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## Drones: Emerging Legal and Regulatory Challenges in the Sky

### *Drones Have Become Increasingly Popular for Both Recreational and Commercial Uses*

Over the last several years, the growth in the use and sales of small unmanned aerial vehicles (“UAVs”)—more commonly referred to as drones—has been extraordinary. Improved technology, lowered costs, and wide availability have led to a boom in recreational sales as well as the possibility of myriad commercial and industrial applications. In the U.S. alone, approximately 2.4 million hobbyist drones were sold in 2016, more than double the estimated 1.1 million sold in 2015. The drone fleet in the U.S. today numbers many millions and forecasters expect the global drone market to reach over \$11 billion by 2020. The expected boom is not limited to hobbyists and recreational users; sales for commercial drones—excluding government uses—are predicted to reach over 800,000 by 2021, compared to just over 100,000 sold in 2016. Drones are relatively affordable, easy

to transport, and generally safe to pilot, factors which combine to give them mass-market appeal.

There are, however, risks to having thousands of small aircraft piloted by relatively untrained individuals flying through U.S. airspace day and night. Indeed, there have been reported incidents of property damage and interference with air traffic, including an in-air collision. According to a December 2015 report by the Office of the Chief Counsel of the Federal Aviation Administration (“FAA”), “[i]ncidents involving unauthorized and unsafe use of small, remote-controlled aircraft have risen dramatically.” FAA Office of the Chief Counsel (Dec. 17, 2015), “State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet” (“FAA UAS Fact Sheet”). In September 2017, an unmanned drone crashed into an Army Black Hawk helicopter flying over New York waters. See Fraser, Ian. “The Trippy, High-Speed World of Drone Racing.” *The New Yorker*, Feb. 5,

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## Quinn Emanuel Once Again Named to the “Fearsome Foursome”

*Law360* has once again named Quinn Emanuel as one of the four firms general counsel “view as the most fearsomely competent litigators and the ones they least wish to see on the other side of the table.” The 2018 “Fearsome Foursome” were selected based on BTI Consulting Group’s recent survey, which conducted over 350 phone interviews with General Counsel, Chief Legal Officers, and other legal decisionmakers at companies with at least \$1 billion in U.S. revenue. The publication recognizes firms that are admired by both clients and peers, yet “strike the utmost fear into the hearts” of adversaries. This is the fifth time Quinn Emanuel has been named to the “Fearsome Foursome.” [Q](#)

## Quinn Emanuel Has the Most Supreme Court Cases Argued by Women Among Top Law Firms Over the Past Ten Terms

The firm has been recognized for having the most oral arguments before the Supreme Court by female attorneys within the last ten terms. Only seven law firms had at least four oral arguments led by female attorneys, with Quinn Emanuel having the highest number of eight. The research done by *Law360* recognizes Quinn Emanuel for championing our female attorneys, with partner Kathleen M. Sullivan arguing the most cases before the Supreme Court at the firm. *Law360* also noted that, of the top ten women advocates before the high court in the last decade, Ms. Sullivan was the only one to make all her appearances while in private practice. Ms. Sullivan says that although male advocates have outnumbered women advocates before the Supreme Court to date, “there will be generational change and we’ll see it in the next few years.” See <https://bit.ly/2Sf0Xoi> to read the full article. [Q](#)

2018. The next month, a drone collided with the wing of a passenger plane landing in Canada, which is the first known collision between a commercial flight and a drone in North America. *Id.* In both these incidents, the manned aircraft landed safely and there were no reported injuries. Surprisingly, the drone pilots were not identified, arrested, or charged with any offences. Incidents like these highlight the subsequent legal challenges and the need for a regulatory scheme that recognizes not only the potential benefits drones have for numerous applications, but more importantly ensuring the safety (and privacy) of all individuals both in the air and on the ground.

### ***Regulating Airspace Has Traditionally Been the Domain of the Federal Government, but Drones Pose Challenges to That Existing Regulatory Scheme***

The recent rapid growth of drone use for both recreational and commercial purposes has left U.S. legislators and regulators playing catch up. The U.S. aviation regulatory system was largely intended to regulate traditional manned aircraft rather than unmanned low-flying drones. Because of this, existing regulations cannot be neatly applied to drone flights and pilots, which has caused issues for those who seek to embrace the full potential of drones.

Recreational and commercial drone operators in the U.S. are faced with a patchwork of federal and local regulations with which they need to comply, and these regulations are rapidly changing to coherently exist in the innovative environment. Traditionally, the federal government has had exclusive sovereignty over U.S. airspace pursuant to the Air Commerce Act of 1926. 49 U.S.C. § 40103. “Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a plane taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.” *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, R.J., concurring). The Supreme Court has referred to U.S. airspace as a “public highway.” *U.S. v. Causby*, 328 U.S. 256, 261 (1946), and even though traditional common law ownership of terrestrial land once extended vertically “to the periphery of the universe,” the Supreme Court has rejected that notion. The Court has found that the traditional common law principle “has no place in the

modern world” that includes air travel and other interstate commercial uses of airspace as part of day-to-day life. *Id.* at 261. Further, “Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.” *Id.*

The basic framework for U.S. airspace regulation was established in the first half of the 20th century, long before lawmakers or judges could have contemplated an influx of low-flying, quiet, unmanned aircraft crisscrossing the nation. The Supreme Court in *Causby*, (when considering the extent to which persons owned the airspace above their properties), based its decision largely on the disturbing impact that aircraft noise and light had on the operation of a chicken farm situated near an airport. *Causby*, 328 U.S. at 259. The Court recognized that “if [a] landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise, buildings could not be erected, trees could not be planted, and even fences could not be run.” *Id.* at 264. Accordingly, in considering the case of Mr. Causby’s farm, the Supreme Court held that “airspace, apart from the immediate reaches above the land, is part of the public domain” but that a landowner controlled, up to a certain limit, his or her immediate airspace. *Id.* at 266. As a consequence of this decision, the federal government historically treated much of the country’s airspace as an instrumentality of interstate commerce, with a band of low-level airspace—below 1,200 feet—partially exempt from federal law under certain circumstances. See Takahashi, Timothy T. *The Rise of the Drones - the Need for Comprehensive Federal Regulation of Robot Aircraft* (2015) 8 Alb. Gov’t L. Rev. 63. All aircraft operations in that federally-regulated airspace required a certified and registered aircraft, a licensed pilot, and operational approval. See Lightfoot, Thaddeus R. *Bring on the Drones: Legal and Regulatory Issues in Using Unmanned Aircraft Systems*, Nat. Resources & Env’t, Spring 2018, at 41. These requirements—until recently—applied equally to manned and unmanned aircraft (*i.e.*, drones) regardless of the size or altitude of the drone.

Drones, of course operate very differently from traditional aircraft; they fly in relative silence, they are small, and can be nearly invisible from the ground to those not otherwise aware of their presence. In other words, a drone would likely not disturb Mr. Causby’s chicken farm in the same way as a commercial plane would. In February 2012, President Obama signed the FAA Modernization and Reform Act (FAA Act), which was passed to incorporate this new class of aircraft (the drone) to existing law. This Act provided some clarity for drone pilots as it treated them differently to pilots of other aircraft. For recreational drone pilots, Section 336 of the FAA Act provided that “the Federal Aviation Administration may

not promulgate any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft” as long as “the aircraft is flown strictly for hobby or recreational use.” FAA Modernization and Reform Act of 2012, PL 112-95, February 14, 2012, 126 Stat 11. On the other hand, commercial drone pilots, were subject to complex authorization requirements under the FAA Act, with the FAA taking a broad view as to what constituted “commercial flying.” See Lightfoot, Thaddeus R. *Bring on the Drones: Legal and Regulatory Issues in Using Unmanned Aircraft Systems*, Nat. Resources & Env’t, Spring 2018. It is known that some drone operators simply chose to ignore these new requirements, presumably under the assumption that the FAA would not use their authority under the FAA Act to impose sanctions. This strategy was certainly successful for many pilots, however others ran afoul of the FAA Act, such as an aerial photography firm that allegedly flew over 60 flights without the proper authorization and was subject to a potential \$1.9 million fine (though the case ultimately settled for approximately \$200,000). *Id.*

In August 2016, the FAA promulgated additional regulations relating to the commercial use of small drones. See 17 C.F.R. 107 (“Small Unmanned Aircraft Systems”). These regulations apply to “unmanned aircraft weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft.” 17 C.F.R. 107. Section 107 of the regulations provide a framework for commercial use of drones that is less complex than what had previously been set forth under the 2012 FAA Act. Under Section 107, a new type of “pilot” is established known as a “remote pilot in command” authorized to operate drones for commercial purposes, who must pass certain FAA-mandated certification requirements. A certified remote pilot in command may pilot a drone for commercial purposes according to certain requirements as specified in section 107, such as time of day, line of sight, and atmospheric conditions. Importantly, Section 107 also provides the FAA with authority to waive some of these restrictions upon application to the FAA. After obtaining such a waiver, a remote pilot in command may then be authorized to, for example, fly a drone at night or beyond his visual sightline. To date, the FAA has granted almost 2,000 of these “Section 107” waivers. See Federal Aviation Administration, “Part 107 Waivers Granted,” *retrieved from* <https://bit.ly/2p4iFxy>.

Notably, the 2016 FAA regulations required universal registration of drones, for both commercial and recreational users. The FAA explicitly stated its view that the federal government had exclusive authority over the registration and regulation of unmanned drones: “No state or local UAS registration law may relieve a UAS owner or operator from complying with the Federal UAS registration requirements. Because Federal registration

is the exclusive means for registering UAS for purposes of operating an aircraft in navigable airspace, no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval.” See FAA UAS Fact Sheet. A federal court later struck down the registration requirement, *see Taylor v. Huerta*, 856 F.3d 1089, 1092 (D.C. Cir. 2017), but it was reinstated by the 2018 National Defense Authorization Act. See National Defense Authorization Act, 2018, PL 115-91, December 12, 2017, 131 Stat. 1283. As the law currently stands, all drones must be registered with the FAA.

Federal law regarding drones continues to be in flux, and some legislators appear to be focused on drones’ potential dangers rather than their benefits. In June of this year, the “Preventing Emerging Threats Act” was introduced in the Senate in order to “assist the Department of Homeland Security in preventing emerging threats from unmanned aircraft and vehicles.” Preventing Emerging Threats Act of 2018, S.2836, *retrieved from* <https://bit.ly/2p3ks64>. This proposed legislation, if passed, would vest the Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”) with authority to monitor drones using a variety of methods and to “[d]etect, identify, monitor, and track the unmanned aircraft system or unmanned aircraft, without prior consent, including by means of intercept or other access of a wire communication, an oral communication, or an electronic communication used to control the unmanned aircraft system or unmanned aircraft.” *Id.* The DHS and DOJ would also be authorized to seize, confiscate, or otherwise take control of any unmanned aircraft. *Id.* According to the DHS’s Deputy General Counsel, this proposed legislation was based on perceived security threats from drones: “Generally, examples of UAS-related threats include recklessly flying UAS near critical infrastructure, intentionally conducting surveillance and counter surveillance of law enforcement, smuggling contraband, or facilitating kinetic attacks on stationary or mobile, and high consequence targets . . . . We have already seen transnational criminal actors adopt UAS technology to move drugs across the border. Terrorist groups overseas use drones to conduct attacks on the battlefield and continue to plot to use them in terrorist attacks elsewhere. This is a very serious, looming threat that we are currently unprepared to confront.” See United States. Cong. Senate Committee on Homeland Security and Government Affairs, *Hearing on S. 2836, the Preventing Emerging Threats Act of 2018: Countering Malicious Drones*, June 6, 2018 (statement of David Glawe, Under Secretary of Intelligence and Analysis, U.S. Dept. of Homeland Security, and Hayley Chang, Deputy General Counsel, U.S. Department of Homeland Security).

In contrast others in the Federal Government consider

that drone regulation is better left to state and local governments. This viewpoint is reflected by the 2017 “Drone Federalism Act” introduced by Senators Feinstein, Lee, Cotton and Blumenthal to “preserve state, local, and tribal authorities and private property rights with respect to unmanned aircraft systems.” Drone Federalism Act of 2017, S. 1272, *retrieved from* <https://bit.ly/2x6N1Uq>. This proposed legislation would authorize local governments to regulate drone activity within 200 feet above a property, with the FAA still retaining authority over altitudes greater than 200 feet. *Id.* Even under the existing laws, the FAA’s Office of the Chief Counsel has advised that local government regulations of drone activity may avoid federal preemption to the extent such laws cover areas “traditionally related to state and local police power . . . including land use, zoning, privacy, trespass, and law enforcement operations.” FAA UAS Fact Sheet. For example, local laws prohibiting attaching firearms or other weapons to drones are likely to fall outside the scope of federal preemption. *Id.* With multiple pieces of federal legislation currently being considered—not all of which are consistent with each other—drone operators are unlikely to have clarity (in the short term) about the precise federal regulations they are supposed to follow.

### ***State and Local Governments Have Also Waded into Drone Regulation, Creating a Patchwork of Laws Across the Country***

While federal government regulation of drones to date has focused on safety concerns relating to drones entering federal airspace, state and local governments have now also stepped into the fray, particularly in regards to the threat drones may pose to individual privacy. Most drones are mounted with cameras with the ability to record high-definition video of individuals who may be on their own private property or may be completely unaware they are being recorded. Anyone who purchases an off-the-shelf drone could easily hover it over a neighbor’s backyard or peer into the window of a skyscraper. Largely in response to such privacy concerns, at least 41 states have enacted laws addressing the flight and operation of unmanned drones and to protect individuals from any breaches of privacy. *See* National Conference of State Legislators, “Current Unmanned Aircraft State Law Landscape” (Feb. 1, 2018), *retrieved from* <https://bit.ly/2xfzjhg>.

Some major cities—such as Los Angeles and Chicago—have implemented their own laws. *See* Widener, Michael N., Local Regulating of Drone Activity in Lower Airspace (2016) 22 B.U. J. Sci. & Tech. L. 239. The majority of these laws provide for civil penalties for recording people via drone without their knowledge or consent. *See* Farber, Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts As Applied to Drones 33 Ga. St. U. L. Rev. 359, 409

(2017).


Florida, for example has passed a law creating a cause of action against anyone who, without prior consent, uses a drone to capture images of persons on private property, if a reasonable expectation of privacy exists. *Id.* Under this law, “a person is presumed to have a *reasonable expectation of privacy* on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.” *See* Fla. Stat. Ann. § 934.50. California law bars the “invasion of privacy” that occurs when a “person knowingly enters onto the land or into the airspace above the land of another person without permission or otherwise commits a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person.” *See* Cal. Civ. Code § 1708.8. A Nevada law that took effect in October 2015 states that “a person who owns or lawfully occupies real property in this State may bring an action for trespass against the owner or operator of an unmanned aerial vehicle that is flown at a height of less than 250 feet over the property” under certain particularized circumstances. Nev. Rev. Stat. Ann. § 493.103.

These new state and local laws are necessary because traditional tort law is not especially well-suited to drones or their potential for invasions of privacy. Every U.S. jurisdiction recognizes the tort of trespass, which arises where a person “intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.” *See* Restatement (Second) of Torts § 158 (1965); Farber, Hillary B., Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts As Applied to Drones (2017) 33 Ga. St. U. L. Rev. 359, 409. Yet when aircraft are involved—and drones in particular—the issue of trespass becomes less clear, as drones are not touching another’s property and are often well above a property’s immediate airspace. The tort of nuisance includes any conduct—not just trespass—that interferes with a person’s use and enjoyment of their property. Nuisance claims often arise where a defendant has done something that directly impacts neighboring properties, such as creating smells, sounds, or vibrations. conversely drones can fly over and potentially record people on their property without those residents even knowing a drone is nearby. A nuisance claim may not be well suited to the presence of a nearby drone. *Id.*

### ***What Drone Operators Can Expect Moving Forward***

The precise contours of drone regulation are still a work

in progress, with the federal government moving slowly and state and local governments filling in the gaps. This regulatory uncertainty will likely continue for at least several more years, as decades of airspace regulation is modified to address this new technology. Ultimately, it seems likely that federal regulation will trump local drone regulations (absent passage of the aforementioned Drone Federalism Act). Federal courts have already begun to invalidate state laws that encroach on U.S. government regulations. In 2016, the city of Newton, MA passed an ordinance requiring, among other things, that all drone owners register their drone with the city. See *Singer v. City of Newton*, 284 F. Supp. 3d 125, 127 (D. Mass. 2017). The ordinance was challenged by a resident of Newton who was also an FAA-certified unmanned aircraft pilot

who owned and operated multiple drones in Newton. *Id.* The resident argued that Newton's ordinance was preempted by federal law because it attempted to regulate an area of aviation that was an almost exclusively federal law. *Id.* at 128. The District Court agreed, holding that "[t]he Ordinance limits the methods of piloting a drone beyond that which the FAA has already designated . . . Intervening in the FAA's careful regulation of aircraft safety cannot stand." *Id.* at 133. For drone operators, the pace of progress by federal regulators may be frustratingly slow, but the benefit of having a cohesive regulatory scheme going forward likely outweighs the risk of having various states and localities take the lead, resulting in variable and inconsistent rules that would be burdensome for any interstate commercial operation to comply with. 

## NOTED WITH INTEREST

### U.S. Supreme Court Holds That Courts Should Carefully Consider, but Not Uncritically Defer to, Foreign Governments' Statements on Issues of Foreign Law

On June 14, 2018, the Supreme Court issued a unanimous opinion in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.*, rejecting the notion that U.S. courts should uncritically accept a foreign government's assertion about what is required under its laws. 585 U.S. \_\_\_, 138 S. Ct. 1865 (2018). The decision will likely have a substantial impact in lawsuits implicating the treatment of a foreign government's characterization of its own laws under Federal Rule of Civil Procedure 44.1.

#### Background

In 2005, U.S.-based purchasers of vitamin C initiated class-action litigation against four Chinese corporations that manufacture and export vitamin C for allegedly conspiring in violation of one of the principal federal antitrust laws, Section 1 of the Sherman Act. Plaintiffs alleged that, starting in 2001, the defendants and China Chamber of Commerce of Medicines & Health Products Importers & Exporters ("Chamber") established an "illegal cartel" to fix the prices of vitamin C exported to the United States and around the world, in particular by implementing a policy of limited production with the intent of creating a vitamin C shortage in order to increase prices. Defendants moved to dismiss the action—under the act of state doctrine, the doctrine of foreign sovereign compulsion, and/or principles of international comity—contending that they had acted pursuant to Chinese regulations issued by Ministry of Commerce of the People's Republic of China (the "Ministry") that controlled vitamin C export pricing.

Notably marking the *first* time any entity of the

Chinese government had appeared *amicus curiae* before any U.S. court, the Ministry itself filed a brief in support of the defendants' motion to dismiss. The Ministry asserted that the Chamber was acting as an instrumentality of the Chinese government and was required to implement the Ministry's rules and regulations with respect to vitamin C. In opposition, the U.S. purchasers introduced evidence indicating that the price fixing alleged was not mandated by Chinese law, but rather voluntary. The District Court denied the motion, finding that the record was "too ambiguous" to determine the voluntariness of the defendants' actions.

After discovery, the defendants moved for summary judgment on the same three defenses originally asserted in their motion to dismiss. The Ministry again submitted a statement in support of defendants' summary judgment motion and, in response, the plaintiffs cited further evidence they contended demonstrated that Chinese law did not require the defendants to fix the price or quantity of vitamin C export, such as evidence that China had previously represented to the World Trade Organization that it had given up administration of vitamin C. The District Court denied summary judgment and the case proceeded to trial. At trial, the jury found for plaintiffs, awarding \$147 million in treble damages and enjoining defendants from further antitrust violations.

On appeal, the Court of Appeals for the Second Circuit reversed. The Second Circuit determined that the question at issue was whether or not it was impossible for the defendants to comply with both Chinese and U.S. law,

and thus whether they had been confronted with “a true conflict.” *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 186 (2d Cir. 2016). The Second Circuit found that the answer to this question “hinges on the amount of deference that we extend to the Chinese Government’s explanation of its own laws,” under Federal Rule of Civil Procedure 44.1—which provides, in relevant part: “In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.”

Weighing in on a circuit split between different U.S. Courts of Appeals regarding the level of deference owed by U.S. courts to a foreign government’s official statement characterizing its own laws, the Second Circuit determined that Federal Rule of Civil Procedure 44.1 had not “softened” the level of deference owed to official interpretations of foreign law, and held that “when a foreign government ... directly participates in U.S. court proceedings ... regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements.” *In re Vitamin C Antitrust Litig.*, 837 F.3d at 189. Plaintiffs then filed a petition for a writ of certiorari seeking the Supreme Court’s review on appeal to resolve the circuit split, which was granted.

## *The Supreme Court’s Opinion*

The Supreme Court vacated the judgment of the Second Circuit and remanded the case for renewed consideration. In so ruling, the Supreme Court held that a “federal court should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statements.”

In reaching this decision, the Court noted that at common law, “the content of foreign law relevant to a dispute was treated ‘as a question of fact,’” but that Federal Rule of Civil Procedure 44.1 had “fundamentally changed the mode of determining foreign law in federal courts,” as the Rule expressly specifies that determinations of foreign law “must be treated as a ruling on a question of law” rather than as a finding of fact.

The Court also clarified that although “[i]n the spirit of ‘international comity,’ a federal court should carefully consider a foreign state’s views about the meaning of its own laws,” “a federal court is neither bound to adopt the foreign government’s characterization nor required to ignore other relevant materials.” Instead, U.S. courts should evaluate certain factors, including “the statement’s clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the

statement; and the statement’s consistency with the foreign government’s past positions.” The Court took no position on the interpretation of Chinese law at issue, but indicated that “there may be cause for caution” when “a foreign government makes conflicting statements” about what the law requires (as the vitamin C plaintiffs had contended), or “as here, offers an account in the context of litigation.”

## *Implications Going Forward*

The Supreme Court’s decision and holding that U.S. courts are not “bound” to accept a foreign government’s characterization of its own laws is significant for at least two reasons.

First, the reversal and remanding of the Second Circuit’s decision handed the class action plaintiffs an important victory, breathing new life into the \$147 million and injunction awarded by the jury, and underscoring the large impact that foreign law disputes can have on major litigation. With respect to the antitrust laws, the class action plaintiffs had argued that a contrary result would likely result in foreign governments “manufactur[ing]” statements to immunize its nationals from the U.S. antitrust laws. Although the Supreme Court did not adopt this argument, the concern potentially animated its decision.

To be clear, the impact of the Supreme Court’s opinion will extend beyond antitrust actions to a plethora of other cases where a foreign government’s views on its own laws and regulations may be of any material import. By way of past examples, in *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), the Seventh Circuit considered and adopted the French government’s interpretation of a French statute concerning recovery for the costs of oil spills after a ship crashed off the coast of France and the French government, among others, filed suit in the United States. And in *D’Angelo v. Petroleos Mexicanos*, when confronted with the scope and effect of an expropriation decree affecting the interests of a dissolved Delaware corporation in Mexican oil wells, the court determined that an official declaration from the attorney general of Mexico on the issue “must be accepted by this Court as an ‘official declaration’ by the Mexican government” and “requires this Court to abstain from further inquiry into [the expropriation decree’s] scope and effect.” 422 F. Supp. 1280, 1284-85 (D. Del. 1976), *aff’d*, 564 F.2d 89 (3d Cir. 1977).

Second, given the Supreme Court’s rejection of a deferential approach to the assessment of a foreign government’s characterization of its own laws, the issue of what foreign law may or may not require will likely become a more contentious issue in U.S. litigation going forward, and one that litigants need to assess how to approach at the outset of litigation. Rejecting a bright-line standard,

the Supreme Court determined that “no single formula or rule will fit all cases” and that the “appropriate weight” to a foreign government’s characterization “will depend on the circumstances” in each case the issue is raised. Moreover, the “[r]elevant considerations” that the Supreme Court stated that U.S. courts should consider when evaluating a foreign government’s proffered views of its own laws are far from clear, and include of a number of undefined terms,

such as the foreign government statement’s “support” and the “transparency” of the foreign legal system. How lower courts utilize the Supreme Court’s instructions remains to be seen, but it is reasonable to expect that, given the flexible standard announced by the Supreme Court, new splits in the jurisprudence on this issue among different courts will develop over time. [Q](#)

## PRACTICE AREA NOTES

### Trademark & Copyright Litigation Update

***Why Congress May Reset and Clarify the Standard for Litigating Preliminary Injunction Motions in Trademark Cases.*** A little over a decade ago, the Supreme Court issued two landmark opinions (*eBay, Inc. v. MercExchange, LLC* and *Winter v. Natural Resources Defense Council*) concerning the issue of irreparable harm in preliminary injunction proceedings. In *eBay*, the Supreme Court held that the requirement that a plaintiff must establish irreparable injury in seeking a permanent injunction applies in the patent context. In *Winter*, an environmental case concerning whether the military’s use of high decibel sonar levels may have a deafening effect on whales, the Supreme Court reversed a preliminary injunction because it was issued on the basis of a mere possibility of irreparable harm, which the Court found was too lenient of a standard.

For the past ten years, federal courts have interpreted these two decisions as having eliminated the longstanding presumption that a trademark owner seeking a preliminary injunction established irreparable harm so long as it could prove it was likely to succeed on the merits of its claim. Trademark owners have since faced the challenge of proving irreparable harm at the outset of the litigation, which is often difficult in the trademark context because typical harm such as injury to goodwill and reputation may not manifest in the form of direct evidence. Accordingly, on September 4, 2018, various intellectual property and trademark law associations sent a joint letter to Congress urging it to amend the Lanham Act in order to reestablish and codify the rebuttable presumption of irreparable harm. See <https://bit.ly/2TO8CLe>.

The driving impetus in favor of the rebuttable presumption is the notion that unless the alleged infringer proffers a sufficiently strong justification, an alleged infringer should not be allowed to continue the purported infringement until trial if a trademark owner is able to prove at the preliminary injunction stage that it is likely to prevail on the merits of its claim. The rebuttable presumption thereby stands in as an equitable substitute for proving

actual damages given the difficulty in doing so, particularly at the early stage of a trademark dispute.

On the other side of the ledger, the rationale against the rebuttable presumption is that a trademark owner could successfully prevent an alleged infringer from competing in the market until trial, even in the absence of any articulable harm. While the grant of a preliminary injunction may cause severe economic damages to the alleged infringer and possibly even put it out of business, the trademark owner might not ever be able to identify any direct evidence of harm.

In the absence of a presumption, recent court decisions on the irreparable harm issue highlight the fine line between those facts and circumstances warranting a finding of irreparable harm, and those rejecting such a finding.

For instance, a court found that evidence of customer complaints expressing confusion and detailing the poor quality of the trademark owner’s purported products, which were actually the alleged infringer’s products, was sufficient to establish irreparable harm. *Hand & Nail Harmony, Inc. v. ABC Nail & Spa Prods.*, 2016 WL 3545524 (C.D. Cal. 2016). Critically, the evidence that the court considered was relegated solely to statements within two declarations proffered by the trademark owner’s Vice President, demonstrating that courts may rely (and have) upon evidence that perhaps would not otherwise be considered admissible in contexts outside of a preliminary injunction proceeding. See, e.g., *Herb Reed Enterprises, LLC v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239 (9th Cir. 2013). (“Due to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings.”)

As another example, a court found that evidence that a trademark owner spent over \$11 million on advertising, marketing, and promotion using its logo was probative of irreparable harm where the allegedly infringing logo was similar and the target audiences of the two logos-at-issue were identical. *Nat’l Fin. Partners Corp. v. Paycom Software, Inc.*, 2015 WL 3633987 (N.D. Ill. 2015).

# PRACTICE AREA NOTES (cont.)

In contrast, the Ninth Circuit found in a seminal decision that an email from a potential customer complaining that the customer had wanted to book the trademark owner's band rather than the alleged infringer's band evidenced customer confusion, but did not constitute evidence of irreparable harm. *Herb Reed*, 736 F.3d 1239.

Likewise, a court found that evidence that a trademark owner's 40% drop in product sales after the alleged infringer entered the market was insufficient to constitute irreparable harm because the sales history of the trademark owner's product showed wide fluctuations from year to year. *Suja Life, LLC v. Pines Int'l, Inc.*, 2016 WL 6157950 (S.D. Cal. 2016). The court also noted that loss of sales alone was insufficient to constitute irreparable harm given the available remedy of money damages.

To add to the murkiness, while a number of circuits (*e.g.*, the Third, Ninth, and Eleventh) have conclusively held that a trademark owner must present sufficient evidence of likely irreparable harm for an injunction to issue, other circuits have yet to definitively weigh in.

As federal courts continue to reject the presumption of irreparable harm, trademark owners should monitor Congress's response to this issue, in order to determine the best course of action regarding a potential trademark dispute.

## Trial Practice Update

**Computer Forensic Evidence in Trade Secret Cases.** Trade secret litigation is on the rise. Perhaps the most common fact pattern involves an allegation that one or more former employees stole confidential information from a former employer to use in a separate, often competing venture (whether at an established competitor or new venture). Not surprisingly, the information that is often alleged to have been stolen is digital. Given the nature of this information—*i.e.*, electronic and easily transferrable—a plaintiff's most critical evidence is likely to come from computing devices such as laptops, cell phones, tablets, thumb drives, external hard drives, home servers, or any other device that can be used to store digital information. These electronic devices may contain critical evidence in a trade secret case because they often contain logs of user activities such as creating, deleting, copying, or altering files, and even logs showing when certain external devices were connected, how long they were connected, and how much data was transferred between the devices. And while this computer forensic evidence can be used to help prove trade secret theft and misappropriation, the process by which the computer forensic evidence is collected and ultimately presented at trial must be carefully thought out, planned, and executed.

The first step in the process is data collection and preservation. To take advantage of computer forensic

evidence at trial, it is imperative to swiftly and carefully collect, log, and properly preserve all electronic devices in question in order to reduce the risk that potentially relevant electronic data on a device is not deleted or altered in any way. As a general rule, computer forensic evidence tends to deprecate over time, so it is advisable to seek any potentially relevant computer forensic evidence at the outset of an investigation or case. Typically, the process of collecting computer forensic evidence includes forensically imaging the electronic devices at issue, which effectively creates a digital replica of the device in question, thereby permitting a party and its forensic experts to perform analysis on the imaged version of the device without modifying or corrupting the original. While forensic images of an adversary's electronic devices can be discoverable, there are limits. For example, courts have prohibited or circumscribed such discovery due to privacy and relevance concerns. *See, e.g., Genworth Financial Wealth Management, Inc. v. McMullan*, 267 F.R.D. 443, 449 (D. Conn. 2010) (noting that courts are "cautious in requiring the mirror imaging of computers" but are still granting motions to compel forensic imaging by a neutral court-appointed expert). Accordingly, discovery requests seeking forensic images are more likely to be successful when the requests are narrowly tailored (*e.g.*, identify a specific, relevant device) and the proponent can demonstrate a sufficient nexus between the underlying allegations in the case and the requested imaging (*e.g.*, the specific device is believed to have been the device used by a former employee to steal trade secrets). *See New Hampshire Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 431 (2009) (affirming denial of motion to compel imaging of company's entire network in trade secrets dispute because the allegations related to only a small portion of the company's operations); *Ameriwood Industries, Inc. v. Liberman*, 2006 WL 3825291, at \*4 (E.D. Mo. Dec. 27, 2006) (imaging appropriate in trade secrets case because "allegations that a defendant downloaded trade secrets onto a computer provide a sufficient nexus between the plaintiff's claims and the need to obtain a mirror image of the computer's hard drive").

Once a forensic image has been obtained, the data must be analyzed. Typically, outside vendors with expertise in computer forensics are retained to perform this analysis (as well as the imaging). These experts analyze the forensic image with specialized software targeted at locating potential evidence of trade secret theft by, *e.g.*, determining "what peripheral devices have been connected to the device, what a user accessed, what has been stored on the device, and when it was last accessed or modified." *New Hampshire Ball Bearings*, 158 N.H., 424. Gathering these types of forensic evidence—essentially a trail of digital breadcrumbs—can be crucial to developing a trade secrets case: they can establish timelines, access/download records, network activity, data



transfer logs, and data modifications/alterations, among other relevant information. Accordingly, computer forensic evidence collection and specialized analysis by experts is a frequently-used and often critical discovery tool. See *In re Arvanitis*, 2015 WL 5202990 (Bankr. N.D. Ill. Sept. 4, 2015) (relying on computer forensics expert to demonstrate the defendant had downloaded thousands of corporate documents containing trade secrets to his personal laptop); *Digital Assurance Certification, LLC v. Pendolino*, 2017 WL 4342316 (M.D. Fl. Sept. 29, 2017) (relying on computer forensics expert to allege former employee downloaded files containing trade secrets onto a USB drive); *Zarwasch-Weiss v. SKF Economos USA, Inc.*, 838 F. Supp. 2d 654 (N.D. Ohio 2012) (relying on testimony from computer forensics expert to establish that former employee accessed and transferred data to USB devices).

Of course, to be useful at trial, the computer forensic evidence must be admissible, and a common admissibility issue with computer forensic evidence is showing that it is reliable and authentic. Under Federal Rule of Evidence 901(b)(9), a party seeking to admit forensic evidence will need to offer testimony demonstrating that the processes or systems used to extract the forensic evidence were executed with reliable procedures that produce accurate results. This could be shown, e.g., through testimony that the forensic expert regularly works with and relies on the software used to extract and analyze the forensic evidence. See *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015) (authentication requirement that Google Earth produces reliable and accurate digital tack and coordinates can be satisfied with testimony from “a witness who frequently works with and relies on the program.”). Rule 902(b)(13) and (14) permits a similar showing to be made through a certification by a qualified person rather than testimony.

In sum, if a company is faced with a situation where a former employee is suspected or known to have illicitly taken confidential company information, a company should at least consider (i) investigating and analyzing any internal digital logging system, such as software that logs employee access to internal corporate networks, servers, and sensitive company data for unusual or suspicious activity, and (ii) collecting all company-owned electronic devices from the former employee and imaging those devices to preserve the data. If the situation leads to litigation, it is generally recommended to (i) seek early discovery of the former employee’s personal electronic devices in order to ensure that any relevant computer forensic evidence is preserved, (ii) hire a reputable, experienced outside forensic expert to investigate both the employer-provided and personal electronic devices, and (iii) instruct the forensic expert to keep meticulous records of all steps taken to extract any forensic data, so that he or she is able to authenticate that

data at trial. Of course, these are just some high-level examples of steps companies can and should consider—this list is not intended to be exhaustive. Different fact patterns may demand additional or different steps and investigative tactics, and each case should be assessed on its own merits.

## Construction Litigation Update

***Excluding Liability for Concurrent Delay in English Law Construction Contracts – Recent Clarity from the Court of Appeal.*** Delays are almost inevitable on construction projects of any complexity. In turn, delay claims can form the most complex (and costly) aspect of any construction dispute. Against that background, parties routinely take steps to manage that risk when contracting – with examples frequently including liquidated damages provisions, or clauses addressing when and how extensions to the time for completion can be sought.

The case of *North Midland Building Limited v. Cyden Homes Limited* concerns a contractual clause aimed at addressing delay risk in circumstances where a period of delay is arguably attributable both to the contractor, as well as events for which the project owner carries the risk, i.e. concurrent delay. The clause in question provided that in such circumstances the contractor bore all risk, with no entitlement to an extension to the time for completion as a result.

In its decision in the case of July 30, 2018 ([2018] EWCA Civ 1744), the English Court of Appeal affirmed the decision of the High Court supporting the clause, in rejecting a further challenge to the enforceability of that form of risk-shifting, and providing a further reminder of the willingness of English courts to uphold the parties’ agreement. The decision is also notable given the guidance it provides with respect to the English law concept of the “prevention principle,” and the ability to contract out of, or around it.

***The Facts of the Case.*** North Midland (the appellant) entered into an agreement with Cyden (the respondent) under which North Midland contracted to design and build a substantial house and equestrian center in Lincolnshire (the “Contract”). The appeal focused on one clause of the Contract in particular – clause 2.25.1.3(b) – which provided that with respect to any delays on the project, and a request from North Midland for an extension of time, any delay “concurrent with another delay for which the contractor is responsible shall not be taken into account.”

The works were delayed, and North Midland sought an extension to the time for completion – giving rise to a dispute regarding the amount of any extension to be made. North Midland’s extension was rejected by Cyden, on the basis that while the delay could partly be attributed to adverse weather conditions (for which Cyden bore the

(continued on page 11)

# VICTORIES

## Pro Bono Victory in Defamation Case Sets Important Free Speech Precedent

The firm secured an important pro bono victory for free speech. Our client—a young woman who came to the United States from Nigeria as a student—wrote a blog describing sexual abuse she suffered in Nigeria as a teenager. In it, she named a powerful Nigerian Prince and members of his inner circle as her abusers. Shortly thereafter, the prince began a bid for political office. Concerned that our client's allegations would sway public opinion against him, he and his brother filed a defamation lawsuit against her in D.C. Superior Court, seeking to force her to recant.

The firm agreed to take the case on pro bono and filed a special motion to dismiss under D.C.'s relatively new Anti-SLAPP law—a law which affords special protection to defendants sued for speaking publicly on topics of moment. The firm argued that the law applied because sexual abuse committed and facilitated by powerful men is a matter of public interest; that the allegations of sexual abuse cited in the complaint fell outside the statute of limitations; and that the one cited publication made within the statute of limitations (which included no allegations of abuse regarding either plaintiff) could not, as a matter of law, be construed to incorporate the time-barred allegations by reference.

After a lengthy oral argument, the court largely agreed. The court held, as a matter of first impression, that D.C.'s Anti-SLAPP law protects speech concerning sexual abuse committed and facilitated by powerful men. The court further dismissed all but one of the prince's claims, held his one remaining claim would be subject to the stringent "actual malice" standard for defamation, and dismissed the prince's brother from the case entirely. Finally, the court invited briefing on an award of attorney's fees.

The prince sought to amend his complaint and the firm opposed, warning that a second Anti-SLAPP motion would be forthcoming should the court permit amendment. The court ultimately permitted the prince to file an amended complaint, but invited a second Anti-SLAPP motion. Shortly thereafter, the court award our client more than \$34,000 in fees related to the first motion, including a 10% upward adjustment of prevailing D.C. billing rates due in part to the firm's "high degree of skill in both drafting and arguing the motion." Facing the threat of a second Anti-SLAPP motion and its attendant fee award, the prince stipulated to the dismissal of what remained of the case, thus handing our client an early and decisive victory.

## Victory for City of Oakland

In 2008, two Quinn Emanuel partners tried and won a jury trial against the Town of Mammoth, California. The jury returned a verdict of \$30 million after finding that the Town

of Mammoth had breached a particular type of contract known as a "Development Agreement." Development Agreements are authorized by a 1976 California statute. To provide certainty to private developers who contract with the government on significant public projects, the statute guarantees a developer can be subject to only those laws and regulations in existence at the time the applicable Development Agreement is signed. No subsequent rules can be applied unless specific exceptions are met—one being a finding that "substantial evidence" establishes that a "substantial danger" to health and safety would result absent application of a new regulation.

Based on the verdict in the Mammoth case, including its affirmance on appeal, Quinn Emanuel was retained to represent a different real estate developer in Oakland regarding its Development Agreement. The developer had entered a Development Agreement with the City of Oakland to redevelop a portion of the former Oakland Army Base. The Development Agreement gave the developer the right to build a marine terminal located near the Port of Oakland. A terminal operator would then "transload" bulk commodities from interstate railroads to cargo ships for international export, typically to Asia.

After the Development Agreement was signed, the developer determined that it might ship coal through the terminal. In response, the Oakland City Council passed legislation imposing a coal ban on the terminal. The City claimed that it had established a record of substantial evidence that substantial danger to the surrounding community would be caused by "transloading" coal. The public record included a 154-page report from a City-retained environmental consultant, and tens of thousands of pages of studies and other comments submitted by the public and various special interest groups. Oakland claimed that the coal shipments would pose substantial dangers regarding air quality and emissions, fire hazards, and worker safety.

Our client was unsuccessful in convincing Oakland that, in fact, there was no substantial danger from the transportation—as opposed to the burning or mining—of coal. Eventually, Quinn Emanuel filed a complaint against the City of Oakland in federal court in San Francisco, California. The complaint asserted a breach of the parties' Development Agreement, a violation of the Dormant Commerce Clause (because the local legislation impacted interstate and foreign commerce, a regulation of which is reserved for the federal government), and violations of the Supremacy Clause (based on federal statutes that governed certain aspects of the proposed terminal's activities).

Following a bench trial, the court issued a 37-page decision finding in favor of our client. In ruling that the City of Oakland had breached the Development Agreement, the court credited testimony offered by our

client's experts exposing significant inaccuracies, evidentiary gaps, erroneous assumptions, and faulty analyses in the evidence relied on by the City. In particular, significant flaws were exposed regarding the key coal-dust emissions estimates prepared by the City's retained consultant. The City also failed to assess how expected emissions would actually impact air quality, and the levels of exposure to emissions that people in Oakland would face. Finally, the court found no substantial evidence supporting the City's claim of fire risks associated with the terminal, dangers to

terminal worker health or safety, or global warming-related danger to the people in Oakland.

Based on the evidence, the court found a breach of contract and awarded the relief requested by our client—an injunction precluding Oakland from enforcing the coal ban legislation against it. Because it was able to decide the entire controversy in our client's favor based on the contract claim, the court declined to reach the constitutional claims. [Q](#)

## PRACTICE AREA NOTES (cont.)

contractual risk), the delay was concurrent with other delays for which North Midland was responsible.

The agreed meaning of clause 2.25.1.3(b) was that if delays arose on the project and these were partly caused by Cyden, this would not reduce North Midland's liability for the period of delay. The question to be decided by the court was the extent to which the clause was enforceable.

**The Prevention Principle.** In circumstances where work on a project is delayed, contractors frequently seek to rely on the prevention principle when arguing that the delay, or a portion of the delay, stems from acts taken, or not taken, by the project owner. In accordance with the principle, parties are taken to have agreed that they will not do anything to prevent the other party from performing a contract, or that would delay the other party in the performance of its obligations.

North Midland's argument was that clause 2.25.1.3(b), which effectively excuses the project owner from liability for its own delays, where those delays are concurrent with contractor-caused delays, was inconsistent with the prevention principle, and should therefore not be upheld. This was framed as what the Court of Appeal described as the "bold proposition" that the prevention principle "was a matter of legal policy," and which could "rescue the appellant from the clause to which it had freely agreed" – seeking to draw analogies with the English law position on penalties.

This argument was not accepted by the court, which found no authority for the proposition that the principle is "an overriding rule of public or legal policy." The court

had already stated its view that the principle operates as an implied contractual term. However 2.25.1.3(b) was an expressly agreed term. It is trite law that no term can be implied into a contract if it contradicts express terms.

The court was also unsatisfied with connections being drawn between the principle and concurrent delay, there being no mention of concurrent delay in the cases from which the principle derives. Moreover, the court considered that parties are able to contract "out of some or all of the effects of the prevention principle." Accordingly, the court upheld the clause.

**Implications of the Decision.** The decision can be taken as confirmation that parties are entitled freely to allocate the risk of concurrent delay in English law governed construction contracts.

The contract out of which the dispute between North Midland and Cyden had arisen was based on the JCT Design and Build 2005 Standard Terms and Conditions. Clause 2.25.1.3(b), however, was one of a number of bespoke amendments. In view of the Court of Appeal's support for the clause, it is likely that project owners/employers will more routinely (and confidently) seek to include similar provisions in their contracts going forward (to the extent the contractor is willing to agree to them).

As the case is arguably limited to a narrow set of facts, however, and given that a number of points concerning both concurrent delay and the prevention principle did not require a final view from the court in its decision, we do not expect this to be the last time analogous issues are litigated. [Q](#)

### Firm Recruits Life Sciences Partner in New York

Colleen Tracy James has joined the firm as a partner in New York. Ms. James represents clients in the life sciences industry, focusing on patent litigation, USPTO Patent Trial and Appeal Board proceedings, and other complex intellectual property litigation. She has extensive experience litigating against generic pharmaceutical companies in matters brought under Hatch-Waxman Act (ANDA litigation) in federal district and the Federal Circuit. Ms. James received her J.D. from Seton Hall University Law School, and her B.S. *cum laude* in Biology from Manhattan College. [Q](#)

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## business litigation report

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