European Council to develop the final Directive have stalled (last one on January 21st cancelled)

Levola Hengelo BV v. Smilde Foods BV (European Court of Justice 2018)

- Does the taste of a food product enjoy copyright protection under the Copyright Directive?
- Plaintiff dip manufacturer sued another, claiming the taste of its Heksenkaas spread, protected as a "work of literature, science or art," was infringed by Defendant's Wine Wievenkaas spread
- Court said "no," exclusive rights must enable authorities and competitors to clearly know what is protected
- Here no way to objectively and precisely identify what is protected

Imran Syed (European Court of Justice 2018)

- Swedish Supreme Court referred criminal case to ECJ
- Offered infringing goods for sale in store
- Was Syed also liable for infringing goods stored nearby and remotely, trial court said yes
- Appeals court said couldn't find Syed offered those goods for sale or distribution
- ECJ held that "making available to the public … through sale" is a series of acts
- Therefore, an unauthorized act prior to the sale, with the objective of making a sale, is infringing under the Directive
- Still have to prove intent to sell without rightsholder's authorization

New Zealand Copyright Review

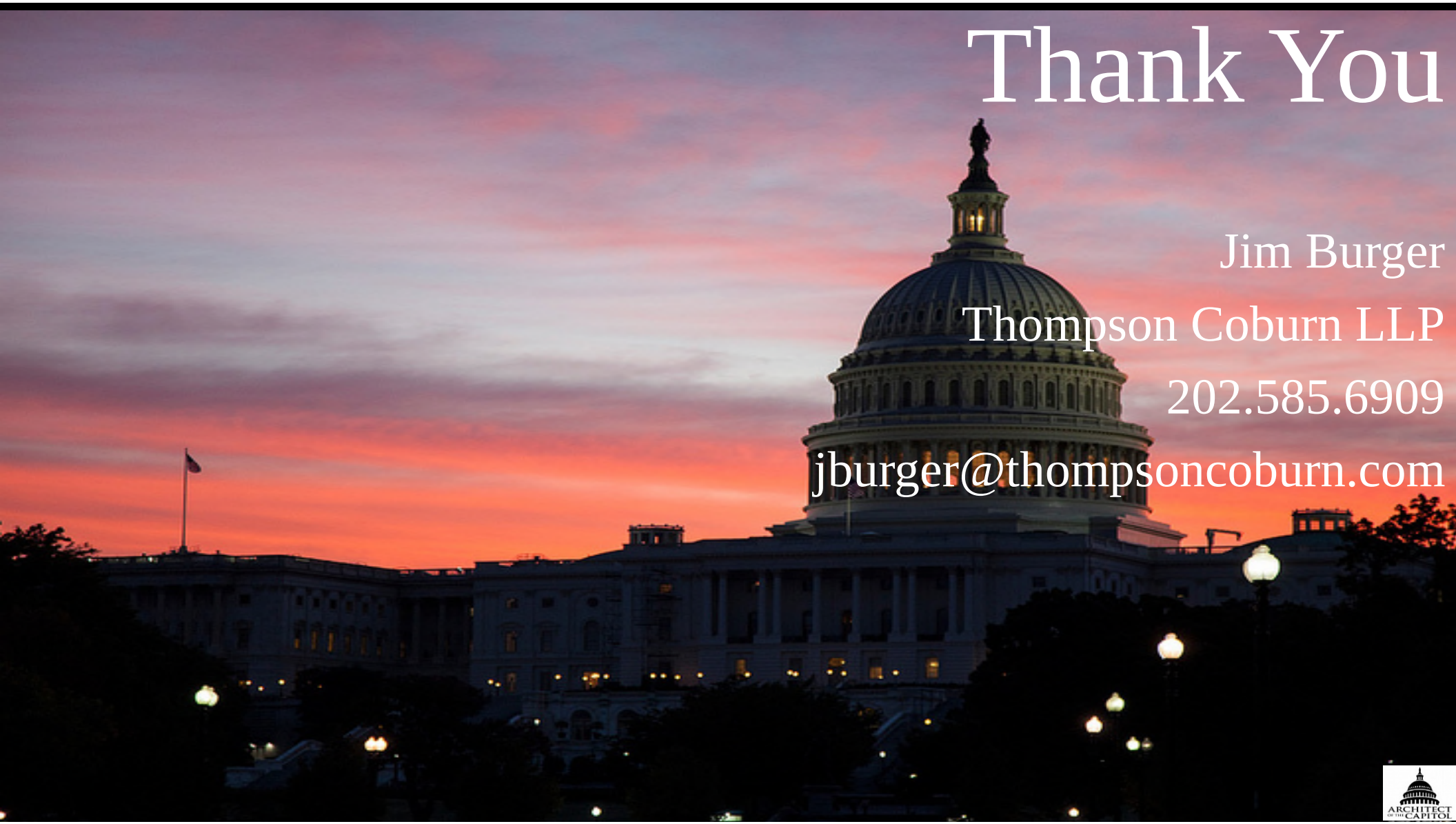
- Ministry issues paper for comment to identify “problems” with the Copyright Act
- Many issues: such as moral rights, performers’ rights, TPMs, fair use, why do we have copyright
- While proposes considering changing fair dealing to fair use says: “we need a much better understanding of the problems with the current regime before we consider alternative options”
- TPMs: law only prohibits trafficking in copy control circumvention device, providing a service or publishing information – access controls not protected

Japan Extends Copyright Protection

- Effective end of 2018, term changed from current life-plus 50 years to life plus 70
- Surprise – In original 12-member TPP U.S. insisted on this longer term
- But TPP 11 put the provision on hold
- Nevertheless, Japan went ahead with longer term saying, the longer term was a global norm

Israel Adopts Copyright Amendment

- New procedure: parties can obtain court blocking orders against ISPs
- ISP forced to take reasonable steps to limit/block access to a website whose content directly or indirectly amounts to copyright infringement
- Expands indirect infringement: any person easing or broadening public access to a protected work through infringement of copyright will constitute infringement
- Sites exempted using technological measure to prevent access, e.g., YouTube's Content ID
- Courts can force ISP to reveal subscriber information
- Right to Broadcast and making available = infringement



Thank You

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