

# 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

# Act III

**Act I: Basic copyright history and its evolving public policies (*Classes 1-5*)**

**Act II: The core structures of copyright ownership and the copyright owner's baseline exclusive rights (*Classes 6- 16*)**

**Act III: Working with copyright law and practice with awareness of their contemporary settings and stakes**

## Summing up Section 106

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

Can the city's public transit authority charge passengers a fee to listen or watch copyrighted content "purchased" by the passenger (downloaded or streamed via Spotify or TikTok) and accessed via the passenger's device?

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

Why / why not?



This legendary Pittsburgh restaurant in Market Square – now closed – played a surprisingly important role in the history of copyright law.



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

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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

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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)

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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)

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

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History: Publishers push to extend the scope of their power to claim \$\$\$ for © works, as they have for centuries:

Musical works (i.e., compositions, on paper) were added to U.S. copyright in 1831, protected against unauthorized printing and vending. (In England: In 1777.)

A general public performance right in musical *compositions* was added to U.S. copyright law in 1897. In 1909, this was confirmed but no longer limited to musical works; infringement required that the performance be “for profit”; 1976 – the “for profit” limitation was removed. 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.

Ongoing conflicts in copyright politics:

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)? The absence of a sound recording copyright (until 1972) was an enormous subsidy for broadcast radio – and for jukeboxes.

## Section 106(4) and (5): What does “perform” and “display” mean?

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**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** (9<sup>th</sup> 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. And (iii) few players truly care about “progress” or “authorship”; that rhetoric conceals the real arguments.

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

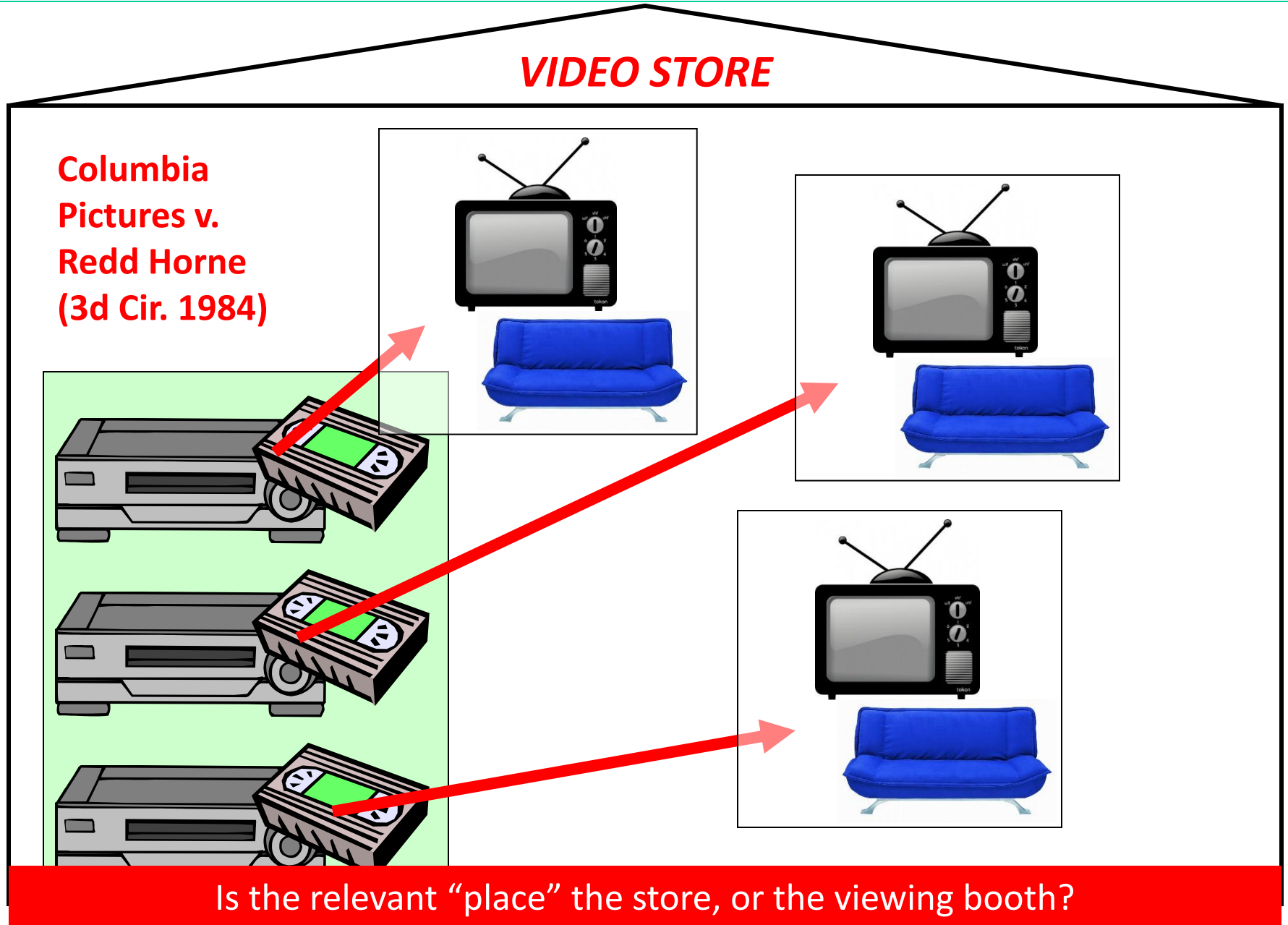


To perform or display a work "**publicly**" means -

- (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;

**See Twentieth Century Music Corp. v. Aiken (U.S. 1975)** (now overruled by statute; a business owner playing music *\*does\** infringe and usually has to pay public performance fees unless Section 110(5) applies))

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



Is the relevant “place” the store, or the viewing booth?

# Section 106(4) and (5): the political economy of “public performance”

## 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]**

**DISCOVER THE FUN WORLD OF VIDEO MOVIES**

**In the exclusive private Showcase Rooms at Maxwell's**

To introduce you to the enjoyment of home video movies, Maxwell's would like you to try a Showcase promotional screening. Come to Maxwell's and rent any of the 21 private showcase rooms, which hold 2 people comfortably. You pay only for the rental of the showcase room. You have free use of Maxwell's entire library of video films.

From 12:00 A.M. to 8:00 P.M. showcase rooms are \$5.00  
From 8:00 P.M. to 10:00 P.M. showcase rooms are \$8.00

Showcase rental is based on 2 hours. See as much as you like. Components of several films or watch a full length movie.

At the end of your showcase screening you get back a Maxwell Video Book which you can use toward equipment, tape rental or purchase, or future screenings.

If you already own a video unit and buy a tape from Maxwell's your showcase rental fee is deducted from the price of the tape and classic movies included in the Video Library.

Maxwell's sells video equipment and accessories at the lowest prices available. We also offer full service or what we call Free papers and assorted wall art are provided for your pleasure while viewing Maxwell's.

**HONEYSUCKLE ROSE** (PG)

**A Change of Seasons** (R)

**AL PACINO CRUISING** (R)

**JOHN TRAVOLTA IRIAN COWBOY** (PG)

**THE AFTER TIME** (R)

**THE WICKER MAN** (R)

**HOPSCOTCH** (R)

**ALIEN** (R)

**Fame** (R)

**FRIDAY THE 13TH** (R)

**THE MUMMY MOVIE**

**Oh, God!** (R)

**A Partial Listing Of The Hundreds of Movies In Maxwell's Library**

**THE ELEPHANT MAN** (R)

**RAISE THE TITANIC** (PG)

**BLAKE EDWARDS "10"** (R)

**THE FORMULA** (R)

**THE STUNT MAN** (R)

**THE ROSE** (R)

**MASH** (R)

**THE CHINA SUNDBOME** (R)

**POPAYE** (R)

**BURCH HOLE** (R)

**King Kong** (R)

**THE SPECIAL EDITION CLOSE ENCOUNTERS OF THE THIRD KIND** (R)

**BEING THERE** (R)

**STAR TREK** (R)

**MAXWELL'S VIDEO SHOWCASE**

2823 W. 26th St. • 10 a.m. to 10 p.m. 633-7220

© 1984 Maxwell's Video Showcase, Inc. Thursday, July 23, 1981

# 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 ...”

## 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-



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 viewing room.

## Section 106(4) and (5): the “transmit” clause

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17 U.S.C. § 101 (2022)

## Section 106(4) and (5): the “transmit” clause

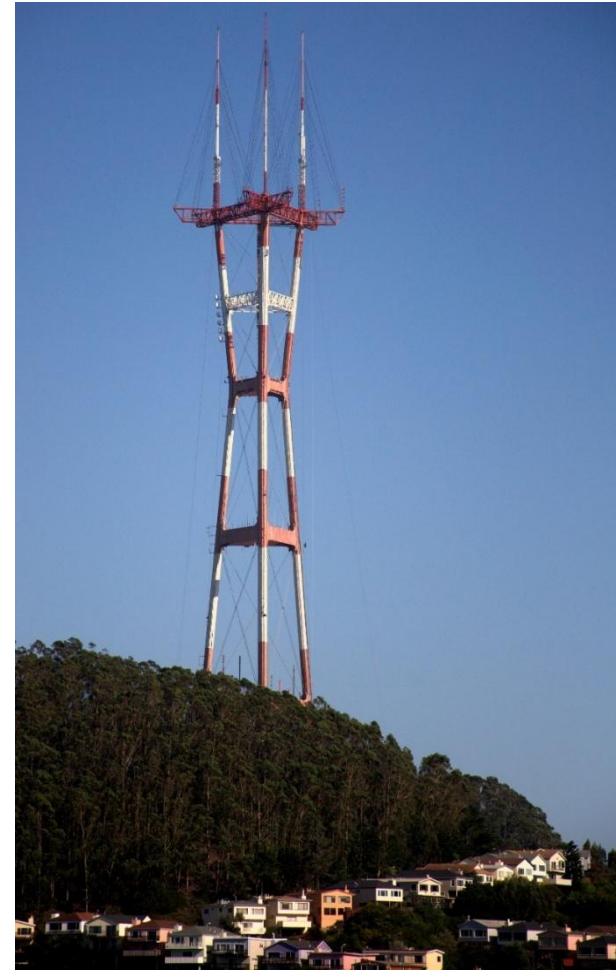
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### The easy cases: broadcast radio and television.

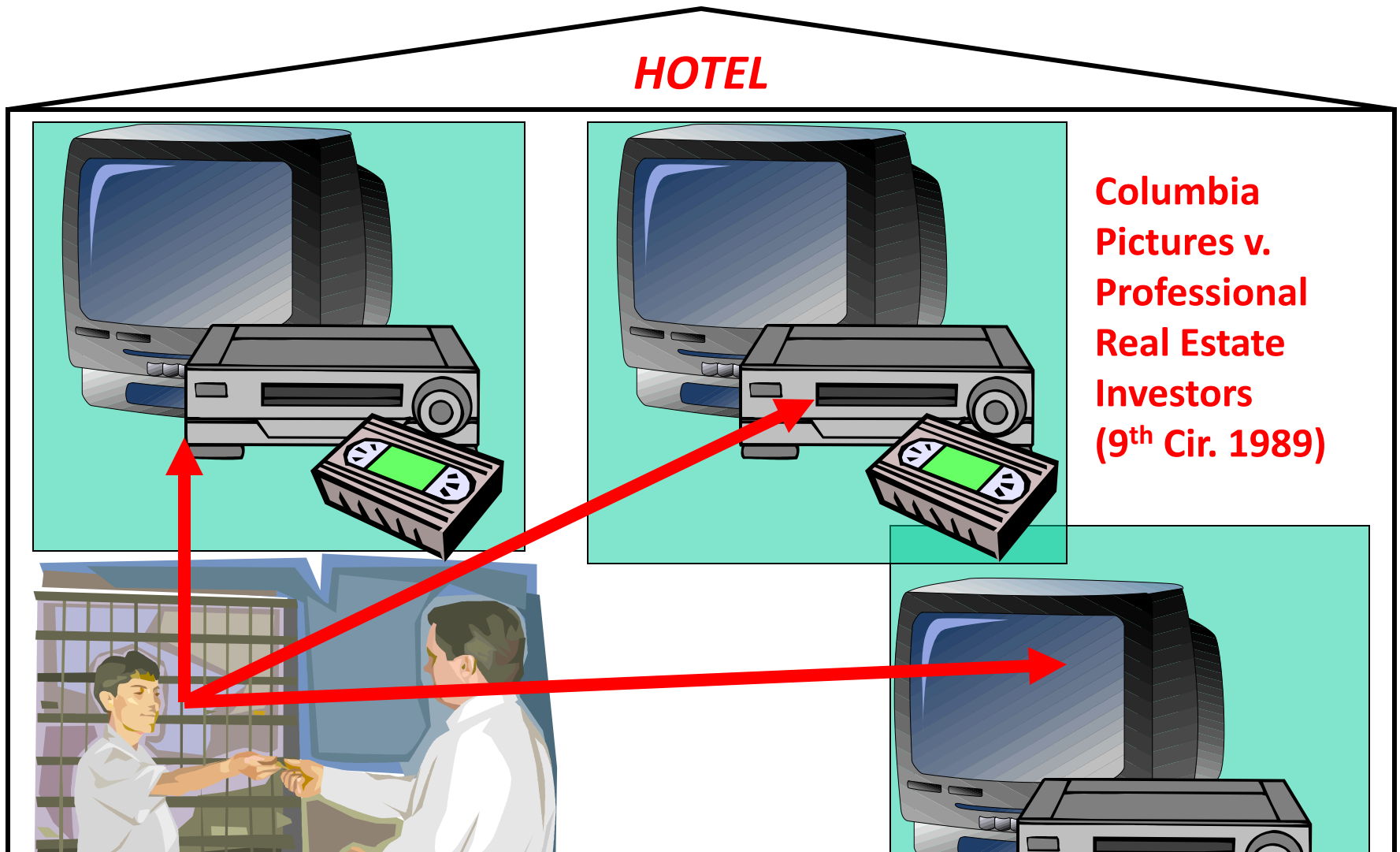
Justification (why was the statute drafted this way?) and implication (why does this matter?):

Broadcasters / transmitters have to obtain public performance licenses from copyright owners in order to “perform” © works (incl. *musical compositions* and *audiovisual works*, but not *sound recordings*) 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



Columbia  
Pictures v.  
Professional  
Real Estate  
Investors  
(9<sup>th</sup> Cir. 1989)

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.

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

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**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 *Teleprompter* (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.

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

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Today, unless an exemption applies, 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:

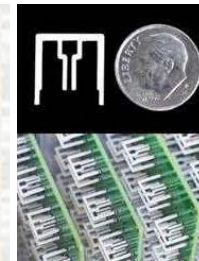
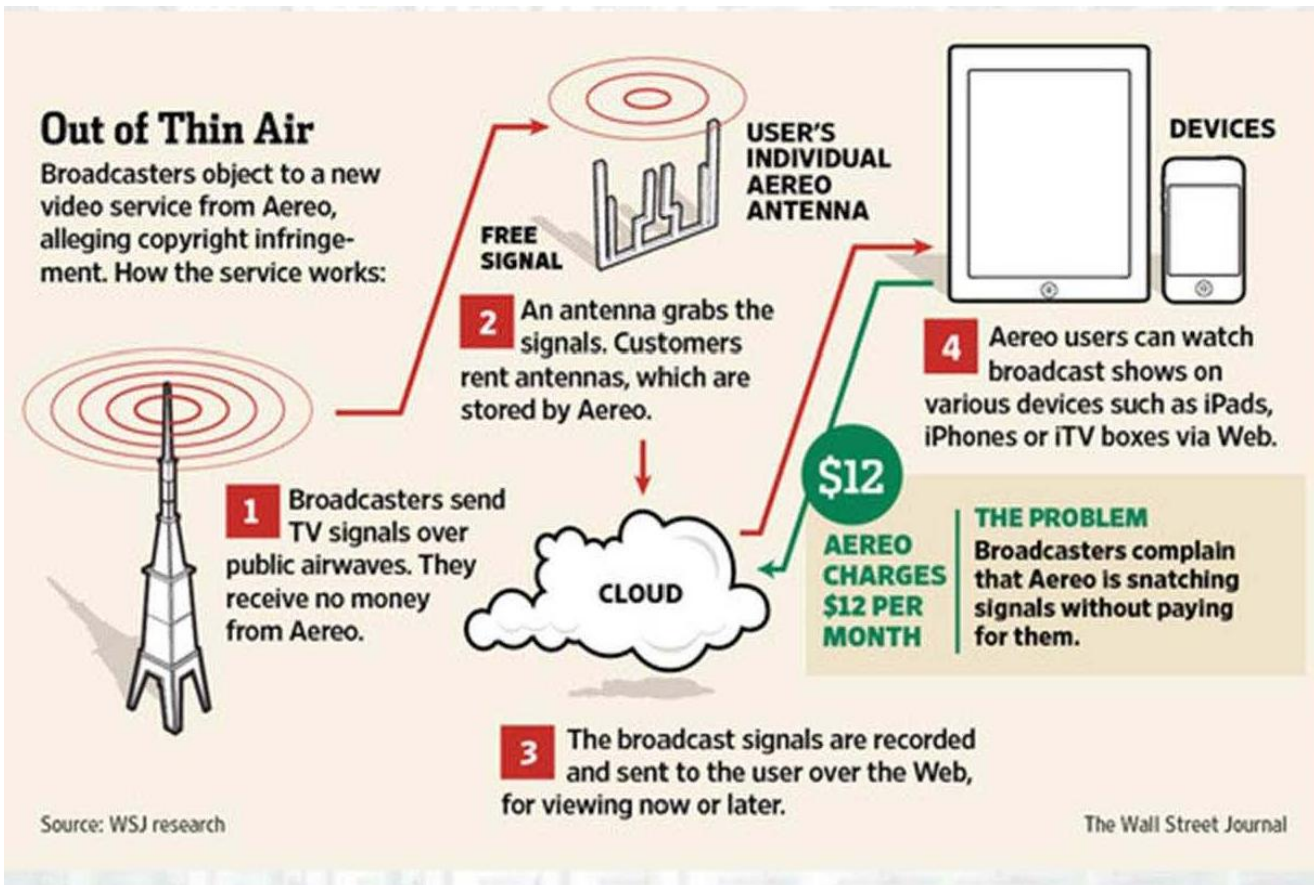
**Does a “Remote DVR” system infringe?** I.e., cloud/remote server; control box in the user’s home; user storage of the © a/v work in the cloud; “performed” in the user’s home)? See *Cablevision*. Probably not. This is *private* transmission.

**Does the Aereo system infringe** (i.e., user rents/controls tiny remote antenna that captures broadcast signal (© a/v work), stores it in the cloud, then “performed” on user’s mobile device. *Aereo*. 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

# How Aereo Disrupts the TV Industry

Receive  
signal free

**Classic**



Pay billions to networks  
to carry signal

**Satellite/Cable**



Use warehouse antennas to  
deliver signal for free

**Aereo**



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

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**Compare** “public performance” analysis of the *Aereo* system with “reproduction right” analysis of Betamax 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. (Why not? Tactics!)

## Summing up Section 106

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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

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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



SYSTEM

Color by TECHNICALOR