



New Recess Appointments Case Roils NLRB And CFTC

The Effects of Noel Canning v. NLRB

By James Ching

On Jan. 25, the DC Circuit issued an opinion, *Noel Canning v. NLRB*, No. 12-1153, slip. op. (DC Cir. 1/25/13), which stated that the Senate's current practice of never going into recess and instead being in recess pro forma until the next session barred the President from making recess appointments simply because no recess ever existed.

Noel Canning is an exercise in the literal meaning of the words of the Constitution. The Constitution provides that the President shall nominate, and with the advice and consent of the Senate, appoint federal officers. See U.S. Const. art. II, § 2, cl. 2. The President attempted to make three recess appointments to the NLRB after the Senate had agreed to continue its first session pro forma from Dec. 20, 2011 through Jan. 23, 2012, with Jan. 3 as the beginning of its second session.

RULING AFFECTS APPOINTMENTS

The three appointments, made on Jan. 4, were held unconstitutional by *Noel Canning*. The court held that when the Senate refuses to appoint a given nominee, the Constitution allows the

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3-D Printing: Strategies to Anticipate the Next Disruptive Technology

By Thomas C. Mahlum and Andrew J. Pieper

Personal computing, the Internet, social networking: Each of these disruptive technologies created new legal challenges to the prevailing order. And yet, even as businesses — and the courts — continue to sort out lingering legal challenges to yesterday's latest disruptions, a new technology exists on the horizon that promises to unsettle the landscape yet again. One could be forgiven for believing that 3-D printing — essentially the ability to design and "print" three-dimensional objects — remains either in the scope of far-fetched science fiction, or out of reach for the masses on account of being hopelessly expensive and complicated. Both of those assumptions, however, are wrong.

From the cover of *Wired Magazine* to the pages of the *New York Times* and *The Wall Street Journal*, it's clear that the advent of large-scale, consumer 3-D printing is fast approaching, and with it will come a host of complex and uncertain legal issues for businesses as they try to protect their proprietary goods. While traditional intellectual property laws, including patent, copyright, and trademark law, have, for the most part, risen to the occasion in shaping the legal contours of disruptive technologies in the recent past, none of those laws neatly address the business concerns raised by 3-D printing.

WHAT IS 3-D PRINTING AND HOW CAN IT BE USED?

At its most basic, 3-D printing allows a user to send a digital blueprint file, usually made with a computer-aided design program, to a machine that can turn the blueprint it into an object. Another form of this same process involves a 3-D scanner capable of scanning an object, creating a blueprint of it, and sending the blueprint to a 3-D printer to make an exact replica. In doing so, 3-D printers use materials — often different kinds of plastics or metals, but new materials are constantly being put into use — and builds the object layer by layer. In this way, 3-D printers cannot only create, or copy, objects that would be impossible to build

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3-D Printing

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otherwise, it also permits users to create objects with internal, moveable parts and build replacement parts for existing objects.

While aspects of 3-D printing have been put into use for commercial purposes for some time, several emerging companies are working to bring costs down and offer consumer 3-D printers for home use. Some of these companies have raised millions from investors and are beginning to sell 3-D printer models at retail for less than \$2,500. It's generally accepted that this sticker price will continue to fall, just as the price of personal computers fell, as the technology becomes adopted on a larger scale.

In addition, some of those companies host forums where users upload and share their designs with an online 3-D printing community, making it possible to freely distribute to anyone else with a 3-D printer.

Like other disruptive technologies, 3-D printing offers unfettered creative potential for average consumers, in addition to businesses. Moreover, it promises a limitless potential for expanding creativity and object design in new and completely unexpected ways. At the same time, it also creates numerous prospective headaches for those who want to shield their proprietary designs from surreptitious copying on a massive scale.

IP LAWS AND 3-D PRINTING: AN UNEASY FIT

Patent, copyright, and trademark laws have been remarkably adaptable, when one considers the technological, scientific, and other advancements over the last few de-

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acades. While each of these kinds of intellectual property protection provides some means for preventing and redressing infringements, however, none of them really fit well when facing the potential threats posed by 3-D printing.

Copyright

Copyright enforcement, of course, has been at the forefront of efforts to protect digital content, particularly on the Internet. At its essence, copyright attaches to original creative works that are fixed in a tangible medium. 17 U.S.C. §§ 101-102. Traditional copyright protection extends to works like writings, drawings, musical compilations, and other designs; such protection, however, does not extend to the function of a copyrighted work or the idea that a copyrighted work expresses.

In theory, copyright protection should apply to objects copied using 3-D printers that are purely design-oriented. To take an obvious example, one would infringe an artist's copyright if he used a 3-D scanner and printer to make an exact copy of the artist's sculpture. This can be applied similarly in the business sense. Companies that make and sell copyrightable objects — including anything from toy figurines to decorative home designs — could find that those objects are easily replicated exactly and sold by others without realizing any of the gain.

Moreover, through what's known as the "separability test," copyright protection may be available for decorative elements that are part of a functional object, if those elements exist outside the scope of the object. See *Chosun Int'l v. Chrisha Creations* (2d Cir. 2005). Consider a coffee mug, which is a functional object. The mug itself is not copyrightable; however, decorative elements that may be added to a coffee mug may be copyrightable. Again, this is relevant to businesses that offer functional products with unique design elements.

Beyond the prospect of suing anyone who makes a replica of a copyrighted design with a 3-D printer for

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DE Court Adheres To Plain Meaning of Acquisition Agreement Terms

Rejects Indemnity Claims Relating to Post-Closing Events

By Robert S. Reder

Consistency in the interpretation and application of frequently used language and constructs in acquisition agreements is certainly a key element in giving corporate deal-makers the confidence to pursue M&A transactions. Accordingly, it is comforting when a dispute over the meaning of familiar M&A agreement provisions is resolved by a court in a manner consistent with the common understanding of how these provisions should work.

Such was the case in a recent decision of the Delaware Court of Chancery in *Winshall v. Viacom International Inc.*, Civil Action No. 6074-CS (Del. Ch. Dec. 12, 2012). By granting summary judgment to selling stockholders in a dispute with media giant Viacom International over its 2006 purchase of Harmonix Music Systems, the court refused to allow Viacom to proceed with claims that the language of its acquisition agreement did not support.

FACTUAL BACKGROUND

Harmonix was “a developer of music-based video games,” including a popular product known as “Rock Band.” In October 2006, Viacom closed its purchase of Harmonix pursuant to a merger agreement that paid Harmonix stockholders \$175 million in cash plus an earn-out tied to 2007 and 2008 perfor-

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mance. Twelve million dollars of the purchase price was placed in escrow to secure the former stockholders’ indemnification obligations to Viacom for breaches of representations and warranties made in the merger agreement. The escrow by its terms was to be released 18 months following closing, to the extent not theretofore tapped for indemnity payments. Walter Winshall was appointed as the representative of the former Harmonix stockholders to, among other things, negotiate indemnity claims asserted by Viacom post-closing.

At the time of the closing, Harmonix was in the midst of developing Rock Band, but the product was not released commercially by Viacom until November 2007, over a year after its acquisition of Harmonix. In April 2008, *just a few days before* the scheduled expiration of the escrow, Viacom made several indemnification claims, each relating to alleged breaches of merger agreement representations concerning the intellectual property underlying the Rock Band software. Viacom’s claims were prompted by three separate lawsuits filed by third parties claiming rights in the software and infringements thereof by Viacom. Viacom’s indemnity claim also prophetically stated that “it ‘hereby reserve[d] the right to seek indemnification for any other claims or matters by the parties named above or other third parties that may result due to the [Harmonix’s] breach of its representations and warranties under the [Merger] Agreement.’” Then, almost *three months after* expiration of the escrow, a fourth infringement claim was brought against Viacom, and Viacom in turn notified Winshall that it was seeking indemnification in respect of this claim as well.

Viacom was relatively successful in these actions, settling one and seeing the other three dismissed with prejudice. Viacom asserted that its costs of defending these actions exceeded \$28 million, and sought reimbursement from the escrow of this amount as well as its settlement payment. Winshall rejected

these claims and demanded release of the escrow in full. When Viacom refused, Winshall filed a complaint with the Court of Chancery seeking release of the escrow and moved for summary judgment.

THE PARTIES’ CONTENTIONS

The merger agreement contained fairly traditional language concerning Viacom’s right to seek indemnification for breaches of Harmonix representations and warranties. The selling stockholders agreed to “indemnify Viacom ‘against any and all Losses’ arising out of ‘the breach of any representation or warranty of [Harmonix] contained in this Agreement.’” Any indemnification claim relating to any non-fraudulent breach of a representation or warranty relating to intellectual property matters was required to be made within 18 months following closing. The intellectual property representations that Viacom claimed had been breached referred to “... ‘the current use’ of software” developed by Harmonix and “... the operation of the Business ... [and] any activity of the Company” Winshall asserted that Harmonix’s representations and warranties spoke as of the date of the merger agreement while the infringement actions brought against Viacom arose from a product developed and released following closing.

With respect to any claim brought by Viacom, the merger agreement provided that the former stockholders also were “liable for the costs of Viacom’s defense of these claims.” Further, the merger agreement gave Viacom “the right to conduct the defense of any claim ‘at the expense of the applicable indemnifying parties.’” Similarly, “if Viacom chooses not to permit Winshall to assume the defense ... , Winshall shall pay ‘the reasonable fees and expenses of counsel retained by [Viacom].’” Viacom argued that “the Sellers are responsible for paying its defense costs ‘if the allegations of the claim at issue fall within the scope of the representation or warranty,’” “even if there was no breach of the representations and warranties.”

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Indemnity Claims

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THE COURT OF CHANCERY'S ANALYSIS

The court rejected Viacom's claims, and granted Winshall summary judgment in his attempt to recoup the escrow, on several grounds. It should also be noted that the court also held in Winshall's favor in respect of Viacom claims that representations and warranties made "to the knowledge of the Harmonix officer" were breached, explaining that Viacom failed to produce any evidence that the officers had any knowledge of the claimed misrepresentations.

EXPENSE REIMBURSEMENT

The court viewed Viacom's assertion that it was entitled to expense reimbursement for its defense costs — "even if there was no breach of the representations and warranties" — as taking the express words of the merger agreement "out of their contractual and logical context." Based on Viacom's argument, the court reasoned, "[t]he Sellers could thus be on the hook for defending against frivolous claims that had nothing at all to do with the state of Harmonix when they sold it to Harmonix." The court found that this "interpretation of the Merger Agreement contradicts its plain text and evident logic ..."

Rather, to collect reimbursement of its expenses, "Viacom must show that there has been ... a breach."

The court premised this finding on, among other things, the language of the merger agreement providing that "defense fees will only be paid by the 'indemnifying parties.'" This makes clear that, for the Sellers to cover Viacom's costs, Viacom's right to indemnification must have been triggered."

PRE-ESCROW TERMINATION CLAIMS

With respect to the first three infringement claims brought against Viacom, the court found that the relevant representations and warranties in the merger agreement "refer to the use of the intellectual property in October 2006, when Viacom purchased Harmonix." In reaching this conclusion, the court focused on the use of the terms "current use" with reference to Harmonix's intellectual property and "as currently conducted" with reference to Harmonix's business. This language led the court to conclude, "it is clear that the representation only covers the present time, not the future."

By contrast, the subject matter of the infringement claims "all relate to final Rock Band video game that was produced in November 2007," many months after the closing of Viacom's purchase of Harmonix. In the court's view, "there is no reason why the Sellers might have indemnified Viacom against losses arising out of infringements of intellectual property rights that took place at the time of Rock Band's publication

in 2007, when the Sellers no longer controlled Harmonix." In fact, the court thought it would be "strange" indeed if the former Harmonix stockholders' indemnification obligations extended to these claims.

POST-ESCROW TERMINATION CLAIM

The court had even less sympathy for Viacom's escrow claim relating to the infringement action brought after the scheduled expiration of the escrow. Viacom argued that its initial indemnity claim contained a "placeholder" that allowed it to seek indemnity for third-party infringement claims brought more than 18 months following closing. Such a reading would, in the court's view, "constitute a unilateral rewriting of the contract and is impermissible." Thus, the court found this aspect of Viacom's claim to be "time-barred."

CONCLUSION

The decision of the Court of Chancery in *Winshall v. Viacom International Inc.* may not be surprising, but it certainly is of comfort to dealmakers and practitioners who are responsible for negotiating and documenting M&A transactions. The decision highlights the importance of careful and considered drafting. The Delaware courts will hold contracting parties to the language used in their acquisition agreements.



3-D Printing

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copyright infringement, the available recourses for such problems are limited. First, it's an open question as to whether a user who simply creates a blueprint of copyrighted work for use in a 3-D printer actually infringes a copyright. By creating a blueprint for making copies, one is merely publishing instructions on how to infringe a copyrighted work; he wouldn't actually be infringing himself.

Second, some companies have attempted to apply the framework of the Digital Millennium Copyright Act

(DMCA) to the world of 3-D printing. See 17 U.S.C. § 512. Under the DMCA, copyright holders are permitted to notify an online service provider of an infringement claim against some material or content that is being made available. Upon receiving this notification, called a takedown notice, online service providers qualify for a safe harbor from infringement claims, assuming they promptly block access to the allegedly infringing material. Using this legal device, companies can stop the spread of 3-D printing blueprints that infringe their copyrighted designs; however, this

puts companies in the position of constantly policing online forums where 3-D printing blueprints are exchanged. And it doesn't prevent users who either don't publish their blueprints online or choose to share designs outside of an easily accessible online forum.

Patent

As copyright protection is largely limited to nonfunctional works, an obvious corollary to protect intellectual property in the context of 3-D printing is patent law. Utility patents, after all, are specifically available to protect inventions that are useful. Moreover,

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The Pros and Cons Of Physical and Logical Collections

The Ruling in National Day Laborer Organizing Network

By Veeral Gosalia

In a July, 2012 decision, Judge Shira Scheindlin found custodial self-collection inadequate in certain circumstances (*National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency, et al.*, 2012 U.S. Dist. Lexis 97863 (SDNY, July 13, 2012)). As she stated in her opinion: “Most custodians cannot be ‘trusted’ to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities. Searching for an answer on Google (or Westlaw or Lexis) is very different from searching for all responsive documents in the FOIA or e-discovery context.”

The specific decision related to government collections in support of Freedom of Information Act (FOIA) requests, but this opinion may have a wide-ranging impact on corporate collection practices. Companies involved in legal proceedings or investigations will likely need to reevaluate their current policies in the coming months to ensure that important information is collected in a defensible manner, and one initial question to answer is which collection methodology should be used.

THE CHALLENGES OF DISCOVERY

When companies become involved in legal or regulatory matters, one of the most significant challenges they face is collecting and analyzing e-mail, documents, and the massive amounts of data stored on employees’ and corporate

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computers. There are advantages and disadvantages of the two different methods of collection. Companies should understand both and know when and how to use each one to best effect.

A CRITICAL CHOICE: PHYSICAL VS. LOGICAL COLLECTION

When personal computers are involved, companies generally have two options for tackling the challenge of forensic data collection: physical and logical.

The physical approach involves making a complete, mirror-image copy of the investigated computer’s hard drive, including all sectors, directories, and files and their complete corresponding metadata. When used as evidence, this mirror image is effectively the same as the original hard drive itself.

The logical approach is a narrower, more targeted method in which the case team will collect a portion of the information on a hard drive — typically the user-created documents that are deemed most relevant to the legal matter.

Physical Collection: Key Considerations

One of the major advantages of the physical approach is its completeness, which supports deeper, broader investigations as well as additional analyses as the scope of a legal matter evolves or changes. Physical collections record not only the active files on a given computer, but also deleted files and remaining file fragments, with which investigators can potentially reconstruct the custodian’s activities — including visited websites, settings, and software in use — even if efforts were made to hide these activities.

The physical approach also gives investigators access to operating system artifacts such as the last time the computer was booted, whether external USB Flash or “thumb” drives were attached, and even if the disk has been “re-formatted.” With the right tools and techniques, teams using the physical approach can restore deleted files or older file versions for review by attorneys. These teams have the potential to boot up an exact copy of the custodian’s system as he or she used it,

thus gaining access to data tucked away in proprietary databases and other repositories.

Just as important, the physical approach allows investigators to re-analyze all of the data on a given hard drive as keywords and case parameters evolve, an action precluded by the narrower logical approach. And while both the logical and physical approaches are fully defensible when properly executed, the physical method makes defensibility more straightforward to achieve.

The image file that results from use of the physical method typically is in a standard format that has a verification hash associated with it. This means that at any point in the future, one can verify that the image is unchanged from the time it was captured which, in turn, strengthens the team’s ability to demonstrate evidential integrity. And it is important to note that although a verification hash can be obtained through both physical and logical methods, one cannot know if anything was omitted from a logical acquisition. Likewise, because the physical forensic investigation approach has been in use for several years by both law enforcement and commercial entities, it benefits from well understood, widely accepted validation methods. Thus, this approach can be valuable for legal teams under pressure to meet stringent defensibility requirements.

However, the physical approach also has its drawbacks, including added time and expense. Because it involves collecting more data, the physical approach can take longer than the logical approach and adds to the workload of downstream reviewers who must wade through a greater volume of material. The physical method also can be disruptive, forcing company employees to give up their computers for longer periods of time compared to the logical method when only small numbers of files require collection. In fact, some collection teams using the physical approach will work overnight or on weekends simply to minimize disruption.

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Self-Collection

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Privacy can be a significant concern as well. Because the physical method entails collecting all data on a computer, personal or otherwise sensitive data can be captured along with potentially relevant data, which is unacceptable in some instances (particularly in countries where personal data is strongly protected by law).

Given the preceding, criminal cases often are good applications for physical collection. Because the physical method is familiar to law enforcement agencies and gathers the most data, it can be best for matters in which a custodian is suspected of criminal activity and may have hidden or deleted critical information. In such instances, the physical approach gives teams the greatest ability to reconstruct a custodian's actions and uncover deception.

The full forensic image obtained via the physical approach also is usually the best way to gather social media artifacts such as Facebook and Twitter posts, which play an increasingly important role in many corporate legal matters. In particular, social media content can provide vital clues which can only be obtained through an analysis of operating system artifacts.

Likewise, the flexibility of the physical approach can make it optimal for cases in which the scope may change. As noted earlier, the physical method allows teams to perform subsequent analyses using new parameters and search terms, and relieves them from having to determine upfront which data and files are important to capture. Thus, if the scope of a case suddenly expands or changes course, investigators can simply redirect their efforts toward new data already in hand.

Logical Collection: Key Considerations

One of the biggest advantages of the logical approach is that it can be faster and often cheaper, as it typically involves fewer documents and lower data volumes. When custodians are willing and able to guide the case team toward the most im-

portant information and when that approach is advisable, the logical method only captures relevant data, leading to a cheaper and faster review of that data.

The logical approach also can make it easier to collect data associated with cross-border legal matters. When legal matters involve custodians in locations around the world, sending resources abroad to physically collect hard drive copies can be prohibitively expensive. Where local data privacy laws allow, experts performing logical forensic collections can use remote tools to access desktops anywhere in the world and gather only the data and files relevant to the case.

On the other hand, the logical approach's hoped-for speed advantage does not always materialize, particularly in complex, large-scale matters. Indeed, it can be simpler and faster to conduct physical imaging for a large group of custodians — especially when they are all in the same location — than it can be to target specific files and folders for logical collection. Depending on the scale and complexity of the case, it can involve interviews between the custodian and the legal team. Such interviews mean the legal team and custodians must speak a common language, which can be an issue when dealing with cross-border matters. Likewise, depending on the complexity of the case and the willingness of custodians to assist the team, identifying the right files to collect sometimes consumes more time than simply making a copy of the entire disk and searching through it.

The logical approach also can be less flexible than the physical option. Collection criteria (such as date range cut-offs) must be established by the team upfront, and if they change as a legal matter evolves, a new collection is required. When new evidence comes to light that makes additional types of files or data relevant, teams using the logical approach must start over, while those using the physical approach can simply re-analyze the copied hard drive.

A number of situations can benefit from the inherent speed and simplic-

ity of the logical approach. Predictable, well-scoped matters — particularly when time is of the essence — are one example. Hart-Scott-Rodino “second requests” from government agencies, for example, typically require companies to produce a well-defined body of information related to a merger or acquisition.

In general, the logical approach is appropriate for matters in which deception or wrongdoing is not suspected. When deception or wrongdoing is not suspected, there typically is not a need to collect operating system artifacts and deleted files that would be helpful in re-creating the actions of the custodian.

Because the physical approach can be intrusive for some custodians, the logical approach can be optimal for matters that involve personal or privileged data. Its more selective nature is well-suited to legal matters involving defense contractors, for example, which often possess volumes of classified information that cannot “leave the building,” let alone be copied in a wholesale fashion during an investigation. Similarly, the logical approach works well for legal matters in which personal devices and data are at play, which often are protected by stringent privacy regulations. This is particularly vital in legal matters that cross jurisdictions.

CONCLUSION

In the wake of the ruling in *National Day Laborer Organizing Network*, corporations need to assess which collection methodology should be used. How much scrutiny the collection process is likely to receive, the scope of the matter, employee cooperation, data privacy, and in-house tools and training are all important factors for answering those two questions. No matter what individual corporations decide to implement, Judge Scheindlin's ruling is likely to generate widespread attention to the importance of defensible collection processes — a game change for the industry, indeed.



No Need to Be Blue About Green Marketing

The FTC's Newly Revised Green Guides

By Jay L. Levine

Today, more Americans than ever take into account the environmental impact of their purchasing decisions. This has not gone unnoticed by manufacturers, distributors, re-sellers and advertisers of all types. Accordingly, “green marketing” has surged in the past few years. Companies in many industries now regularly tout the environmentally friendly attributes of their products, services and packaging. But, as with any good marketing idea, in-house counsel must be vigilant in ensuring that the advertising and marketing claims that their company is making pass legal muster.

Failing to ensure legal compliance when making green claims in advertising can have serious consequences for a company — not the least of which is scrutiny from the Federal Trade Commission (FTC). False or deceptive advertising violates the FTC Act, and can bring about civil penalties. An FTC investigation can consume enormous resources — both money and time. It is also never good business to be on the FTC’s radar and labeled as having deceived customers.

Green marketing claims have evolved over time. To address these new claims, as well as clarify previous guidance, the FTC revised its Guides for the Use of Environmental Marketing Claims (www.ftc.gov/os/fedreg/2012/10/greenguidesfrn.pdf). Colloquially referred to as the “Green Guides,” they represent the latest in

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FTC thinking regarding the appropriateness of making certain claims related to environmental benefits.

AN OVERVIEW

For the most part, the Green Guides simply apply traditional consumer protection principles to environmental marketing claims. The FTC admonishes against making claims that would mislead a reasonable consumer where the claim is material to a reasonable consumer’s (*i.e.*, someone possessing general knowledge) decision. Companies must also ensure that any express and implied messages conveyed by an advertisement are truthful, not misleading, and supported. In addition, companies must possess “competent reasonable and scientific evidence” for any claims they make. What constitutes “competent and reliable scientific evidence” is a hotly debated (and litigated) topic, but the FTC standard is that it consists of “tests, analyses, research, or studies that ... are generally accepted in the profession to yield accurate and reliable results [and] should be ... based on standards generally accepted in the relevant scientific fields ... to substantiate that each of the marketing claims is true.”

The Guides also offer some additional general guidance that should be considered when making any environmental claim:

Overdoing It

An environmental marketing claim should not overstate any of the product’s environmental attributes or benefits, whether directly or by implication. Claims with a broad, unqualified focus such as “green” or “eco-friendly” are particularly problematic. Specific environmental benefits should be clearly conveyed. Avoid altogether any claims that have a negligible benefit.

Trade-offs

Similarly, marketers should be careful about making general claims that identify a particular benefit. Before doing so, one should analyze trade-offs resulting from the touted benefit to determine if the claim, on the whole, can be substantiated. For example, the Guides note, just

because a company comes out with 25% lighter packaging does not mean it can tout environmental benefits, such as reduced packaging. It may be that those bottles take 25% more energy to produce, which could make a generic claim of environmental improvement misleading. Therefore, any claim made for a product that may have a mixed impact on the environment must take the environmental impact over the course of the product’s entire lifecycle into account. Unfortunately, the Green Guides do not provide the FTC’s view on the appropriate methodology for engaging in such a life cycle analysis.

Make Qualifications Clear

In order to prevent certain claims from being deceptive, companies must qualify them appropriately in any advertising or packaging text. Qualifications should be written in plain language, in a reasonably large font, and clearly and prominently displayed in close proximity to the claim itself.

Is it the Product, Package, or Service?

Whenever you are making an environmental marketing claim, unless it is absolutely clear from the context, you should specify whether the environmental benefit being advertised refers to the product, the product’s packaging, a service, or just to a portion of the product, package, or service.

SPECIFIC CLAIMS AND ADMONITIONS

In addition to providing general advice, the Green Guides also set forth guidance with respect to a number of specific types of claims.

Carbon Offsets

Confusion regarding claims of this type was one of the principal reasons why the FTC revised the Green Guides. Four key issues should be kept in mind when making such claims: 1) Any offset should not be sold more than once; 2) Competent and reliable scientific evidence must support the claim and an appropriate accounting method must be used; 3) Be upfront and disclose if the offset purchase pays for emission reductions that will not occur for at least

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two years; and 4) Don't claim emission reductions through carbon offsets if the activity that caused those reductions was required by law.

Certifications or Seals of Approval

The Green Guides make clear that a certification or seal of approval can be considered an endorsement. Accordingly, in addition to specific issues related to environmental claims, you must also ensure that the certification/seal complies with the FTC's Endorsement Guides (<http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>) prior to any such use. Endorsements must be accurate, truthful, not misleading, and from a genuine, qualified third party. Any connection between the endorser and the company must be disclosed. Also, keep in mind that notwithstanding any endorsements provided, scientific evidence is still required to support environmental impact claims.

Finally, beware of three common environmental marketing pitfalls: 1) Using an unqualified environmental certification or seal of approval. Such a certification/seal likely conveys that the product offers a general environmental benefit, which as discussed earlier, is not recommended. Rather, it is better practice to state the basis for the certification/seal in close proximity to it. 2) Seals/certifications provided by an industry trade association or group. Such certifications should be disclosed to avoid any issue of deception. 3) Promoting, on the packaging itself, that the manufacturer belongs to an environmental-friendly association. Unless that association analyzed (and approved) the environmental attributes of the product itself, touting the manufacturer's membership on the packaging could be deceptive.

'Compostable'

In order to tout that a product is compostable, all of the materials in the product or package should break down into usable compost safely, in about the same time as the materi-

als with which it is composted. Any limitations — such as whether or not a product can be composted at home — must be noted.

'Degradable'

Claims that a product is degradable can only be made if the company can prove that the entire product or package will completely break down within one year. Moreover, the Green Guides state in no uncertain terms that biodegradable claims may not be made for products that are disposed of in landfills because they do not present conditions under which decomposition will occur within one year.

'Free-of'

In order to state that a product is "free of" something, three conditions must be met: 1) The product can only include an amount that would be considered a "trace contaminant"; 2) The amount present cannot cause the material harm that people typically associate with the substance; and 3) The substance cannot have been intentionally added. It is not entirely clear, but if the substance was used in the manufacturing process, the FTC may consider this to have been "intentionally added."

Also, never use a "free-of" claim if the substance was never associated with that product type or if the product includes another substance that poses an environmental risk similar to the one caused by the substance itself. Otherwise, the ad will likely be considered deceptive.

'Non-Toxic'

While a product that includes a trace amount of a toxic substance cannot be labeled as "non-toxic," a marketer can disclose that a product only has trace elements of a toxic substance provided that the trace amount is not harmful.

Ozone-Safe/Friendly

Do not represent, either directly or indirectly, that the product, package or service is safe for, or friendly to, the ozone or atmosphere. Period.

Recyclable

To make an unqualified recyclable claim, recycling facilities must be available to at least 60% of the consumers where the product is sold.

Otherwise, a company must modify its claims. Be careful, however. Simply stating "Recyclable where facilities exist" or "Recyclable — Check to see if recycling facilities exist in your area" will not work if product is marketed nationally and the company does not otherwise disclose the limited availability of recycling programs. Additionally, only make an unqualified recyclable claim if the entire product or package (excluding minor incidental components) is recyclable. If only a part of the product/package is recyclable, clearly qualify the claim to avoid any deception charges. On a related note, if any component significantly limits the recyclability of the product, or if the product is shaped in such a way that it would not be accepted in recycling programs, then it should not be marketed as recyclable.

Recycled Content

Do not claim that your product or package is made from recycled content — which includes recycled raw material, as well as used, reconditioned, and re-manufactured components — unless it is from materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process or after consumer use. As with other environmental claims, if the entire product or package is not comprised of recycled content, any such claim must be clearly qualified. Additionally, if there are numerous sources of recycled content in a product, it is best to state the percentage of each source. Thus, "65% recycled content; including 40% from reconditioned parts" is better than merely stating "65% recycled" where the product contains 25% recycled raw materials and 40% reconditioned parts.

Renewable Energy

Unqualified renewable energy claims can only be made if: 1) the company retains or purchases renewable energy certificates (RECs) to match the use of energy that was derived by fossil fuels; and 2) all, or virtually all, the significant

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utility patents can be drafted to protect objects. And in addition to utility patents, U.S. law also provides protection for “new, original, and ornamental design for an article of manufacture” through design patents. 35 U.S.C. § 171. Thus, design patents are available to cover the nonfunctional elements of functional objects.

Through a combination of utility and design patents, businesses may be able to amass significant protection for their intellectual property from illicit copying by 3-D printing. By focusing patenting efforts on the utility of not only apparatuses or systems in their entirety, but on narrower inventive and useful aspects of particular parts of an apparatus or system, companies can ensure patent protection on both the objects they design, build, and sell, as well as the parts that comprise those objects. In addition, companies can use design patents to protect those unique and proprietary design elements that separate their products from others in the marketplace.

One example of how this approach could work is in the medical device industry. It is conceivable that 3-D printing technology could be used to essentially copy a new medical device after it enters the market; alternatively, it is also conceivable that 3-D printing technology could be used to copy replacement parts for existing medical devices. By seeking patent protection not only for its new medical devices, but also for novel and proprietary parts that comprise its medical devices, a medical device company may be able to fully protect its intellectual property from the threat of illicit copying and selling. In addition, to continue with the medical device example, to the extent there are particular nonfunctional design elements for a medical device or its component parts, a company can seek to obtain design patents to protect those elements from copying as well.

There are some downsides to protecting intellectual property in this

way. One such disadvantage is the time and cost involved in applying for utility and design patents. Some companies may have the resources to prosecute numerous applications for utility and design patents; most companies, however, do not. Another hurdle is the time and cost of enforcement of patent rights. As with patent prosecution, some companies have the resources to monitor and enforce their patents against those who may use 3-D printing to copy and sell their products.

Other companies may face difficulties in effectively rooting out wrongful copying in violation of their utility and design patents. In addition, any patent enforcement strategy involves a litigation element and the cost of patent litigation has continues to rise. Finally, as with the availability of copyright protection, there remains an open question as to the availability of enforcing patents against individual who merely provide the blueprints for copying patented objects as opposed to individuals who actual copy protected inventions. In other words, utility and design patents may not extend to enforcement against the source of copying a protected object using 3-D printing.

Trademark

Trademark law provides yet another layer of protection against illicit copying performed by 3-D printing, although one that is decidedly different from the other two. Trademark protection, of course, extends to brands, logos, slogans, and other symbols that mark a company's products. Thus, trademark protection extends to neither the underlying design nor the utility of an object.

In the context of 3-D printing, therefore, trademark law extends its broadest protection to exact replicas of an object; replicas that include an original protected mark. For example, if a manufacturer includes its trademark brand on a product and someone copies that product with a 3-D printer, along with the trademark, then the copy would infringe on the manufacturer's trademark. If, however, someone made a copy

of that product but neglected to include the trademark on the copy, then trademark law may not provide redress.

Moreover, trademark law extends protection only to those products that are “used in commerce.” 15 U.S.C. § 1051. While this element has been broadly interpreted over time — and effectively bars public uses that would dilute trademarks — it does not go so far as to capture the existence, or even the copying, of a protected mark in someone's home. Rather, the focus of trademark protection is on commercial or public uses. A related form of trademark protection, trade dress, is also available, but requires establishing distinct associations between a particular design and a manufacturer.

The availability of trademark protection in commercial and public spaces, however, may be all companies need to combat threats of counterfeit products made using 3-D printers. By effectively using trademarks to identify their products with the prospect of copying via 3-D printing in mind, those who would make copies of a company's protected products to sell, face a choice: either copy the product — and the trademark — exactly and risk a trademark enforcement action, or copy the product without the trademark and sell a more obvious knock-off. And yet, as with copyright and patent law, a large hole exists in the availability of trademark to protect a company's products; such protection would likely not extend to enforce trademark infringement against designers of blueprints for making illicit copies via 3-D printing.

PROTECTING YOUR INTELLECTUAL PROPERTY

While 3-D printing technology remains in its infancy, it is rapidly developing and becoming more accessible to more people. As it become more readily available, the technology will also attract those who seek to profit at others' expense by copying proprietary designs and inventions.

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Recess Appointments

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President to make a recess appointment, a temporary appointment without the Senate's consent only when a vacancy occurs during a recess of the Senate. See U.S. Const. art. II, § 2, cl. 3. The crucial language is: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

'RECESS OF THE SENATE'

Because the Constitution refers to "the Recess of the Senate," *Noel Canning* held this could only refer to the period between one session and the next during which the Senate could not act on the nomination. In this case, the Senate had declared that it was in pro forma session between the first and second sessions in 2011-2012.

The ruling explicitly holds that the Senate's determination that it was in session pro forma trumped the President's attempt to imply that the pro forma session was *de facto* a recess. Thus, the President's attempt to create three recess appointments during the pro forma recess was illegal.

In addition, although the majority recognized that this ruling was not necessary to decide the case, it ruled that a recess appointment must be predicated on a vacancy occurring during a Senate recess. This is an interpretation of the phrase referring to vacancies "that may happen during the Recess ..."

The *Noel Canning* decision invalidated the three appointments on both grounds. In particular, the court found that the Senate's determination of whether it was in recess controlled as to the recess appointment process. Moreover, even if a recess had existed, the vacancies had not arisen during the recess.

CONSEQUENCES FOR THE NLRB

The consequences for the NLRB are so potentially catastrophic that the Board must of necessity

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must seek certiorari from the Supreme Court. The NLRB, being authorized five members, cannot statutorily act without a three-member quorum. See 29 USC § 153(b). Without the participation of at least one of the recess appointments, the NLRB could not have its quorum and could not render and continue to legally render decisions or otherwise act, from Aug. 27, 2011 rather than from Jan. 4, 2012. See *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010).

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This is because the Board lost its quorum on Aug. 27, 2011 through the expiration of two validly-appointed members' terms. On that day, the terms of Chairman Wilma Liebman and Member Peter Schaumber expired. This left a three-person Board consisting of members Mark Pearce, Brian Hayes, and Craig Becker. The latter was a recess appointment affected by *Noel Canning*.

Hayes' term expired on Dec. 16, 2012. After this, the Board consisted of:

- Mark Pearce, named Chairman on Aug. 27, 2011. He was sworn in as a Board Member on April 7, 2010, following his recess appointment, and was confirmed by the Senate on June 22, 2010 to a term ending on Aug. 27, 2013.
- Members Sharon Block and Richard Griffin, sworn in as a Board Members on Jan. 9, 2012, following recess appointments by the President.
- Member Terrance F. Flynn, sworn in as a Board Member

on Jan. 9, following a recess appointment. Flynn resigned on May 27, 2012.

Therefore, the present Board consists of Pearce, Block and Griffin, the latter two being recess appointments affected by *Noel Canning*.

A RECAP

To review, from Aug. 27, 2011 forward, there were only two validly appointed members and a recess appointment on the Board. All decisions from this date, not the date of the current recess appointments, Jan. 4, are potentially void because there were only two available legitimate votes from Aug. 27.

Moreover, the effect of *Noel Canning* on Board membership in the near future is telling. Following the expiration of Hayes' term on Dec. 16, 2012, the Board lost Flynn, a recess appointment member, on May 27, 2012 through resignation.

The current composition of the Board is a validly appointed chair and two recess appointment members. That chair's term expires on Aug. 27, 2013. It appears that legitimate Board membership under *Noel Canning* from Dec. 16 to Aug. 27 is one member and after that, date it is none. See www.nlr.gov/members-nlr-1935.

IMMEDIATE EFFECT

The immediate effect of *Noel Canning* is the voiding of decisions issued by the Board in 2013. For example, *DirectTV*, 359 NLRB No. 54 (2013), a decision issued on Jan. 25, 2013, invalidated four work rules. The decision is directly void under *Noel Canning* because two of the three votes unholding the decision were made by recess appointees Griffin and Block. Assuming that the Supreme Court takes a year to issue its opinion, the NLRB will have been neutered for two years.

Moreover, if *Noel Canning* is correct, the vote of any individual holding an invalid recess appointment should be void, no matter when in our history that vote was cast. For example, on Jan. 3, 2012, the Board issued *DR Horton*, 357 NLRB No. 184 (2012), a decision by Pearce, Becker and Hayes that found it unlawful, as a condition of employment, to require

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Survey of GC Pay Finds Higher Salaries, Lower Bonuses

By Catherine Dunn

General counsel at major corporations saw their base salaries climb, even as cash bonus awards fell in the last year, according to the latest compensation benchmarking figures from the Association of Corporate Counsel, available at www.accempst.com/.

The in-house trade organization, together with the consultancy Empsight International, surveyed the top lawyers at 190 companies with average revenues of \$31.7 billion in its 2012 Large Law Department Compensation Survey. Participants included companies such as Nike Inc., The Coca-Cola Company, Kimberly-Clark Corporation, and Time Warner Inc.

Catherine Dunn writes for *Corporate Counsel*, an ALM sister publication of this newsletter in which this article also appeared.

GCs saw their base salaries rise 1.9% — from \$557,112 in 2011 to \$567,924 in 2012, according to ACC. Annual cash bonuses, however, dipped 7.9% on average, from \$590,040 in 2011 to \$543,109 in 2012.

All in all, total direct compensation for general counsel fell 2.2% in the last year. While general counsel earned \$1,148,313 in 2011, they took home \$1,122,834 in 2012.

But GCs can still take heart in the value of their bonus opportunities, says ACC CEO and president Veta Richardson. “The lion’s share of compensation, year by year, is at risk, meaning that it’s tied to the performance of the company and performance by the individual executive,” she says.

Last year’s average target incentive stood at 73.9%, down slightly from 76.5% in 2011. That figure goes to show “that a significant opportunity exists to be paid based upon performance and delivering results in furtherance of the corporate objective,” explains Richardson, “and what it says to me is that these general counsel, as a whole, were highly regarded by their cor-

porations to achieve bonus levels of three quarters of base salary.”

ACC/Empst also analyzed pay packages for law departments at mid-market and smaller companies. The mid-market edition of the survey examined 114 organizations with an average revenue of \$2.01 billion, including Cal-Maine Foods Inc., JetBlue Airways Corporation, and Mary Kay Holding Corporation.

The average base salary for GCs in that group came in at \$347,662, with an additional annual cash bonus of \$210,900. They had an average target incentive of 53%.

In the 2012 Small Law Department Compensation report, 412 organizations with average revenues of \$190 million provided data on their pay practices. Participants included Alliant Insurance Services Inc., Blue Northern Energy, and Peet’s Coffee & Tea. GCs from these smaller companies earned \$185,866 as an annual base, and \$34,978 in cash bonuses. Their target incentive percentage came to 25.4%.



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Intellectual property laws, however, provide somewhat muddled options for companies that want to maximize protection for their products from such illicit copying. With that understanding there are a handful of strategies companies can employ to identify and anticipate threats to their intellectual property in the future:

1. Review product lines with an eye toward what is unprotected. This may involve identifying those products that would be most susceptible to illicit copying with 3-D printing.
2. Develop legal strategies with the goal of creating action plans in the event that illegal copying is detected. Every company and every industry has different needs for pro-

tecting their products; it’s crucial to recognize what those needs are and determine what combination of laws can best protect proprietary designs.

3. Monitor the marketplace for products that copy protected designs. As the prevalence of 3-D printing technology increases, it will be vital for companies to observe not only the traditional forums for their products, but new forums as well.
4. Learn more about 3-D printing technology and how it could be applied to a company’s product lines. As the technology becomes more sophisticated, so will its potential uses; it is critical to stay informed about new ways the technology could implicate products.

CONCLUSION

Ultimately, a large share of those who will adopt 3-D printing will use it in ways that are genuinely new, innovative, and do not infringe on the intellectual property of others. Inevitably, however, there will be those who use it to take the work of others — and sell it for their own profit — rather than make original works. By recognizing and planning for this disruptive technology before it disrupts their business, companies can use available legal protections to place themselves in the best position to meet it.



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Green Guides

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manufacturing processes involved in making the product or package are powered with renewable energy or non-renewable energy that is matched by RECs. Otherwise, state the percentage, or specify the part of the manufacturing process or product to which the claim applies. Importantly, companies that generate renewable energy — e.g., through solar panels installed on-site — but sell all of that electricity and the associated RECs to the utility cannot claim they “use” renewable energy.

According to the FTC, “research suggests that reasonable consumers may interpret renewable energy claims differently than marketers may intend.” As such, the Green Guides recommend specifying the source of the renewable energy (e.g., wind or solar energy). That can be done by either disclosing all the sources, or stating that a mixed of sources was used and specify the source that makes up the greatest percentage, calculated on an annual basis.

Notably absent from the Green Guides is any discussion of two common environmental claims — “sustainable” and “natural.” The FTC

felt that these terms were susceptible to too many different meanings to offer meaningful guidance.

CONCLUSION

Companies intending to market products that contain environmental claims should consider general advertising and consumer protection principles, as well as consult the Green Guides. Consider qualifying the claim or making a more specific claim, if consumers might otherwise misinterpret the broader claim. Additionally, maintain accurate records regarding the substantiation of any claims.



Recess Appointments

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an employee to agree not to file joint, class, or collective claims addressing their wages, hours, or other working conditions. Under *Noel Canning*, *DR Horton* is a nonentity because one of the Board votes was made by Hayes, a recess appointment.

An advocate could make an argument that *DR Horton* might still be in effect despite the fact that *Noel Canning* implies that decisions within its ambit are void, not voidable. However, if *Noel Canning* is somehow governed by principles analogous to *Linkletter v. Walker*, 381 U.S. 618, 636 (1965), the proper approach to a retroactivity decision is to “weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” *Noel Canning* leaves no doubt that the balance of these factors implies that prior decisions made by an imperfectly appointed Board are in serious doubt.

IMPLICATING THE BOARD'S POWERS

Noel Canning provides a basis for finding that its decision is wholly ap-

plicable to past decisions. In addressing the entirely different question of whether the court had jurisdiction to consider the validity of recess appointments because the issue had not been raised before the Board, the court found that extraordinary circumstances justified ruling on the issue. The court unanimously found that the issue implicated the very power of the Board to act and raised fundamental separation of powers concerns. *Noel Canning*, op. cit. at 11.

Assuming that these concerns make the retroactivity issue fruitless, some past decisions, long final, will be questionable as between the original parties or as precedent.

CONCLUSION

The final aspect to the Armageddon of *Noel Canning* may be in store for the CFPB, for its current director holds a recess appointment that is invalid in the same way that the NLRB appointments were invalid under *Noel Canning*. The prospect for the CFTC's issuance of final and binding Dodd-Frank regulations is problematic, as that agency has never had a validly appointed director, although it regards 41 of its regulations as “finalized.” See www.cftc.gov/lawregulation/doddfrankact/dodd-frankfinalrules/index.htm.

On Feb. 13, the President renominated Block and Griffin while the Senate was in session. See www.nytimes.com/2013/02/14/business/obama-resubmits-two-appointees-for-the-nlrb.html. Because the President has ordered the Board to continue its business as it did before *Noel Canning*, it appears the renominations are intended to induce Republicans to make two nominations of their own, allowing the Board to operate with five members. However, there is no obvious advantage to Republicans cooperating in reconstituting a wholly effective Board with a Democratic three-member majority.

The President has also renominated his CFPB director with the support of Senate Democrats. See *LA Times* (2/14/13), <http://articles.latimes.com/2013/feb/14/business/la-fi-consumer-bureau-fight-20130215>. In this case, the President appears to be reiterating his support for the nominee.



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