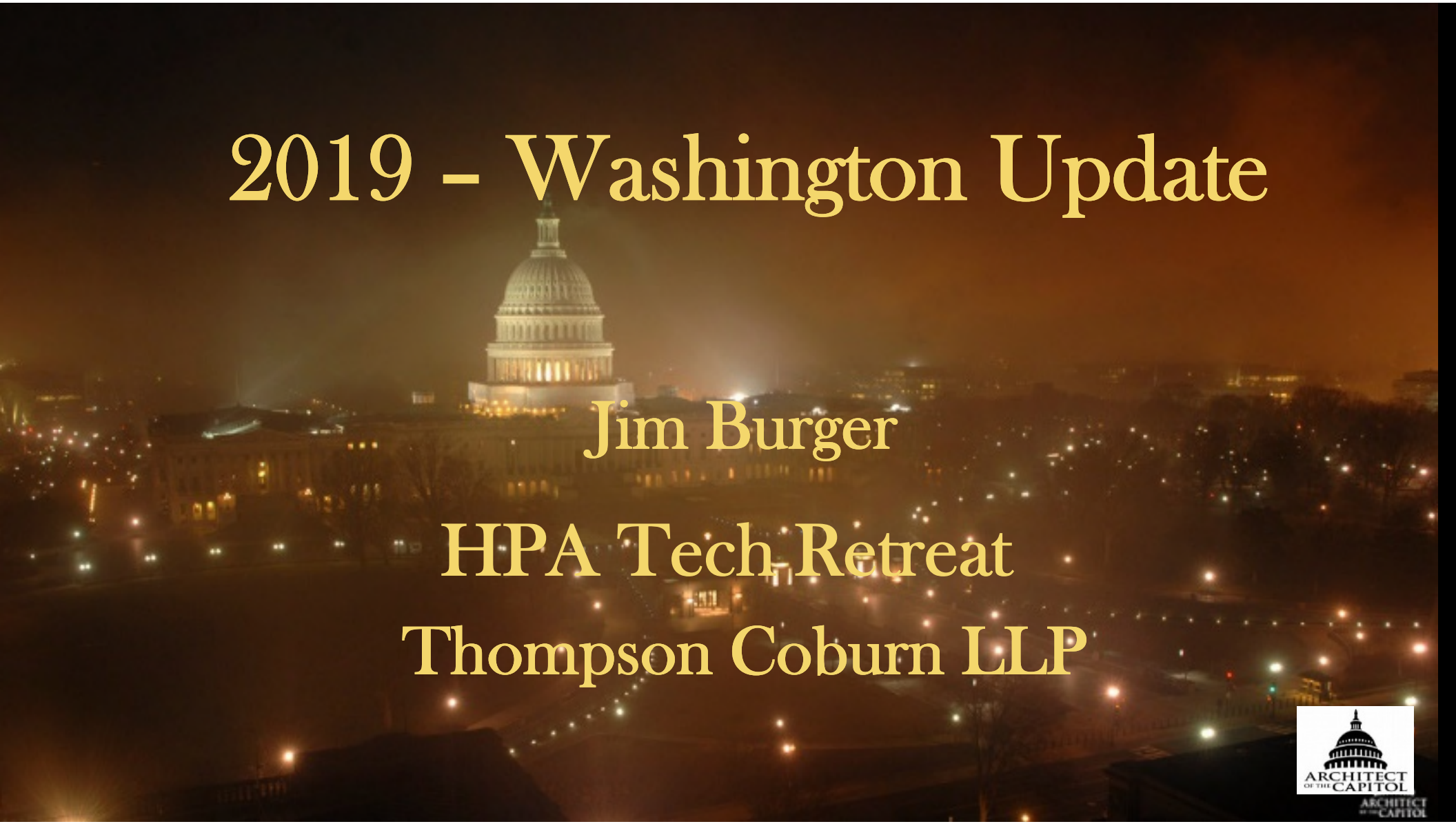


# 2019 – Washington Update

Jim Burger

HPA Tech Retreat

Thompson Coburn LLP

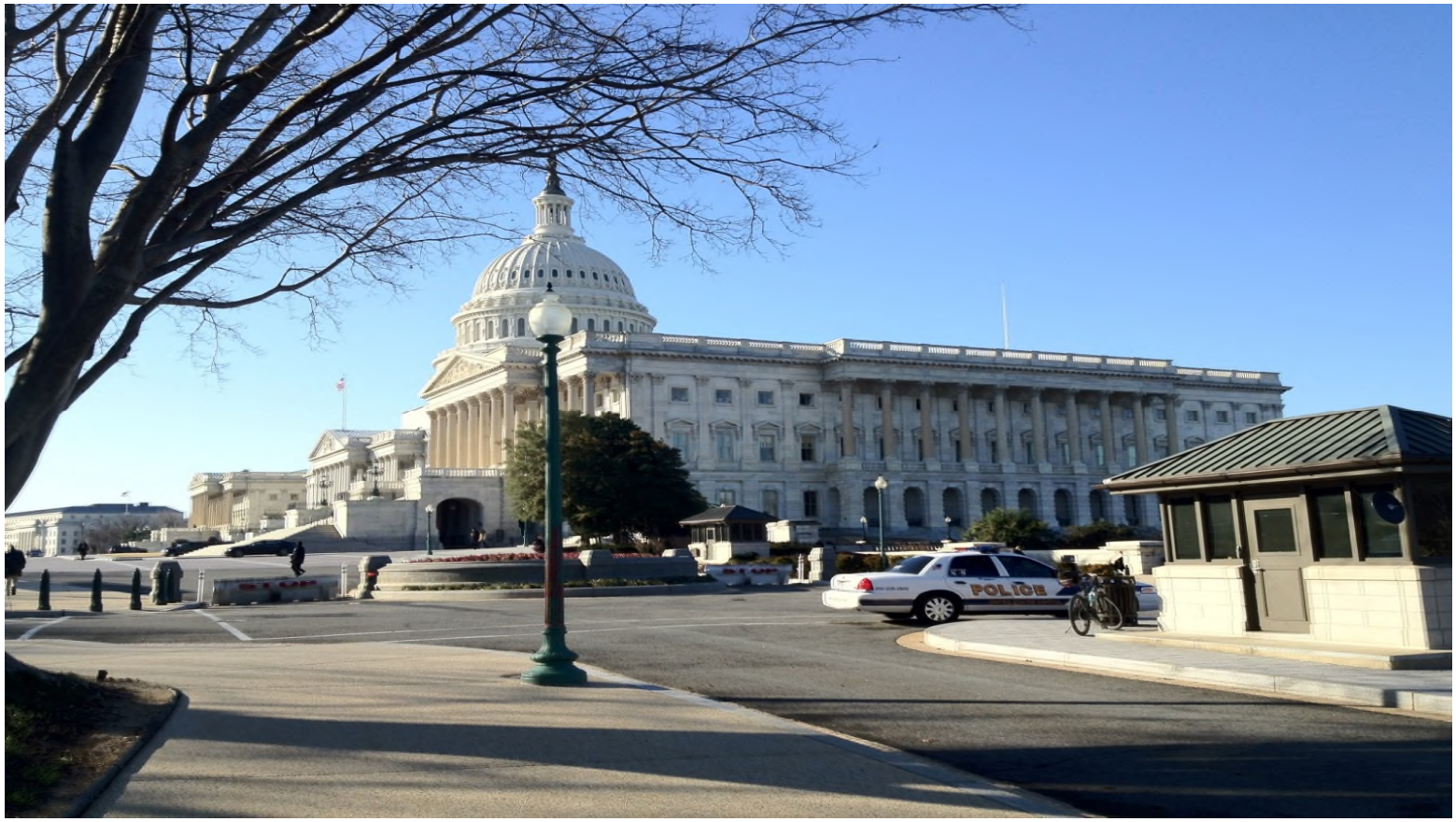
ARCHITECT OF THE CAPITOL

ARCHITECT OF THE CAPITOL

# Introduction

- Intellectual Property
  - The Congress
  - The Courts - Copyright
- Communications
  - Locast
  - Net Neutrality
- If time, questions; otherwise available at roundtable breakfast tomorrow

# Administrative – Legislative Developments



# Litigation

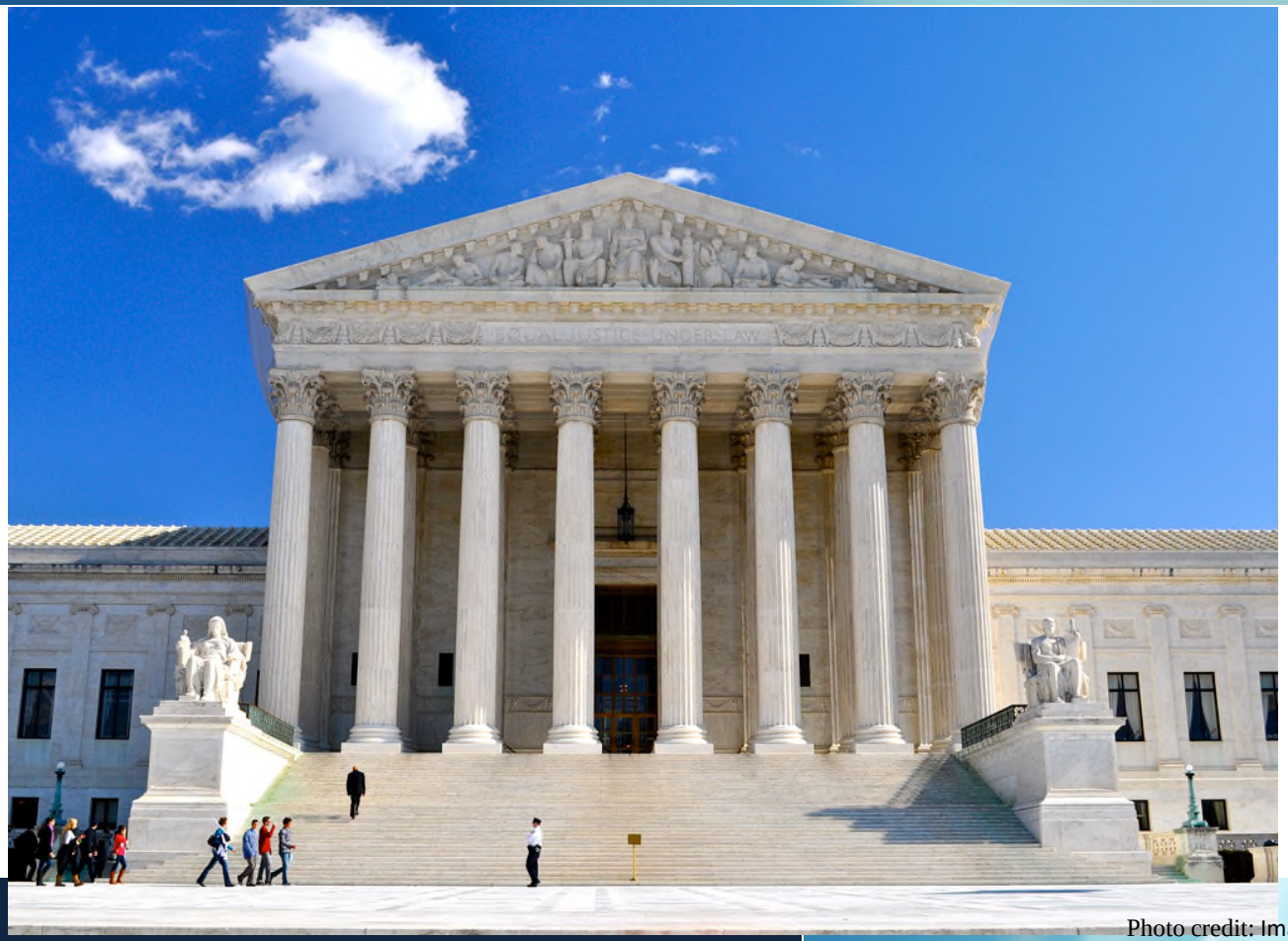


Photo credit: Image source: Flickr / Creative Commons

# Copyright 101

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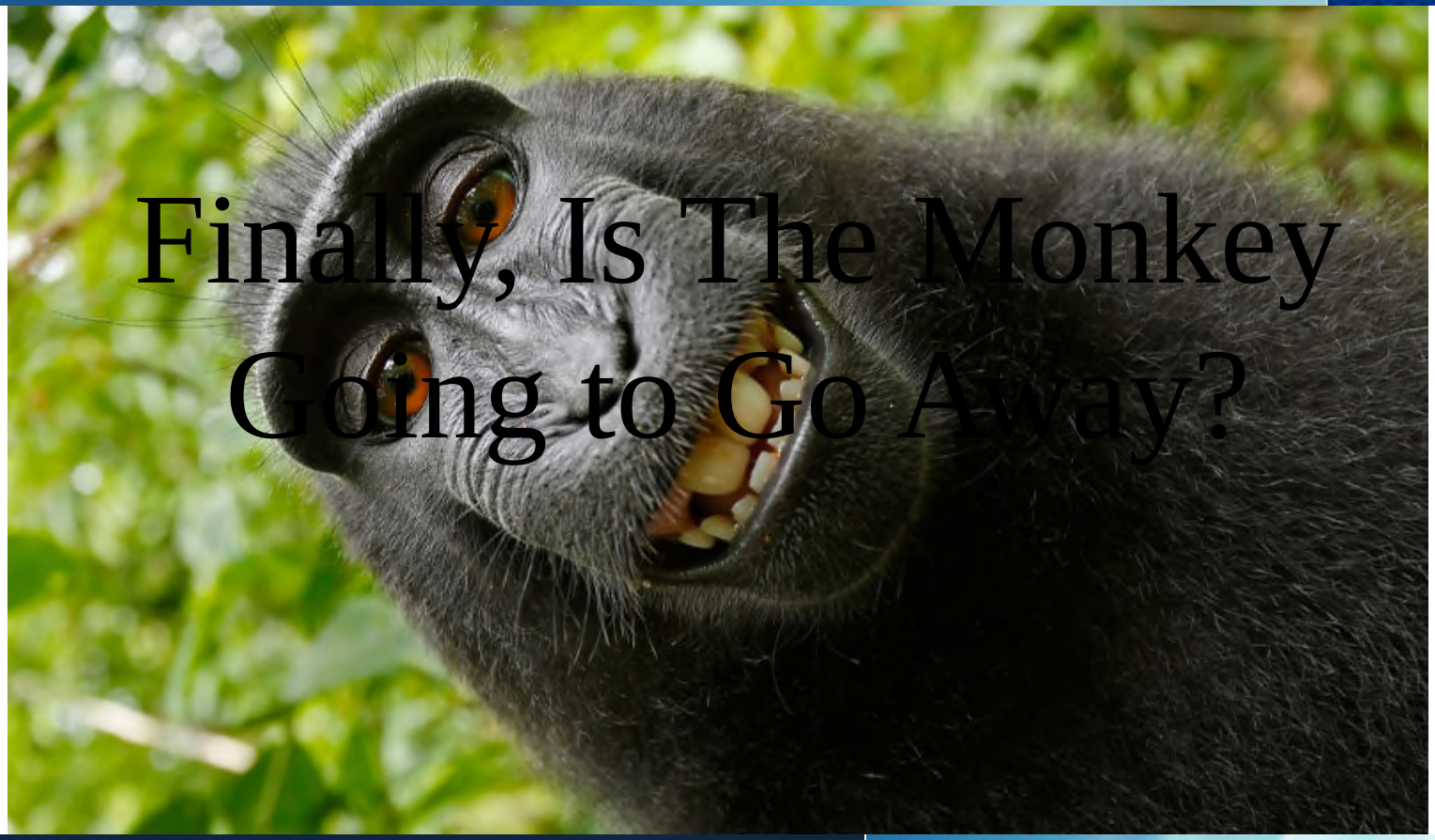
- Fix expression get bundle of exclusive rights:

  - Reproduction
  - Distribution
  - Derivative works – e.g., movies based on a book
  - Public Performance/Display
- Exceptions & Limitations: Fair use – four factor non-exclusive test
  - Nature & character of use (commercial vs. educational or transformative, e.g., parody)
  - Nature of the work – fiction vs. factual
  - Amount used
  - Effect of the use on the value of the work including potential market
- DMCA – anticircumvention provision

# *Oracle American, Inc. v. Google LLC* (Fed. Cir. 2018)

- Long-running $8.8 BN suit – Google copied 37 Java API declaring code packages (11,500 lines) to make it easier for Java programmers to code for Android
- Earlier, Federal Circuit found Oracle's API & SSO entitled to © protection, remanded to DC for fair use trial, Jury found fair use
- Federal Circuit reviewed facts under the fair use four factor test
  1. Held commercial use (free but ads)/not transformative (same purpose in Android)
  2. Jury could find functional characteristics but 9th Cir. precedent downplays factor
  3. Google copied far more than was necessary
  4. Android devastated Java SE mobile phone market
- Weighing four factors together: 1 and 4 for Oracle, 2 for Google, 3 neutral at best – not fair use as a matter of law
- Google Supreme Court Cert Petition

# Monkey Selfie



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

- PETA appeals District Court judgment no copyright
- After oral argument PETA and Slater "settled"
- Ask 9th Circuit to dismiss case and ***vacate*** DC decision
- Refused: Court – Isn't this about the monkey?
- Couldn't find anything in Copyright Act authorizing animals to sue (humans and legal entities only)
- Awarded Slater attorneys' fees
- Unidentified Judge asks for en banc hearing, but majority of 9th Circuit: "we're done"

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

- Reardon owned equipment/software providing facial capture services; output CGI images using actors expressions (e.g., Dan Stevens in the film to create animated Beast face)
- Reardon claimed film's copyright because his system created the images
- Judge found copyright may extend to output if the program "does the lion's share of the work" and user's role "marginal"
- Judge points to actors' creative input – not a marginal role
- Major Artificial Intelligence issue

# *Jean-Etienne De Becelievre v. Anastasia Musical LLC* (S.D.N.Y. 2018)

- Dispute about a play, film and now a musical – know the Anastasia story? Play's author sues musical's author
- Defendant's SJ motion, argued not substantial similarity
  - Historical facts and *scènes à faire* not protected
  - May use from prior work if no "*bodily appropriat[tion] of the expression of another*"
- In denying motion Judge found the works:
  - "share significant commonalities not traced to any documented historical record"
  - E.g., depictions of woman claiming to be Anastasia meeting with the Dowager Empress "entirely fictionalized" by play's authors

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

- Searching for a sympathetic judge, VidAngel suffers numerous defeats for its disc-sale-filter-stream-repurchase model
  - Lost preliminary injunction motion in District Court CD CA
  - Lost appeal to 9th Circuit
  - Filed for declaratory judgment in Utah FDC – no jurisdiction
  - Obtained bankruptcy court 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 file summary judgment motion in DC CA under DMCA and Copyright Act – damages claim: $950,000 to $152.5 million
- VidAngel claims fair use and seeks protection for "new model," but only $1.2 million cash
- Studios reject VidAngel's arguments

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

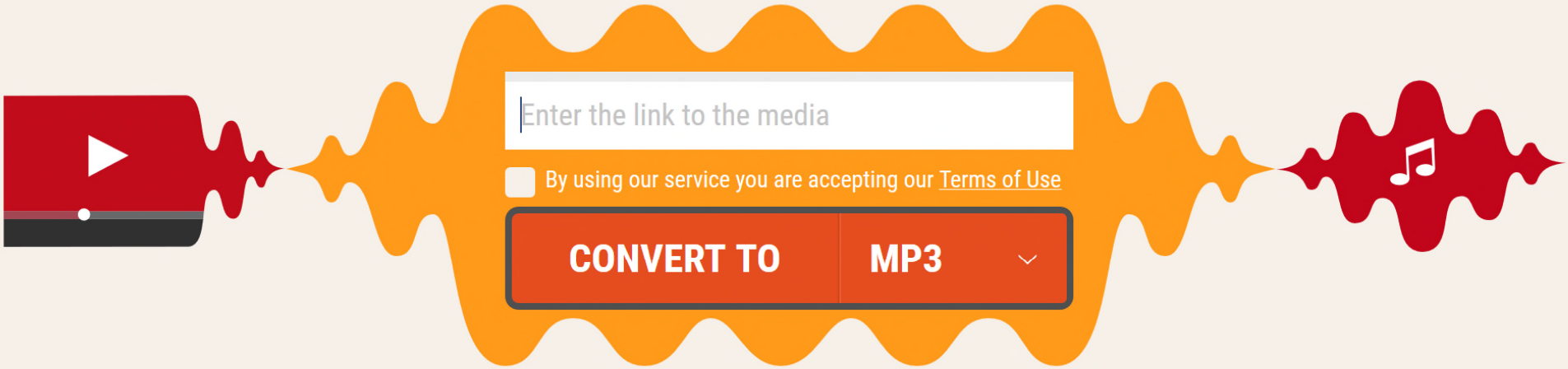
- Gayle sued HBO for infringement based on brief background depiction in *Vinyl* of an "art we all" graffiti tag he claimed as his work
- HBO defense – *de minimis* use, *i.e.*:
  - Copying occurred to such a trivial extent as to fall below quantitative threshold of substantial similarity
  - Three seconds,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

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

- Scheme to allow consumer "resale" of iTunes songs
  - Software checks to make sure legitimate iTunes file
  - Upload to ReDigi servers making 4K buffer copies – 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 claims protected by First Sale doctrine but provision says "that copy or phonorecord"
  - Leval: when user downloads from iTunes creates a new phonorecord – "fixed" in 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 and invitation to create new policy

# *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."




## How can I download video and audio from YouTube?

Our FREE YouTube converter makes converting streaming videos to MP3 online easier and faster than ever! Get the ultimate listening experience with our music downloader.

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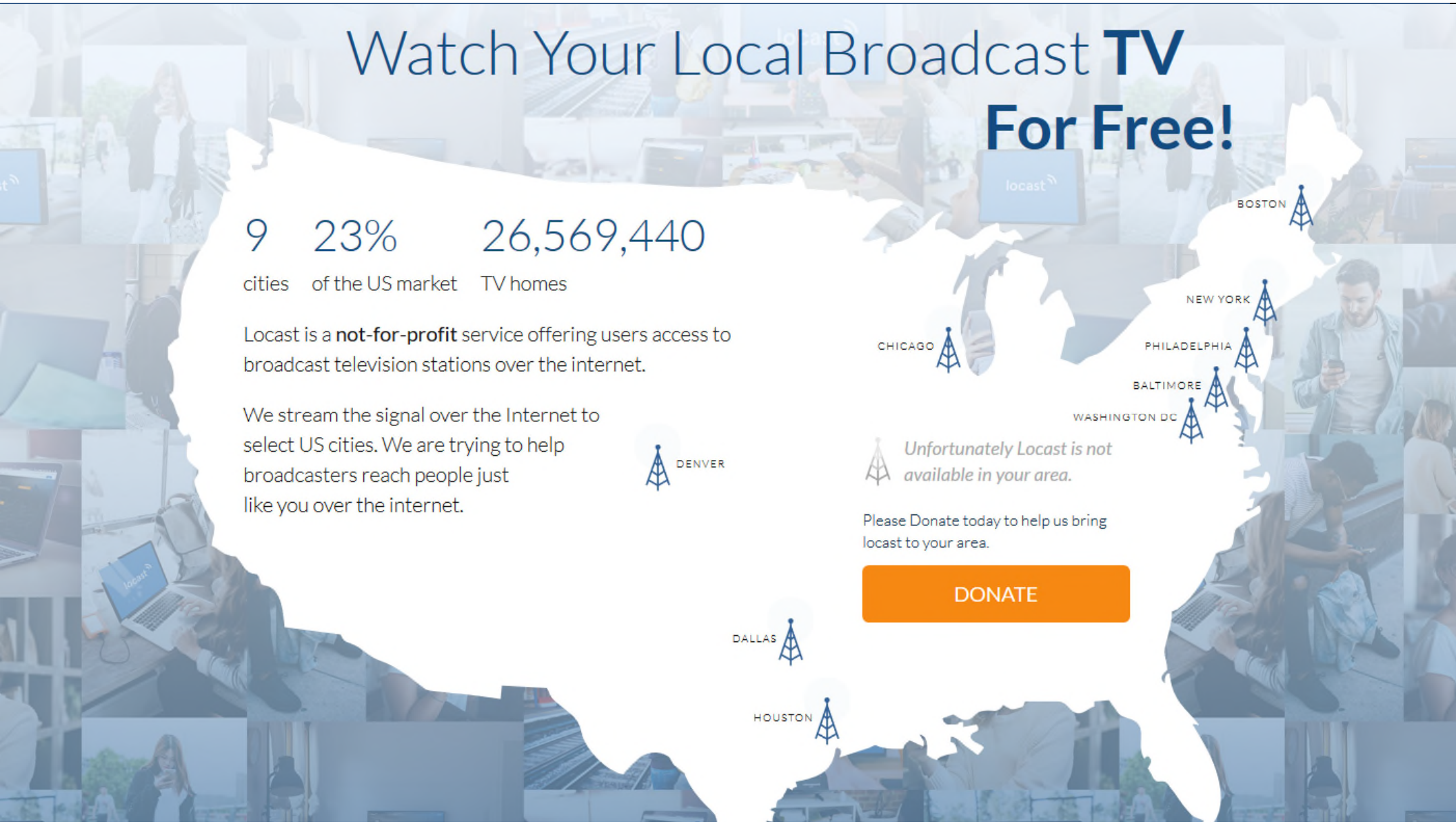
# *UMG Recordings, Inc. v. Kurbanov* (DC ED VA 2019)

- Rips content from streaming sites – 263 million visits/month
- Sued by labels, Kurbanov challenges jurisdiction
- Located in Russia, free to user, no sign-in, revenue from Ukrainian Ad broker
- Issue: whether jurisdiction 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

# *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 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

# Watch Your Local Broadcast **TV For Free!**




9 cities

23% of the US market

26,569,440 TV homes

Locast is a **not-for-profit** service offering users access to broadcast television stations over the internet.

We stream the signal over the Internet to select US cities. We are trying to help broadcasters reach people just like you over the internet.

*Unfortunately Locast is not available in your area.*

Please Donate today to help us bring locast to your area.

DONATE

# Locast

- Remember *Aereo*, *Aerokiller*, *ivi*?
  - Held publicly performing by "transmitting" TV programs to paying customers, but not a "cable system" under §111(c) entitled to a license
- Locast claims exempt under §111(a)(5)
  - "… not an infringement of copyright if a secondary transmission not made by a cable company but is made by a … nonprofit … without charge to recipients
- Cites Supreme Court, Copyright Office, and content industry saying Internet service is "transmission"
- Claims falls squarely in broad '76 Act exemption meant for repeaters and translators – but §111(a)(5) not so limited and "now known or later developed" device or process definition

# *EU Copyright Directive*

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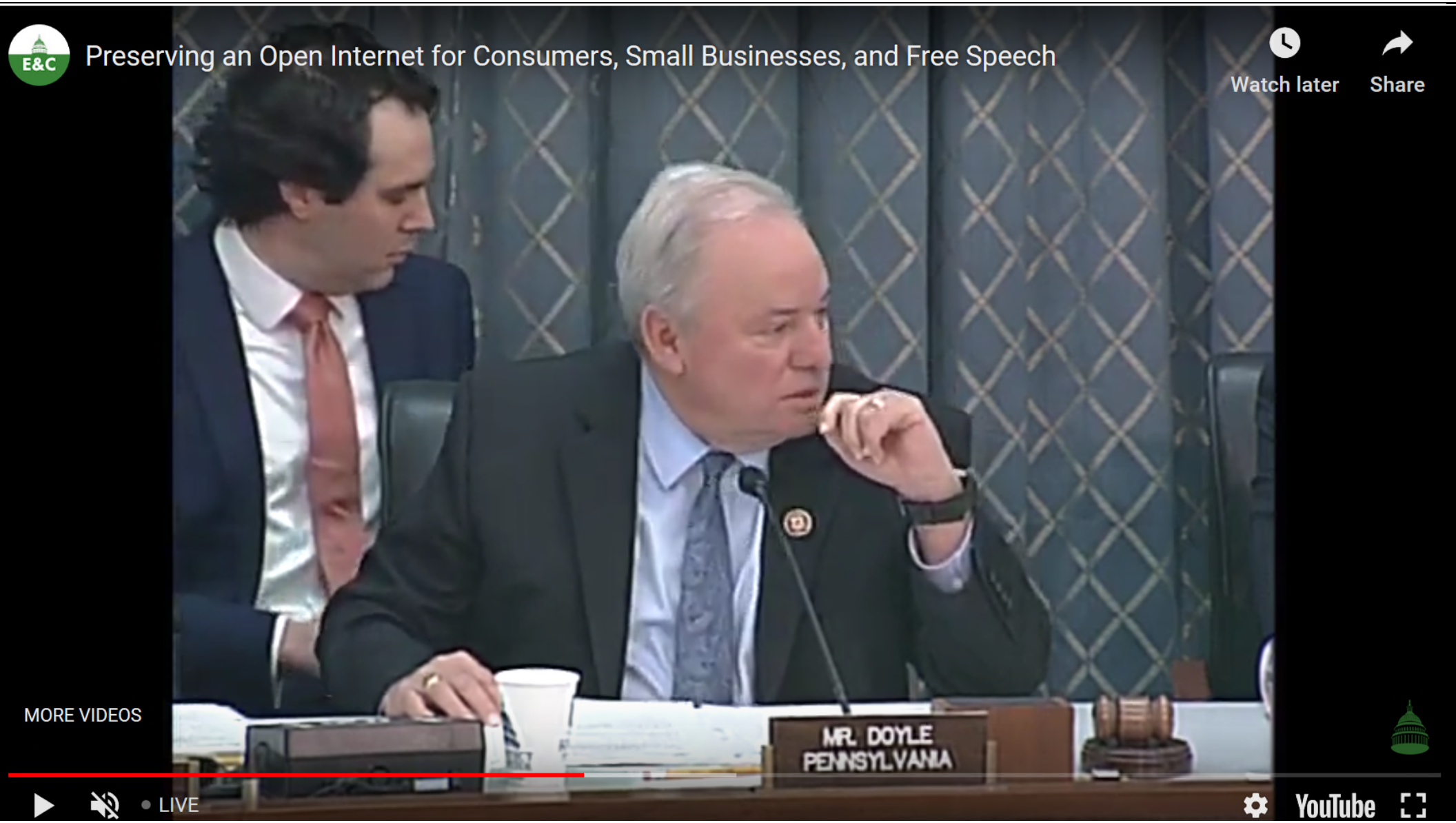
- The EU Council, Commission and Parliament Members (the "Trilogue") considering Copyright Directive Parliament passed with two controversial provisions
- Article 11 –websites to pay publishers fees for linking to news sites or to use snippets linking to their website, so-called link tax – see e.g., Spain and Germany's failed link license requirements
  - Critics: will shut down search in EU, publisher can block today
  - Proponents: should share revenue attributable to their content and doesn't forbid linking, just snippets
- 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 – final agreed text must be approved by Parliament
- Must finish before May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Preserving an Open Internet for Consumers, Small Businesses, and Free Speech
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# Net Neutrality: Goes To Court Again

- Last left Pai FCC overturns Obama-FCC net neutrality – finds Internet an "information service" – light touch regulation not "telecommunications service" – heavy regulation
  - Therefore, no prohibition on blocking, throttling or "fast lanes"
- Opponents sue FCC in DC Circuit to overturn Pai's decision
- Opponents: Internet is telecommunications (i.e., transmits, doesn't provide information)
- FCC: agency has authority to re-classify, statute ambiguous
- *BrandX* and *Chevron* deference may determine outcome
- Congress? Republicans drop three bills at hearing

Source: Level 3 Letter to FCC (May 5, 2014) in GN Docket 14-28


Digital Copyright
• User-Generated Content-UGC
– DMCA "notice & takedown"
– Duty to police?
• Viacom v. YouTube
Thank you
Questions at Roundtable Tomorrow

# Thank you

Jim Burger
Thompson Coburn LLP
Washington, DC
(202) 585-6909
jburger@thompsoncoburn.com