

FOR

AND

Case Analyses

Intellectual

Property Law

New Media

Steven L. Baron

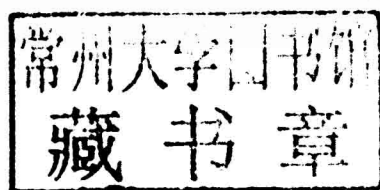
Edward Lee Lamoureux

Claire Stewart



Steven L. Baron, Edward Lee Lamoureux, and Claire Stewart

Case Analyses FOR Intellectual Property Law AND New Media



PETER LANG

New York • Bern • Frankfurt • Berlin
Brussels • Vienna • Oxford • Warsaw

Library of Congress Cataloging-in-Publication Data

Baron, Steven L., author.

Case analyses for intellectual property law and new media /

Steven L. Baron, Edward Lee Lamoureux, Claire Stewart.

pages cm. — (Digital formations; vol. 107)

Includes bibliographical references and index.

1. Intellectual property—United States—Cases.

2. Digital media—Law and legislation—United States—Cases.

3. Multimedia systems—Law and legislation—United States—Cases.

I. Lamoureux, Edward Lee, author. II. Stewart, Claire, author. III. Title.

KF2979.B374 346.7304'8—dc23 2015019689

ISBN 978-1-4331-3101-1 (paperback)

ISBN 978-1-4539-1605-6 (e-book)

ISSN 1526-3169

Bibliographic information published by **Die Deutsche Nationalbibliothek**.

Die Deutsche Nationalbibliothek lists this publication in the "Deutsche Nationalbibliografie"; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de/>.

Cover design concept by Edward Lee Lamoureux

The paper in this book meets the guidelines for permanence and durability of the Committee on Production Guidelines for Book Longevity of the Council of Library Resources.



© 2015 Peter Lang Publishing, Inc., New York

29 Broadway, 18th floor, New York, NY 10006

www.peterlang.com

All rights reserved.

Reprint or reproduction, even partially, in all forms such as microfilm, xerography, microfiche, microcard, and offset strictly prohibited.

Printed in the United States of America

Preface to the 2nd Edition

The 2nd edition of *Intellectual Property Law and Interactive Media: Free for a Fee*, improves on the 1st edition in form and content. Although developments in the law tend to move somewhat slowly, the new media environment changes rapidly, such that while the decisions that are made follow time-worn practices (the law), the case specifics present new, innovative, and challenging legal dilemmas. The 2nd edition moves our coverage of case analysis to this separate volume, *Case Analyses for Intellectual Property Law and New Media*, enabling us to focus our attention, and that of our students and readers, on important trial and legal procedures that attend applying extant law to, largely, new circumstances. Moving the case analyses to this separate volume enables students/readers to focus their attention on history and theory while reading the conceptual text, then bring understandings derived there to bear on cases found in this analytic text. The approach offers relief from information overload and arms one with time and space to “shift gears” between concepts and cases. The 2nd edition includes the most important cases presented in the 1st edition, and updates case selections to include the most recent key cases prior to publication.

Each case summary begins with a brief statement highlighting the importance of the litigation’s outcome. This element is added to our approach in the 1st edition where we left this interpretation to the reader/student. The new précis provide focus that is especially important given the complexities found in many of

the cases. The authors are well aware of, and sensitive to, the fact that few in our target audience have experience with legal terms or protocols. Providing focused interpretations in addition to analysis aids understanding and learning.

Full case citations are given within this text. Having the proper case citation is crucial for accurate searching. When we note cases in the concept text, and when we analyze them in detail, here, in the companion volume, we provide a full case listing using Harvard Law Review Association's *The Bluebook: A Uniform System of Citation*, 19th ed. (2010, sixth printing, 2012) style. Additionally, readers/students may go to our companion website, *freeforafee.com*, and find there a list of URLs that link to case files from the litigation covered in this text.

Marc Cooperman and Robert Resis authored portions of the case analyses in the 1st edition. Many of those passages have been edited/modified and the attributions (that appeared in the 1st edition) are removed in this 2nd edition. Nevertheless, we thank these outstanding intellectual property lawyers for allowing us to build on their work. Additionally, Steve Baron expresses sincere gratitude to attorney Tina Salvato who assisted in compiling case summaries for this 2nd edition.

Table of Contents

Preface to the 2 nd Edition	vii
Chapter One: Copyright Cases	1
Traditional Media Copyright Cases with New Media Implications	1
New Media Cases and Copyright Law	4
Learning Objectives and Discussion Questions	17
Chapter Two: Three Copyright Issues Cases	18
Traditional Special Copyright Issues Cases with New Media Implications	18
New Media Special Copyright Issues Cases	21
Learning Objectives and Discussion Questions	24
Chapter Three: Patent Cases	25
Traditional Media Patent Cases with New Media Implications	25
New Media Cases and Patent Law	30
Learning Objectives and Discussion Questions	38
Chapter Four: Open Source Cases	39
New Media Open Source Cases	39
Learning Objectives and Discussion Questions	43
Chapter Five: Trademark Cases	45
Traditional Media Trademark Cases with New Media Implications	45
New Media Cases in Trademark Law	49
Learning Objectives and Discussion Questions	59

Chapter Six: Trade Secrets Cases	60
Traditional Media Trade Secret Cases with New Media Implications	60
New Media Cases in Trade Secret Law	62
Learning Objectives and Discussion Questions	74
Chapter Seven: Tort Laws for Intellectual Property of the Persona Cases	75
Traditional Media Right of Publicity Cases with New Media Implications	75
New Media Cases in Right of Publicity Law	82
Traditional Media Privacy of the Persona Cases with New Media Implications	97
New Media Privacy of the Persona Cases	102
Traditional Media Defamation Cases with New Media Implications	107
New Media–Related Cases in Defamation Law	110
Learning Objectives and Discussion Questions	114
Chapter Eight: International Intellectual Property Laws and Systems Cases	116
New Media Cases Illustrating International Intellectual Property Law	116
Learning Objectives and Discussion Questions	121
Chapter Nine: Digital Rights Management Cases	122
Cases Illustrating DRM	122
Learning Objectives and Discussion Questions	128
Chapter Ten: Intellectual Property Law in Virtual Worlds and Games Cases	129
Cases Involving Virtual Worlds and Games	129
Learning Objectives and Discussion Questions	134
Notes	136
Glossary	138
Works Cited	142
Cases	171
About the Authors	177
Index	180

Copyright Cases

Traditional Media Copyright Cases with New Media Implications

Baker v. Selden, 101 U.S. 99 (1879).

Baker v. Selden, well prior to the Copyright Act of 1909, deals with the idea versus expression dichotomy in copyright law and the differences between copyrights and patents.

The US Supreme Court (SCOTUS) in *Baker v. Selden* considered what aspects of Selden's book relating to an improved bookkeeping system could be protected by copyright. Selden's book contained mostly bookkeeping forms and descriptions of how to use the new bookkeeping system. The case involved an attempt to keep Baker from selling a book describing a similar system. The Court held that, although copyright law granted Selden the right to prevent others from printing or publishing any material part or his entire book, the system that Selden devised was merely an idea and therefore not subject to copyright protection. The specific layout and presentation of Selden's book was subject to copyright protection, but Baker was not copying the text or presentation from Selden.

The Court went on to distinguish copyright and patent laws. The particular description of the system itself (the expression of ideas) can be protected by

copyright, but not the abstract idea of the method or system—inventions, if they qualify, are protected by patent.

Mazer v. Stein, 347 U.S. 201 (1954).

Mazer v. Stein supported the validity of copyright protection for certain kinds of design elements.

Stein designed statuettes of male and female dancing figures intended for use as bases for table lamps. The statuettes, without any of the components used for lamps, were registered with the Copyright Office as works of art. Stein then sold the statuettes for use as the bases on fully equipped lamps. Mazer copied the designs of the lamp bases and sold them as fully equipped lamps as well. Stein sued Mazer for copyright infringement.

The SCOTUS evaluated whether a work of art, intended for use as an element in a useful manufactured article, is copyrightable. The Court affirmed the appellate court and held that such a use of a copyrighted work of art does not affect the ability to protect against copyright infringement of the work of art. The Court held that the statuettes in *Mazer* were an original, tangible expression of the author's ideas and that the reproduction of the statuettes as lamps did not bar or invalidate the statuettes' copyright registration.

The Court found that the statuettes were subject to copyright protection: "the dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright."

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

Sony v. Universal City Studios is a seminal case involving consumer rights to copy and time shift broadcast television and for device manufacturers to provide recording equipment. The case also speaks to issues of private use and fair use.

In *Sony*, various movie studio companies elected to sue Sony for copyright infringement based on its production of home video recorders. The studios argued that notwithstanding some non-infringing uses, the primary purpose of home video recorders was to make unauthorized copies of copyrighted material. Sony argued that: (1) recording copyrighted broadcasts to be watched at a later time for noncommercial use was simply time-shifting, that—even if unauthorized—is a fair use, and (2) there were substantial non-infringing uses, including the copying of non-copyrighted material or copyrighted programming whose owners consent to such copying.

The SCOTUS established a test for determining whether video tape recording devices violate copyright law. In a narrow majority, the Court stated: "the sale of

copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.” The Court examined whether the allegedly infringing device “is capable of commercially significant non-infringing uses” and agreed with Sony that there were substantial non-infringing uses and that recording programming for a noncommercial home use is a fair use of the copyrighted material. The Court emphasized that the public was invited to view the broadcast free of charge; the home video recorder allows them to do that, but at a later time.

Harper & Row v. Nation Enterprises Case Media, 471 U.S. 539 (1985).

Harper & Row v. Nation Enterprises Case Media examined publishing copyright protected material based on the theory of “the public’s right to know” as it is related to fair use in news and publishing.

Former President Gerald Ford licensed publication rights to Harper & Row for memoirs relating to his decision to pardon Richard Nixon. Harper & Row had, in turn, contracted with *Time Magazine* to print portions of Ford’s memoirs. *The Nation* magazine obtained and published significant excerpts without permission from Ford, Harper & Row, or *Time Magazine*. Once *The Nation* published excerpts, the value of the publication rights for excerpts was reduced, so *Time* withdrew from its contract with Harper & Row, as allowed by a clause in the contract. Harper & Row then sued *The Nation* for copyright infringement.

The Nation claimed that the public interest in learning of Ford’s reasons for pardoning Nixon was vital, and that its appropriation and publication should therefore constitute a fair use. The SCOTUS found that there was no exception to copyright protection merely because the memoirs were those of a public figure. The Court applied the traditional fair use tests and found that the factors weighed against fair use because it was a commercial use of the significant portion of the copyrighted material that caused an actual harm (the cancellation of the contract) despite the fact that the nature of the work was informative.

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).

In *Feist v. Rural Telephone*, the SCOTUS addressed the minimum originality requirement for copyright protection. The Court held that effort and the expenditure of resources are not protected by copyright and rejected the “sweat of the brow” doctrine.

Rural provided telephone service in Kansas and was statutorily required to provide a phone directory to customers free of charge. Feist compiled telephone directories from larger areas than did Rural. When Rural refused to license its local

directory to Feist, Feist copied Rural's listings. Rural was able to detect the copying because it had placed some phony numbers in its listings for just that purpose.

Rural sued Feist for copyright infringement, alleging that Rural's "compilation" of phone numbers warranted copyright protection. Prior to *Feist*, investing a significant amount of time and energy into a work helped qualify content owners for copyright protection. *Feist* rejected that aspect.

Feist clarified that the point of copyright protection is to encourage creative expression, thereby "promot[ing] the Progress of Science and useful Arts." Prior to *Feist*, it had long been settled that information itself could not be protected by copyright, but that collections of information could be. The Court in *Feist* indicated that in order to be copyrightable, a work must possess "a minimal degree of creativity" and that the copyright only applies to those creative aspects of the work. The Court held that an author's selection and arrangement of a compilation of facts can warrant copyright protection, although in this case, Rural's arrangement of names and phone numbers in alphabetical order was not remotely creative and did not warrant copyright protection.

New Media Cases and Copyright Law

Cases Involving Thumbnail Image and Hyperlinking to Protected Content

Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

Kelly v. Arriba Soft addresses the copyright status of image thumbnails; in effect, it set precedent for use of modifications of otherwise protected content in online/WWW searches.

In 1999, Leslie A. Kelly, a professional photographer, sued Arriba Soft Corporation for copyright infringement. Arriba operated an Internet search engine that functioned by presenting thumbnails, reduced-size versions of entire images, both as search results and as hyperlinks to larger versions (where licensed versions could be legally acquired). At trial, Kelly requested summary judgment against Arriba's use of thumbnail images, arguing both that Arriba infringed his copyright and, in removing copyright management information, violated the DMCA. The District Court disagreed with Kelly, finding that Arriba's use was fair and that no DMCA violation had occurred.

At the time the suit was filed, most search engines operated by presenting search results in textual form. Arriba's was among the first to operate by displaying a downsized "thumbnail" version of the content itself. The case was an important

test of the application of copyright law and traditional infringement defenses on the Internet. Arriba conceded that it had both copied the images and then displayed Mr. Kelly's images, at reduced size, on its site, but denied removing or altering any copyright management information.

The DMCA requires that copyright management information, for example, the title of the work and the identification of the copyright owner, not be falsified, removed, or altered. Judge Taylor found that, since the copyright identification information was in the text surrounding but not included within the images on Mr. Kelly's website, no removal had occurred in the act of copying images to Arriba's database. Although the thumbnails were displayed in the Arriba search engine without the text accompanying them on Kelly's website, "Defendant's users could obtain a full-sized version of a thumbnailed image by clicking on the thumbnail. A user who did this was given the name of the Web site from which Defendant obtained the image, where any associated copyright management information would be available, and an opportunity to link there."

In his analysis of the four fair use factors, the judge found that two of the factors weighed in favor of a fair use finding, and two against. The first factor, the character and purpose of the use, focuses on the way(s) the "new" work uses the protected work. Although Arriba used the images in the context of a commercial enterprise, the judge found the use was a minimally commercial use as it did not offer the work for sale or directly use it to promote other sales. In addition, he found that the use of Kelly's work was transformative, that is, the work was used in a substantially new way in the process of creating a new and useful service. The transformative evaluation, introduced in a 1990 *Harvard Law Review* article by Pierre Leval and famously applied by the SCOTUS in the 2Live Crew/Pretty Woman parody case (*Campbell v. Acuff-Rose Music, Inc.*, 1994) is increasingly seen as an important part of a fair use evaluation.

Evaluation of the second factor, nature of the copyrighted work, weighed against a fair use finding. The protected works were of a highly creative nature, which typically receives more copyright protection than factual works. The third factor determines whether the amount of the work copied was reasonable in light of the intended purpose. Here, the judge evaluated both the thumbnail-sized display and the intermediate linking page that displayed the image full-size alongside a link to the originating site. Although the thumbnail display prevented users from reprinting or otherwise reproducing the image at full size, the judge also felt that the intermediate page created a problem and was not necessary to fulfill the purpose of the search engine: "The Court finds the third factor weighs slightly against fair use."

The final factor evaluates the use against its likely effect on the market for the work. Kelly argued that the Arriba search service made it more likely that users

could copy and reuse his work in violation of his copyright, while Arriba argued that the service increased Kelly's market. Since Kelly did not present any evidence of actual harm, the judge found Arriba's argument more compelling and ruled in favor of fair use for the fourth factor.

Although two factors favored fair use and two did not, the use was found to be fair overall, with the first factor playing a key role in tipping the scales: "Defendant's purposes were and are inherently transformative, even if its realization of those purposes was at times imperfect. Where, as here, a new use and new technology are evolving, the broad transformative purpose of the use weighs more heavily than the inevitable flaws in its early stages of development."

Kelly appealed the District Court ruling. The Ninth Circuit Court of Appeals ruled that the creation and use of the thumbnails in the search engine was a fair use. However, the appeals court ruled that the District Court should not have decided whether the display of the larger image was a violation of one aspect of Kelly's copyright protection for the originals (the right to publicly display his works), so that part of the case was remanded for further proceedings. Arriba Soft went out of business before Kelly obtained a large judgment against them, at the District Court, for infringement of the full-sized images.

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

Perfect 10, Inc. v. Amazon.com, Inc. re-examined the use of thumbnail images and extended analysis to linking to protected material. The case continued fair use exemptions for basic functions enacted by search technologies and firms.

The Ninth Circuit revisited thumbnail images a few years later when Perfect 10, a company selling subscription photos of nude models, sued Google and Amazon for infringing its display and distribution rights by using thumbnail images and linking to copyrighted full-sized images.

The court reasoned that infringement depended on whether Google actually stored and displayed copies of the images on its servers or merely linked to the information. Since Google's use of full-sized images merely linked to Perfect 10's content, the court held that Google could not be liable for infringement of the full-sized images. In contrast, Google could be liable for its use of thumbnail images because Google's servers actually stored copies of Perfect 10's copyrighted images. However, the court ultimately concluded that Google's use of thumbnail images constituted fair use under *Kelly v. Arriba Soft*, finding that the search engine put the images "to a use fundamentally different than the use intended by Perfect 10," thereby providing "a significant benefit to the public."

As for whether Google could be liable for infringement committed by search engine users, the court found that Google lacked the ability to stop or limit

third-party infringement and thus Perfect 10 could not establish a likelihood of success under a theory of vicarious infringement. But the court did not resolve the issue of contributory infringement, finding that factual disputes remained over whether there were reasonable and feasible means for Google to refrain from providing access to infringing images.

Cases Involving DeCSS and the DMCA (Digital Rights Management)

The DMCA, almost a footnote in the *Kelly v. Arriba Soft* case, took center stage in a series of cases involving the distribution of a computer program designed to circumvent the Contents Scrambling System (CSS) used, to prevent unauthorized access, in many commercial DVDs.

In 1999, Jon Johansen, a teenager living in Norway, reverse engineered the CSS encryption. The version of the Linux operating system that Johansen was using did not have a DVD software player licensed by the DVD Copy Control Association (DVD-CCA), so he wrote a software program to defeat CSS and copy unencrypted movie contents to a computer. This code, released as a Windows program called DeCSS, was later redistributed and linked to from hundreds of sites around the world, including the online “hacker” magazine *2600*. The publishers of *2600* and others who had linked to or posted the code were sued in New York and Connecticut by eight movie studios for violation of the DMCA, and in California, several individuals were sued by the DVD-CCA for violation of trade secrets. Analysis of three related cases follows, below. Chapter Six of Volume Two includes material about DeCSS and trade secrets; Chapter Nine of Volume One includes material about DeCSS and digital rights management.

Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001).

Universal City Studios, Inc. v. Corley tested the degree to which certain kinds of online publication (DeCSS; computer code) should receive blanket First Amendment/free speech protection, whether publication of code elements should receive a fair use exemption, and challenged the applicability of the anti-circumvention components of the DMCA to the publication of encryption research findings.

In defending themselves against the accusation that they violated section 1201 of the United States Copyright Act (the anti-circumvention portion of the law enacted by the DMCA), Eric Corley (publisher of *2600*), Shawn Reimerdes, and Roman Kazan argued that they had been improperly targeted as parties in the suit, cited the encryption research anti-circumvention exemption, and argued that the DMCA was unconstitutional because it violates both the fair use exemption in the copyright law and the First Amendment right to free speech. The District Court

disagreed and enjoined the sites from posting or linking to DeCSS. In late 2001, the Court of Appeals upheld his ruling. The District Court found the fair use argument irrelevant, since the suit had been brought for violation of anti-circumvention provisions, not for infringing the plaintiff's copyrights. In other words, only the circumvention actions were challenged, not the copying of any video content. The free-speech argument consumed most of the Court's attention in both the district and appellate stages, but ultimately the judges felt that while it could plausibly be argued that computer code is speech, the functional aspects of the computer program could not be so protected (Merges, Menell, and Lemley 514).

321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

321 Studios v. Metro Goldwyn Mayer Studios, Inc. tested the practical commercial implications of rulings against software that enabled circumvention of DRM.

Despite the ruling in *Universal City Studios, Inc. v. Corley*, 321 Studios, a small San Francisco software company, attempted to market software to copy the contents of DVDs, including a package called "DVD X Copy," that allowed DVDs encrypted with CSS to be duplicated to a blank DVD disc. In 2002, 321 Studios, fearing a suit from the film industry, proactively asked a California District Court to find that, because its software had substantial non-infringing uses and allowed consumers to use content as allowed under the fair use clause, its manufacture and distribution were not in violation of the DMCA. The non-infringing uses argument refers to the standard established in the *Sony/Betamax* case, when the SCOTUS found that, because the commercial videocassette recorder could be used for a variety of purposes (including many that did not infringe copyrights), its manufacture could not be prohibited. In ruling on the *321 Studios* case, however, US District Court Judge Susan Illston instead relied heavily on the findings in the *Universal DeCSS* case. She declined to rule specifically on the claim that DVD X Copy supports fair use, focusing instead on the circumvention and trafficking bans and finding 321 Studios in violation of both. Not long thereafter, 321 Studios went out of business.

Realnetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

Realnetworks, Inc. v. DVD Copy Control Ass'n revisited the practical commercial implications of rulings against software that enabled circumvention of DRM in light of a potentially changed new media environment. Both the passage of time and the commercial successes (in the digital space) of Realnetworks suggested that perhaps a commercial product with features and constraints would be acceptable

to big content. Further, the case tested the “reach and strength” of the DMCA against the fair use principles established (for recording broadcast television programs, for personal use, with VCRs) in *Sony*.

Following the *321 Studios* case, Realnetworks brought a similar action against the DVD-CCA and several major motion picture studios, asking the court to find that it did not violate the anti-circumvention provision of the DMCA by manufacturing and distributing its RealDVD software, that allowed users to copy DVDs onto their hard drives so that they would not need the physical DVD to watch the content. Realnetworks argued that CSS was no longer an effective technological measure because it had already been cracked and published on the Internet. However, the District Court found that the technology was still effective for the average consumer and the product thus violated the copy-control provision of the DMCA.

In addition, Realnetworks argued that the studios and the DVD-CCA did not have a legal right to prevent consumers from making personal or “backup” copies of the DVDs under copyright law, and also that the RealDVD software was capable of substantial non-infringing use under the *Sony/Betamax* standard. The District Court rejected these arguments, noting that the *Sony* case was superseded by the DMCA, and finding that the DMCA permits copying of a work to be fair use under certain circumstances, but that this exemption applies only to individual users. Thus, “while it may well be fair use for an individual consumer to store a backup copy of a personally-owned DVD on that individual’s computer, a federal law has nonetheless made it illegal to manufacture or traffic in a device or tool that permits a consumer to make such copies.”

Cases Involving Digital Transmission and the Public Performance Right

Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision), 536 F.3d 121 (2nd Cir. 2008).

Cartoon Network LP, LLLP v. CSC Holdings, Inc. is the first in a line of cases (continuing to the date of publication of this 2nd edition) examining the copyright implications of various digital methods and business models for time and place shifting of content and programs.

In 2006, the cable television provider Cablevision announced its plans to sell a remote storage digital video recorder (DVR) system. Unlike traditional DVRs, which required appliances in the home of the user, the Cablevision DVR stored content on servers in Cablevision’s facilities. Under the system, content requested by a particular user was stored independently and made available only for the user who requested it.

In response, a consortium of networks and studios sued for direct copyright infringement, alleging violations of their reproduction and public performance rights. The District Court ruled in favor of the copyright owners. However, on appeal, the Second Circuit reversed, finding that Cablevision's proposed DVR system did not directly infringe on any of the plaintiffs' exclusive rights. In particular, the court held that the system's use of content buffering (the creation of RAM copies) did not qualify as a "copy" because the data was not perceivable "for a period of more than transitory duration." The Circuit Court also held that Cablevision could not be directly liable for creating playback copies because those copies were actually made at the direction of the cable company customers. Lastly, the Circuit Court held that the transmissions of playback copies were not performances "to the public" because Cablevision transmitted only the copy requested and recorded by a particular user to that same user. Though controversial, this decision is often credited with bolstering the legality of cloud-based storage and DVR services.

American Broadcasting Cos., Inc., et al. v. Aereo, Inc., f/k/a Bamboom Labs, Inc., 13 US 461 (2013).

American Broadcasting v. Aereo (re)presents issues that first appeared decades earlier in copyright battles between broadcasters and cable television. "Retransmissions" of copyright protected material challenge interpretations of a variety of those rights. In this instance, however, retransmissions are combined with digital storage and delivery.

The issues in *Cablevision* were again raised with the development of Aereo, an online TV service that allows subscribers to view and record live broadcasts. Aereo uses individual antennas to capture free over-the-air television signals that it then digitizes and stores on its servers for individual customers. After the product launched in 2012, a consortium of major broadcasters and content providers sued Aereo for copyright infringement, seeking to shut down the service. The broadcasters argued that Aereo was a threat to their business model, noting that cable companies have to pay broadcasters for the right to carry their signals; on the other hand, Aereo obtains and retransmits the very same signals without permission or fee/royalty payments.

The Second Circuit held that Aereo's transmissions to subscribers did not constitute copyright infringement because they were not "public performances" under the Copyright Act. Relying on the *Cablevision* case, the court focused on Aereo's transmission to subscribers instead of the underlying public broadcast signal, finding that it was not "capable of being received by the public" and was thus a private transmission. In response to this ruling, several networks and sports