Copyright Law

Prof. Madison
University of Pittsburgh School of Law

Topics:

- The Public Performance and Display Rights
- Sections 106(4) and (5)
- The Transmit Clause and Technology Changes

This legendary Pittsburgh restaurant in Market Square – now closed – played a surprisingly important role in the history of copyright law. (So did Fred Rogers – stay tuned.)

Section 106(4) and (5): The public performance (4) and public display (5) rights

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform the copyrighted work publicly**;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, **to display the copyrighted work publicly.**

17 U.S.C. § 106 (2022)

Section 106(4) and (5): The public performance (4) and public display (5) rights

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform the copyrighted work publicly**;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, **to display the copyrighted work publicly**

17 U.S.C. § 106 (2022)

To **''perform''** a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

To **''display''** a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

17 U.S.C. § 101 (2022)

Section 106(4) and (5): The public performance (4) and public display (5) rights

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform the copyrighted work publicly**;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, **to display the copyrighted work publicly**

17 U.S.C. § 106 (2022)

To **''perform''** a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

To **''display''** a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

17 U.S.C. § 101 (2022)

To perform or display a work **''publicly''** means

(1) to perform or display it at **a place open to the public** or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to **transmit or otherwise communicate** a performance or display of the work **to a place** specified by clause (1) or **to the public, by means of any device or process,** whether the members of the public capable of receiving the performance or display receive it in **the same place or in separate places and at the same time or at different times**.

To ''**transmit**'' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

17 U.S.C. § 101 (2022)

History

Musical works (i.e., compositions, on paper) were added to copyright in 1831, protected against unauthorized printing and vending.

A general public performance right in musical *compositions* was added to U.S. copyright law in 1897. *The business of selling musical recordings only began circa 1900.*

Compare: exclusive right to prepare translations and dramatizations – precursor to the 106(2) adaptation right – added in 1870.

Consistency and copyright politics

Copyright and the business of authorship: Is public performance *free publicity* for music composition rights owners (who sell copies of sheet music), or is it improper / *unfair appropriation* (because there is real money in the performance)?

Copyright and the business of related businesses: Nb. piano roll producers and radio stations and networks *opposed* extending the public performance right to their businesses during the process that led to the 1909 Copyright Act.

Section 106(4) and (5): What does "perform" and "display" mean?

Traditionally: Live drama and music (plays, other literature) were "performed"; television and radio broadcasts were "performed"; visual art (paintings, photographs, books, sculptures) was "displayed" (e.g., in art galleries and museums).

Today: "The Internet" makes it possible to separate the object from the audience in new and different ways. Slightly older technology: images/videos hosted on server 1 could be "framed" and included in websites hosted on server 2. Today: images/videos on server 1 may be "embedded" in websites hosted on server 2.

Does the operator of server 2 infringe the display or performance rights?

Widely but not universally followed precedent: the "server test." Perfect 10, Inc. v. Amazon.com (9th Cir. 2007). Server 2 does *not* infringe.

Newer cases (a trend?): distinguishing and refusing to follow the "server test." Nicklen v. Sinclair Broadcast Group (S.D.N.Y. 2021). Server 2 may infringe. (See also *Aereo* on "performance.")

Why the split? (i) Different emphases in reading the statutory text; (ii) Different public policy intuitions about the role of copyright on the Internet.

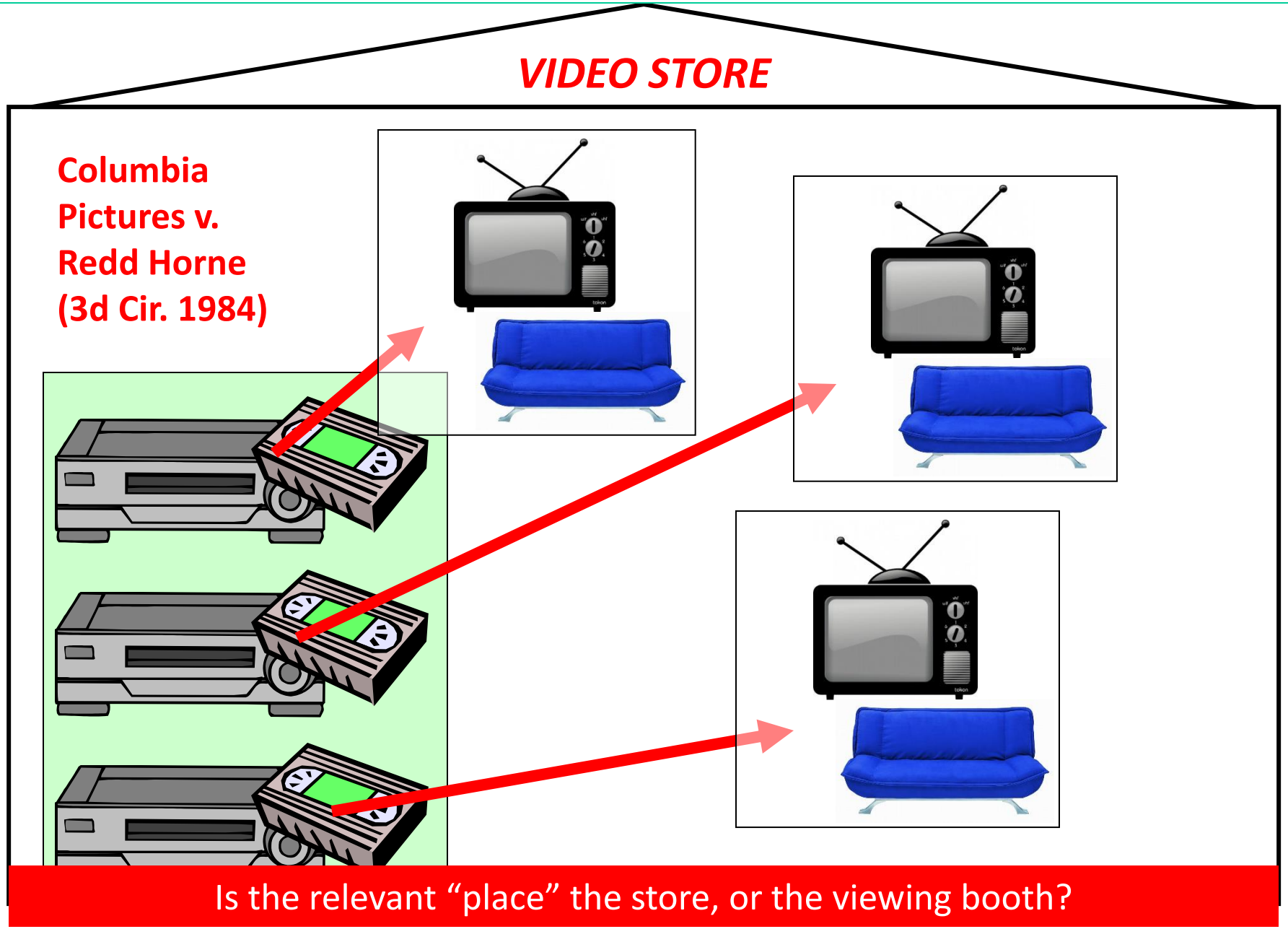
Section 106(4) and (5): “open to the public”

See Twentieth Century Music Corp. v. Aiken (U.S. 1975) *(now overruled by statute; a business owner playing music *does* infringe)*

To perform or display a work "**publicly**" means -

(1) to perform or display it at **a place open to the public** or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

Section 106(4) and (5): “open to the public”



Section 106(4) and (5)

Columbia Pictures v. Redd Horne (3d Cir. 1984)

"It is just one aspect of a broad attack by the studios on the video cassette and recorder industry …."

The New York Times

MONDAY, AUGUST 20, 1984

Video Rental Rooms Fought

Like some 12,000 others across the country, two small Pennsylvania merchants, Maxwell's Video Showcase and the Nickelodean Video Showcase, rent out movie cassettes. But they go one step further.

They also rent small viewing rooms containing a couch and a television set hooked to a video recorder. And that innovation has touched off a complex copyright battle.

Eight Hollywood studios are arguing that the two merchants are showing their films in public without paying royalties — a violation of Federal copyright law. The merchants respond that the viewing rooms are private.

The central question is: What constitutes a public showing? The answer is not a clear-cut one, legal experts say.

"The issues being raised here would make the perfect law school exam question," said David Lange, a professor of law and copyright expert at Duke University Law School. "It is a very close call that is by no means black and white."

The legal challenge to the showings by the Nickelodean and Maxwell's was brought by Columbia Pictures Industries, Walt Disney Productions, Embassy, MCA-Universal, the MGM-UA Entertainment Company, the Paramount Pictures Corporation, the 20th Century-Fox Film Corporation and Warner Brothers.

It is just one aspect of a broad attack by the studios on the video cassette and recorder industry, which has boomed in popularity in recent years with sales of home video recorders this year expected to reach 7 million units.

The stakes in the battle between the studios and the video cassette rental industry are high. Last year, there were some 150 million video cassette rental transactions, with an estimated value of more than $750 million, according to the Fairfield Group, a video consulting company. By next year, Fairfield projects that rentals will more than double, to 350 million transactions worth $1.75 bil-

Continued on Page D5

The New York Times/Steve Williams

Todd Moore, top, renting a video cassette from Andy Miller, assistant manager of Nickelodean Video Showcase in State College, Pa., and viewing it with friends in a private viewin

Columbia Pictures v. Redd Horne (3d Cir. 1984)

Who controls access to and consumption **of motion pictures?**

Of broadcast television?

Of cable television?

[In 1984! Yet to come: pre-recorded videocassettes, DVDs, Blu-rays, streaming]

To perform or display a work ''**publicly**'' means -

(2) to **transmit or otherwise communicate** a performance or display of the work to a place specified by clause (1) or **to the public, by means of any device or process,** whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

To ''**transmit**'' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

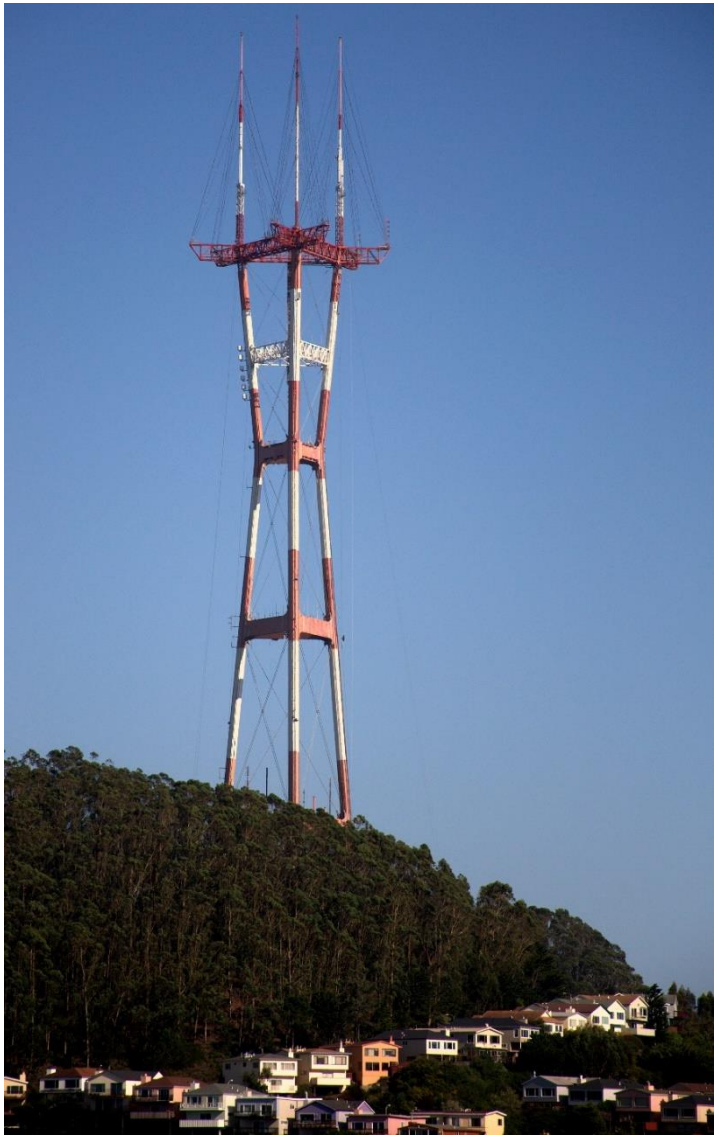
17 U.S.C. § 101 (2022)

The easy cases:
broadcast radio and television.

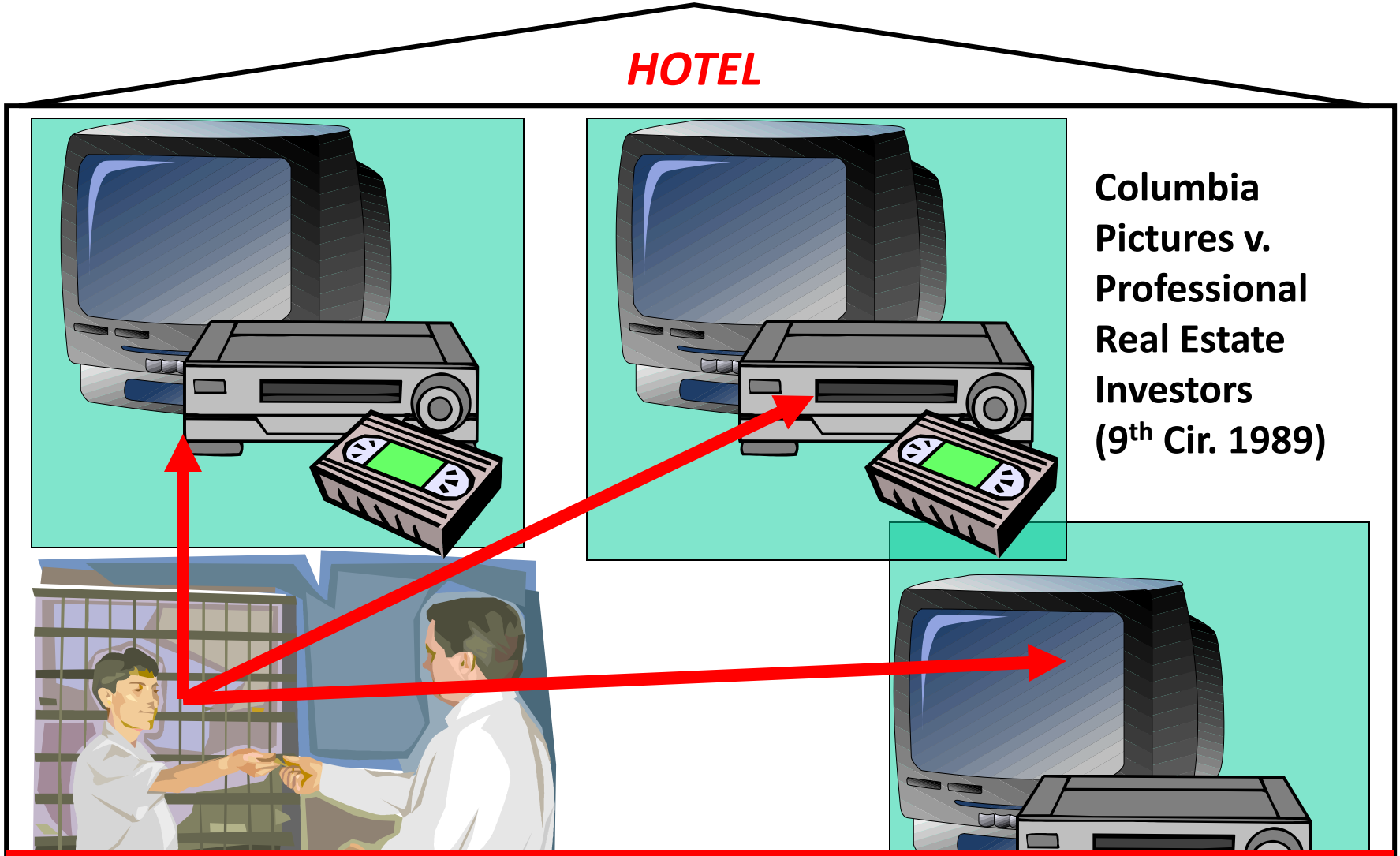
Justification (why was the statute drafted this way?) and implication (why does this matter?):

Broadcasters / transmitters have to obtain public performance licenses from copyright owners in order to “perform” their works (incl. *musical compositions* and *audiovisual works*) Review the statutory definitions in order to understand why. In practice: ASCAP and BMI and other “performing rights organizations” (PROs) issue these licenses.

The general public performance right does not apply to sound recordings but does apply to musical works (i.e., musical compositions).



Section 106(4) and (5): “public” v. “private” under the “transmit” clause



One VCR per room, with tapes located at the front desk = no transmission or “other communication to the public,” and a hotel room is not a public place; therefore, the hotel is engaging in *private* performances.

Real problems: understanding the letter of the law v. intuitions/understanding the spirit or purpose of the law.
How, if at all, does the latter matter in resolving disputes? In planning businesses?

- Cartoon Network LP v. CSC Holdings, Inc. (2d Cir. 2008) (a/k/a “*Cablevision*”)
- ABC, Inc. v. Aereo (U.S. 2014)

Background: The Transmit Clause was added to the ‘76 Copyright Act largely to overrule the *TelepromptTer* (1974) and *Fortnightly* (1968) cases from the Supreme Court, which held that a CATV system (community access television, now commonly referred to as cable TV) did not infringe broadcasters’ copyrights when it captured broadcast signals on a single antenna and transmitted them via cable to system subscribers in the neighborhood.

In other words:

A cable TV system that "re-broadcasts" over-the-air (i.e., broadcast) TV signals without copyright owners' permission is infringing under section 106(4).

Now:

Does a "Remote DVR" system infringe? See *Cablevision.*

User at home stores © a/v recording in remote server; plays back at home from remote server) (probably not – this is *private* transmission).

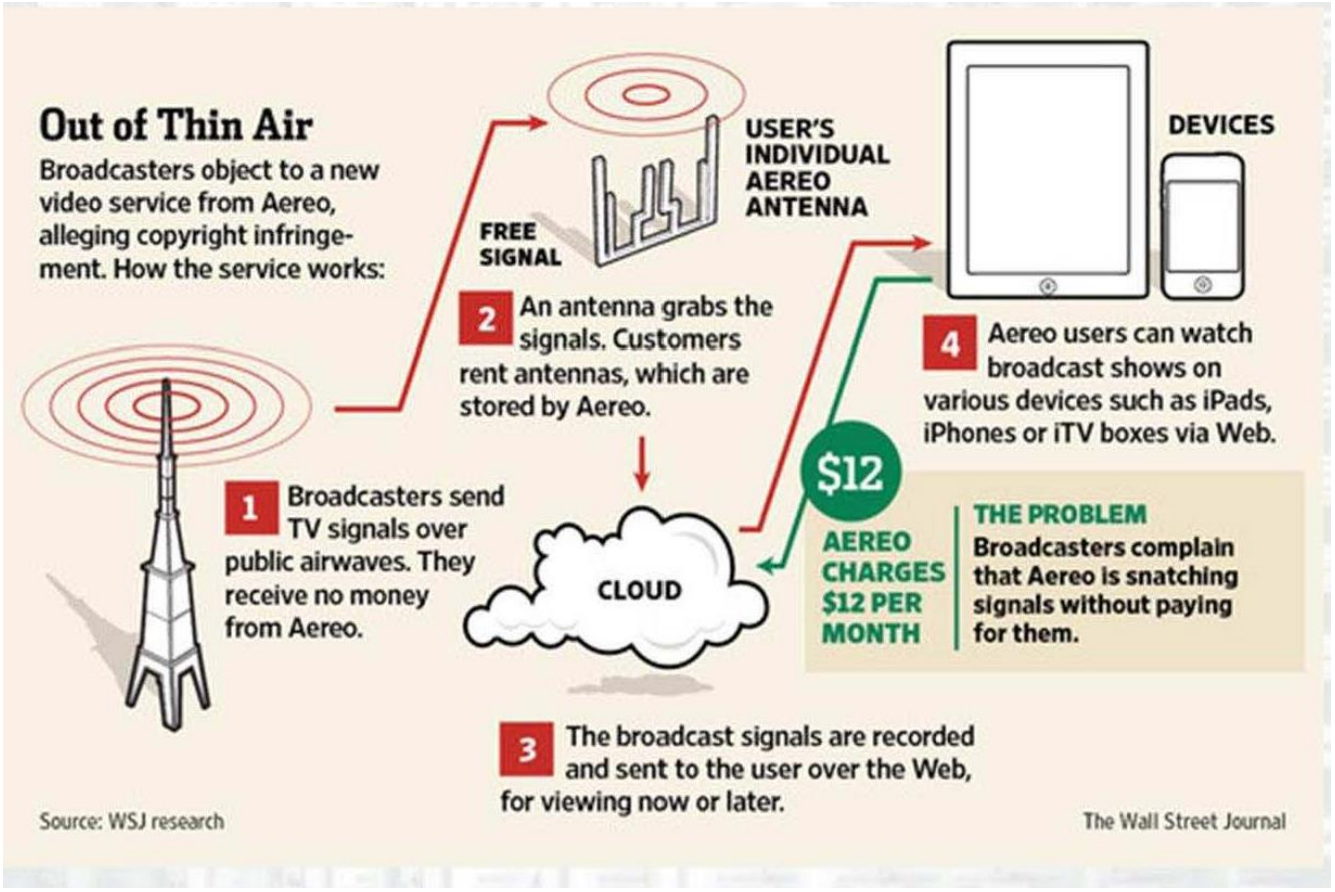
Does the *Aereo* system infringe?

User rents/controls tiny remote antenna that captures broadcast signal (© a/v work), stores it, then beams it to mobile device. (probably yes – this is *public* transmission).

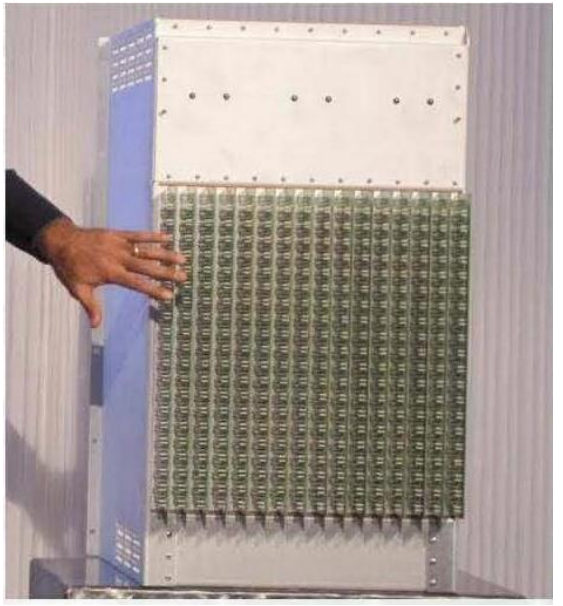
Is there a meaningful difference – functionally, economically, or legally? What does the Court argue?

Section 106(4) and (5): the political economy of the "transmit" clause

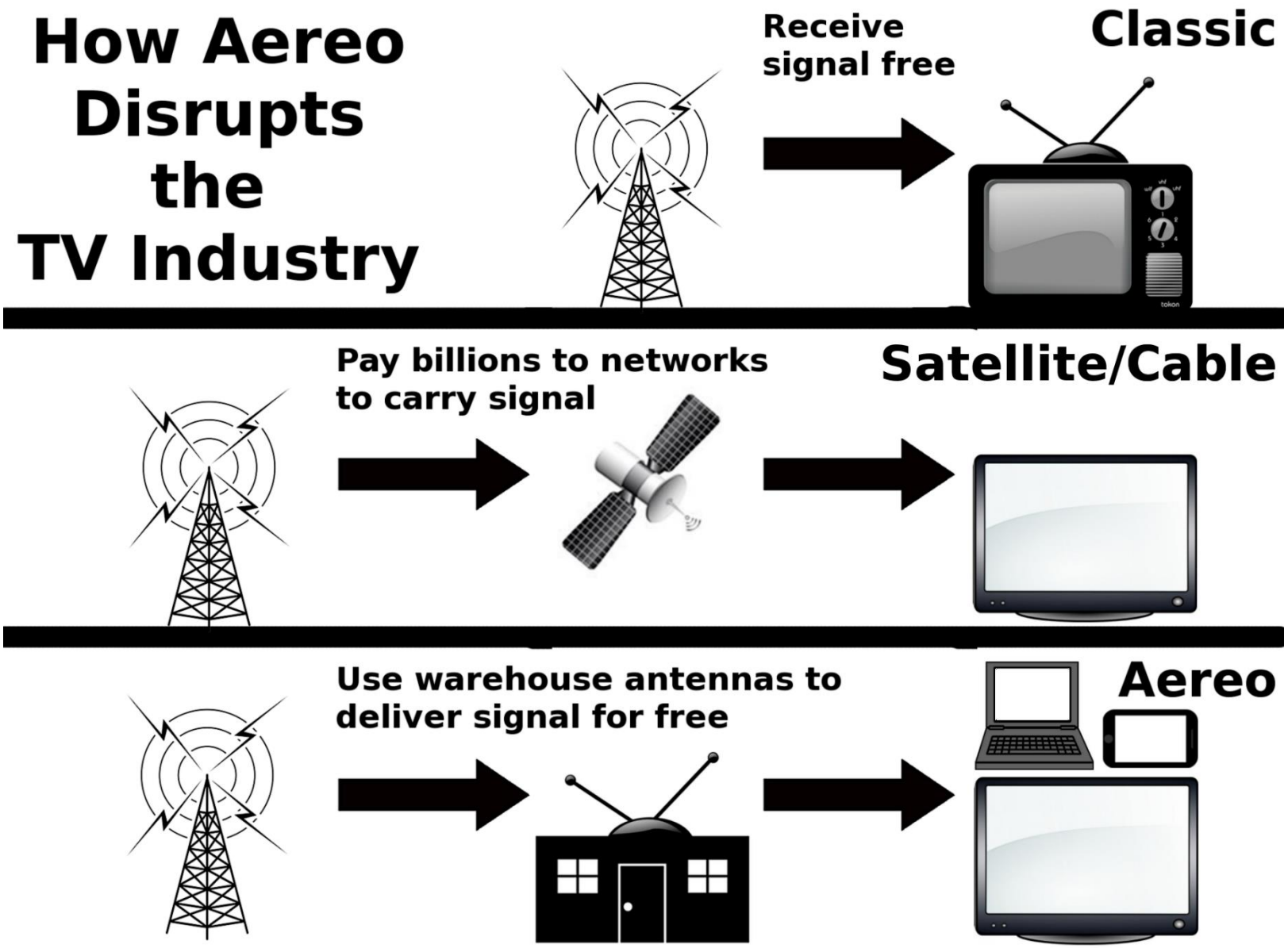
ABC, Inc. v. Aereo (U.S. 2014): Aereo designed a system based on the holding in *Cablevision* (i.e., remote DVRs do not infringe the p.p. right): thousands of individual antennas, each of which can be assigned to an individual Aereo subscriber to record and re-transmit broadcast TV content to that subscriber's mobile device. **Does Aereo infringe the public performance right in broadcast TV content?**



An Aereo antenna, and an Aereo antenna array:



Section 106(4) and (5): the political economy of the “transmit” clause



Section 106(4) and (5): the "transmit" clause compared to the reproduction right under Section 106(1)

Compare "public performance" analysis of the *Aereo* system with "reproduction right" analysis of Betamaxes and VCRs.

Under *Sony Corp. of America v. Universal City Studios* (U.S. 1984), it is *lawful* under the reproduction right to record a broadcast TV program and play it back for yourself – under the *reproduction* right. Why? Fair use.

Under *Aereo*, hiring a company to record a broadcast TV program and play it back to you is copyright infringement – under the public *performance* right.

How does running/using the *Aereo* system differ from selling/using VCRs? Does it differ? Nb. in *Aereo* there was no dispute or argument about reproduction rights or fair use.

Summing up Section 106

Rule-oriented, doctrinal analysis of the exclusive rights in Section 106 tends to favor (copyright owners) (incumbent industries that produce/distribute copyrighted works) (parties – usually companies – with money) and to *dis-favor* (authors) (users, readers, listeners, viewers, players, fans, librarians/archivists) (downstream / next-generation creators). *That is by design.*

The definitions of "originality," "copying," "adaptation," and "substantial similarity" are (almost) hopelessly vague, leaving fact-finders (juries, sometimes judges) to rely on intuition and gut instinct. *That is also by design.*

Example – a forward-looking question: Entrepreneurs and startups may want to build "cloud"-based services to compete with incumbent © owners and incumbent distributors. What's the relevant copyright law?

Summing up Section 106

Do public bus passengers infringe when they play movies on their iPads, or listen to music on their smartphones, on the bus?

Can the public transit authority (in Pittsburgh: the Port Authority) charge passengers a fee to listen or watch copyrighted content “purchased” by the passenger (downloaded or streamed via Spotify) and accessed via the passenger’s device?

What if the content is stored in the passenger’s cloud account?

Why / why not?


A
WALT DISNEY
DONALD DUCK
The End
DISTRIBUTED BY
R-K-O RADIO PICTURES INC.
SOUND RCA SYSTEM
Color by TECHNICOLOR