

# THE U.S. SUPREME COURT'S *AEREO* DECISION AND OVERLAPPING PROTECTION IN CYBERSPACE

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## SANTA CLARA UNIVERSITY LAW PRESENTS “HOT TOPICS IN INTERNET, CLOUD, AND PRIVACY LAW”

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**4.04[3] Overlapping Protection in Cyberspace**

Mark Lemley, in a law review article entitled “Dealing with Overlapping Copyrights on the Internet,”<sup>1</sup> has argued persuasively that the exclusive rights granted a copyright owner on *terra firma* overlap online. The act of posting a

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**[Section 4.04[3]]**

<sup>1</sup>Mark Lemley, “Dealing with Overlapping Copyrights on the Internet,” 22 U. Dayton L. Rev. 2 (1997).

work on a website, for example, may constitute a *reproduction*, since under *MAI Systems Corp. v. Peak Computer, Inc.*,<sup>2</sup> a separate copy is created, but it also may be deemed a *distribution*, a *public performance* or *public display* (for most works, but excluding in particular sound recordings and architectural works).<sup>3</sup> Indeed, the Ninth Circuit noted that “[n]othing in the Copyright Act prevents the various rights protected in section 106 from overlapping.”<sup>4</sup>

Courts that have specifically addressed this issue have not been entirely consistent in pinpointing the specific exclusive rights of a copyright holder implicated by various online transactions. In *New York Times v. Tasini*,<sup>5</sup> the U.S. Supreme Court treated the digitized versions of newspapers and magazines included in databases as *reproductions* and expressly declined to reach the issue of whether they also involved public displays.<sup>6</sup> The Court did not consider the questions of whether the transmission of electronic publications from content providers to database companies (or from database companies to consumers) amounted to distributions or at what points in the process (i.e., digitization, inclusion in databases, transmission to third parties) specific rights might be infringed.<sup>7</sup>

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<sup>2</sup>*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994); *see supra* § 4.03.

<sup>3</sup>The exact nature of an online work may be unclear. For example, in their legal treatise *Kohn on Music Licensing*, Al Kohn and Bob Kohn argue that an image on a website is, almost by definition, a multimedia presentation encompassing, at the very least, images arguably “displayed” and the software operating the site (which allows the images to be “displayed”). Whether a website operates like a projector, merely projecting an image on display, or is, if involving sound, an audiovisual work, is unclear. As part of a website, a visual display may be an audiovisual work, in which case it would not be “displayed” if shown sequentially. However, even a series of still images, when displayed on a website, may be deemed a sequential motion picture or audiovisual work, since they are stored together electronically as part of a compilation (in this case, a software program, which is a literary work under the Copyright Act). *See* Al Kohn & Bob Kohn, *Kohn on Music Licensing* 1193 (2d ed. 1996).

<sup>4</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161 (9th Cir. 2007).

<sup>5</sup>*New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

<sup>6</sup>*See New York Times Co. v. Tasini*, 533 U.S. 483, 499 n.8 (2001).

<sup>7</sup>This case is analyzed in greater detail in chapter 17.

In *A&M Records, Inc. v. Napster, Inc.*,<sup>8</sup> the Ninth Circuit accepted the district court's determination that users of Napster's peer-to-peer system infringed copyright owners' exclusive rights of reproduction and distribution when they transferred digital sound files from the hard drives of their computers, using Napster's software system.

In another Ninth Circuit case, *Kelly v. Arriba Software Corp.*,<sup>9</sup> the court ruled that the practice of in-line linking—or linking to a portion of another website, from which content is displayed (but not copied) on the first site—could not involve a reproduction. This ruling is sound given that a link is merely an instruction to a browser to retrieve information from another location and therefore does not do not involve making a “copy” within the meaning of *MAI Systems Corp. v. Peak Computer, Inc.*<sup>10</sup> on the linking party's site.

In an earlier version of the opinion in *Kelly v. Arriba Software Corp.*<sup>11</sup> that ultimately was vacated on procedural grounds, the panel had also ruled that in-line links infringed the copyright owner's public display right.<sup>12</sup> The Ninth Circuit panel had ruled that “[a]lthough Arriba does not download Kelly's images to its own server but, rather, imports them directly from other websites, . . . [b]y allowing the public to view Kelly's copyrighted works while visiting Arriba's site, Arriba created a public display of Kelly's works.”<sup>13</sup> This analysis arguably conflicts with the “server test” subsequently adopted by the Ninth Circuit, as discussed below.

In *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>14</sup> the Ninth Circuit adopted the “server test” to evaluate whether a given online use violates the public display right. Under this test, “a computer owner that stores an image as electronic information and serves that electronic information directly to the user

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<sup>8</sup>*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>9</sup>*Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

<sup>10</sup>*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994); *see generally supra* § 4.03.

<sup>11</sup>*Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), *vacated*, 336 F.3d 811 (9th Cir. 2003).

<sup>12</sup>*Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 944–46 (9th Cir. 2002), *vacated*, 336 F.3d 811 (9th Cir. 2003).

<sup>13</sup>*Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 946 (9th Cir. 2002), *vacated*, 336 F.3d 811 (9th Cir. 2003).

<sup>14</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

. . . is displaying the electronic information in violation of a copyright holder's exclusive display right. Conversely, the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information."<sup>15</sup> Applying this test to a case involving strikingly similar facts to *Kelly v. Arriba Software Corp.*, the Ninth Circuit affirmed the district court's rulings in *Perfect 10, Inc. v. Amazon.com, Inc.* that the defendants (Google and *Amazon.com*) potentially could be held liable for direct infringement based on thumbnail images created by Google and cached, or stored on its servers,<sup>16</sup> but that the plaintiff was unlikely to succeed in its claim that Google's in-line linking to full-size infringing images constituted a direct infringement.<sup>17</sup> In the words of the court, "Google transmits or communicates only an address which directs a user's browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself."<sup>18</sup> Stated differently, "it is the website publisher's computer, rather than Google's computer, that stores and displays the infringing image."<sup>19</sup>

In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,<sup>20</sup> the Second Circuit construed the meaning of a *public performance*<sup>21</sup> in considering a remote DVR system that Cablevision had created to allow users to access copies of television

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<sup>15</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007).

<sup>16</sup>The court ruled, however, that Google and Amazon.com were likely to prevail on their fair use defenses. *See infra* § 4.10[1].

<sup>17</sup>The court evaluated a ruling on plaintiff's motion for a preliminary injunction, which is why its determination was that the plaintiff was unlikely to succeed, rather than a final decision on the merits.

<sup>18</sup>508 F.3d at 1161 n.7.

<sup>19</sup>508 F.3d at 1162. The court ultimately found Google's use to be a fair use. *See infra* § 4.10[1].

<sup>20</sup>*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009).

<sup>21</sup>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.

programs stored remotely on Cablevision's servers. The court concluded that whether a given transmission constitutes a public performance requires an examination of "who precisely is 'capable of receiving' a particular transmission of a performance." Because the RS-DVR system, as designed, only made transmissions to a single subscriber using a single copy made by that subscriber, the court held that the universe of people capable of receiving an RS-DVR transmission was the single subscriber whose self-made copy was used to create that transmission, and therefore the transmission did not constitute a public performance.<sup>22</sup> As discussed below, this aspect of *Cartoon Network* likely remains valid after the U.S. Supreme Court's subsequent ruling in *American Broadcasting Cos. v. Aereo, Inc.*,<sup>23</sup> if at all, only to the extent the content delivered is owned or licensed by the provider, or to the subscriber.

The Second Circuit emphasized in *Cartoon Network* that when a public performance is found, each step in the process

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17 U.S.C.A. § 101. The court in *Cartoon Network* analyzed whether Cablevision could be held liable for a public performance based on a *transmission* within the meaning of clause (2) of the definition of a *public performance*. The parties had stipulated that clause (1) was inapplicable to their case. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 134 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009).

<sup>22</sup>*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 134–39 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009). In so ruling, the court in *Cartoon Network* distinguished *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), a Third Circuit case in which the operator of a video rental store that allowed customers to rent movies and watch them in private booths containing individual television sets was held liable for violating the copyright owners' public performance rights because the same copy of the work (an individual video cassette) was repeatedly "performed" to different members of the public at different times.

By contrast, a court in another pre-*Aereo* opinion concluded that a different result should obtain where the transmission is to a publicly accessible website where multiple users could access the same recording at the same time. See *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (preliminarily enjoining operation of a DVD rental service that allowed users to stream videos over the Internet). While the district court in *WTV Systems* declined to apply *Cartoon Network*, it also pointed out that *Cartoon Network* was distinguishable because, unlike in *Cartoon Network*, the defendants' customers in *WTV Systems* did not produce their own unique copies of plaintiffs' works. See *id.* at 1011 n.7.

<sup>23</sup>See *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).



by which a protected work wends its way to its audience would likewise be deemed a public performance.<sup>24</sup>

Based on its holding, the *Cartoon Network* panel declined to consider Cablevision's other argument that it could not be held liable for a public performance when a program was replayed because it was the customer, and not Cablevision, that was responsible for any transmission and, hence, any performance.<sup>25</sup> In an earlier part of its opinion, the court had held that Cablevision could not be held directly liable for copyright infringement for *reproducing* copies of plaintiff's works because copies were made by Cablevision customers, not Cablevision itself.<sup>26</sup>

In a subsequent case, *WNET, Thirteen v. Aereo, Inc.*,<sup>27</sup> the Second Circuit applied *Cartoon Network* in holding that Aereo, a company that allocated to its monthly subscribers antenna space to stream live television over the Internet or record programs to a remote hard drive like a DVR, did not engage in public performances of television transmissions but instead effectively rented to its users remote equipment for individual use.<sup>28</sup> The U.S. Supreme Court ultimately reversed the Second Circuit in *Aereo* although the Court did not expressly disapprove of *Cartoon Network*.

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<sup>24</sup>*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 136 (2d Cir. 2008) (quoting *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000)), *cert. denied*, 557 U.S. 946 (2009).

<sup>25</sup>*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 134 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009). 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." 17 U.S.C.A. § 101.

<sup>26</sup>*See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130–33 (2d Cir. 2008) (applying the volitional conduct test for direct infringement), *cert. denied*, 557 U.S. 946 (2009); *see generally infra* § 4.11[2] (discussing the case in connection with an analysis of direct liability).

<sup>27</sup>*WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *rev'd*, 134 S. Ct. 2498 (2014).

<sup>28</sup>Aereo subscribers accessed the service by logging on to Aereo's website from a computer, smart phone or tablet or Internet-connected television and could either (1) record programs currently playing or scheduled in the future or (2) watch live television with a brief time delay to allow users to be able to pause or rewind a program. Aereo obtained terrestrial television signals via thousands of individual antennas. The Second Circuit emphasized three technical details of Aereo's system:



*Aereo* was an appeal from the lower court's denial of a motion for preliminary injunction and addressed only the question of whether *Aereo's* transmission of recorded programs violated plaintiffs' public performance right. The parties did not brief the issue of whether *Aereo* could be held liable for reproducing plaintiff's works in connection with plaintiffs' motion for a preliminary injunction. The Second Circuit likewise did not address whether *Aereo* had engaged in volitional conduct because it found that, under *Cartoon Network*, the transmissions at issue were not public performances.

In ruling that plaintiffs were not likely to prevail in showing that *Aereo's* service involved the public performance of plaintiffs' television broadcasts, the Second Circuit panel's majority<sup>29</sup> cited *Cartoon Network* for the proposition that "whether a transmission originates from a distinct or shared copy is relevant to the Transmit Clause [clause (2) of the definition of *public performance*] because 'the use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made

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First, *Aereo* assigns an individual antenna to each user. No two users share the same antenna at the same time, even if they are watching or recording the same program. Second, the signal received by each antenna is used to create an individual copy of the program in the user's personal directory. Even when two users are watching or recording the same program, a separate copy of the program is created for each. Finally, when a user watches a program, whether nearly live or previously recorded, he sees his individual copy on his TV, computer, or mobile-device screen. Each copy of a program is only accessible to the user who requested that the copy be made, whether that copy is used to watch the program nearly live or hours after it has finished airing; no other *Aereo* user can ever view that particular copy.

*WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 682–83 (2d Cir. 2013) (footnote omitted), *rev'd*, 134 S. Ct. 2498 (2014). If multiple users watched or recorded the same program each user would be temporarily assigned a separate antenna that would be separately tuned to the same channel. Subscribers were not assigned dedicated antennas, however. Users in fact shared antennas, but not simultaneously. The same antenna would be used by different subscribers at different times. *See* 712 F.3d at 683 n.7.

*Aereo* involved the transmission of terrestrial television signals. Re-transmission by cable systems are subject to a compulsory license under the Copyright Act. *See* 17 U.S.C.A. § 111(d). Relying principally on legislative history and the views of the U.S. Copyright Office, the Second Circuit previously had held that a website that re-transmitted television signals over the Internet to paid subscribers could not qualify for this compulsory license as a "cable system." *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278–84 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013).

<sup>29</sup>The majority opinion was written by Judge Christopher F. Drony, who was joined by Eastern District of New York Judge John Gleeson, who was sitting by designation.

‘to the public.’”<sup>30</sup> This analysis subsequently was rejected by the Supreme Court (although, as discussed later in this section, it may have continuing application where, unlike in *Aereo*, the material at issue is owned by or licensed to the subscriber).

Second Circuit Judge Denny Chin dissented, rejecting *Aereo*’s argument that it was merely providing a technology platform that enabled consumers to use remotely-located equipment to create, access and view their own unique recorded copies of free over-the-air broadcast television programming. He characterized *Aereo*’s system of thousands of dime-sized antennas as a sham; a “Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.”<sup>31</sup> Judge Chin distinguished *Cartoon Network* because that case involved a DVR system that existed only to produce a copy of material that it al-

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<sup>30</sup>*WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 688–89 (2d Cir. 2013) (quoting *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 138 (2d Cir. 2008), cert. denied, 557 U.S. 946 (2009)), rev’d, 134 S. Ct. 2498 (2014). The majority in *Aereo* articulated “four guideposts” from *Cartoon Network* that determined the outcome in *Aereo*:

First and most important, the Transmit Clause directs courts to consider the potential audience of the individual transmission. *See id.* at 135. If that transmission is “capable of being received by the public” the transmission is a public performance; if the potential audience of the transmission is only one subscriber, the transmission is not a public performance, except as discussed below. Second and following from the first, private transmissions—that is those not capable of being received by the public—should not be aggregated. It is therefore irrelevant to the Transmit Clause analysis whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions. *See id.* at 135–37. Third, there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work. In such cases, these private transmissions *should* be aggregated, and if these aggregated transmissions from a single copy enable the public to view that copy, the transmissions are public performances. *See id.* at 137–38. Fourth and finally, “any factor that limits the *potential* audience of a transmission is relevant” to the Transmit Clause analysis. *Id.* at 137.

*WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 689 (2d Cir. 2013) (citing *Cartoon Network*), rev’d, 134 S. Ct. 2498 (2014). Because the *Aereo* service, like Cablevision’s remote DVR in *Cartoon Network*, created unique copies of programs that subscribers wished to record and transmitted those recorded programs only to the particular customer who generated a given copy, and no one else, the majority explained that the potential audience for every transmission was only a single subscriber and the transmission therefore was not made to the public. *See* 712 F.3d at 689–90.

<sup>31</sup>*WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting).

ready had a license to retransmit to consumers. This point ultimately resonated with the Supreme Court.

Judge Chin also found significant the fact that Cablevision's remote DVR was intended merely to operate like a VCR or set-top DVR, not a substitute for viewing live television broadcasts like Aereo, which existed primarily to stream live television over the Internet.

In his dissent, Judge Chin cited approvingly *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*,<sup>32</sup> a district court decision from Los Angeles in which the court enjoined<sup>33</sup> a similar service that used individual mini digital antennas and a DVR to allow users to watch or record free television broadcasts. In *BarryDriller*, the court declined to apply *Cartoon Network* or the district court decision in *Aereo* (which was subsequently affirmed by the Second Circuit, as noted earlier) because *Cartoon Network* expressly disagreed with an earlier district court opinion from the Northern District of California, *On Command Video Corp. v. Columbia Pictures Industries*,<sup>34</sup> which the *BarryDriller* court characterized as Ninth Circuit precedent. In *On Command*, the owner of a hotel system that transmitted to individual hotel rooms movies played from individual videotapes by remote control from a central bank in a hotel equipment room was held to violate the copyright holder's public performance right.<sup>35</sup>

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<sup>32</sup>*Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012). The defendant company, BarryDriller, was founded by Alki David and adopted the name "Barry Driller" as a parody of Barry Diller, the founder of *Aereo*. The defendant ultimately was enjoined from using the name "Barry Driller" in a right of publicity lawsuit brought by Barry Diller. See *Diller v. Barry Driller, Inc.*, No. CV 12-7200 ABC (Ex), 104 U.S.P.Q.2d 1676 (C.D. Cal. Sept. 10, 2012); see generally *infra* § 12.05[4][D] (discussing the case). The company subsequently was renamed Aereokiller and thereafter Filmon X LLC.

<sup>33</sup>The court limited its injunction to the Ninth Circuit, recognizing that its holding conflicted with Second Circuit law.

<sup>34</sup>*On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991).

<sup>35</sup>The Second Circuit in *Cartoon Network* had distinguished *On Command* as a case where multiple performances had been made from a single copy of a work. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 138–39 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009). In *BarryDriller*, the court wrote that this distinction was relevant only if one focuses on whether a *transmission* is publicly performed, but Ninth Circuit precedent "looks at public performance of the copyrighted work." *Fox*

The Second Circuit denied *en banc* review in *Aereo*.<sup>36</sup> Judge Chin, who had dissented from the original opinion, also dissented from the Second Circuit's denial of *en banc* review, arguing, among other things, that *Cartoon Network's* analysis of what constitutes a public performance was wrongly decided and should be reconsidered.<sup>37</sup>

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*Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915 F. Supp. 2d 1138, 1145 (C.D. Cal. 2012).

In subsequent litigation that pre-dated the Supreme Court's decision in *Aereo*, a court in Boston declined to enjoin Aereo from its planned operation in that city, while a court in Washington, D.C. preliminarily enjoined the entity formerly known as BarryDriller, Filmon X LLC, from operating anywhere in the United States, other than the Second Circuit (given the Second Circuit's conflicting interpretation of governing law) and a court in Salt Lake City entered an injunction against Aereo's operating in Utah. See *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32 (D. Mass. 2013); *Fox Television Stations, Inc. v. Filmon X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013); *Community Television of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191 (D. Utah 2014); see also *Fox Television Stations, Inc. v. Filmon X LLC*, 968 F. Supp. 2d 134 (D.D.C. 2013) (denying reconsideration and declining to stay the injunction).

<sup>36</sup>*WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013).

<sup>37</sup>See *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 506-11 (2d Cir. 2013) (Chin, J., dissenting from the denial of *en banc* review). Judge Chin, in a published opinion joined by Judge Richard Wesley, argued that Aereo presented an issue of exceptional importance because of the threatened expansion of *Aereo* to other markets, plans by other companies to offer similar services and the potential that various television stations or networks could discontinue free, over-the-air broadcasts of television and instead make their channels available exclusively to cable subscribers. He also wrote that there was a need for uniformity because other Second Circuit decisions—including *United States v. American Society of Composers, Authors & Publishers*, 627 F.3d 64, 74 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011) and *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 286-87 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013)—had been decided on the assumption that streaming television over the Internet constituted a public performance. Judge Chin further opined that the majority's ruling was inconsistent with *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 106-07, 111-12 (2d Cir. 1998), in which the court held that “providing individual users with access to receivers connected to private phone lines—arguably the equivalent of individual antennas . . .—so they could listen to public radio broadcasts in remote locations was a public performance.” *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 504 (2d Cir. 2013) (Chin, J., dissenting from the denial of *en banc* review).

While Judge Chin was bound to apply *Cartoon Network* in initially deciding *Aereo*, in his opinion dissenting to the denial of *en banc* review Judge Chin argued that *Cartoon Network* was wrongly decided and its interpretation of what constitutes a *transmission* should be reconsidered. *Id.* at 506–12. Among other things, he argued that the *Cartoon Network* court

The U.S. Supreme Court reversed the Second Circuit's decision in *Aereo*, but neither explicitly rejected nor explicitly approved of *Cartoon Network*.<sup>38</sup>

In holding that Aereo publicly performed the television transmissions it made available to its users, the Court separately analyzed whether Aereo *transmitted* the programs accessed by its users and whether the transmissions involved public or merely private performances. Justice Breyer, writing on behalf of himself, Chief Justice Roberts, and Justices Kennedy, Ginsburg, Sotomayor and Kagan, held that Aereo itself publicly performed television transmissions accessed by its subscribers – rejecting Aereo's argument that it merely leased users access to television antennas that accessed televisions signals – because one of Congress' primary purposes in amending the Copyright Act in 1976 was to include within the scope of the transmit clause services like the community antenna television (CATV) systems at issue in *Fortnightly Corp. v. United Artists Television*<sup>39</sup> and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*<sup>40</sup> and overturn the holdings in those two cases. While Aereo plainly was not a cable system, the majority explained that “an entity that acts like a CATV system itself performs, even if

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erroneously conflated the phrase “performance or display” with the term “transmission.” Judge Chin also criticized *Cartoon Network*'s focus on the recipient of a transmission, noting that:

It is the transmitter's *actions* that render him liable, not his individual *transmissions*, and he can “transmit” by sending one transmission or multiple transmissions. Thus, there is no textual reason why each individual transmission must be able to reach the public. Based on the plain language, it is sufficient if the actor is “transmit[ting]” the same performance or display and his recipients are members of the public.

*WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 509–10 (2d Cir. 2013) (Chin, J., dissenting from the denial of *en banc* review) (emphasis in original; footnotes omitted). Judge Chin argued that “only the performance clause requires that the public be able to view the performance or display at the same time and place; the transmit clause expressly removes that limitation.” *Id.* at 510. Moreover, he noted, the textual basis for distinguishing between public and private performances is focused on the definition of “the public” as “a substantial number of persons outside of a normal circle of a family and its social acquaintances.” *Id.*, citing 17 U.S.C.A. § 101.

<sup>38</sup>See *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

<sup>39</sup>*Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

<sup>40</sup>*Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1975).

when doing so, it simply enhances viewers' ability to receive broadcast television signals."<sup>41</sup> The Court acknowledged that in contrast to a CATV system, Aereo did not transmit television signals continuously; it remained inert until a subscriber affirmatively sought to watch a program. The majority in *Aereo*, however, held that "this sole technological difference . . . [did] not make a critical difference . . . ."<sup>42</sup>

The majority rejected the distinction drawn by dissenting Justices Scalia, Thomas and Alito between services that provide programming to consumers and Aereo, whose subscribers, the dissenting justices argued, selected the copyrighted content and performed it themselves. Justice Breyer wrote that the dissenting justices made too much of too little, "[g]iven Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments . . . ."<sup>43</sup> The majority emphasized that "[i]n other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But the many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here."<sup>44</sup>

The majority likewise rejected Aereo's argument that its system did not perform television transmissions *publicly* because it streamed content to individual users via an antenna dedicated to a single user and only a single subscriber had the ability to see and hear each transmission. While 1,000 people might watch the same program at the same time via Aereo, each one received the transmission separately via a separate antenna. Justice Breyer, however, disclaimed that "these technical differences matter[ed] . . .

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<sup>41</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2501 (2014).

<sup>42</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2507 (2014).

<sup>43</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2507 (2014).

<sup>44</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2507 (2014).



.<sup>45</sup> The Court explained that “whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds.”<sup>46</sup>

The majority held that “an entity may transmit a performance through one or several transmissions, where the performance is of the same work.”<sup>47</sup> The Court explained that “when an entity communicates the same contemporaneously perceptible images and sounds to multiple people [who are “unrelated and unknown to each other”], it transmits a performance to them regardless of the number of discrete communications it makes.”<sup>48</sup>

The Court dismissed as irrelevant the point that Aereo’s subscribers could receive the same programs at different times and locations, noting that “‘the public’ need not be situated together, spatially or temporally.”<sup>49</sup>

In other words, whether a work is publicly performed depends on whether it is made available to the public, not whether it may be viewed from individual streams or a common transmission.

Justice Breyer summarized the majority opinion by stating that Aereo’s practices were

highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act. Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo’s activities outside the scope of the Act.<sup>50</sup>

The dissenting justices criticized the majority for, among

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<sup>45</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2508 (2014).

<sup>46</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509 (2014).

<sup>47</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509 (2014).

<sup>48</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509 (2014).

<sup>49</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2510 (2014).

<sup>50</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014).



other things, rendering a verdict that they characterized derisively as premised on “guilt by resemblance.”<sup>51</sup> They argued that a test based on evaluating how closely a system appears to be to a traditional CATV service leaves more ambiguity in its potential application than a bright-line test for determining whether the technology provider or user could be held directly liable for copyright infringement.<sup>52</sup>

The majority did not discuss the continuing validity of *Cartoon Network*, but seemed to agree implicitly (at least in part) with dissenting Second Circuit Judge Chin that *Cartoon Network*'s public performance holding could be distinguished because the material at issue there had been licensed to Cablevision. In elaborating on what constitutes the *public*, the majority in *Aereo* explained that whether a subscriber is an owner or possessor of a work may be relevant. Justice Breyer, drawing an analogy to a valet parking attendant who unlike a car dealer is not making a car available to the public when he returns a car to its owner, wrote that “an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to ‘the public,’ whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.”<sup>53</sup>

The majority emphasized that although Congress intended the transmit clause “to apply broadly to cable companies and their equivalents, [the Court’s holding in *Aereo* was] not intend[ed] to discourage or to control the emergence or use of different kinds of technologies.”<sup>54</sup> The majority also made clear that it had not considered whether the public performance right was infringed when the user of a service pays primarily for something other than the transmission of

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<sup>51</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511–19 (2014) (Scalia, J., dissenting).

<sup>52</sup>The dissenting justices also argued that Aereo’s liability for the acts of its users should be evaluated based on principles of secondary liability, not direct infringement. This aspect of their dissenting opinion is separately analyzed in section 4.11[2].

<sup>53</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2510 (2014). *Cartoon Network*'s analysis on what constitutes *reproduction* was not before the Court.

<sup>54</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2510 (2014).

copyrighted works, such as the remote storage of content.”<sup>55</sup> The majority further clarified that it agreed with the Solicitor General that that questions involving cloud computing and remote storage DVRs were not before the Court in *Aereo*.<sup>56</sup>

On remand, the district court enjoined Aereo from retransmitting programs to its subscribers while those programs were still being broadcast, ruling that Aereo could not qualify for a compulsory public performance license.<sup>57</sup> Southern District of New York Judge Alison J. Nathan explained that “the Supreme Court . . . did not imply, much less hold, that simply because an entity performs publicly in much the same way as a CATV system, it is necessarily a cable system entitled to a § 111 compulsory license.”<sup>58</sup> Aereo’s competitor, Filmon.com, Inc. (formerly known as Barry Driller, Inc. and Aereokiller), likewise was held not entitled to a compulsory license following the Supreme Court’s decision in *Aereo*.<sup>59</sup>

In light of *Aereo*, the Second Circuit’s public performance analysis in *Cartoon Network* is no longer valid, except, as noted earlier in this section, perhaps in cases where the subscriber or provider owns or is licensed to use the material performed. The Supreme Court’s opinion neither validates nor rejects the portions of *Cartoon Network* that analyzed reproduction<sup>60</sup> and direct liability.<sup>61</sup>

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<sup>55</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014). The court further emphasized that an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family. *Id.*; see generally *supra* § 4.04[1] (analyzing public performance).

<sup>56</sup>*American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014). *Aereo* is discussed in greater detail in sections 4.11[2] (*Aereo*’s impact on the standards for direct liability) and 17.04[2][B] (*Aereo*’s impact on licensing law).

<sup>57</sup>*American Broadcasting Cos. v. Aereo, Inc.*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014).

<sup>58</sup>*American Broadcasting Cos. v. Aereo, Inc.*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at \*4 (S.D.N.Y. Oct. 23, 2014).

<sup>59</sup>See *CBS Broadcasting Inc. v. Filmon.com, Inc.*, No. 10 Civ. 7532 (NRB), 2014 WL 3702568 (S.D.N.Y. July 24, 2014) (entering sanctions for contempt).

<sup>60</sup>See *supra* § 4.03[3] (analyzing *Cartoon Network*’s holding on reproduction).

<sup>61</sup>See *infra* § 4.11[2] (analyzing direct liability and the volitional conduct test in light of *Aereo*).

In contrast to streaming, downloading a music file was held not to constitute a public performance in a Second Circuit case that affirmed a decision of the Southern District of New York sitting as an ASCAP “rate court.”<sup>62</sup>

A number of district courts have considered the issue of whether an image copied on a website or BBS constitutes a reproduction, distribution, public display or some combination of these exclusive rights. In *Playboy Enterprises, Inc. v. Frena*,<sup>63</sup> the court, analyzing a case where plaintiff’s protected photographs had been digitized and placed on the defendant’s BBS, concluded that plaintiff’s exclusive right to public distribution<sup>64</sup> was violated when the images were made available over defendant’s subscription BBS. The court concluded that concurrently plaintiff’s exclusive right to publicly<sup>65</sup>

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<sup>62</sup>See *U.S. v. ASCAP*, 627 F.3d 64, 71–73 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011). As explained by the court:

The downloads at issue are not musical performances that are contemporaneously perceived by the listener. They are simply transfers of electronic files containing digital copies from an on-line server to a local hard drive. The downloaded songs are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded. Because the electronic download itself involves no recitation, rendering, or playing of the musical work encoded in the digital transmission, we hold that such a download is not a performance of that work . . . .

*U.S. v. ASCAP*, 627 F.3d 64, 73 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011). In contrast to streaming music, which is perceived simultaneously with the transmission and therefore may constitute a public performance, “downloads do not immediately produce sound; only after a file has been downloaded on a user’s hard drive can he [the user] perceive a performance by playing the downloaded song.” 627 F.3d at 74.

<sup>63</sup>*Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

<sup>64</sup>17 U.S.C.A. § 106(3). Distribution “to the public” has been held to include “paying subscribers to an otherwise publicly available service.” *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997) (infringement by a BBS similar to Frena’s), *citing Thomas v. Pansy Ellen Products, Inc.*, 672 F. Supp. 237, 240 (W.D.N.C. 1987) (display at trade show was public even though limited to members); *Ackee Music, Inc. v. Williams*, 650 F. Supp. 653 (D. Kan. 1986) (performance of copyrighted songs at defendant’s private club constituted public display).

<sup>65</sup>The court found that even though the BBS was a closed, subscription service it satisfied the requirement that a display be public because a BBS is a place “where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” 17 U.S.C.A. § 101. See *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. at 1557 (citing other cases and Nimmer on Copyright); see also *Playboy Enterprises, Inc.*

display the photographs had been violated.<sup>66</sup> Unauthorized copies of protected images posted on a BBS were also found to violate plaintiff's exclusive rights of distribution and public display in *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*<sup>67</sup> In *Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors*,<sup>68</sup> by contrast, posting protected material on a Web server was held to violate the copyright owner's exclusive rights of reproduction and public distribution of a work, although the court also noted in *dicta* that the same act violated plaintiff's public display rights in the work.<sup>69</sup>

In *Playboy Enterprises, Inc. v. Webbworld, Inc.*,<sup>70</sup> a court in late 1997 held that unauthorized copies of plaintiff's photographs on a subscription-based website violated plaintiff's rights to reproduce, distribute *and* publicly display the works. In that case, images were automatically culled from Usenet postings, reformatted and posted on defendants' website. The court held that unauthorized copies were reproduced on each of the website's twelve servers. In addition, the court ruled that when images were reformatted into smaller thumbnail copies and full-size images (which could be accessed by clicking on the thumbnail pictures) sep-

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*v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (reaching the same conclusion based on legislative history).

<sup>66</sup>17 U.S.C.A. § 106(5). According to the legislative history, the display right covers the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 64 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5677. The display right expressly precludes unauthorized transmission from one place to another by, among other things, a computer system. *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1557 (M.D. Fla. 1993), *quoting* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 80 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5694.

<sup>67</sup>*Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997). Not surprisingly, the unauthorized distribution of video over the Internet also has been held inconsistent with a plaintiff's exclusive rights to distribute and publicly display a work. *See Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

<sup>68</sup>*Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997).

<sup>69</sup>*Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997).

<sup>70</sup>*Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999).

arate acts of reproduction occurred.<sup>71</sup> Defendants were held liable for distributing plaintiff's works "by allowing [website] users to download and print copies of electronic image files."<sup>72</sup> Finally, the court held that defendants violated plaintiff's exclusive right to publicly display its works by allowing "paying subscribers to view PEI's copyrighted works on their computer monitors while online."<sup>73</sup>

According to the *Webbworld* court, a *reproduction* is made both when a temporary digital copy is created under *MAI Systems Corp. v. Peak Computer, Inc.* and when images are resized. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,<sup>74</sup> by contrast, a different court ruled that "the storage on a defendant's system of infringing copies and retransmission to other servers is not a direct infringement by the BBS operator of the exclusive right to *reproduce* the work where such copies are uploaded by the infringer."<sup>75</sup> Viewed in the context of the holding, however, this language may be understood as requiring volitional conduct to find liability, rather than an affirmative act (beyond what would be required under *MAI*) to find that a work has been *reproduced*.

Indeed, the right of reproduction is perhaps the right most likely to be implicated when a work has been digitized. In

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<sup>71</sup>*Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 551 (N.D. Tex. 1997) (citing *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994)), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999).

<sup>72</sup>991 F. Supp. at 551.

<sup>73</sup>*Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999). In so ruling, the court rejected the argument that no image existed until a subscriber downloaded it (since the images could only be accessed by subscribers and decoded using special software). Judge Sanders wrote that "[t]he image existed in digital form on Webbworld's servers, which made it available for decoding as an image file by the subscriber's browser software." *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 552 (N.D. Tex. 1997), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999).

<sup>74</sup>*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>75</sup>*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) (emphasis in original).

*Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*,<sup>76</sup> for example, a court in Nevada ruled in 1999 that simply digitizing or scanning protected material constituted an unauthorized reproduction in violation of the Copyright Act, regardless of whether the work was subsequently distributed to the public. A *reproduction* potentially may occur when a work is first digitized, each time the work is called up (either by a website user or by an individual when a program is loaded into RAM), when a work accessible online is cached or refreshed and any time it is transferred to others. A *distribution*, by contrast, implies at a minimum a transfer to a third party, while a *public display* may not occur when a work is merely used at home, for example, rather than made available over the Internet.

In *Capitol Records, LLC v. ReDigi, Inc.*,<sup>77</sup> a district court evaluating a service that had created a secondary market for the resale of digital music files held that the unauthorized transfer of a digital music file over the Internet – where only one file existed before and after the transfer – constituted both a *reproduction* and *distribution*.<sup>78</sup> In that case, the defendant had argued that no reproduction had occurred because ReDigi merely migrated a file from the user's hard drive to its Cloud Locker. The court, however, rejected this argument, explaining that

the fact that a file has moved from one material object – the user's computer – to another – the ReDigi server – means that a reproduction has occurred. Similarly, when a ReDigi user downloads a new purchase from the ReDigi website to her computer, yet another reproduction is created. It is beside the point that the original phonorecord no longer exists. It matters only that a new phonorecord has been created.<sup>79</sup>

Although *reproduction* may be easier to show in a given

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<sup>76</sup>*Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113 (D. Nev. 1999).

<sup>77</sup>*Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

<sup>78</sup>*Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 648–51 (S.D.N.Y. 2013).

<sup>79</sup>*Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 650 (S.D.N.Y. 2013); see generally *infra* §§ 4.10[1], 16.02[1], 17.02[2][I] (discussing other aspects of the case). In 2012, ReDigi had launched a new version, ReDigi 2.0, that, when installed on a user's computer, directed iTunes to directly upload new iTunes purchases to the Cloud Locker so that, while access could transfer from one user to another upon resale, the uploaded file was never moved from its initial location in the Cloud Locker.



case than *distribution* or *public display*, not every reproduction will necessarily lead to liability for copyright infringement. Because a single work, when digitized, may be reproduced multiple times (including in many cases simply based on engineering protocols that neither copyright owners nor alleged infringers directly control), certain acts of *reproduction* may be subject to stronger fair use or implied license defenses than acts of distribution or public display.<sup>80</sup>

In cases involving peer-to-peer “file sharing,” courts initially had little difficulty finding that making files available to other users, or uploading, constitutes unauthorized *distribution*, while copying them from other users, or downloading, infringes a plaintiff’s exclusive right to *reproduce* their works. In *In re Napster, Inc.*,<sup>81</sup> a suit brought against investors in the Napster service after Napster, Inc. shut down and filed for bankruptcy, the court accepted this analysis but rejected the argument that plaintiffs’ *distribution* rights were violated by Napster itself (as opposed to Napster’s users) when it indexed MP3 files that its users posted on the Napster network. The court ruled that distribution requires the transfer of an identifiable copy of a work. A mere offer does not violate this right.<sup>82</sup>

While a site or service that indexes files may not be deemed to engage in distribution when it creates the index, a number of district courts have held that an individual user’s act of placing music files in a Kazaa shared folder or otherwise making them available to Internet users to access is deemed a distribution since the files were made available for others to download (or at least is sufficient to state a

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The legality of this version, which launched just days before the close of discovery, was not considered by the court. See *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 646 n.3 (S.D.N.Y. 2013).

<sup>80</sup>These issues are considered at greater length in sections 4.10 (copyright fair use), 4.05[7] (implied license) and 9.02 (laws governing caching). Liability for caching also may be limited pursuant to the Digital Millennium Copyright Act. See *infra* § 4.12.

<sup>81</sup>*In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796 (N.D. Cal. 2005).

<sup>82</sup>*In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796 (N.D. Cal. 2005), citing 2 Paul Goldstein, Copyright § 5.5.1, at 5:102 to 5:102-1 (2d ed. 2000 & Supp. 2005). The act of creating an index, however, could lead to secondary liability for contributory or vicarious infringement or inducing infringement, based on the acts of direct infringement of users of that index. See *infra* § 4.11.



claim for infringement based on distribution).<sup>83</sup>

Other district courts, however, have rejected the deemed distribution rule, holding that merely because files were made accessible over the Internet does not necessarily mean that they were in fact distributed to third parties.<sup>84</sup> Consequently, district courts increasingly avoid deciding whether

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<sup>83</sup>See, e.g., *UMG Recordings v. Alburger*, Civil No. 07-3705, 2009 WL 3152153, at \*3 n.41 (E.D. Pa. 2009) (stating that “an individual violates the exclusive-distribution right by ‘making available’ that illegally downloaded work to other internet users . . . . There is no requirement that plaintiffs show that the files were actually downloaded by other users from Defendant, only that the files were available for downloading.”); *Warner Bros. Records, Inc. v. Doe*, No. 5:08 CV-116-FL, 2008 WL 5111884 (E.D.N.C. Sept. 26, 2008) (holding that distribution includes not only actual dissemination but making a protected work available to the public), citing *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); *Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 250 (D. Me. 2008) (holding that alleging distribution by making the work available was sufficient at least to state a claim); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 167–69 (D. Mass. 2008) (holding that it was sufficient, at least for pleading purposes at the outset of the lawsuit, to allege distribution by making available the work, while declining to hold that making it available necessarily was a viable basis for actually imposing liability); *Motown Record Co., LP v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at \*3 (E.D. Pa. Feb. 16, 2007) (holding that section 106 encompasses an exclusive right to make a work available); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 969 (N.D. Tex. 2006) (holding that “making copyrighted works available to others may constitute infringement by distribution in certain circumstances.”); *Universal City Studios Productions LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190–91 (D. Me. 2006) (granting summary judgment for a motion picture studio based on the defendant making available two films on Kazaa); *Warner Bros. Records, Inc. v. Payne*, No. 06-CV-051, 2006 WL 2844415 (W.D. Tex. July 17, 2006) (declining to “rule out the plaintiffs’ ‘making available’ theory as a possible ground for imposing liability.”); see also *Arista Records LLC v. Does 1-16*, Civ. No. 1:08-CV-765, 2009 WL 414060, at \*5 (S.D.N.Y. Feb. 18, 2009) (holding that a plaintiff states a claim by merely alleging distribution without specifying whether it alleges actual distribution or distribution by making available files on a peer-to-peer network).

<sup>84</sup>See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999 (D. Minn. 2011) (granting a permanent injunction against the defendant downloading both existing and future titles issued by the plaintiff but declining to enjoin her from making plaintiff’s works available for others to download), *vacated*, 692 F.3d 899 (8th Cir. 2012) (holding that the defendant’s willful infringement justified an injunction against her making available the works without addressing whether making a work available online should be deemed a distribution), *cert. denied*, 133 S. Ct. 1584 (2013); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (granting a new trial based on the jury instruction on the term *distribution*); *Atlantic Recording Corp. v. Howell*, 554 F.

“making available” a work constitutes distribution.<sup>85</sup>

In *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>86</sup> the Ninth Circuit held that Google, by creating links to third-party sites, in conjunction with indexing the Internet, would not be deemed to have distributed linked images. The court explained that whereas when persons or entities make available files stored on their own servers they will be deemed to have distributed them, the “deemed distribution” rule will not apply if they merely create links to third-party sites. In so ruling, the court distinguished *Napster*, writing that “the distribution rights of the plaintiff copyright owners were infringed by Napster users (private individuals with collections of music files stored on their home computers) when they used the Napster software to make their collections available to all other Napster users.”<sup>87</sup>

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Supp. 2d 976, 981–82 (D. Ariz. 2008) (denying plaintiff’s motion for summary judgment and ruling that “[m]erely making a copy available does not constitute distribution.”); *Elektra Entertainment Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 245 (S.D.N.Y. 2008) (holding that the plaintiffs could not pursue a claim against the defendant based on distribution merely for making a work available, but nonetheless declining to grant the defendant’s motion to dismiss where the plaintiff also alleged actual distribution). Although the court in *Thomas* held that actual distribution of copyrighted sound recordings, rather than making them available for dissemination through a peer-to-peer file sharing application, was required to establish distribution, the court noted that direct proof of actual dissemination is not required by the Copyright Act. “Plaintiffs are free to employ circumstantial evidence to attempt to prove actual dissemination.” 579 F. Supp. 2d at 1225.

<sup>85</sup>See, e.g., *Warner Bros. Records Inc. v. Walker*, 704 F. Supp. 2d 460, 467–68 (W.D. Pa. 2010) (declining to decide whether making available constitutes distribution, but nonetheless enjoining the defendant from making available protected works for distribution online).

<sup>86</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162–63 (9th Cir. 2007).

<sup>87</sup>508 F.3d at 719 (emphasis in original), citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011–14 (9th Cir. 2001). The court further explained that:

Unlike the participants in the *Napster* system or the library in *Hotaling*, Google does not own a collection of Perfect 10’s full-size images and does not communicate these images to the computers of people using Google’s search engine. Though Google indexes these images, it does not have a collection of stored full-size images it makes available to the public. Google therefore cannot be deemed to distribute copies of these images under the reasoning of *Napster* or *Hotaling*. Accordingly, the district court correctly concluded that Perfect 10 does not have a likelihood of success in proving that Google violates Perfect 10’s distribution rights with respect to full-size images.

In *Live Nation Motor Sports, Inc. v. Davis*,<sup>88</sup> the court held that a link to a stream of a live webcast of motor races that were shown in real time constituted a public performance or display because those terms encompass “each step in the process by which a protected work wends its way to the audience.”

By contrast, in *Flava Works, Inc. v. Gunter*,<sup>89</sup> the Seventh Circuit held that creating links to videos on other websites that could be accessed by users and displayed in frames on the myVidster website did not involve a public performance because myVidster did not “touch the data stream, which flows from one computer to another, neither being owned or operated by myVidster.”<sup>90</sup>

While courts thus far have not always carefully or completely analyzed the potentially overlapping nature of exclusive rights online, they also typically have not been required to do so to determine whether a given act constitutes infringement, which is the issue most commonly litigated. A court need only find that any one of a copyright owner’s exclusive rights has been violated to find infringement. At that point in a dispute, it usually doesn’t matter whether a copyright owner’s exclusive right to *distribution*, *reproduction* or *public display* has been infringed. It typically only matters where separate parties own different exclusive rights (or in particular cases such as where individual defendants have made available their works but not also downloaded unauthorized copies).

Which rights are implicated may be more pressing in multi-jurisdictional cases. In *Shropshire v. Canning*,<sup>91</sup> for example, the court denied defendant’s motion to dismiss, where the defendant, a Canadian resident who posted a video on YouTube that contained an audio of plaintiff’s U.S. copyrighted song (“Grandma Got Run Over By A Reindeer”),

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508 F.3d at 719; see also *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020, 1034 (9th Cir. 2013) (holding that with respect to users of defendant’s BitTorrent sites, “[b]oth uploading and downloading copyrighted material are infringing acts. The former violates the copyright holder’s right to distribution, the latter the right to reproduction.”).

<sup>88</sup>*Live Nation Motor Sports, Inc. v. Davis*, Civil Action No. 3:06-CV-276-L, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007).

<sup>89</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

<sup>90</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012).

<sup>91</sup>*Shropshire v. Canning*, 809 F. Supp. 2d 1139 (N.D. Cal. 2011).

had argued that the alleged infringing act—uploading an infringing video to YouTube—took place in Canada. The court, however, ruled that “the alleged act of direct copyright infringement—uploading a video from Canada to YouTube’s servers in California for display within the United States—constitutes an act of infringement that is not ‘wholly extraterritorial’ to the United States.”<sup>92</sup>

Similarly, in *Stevo Design, Inc. v. SBR Mktg. Ltd.*,<sup>93</sup> the court rejected arguments that a sports betting website’s copyright infringement suit against a website based in Costa Rica could not be brought in the United States where the plaintiff alleged that users of the defendant’s website reproduced the material in the United States.

The scope in cyberspace of each exclusive right granted to owners under the Copyright Act also is important in construing copyright licenses since a licensor may parse its rights into distinct packets, which may be separately granted to different licensees. License rights clearly understood on *terra firma* may be ambiguous, inadequate or overly broad when applied to uses in digital media. For example, a license granting a party the right to distribution, but not public display, may be problematic for a licensee who seeks to distribute the licensed work online.

In older agreements entered into before the advent of the Internet and online services, licensees who were granted broad permission are likely to be better protected in cyberspace than those who received only narrowly defined rights. Conversely, licensors may be precluded from entering into exclusive license agreements for new online ventures if they previously granted rights under old license agreements which could be construed as necessary to reach applications in new media.

For agreements entered into today, parties may prefer in some cases to specifically define permitted uses of a work—or those uses that are prohibited—rather than relying exclusively on the statutory terminology of the exclusive rights enumerated in the 1976 Copyright Act, which long predates the relevant technology. Regardless of how rights are divided, it may be advisable to include specific language

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<sup>92</sup>*Shropshire v. Canning*, 809 F. Supp. 2d 1139, 1147 (N.D. Cal. 2011).

<sup>93</sup>*Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1091–92 (D. Nev. 2013).

permitting or prohibiting various potential online uses.<sup>94</sup> Further discussion of Internet licensing may be found in

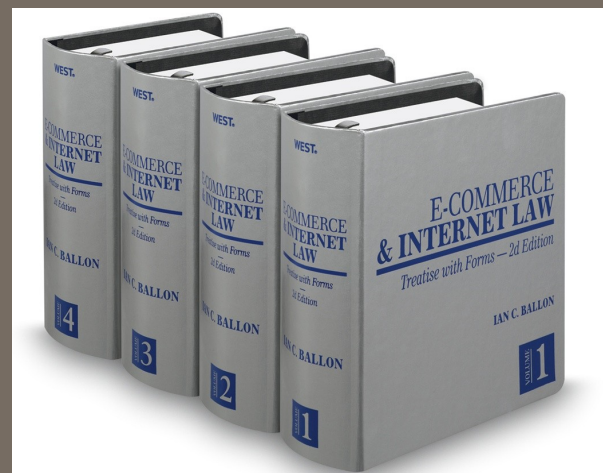
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<sup>94</sup>To protect itself in such cases, a licensee may seek to include a qualifying provision that, in the event a court determines that any particular online conduct intended to be permitted by the agreement does not constitute an act of reproduction, distribution, public display—or whatever specific rights are being licensed—the parties intend that the license be construed to permit specific online conduct and agree that whatever rights under the Copyright Act may be implicated by such conduct shall be deemed licensed under the terms of the agreement. Licensors, however, usually will be uncomfortable with such a provision, which could adversely affect agreements with other licensees.

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Mr. Ballon, who is admitted to practice in California, the District of Columbia and Maryland and in the U.S. District Court for the District of Colorado, represents companies in



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Mr. Ballon was the recipient of the 2010 Vanguard Award from the State Bar of California's Intellectual Property Law Section. He also has been recognized by The Daily Journal as one of the Top 75 Intellectual Property litigators and Top 100 lawyers in California.

Mr. Ballon is listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology. He also was recognized by the Los Angeles and San Francisco Daily Journal in 2009 for obtaining the third largest plaintiff's verdict in California in 2008 in *MySpace, Inc. v. Wallace*, which was one of several cases in which he served as lead counsel that created important precedents on the applicability of the CAN-SPAM Act, California's anti-phishing statute and other laws to social networks.

Mr. Ballon received his B.A. magna cum laude from Tufts University, his J.D. with honors from George Washington University Law School and an LL.M. in international and comparative law from Georgetown University Law Center. He also holds the C.I.P.P. certification from the International Association of Privacy Professionals.

In addition to E-Commerce and Internet Law: Treatise with Forms 2d edition, Mr. Ballon is the author of The Complete CAN-SPAM Act Handbook (West 2008) and The Complete State Security Breach Notification Compliance Handbook (West 2009), published by Thomson West ([www.IanBallon.net](http://www.IanBallon.net)).

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