Hot Topics in Internet, Mobile and Cloud Law and Liability

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E-Commerce & Internet Law

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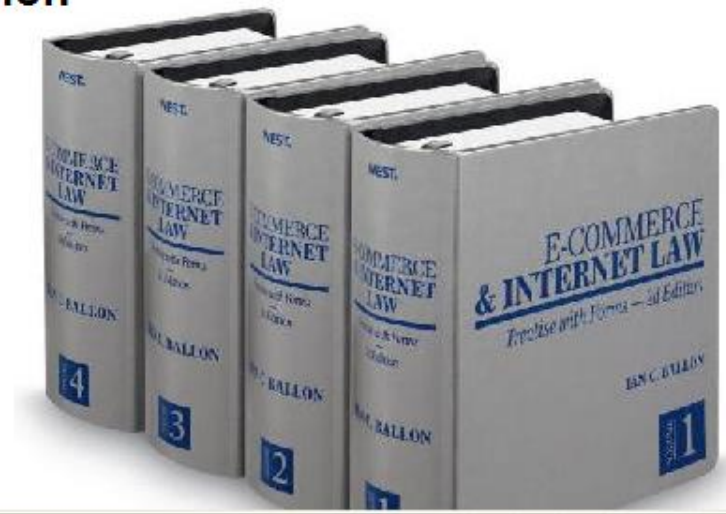
By Ian C. Ballon



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Mobile Law Trends

- Internet contracting
  - Confusion over "clickwrap" and "browsewrap" agreements
  - Arbitration clauses broadly enforceable despite resistance in California
- Children and the use of mobile devices
  - COPPA regulations
    - Sites and services targeted to children
    - General audience sites
  - I.B. v. Facebook, 905 F. Supp. 2d 989 (N.D. Cal. 2012) (allowing claims by minors for reimbursement of credit card charges for Facebook credits based on the California law that provides that certain contracts with minors are void)
  - But see
    - Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012) (enforcing choice of forum clause; infancy cannot be used as a sword rather than a shield)
    - A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), *aff'd in part and rev'd in part on other grounds*, 562 F.3d 630, 639 (4th Cir. 2009) (minors equitably estopped from denying agreement to the terms of use of a plagiarism verification site)
  - Age of majority is higher in Alabama, Nebraska and Mississippi
- Liability for user conduct and content
  - DMCA, Trademark, CDA
  - Do the same rules apply for content or conduct in the cloud, on social media or on mobile devices?
- Copyrightability of APIs
  - Oracle America Corp. v. Google, Inc., 872 F. Supp. 2d 974 (N.D. Cal. 2012) (holding that Google's use of application programming interface (API) packages in connection with original code for the Android operating system did not infringe Oracle's copyrights in Java)
- Privacy
  - State AG enforcement of privacy relating to Apps
    - Letters and litigation
    - *Privacy on the Go* (January 2013)
  - New COPPA regulations
- First Sale and intangible goods
- TCPA class action suits
- Retransmission of television over the Internet and to mobile devices (and what constitutes *public performance* and *reproduction*)

Online Contract Formation

- Trend: Characterizing Click-Through + a link as browserwrap
  - Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012)
  - Fteja v. Facebook, Inc., 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (hybrid)
- Continued Hostility to implied contracts
  - In re Zappos.com, Inc. Customer Data Securities Breach Litig., 893 F. Supp. 2d 1058 (D. Nev. 2012) (links to TOU on every page)
  - Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927 (E.D. Va. 2010)
- Arbitration and Class Action Waivers
  - AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
  - American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)
  - Kilgore v. KeyBank, Nat'l Ass'n, 718 F.3d 1052 (9th Cir. 2013) (*en* banc)
  - Mortensen v. Bresnan Communications, LLC, 722 F.3d 1151, 1157-61 (9th Cir. 2013)
  - Coneff v. AT & T, Corp., 673 F.3d 1155, 1160-62 (9th Cir. 2012)
  - Schnabel v. Trilegiant Corp., 697 F.3d 110 (2d Cir. 2012) (email after agreement "failure to cancel = consent to arbitration" not a binding agreement to arbitrate disputes)
    - But see Hancock v. AT+T, 701 F.3d 1248 (10th Cir. 2012) (enforcing click through contract and arbitration provision contained in subsequent email that afforded the plaintiff the opportunity to cancel service within 30 days and obtain a partial refund if it did not agree with the provision)
- Reservation of Unilateral Rights
  - Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021 (D. Colo. 2012) ("[b]ecause Qwest retained an unfettered ability to modify the existence, terms and scope of the arbitration clause, it is illusory and unenforceable."), appeal dismissed, _ F.3d _, 2013 WL 4083273 (10th Cir. 2013)
  - In re Zappos.com, Inc. Customer Data Securities Breach Litig., 893 F. Supp. 2d 1058 (D. Nev. 2012) (unilateral right to amend the TOU at any time rendered the agreement illusory)
- Drafting tips
  - Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)
    - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
    - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable

Computer Fraud and Abuse Act

- $5,000 threshold: loss to any one or more persons during a one year period aggregating $5,000 in value. 18 U.S.C. § 1030(c)(4)(A)(i)(I)
  - Bose v. Interclick, Inc., No. 10 Civ. 9183, 2011 WL 4343517 (S.D.N.Y. Aug. 17, 2011)
- Scaling back of the CFAA as a tool to challenge screen scraping or trade secret misappropriation in the Ninth and Fourth Circuits (disagreeing with the Fifth, Seventh and Eleventh Circuits)
  - United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (*en banc*) (the prohibition on exceeding authorized access under the CFAA applies to access restrictions, not use restrictions such as violating TOU or employment policies)
  - WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199 (4th Cir. 2012) (CFAA fails to provide a remedy for misappropriation of trade secrets or violation of a use policy where authorization has not been rescinded)), cert. dismissed, 133 S. Ct. 831 (2013)
  - But see U.S. v. John, 597 F.3d 263, 271 (5th Cir. 2010) (holding that an employee of Citigroup exceeded her authorized access when she accessed confidential customer information in violation of her employer's computer use restrictions and used that information to commit fraud, writing that a violation occurs "at least when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime . . . ."); U.S. v. Rodriguez, 628 F.3d 1258, 1263 (11th Cir. 2011) (holding that a Social Security Administration employee exceeded authorized access by obtaining information about former girlfriends and potential paramours to send flowers to their houses, where the Administration told the defendant that he was not authorized to obtain personal information for nonbusiness reasons); International Airport Centers, LLC v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006) (reversing dismissal of a claim against an employee who accessed plaintiff's network and caused transmission of a program that caused damage to a protected computer where the court held that an employee who had decided to quit and violate his employment agreement by destroying data breached his duty of loyalty to his employer and therefore terminated the agency relationship, making his conduct unauthorized (or exceeding authorized access)); *see also* EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001) (concluding that where a former employee of the plaintiff provided another company with proprietary information in violation of a confidentiality agreement, in order to "mine" his former employer's publically accessible website for certain information (using scraping software), he exceeded the authorization he had to navigate the website).

Resale of Digital Goods and the limitations of the first sale doctrine in digital media

- First sale doctrine applies to copies of copyrighted works lawfully made abroad
  - Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013)
- Intangible digital works, as opposed to those fixed in tangible media, may not be subject to the first sale doctrine because of what Mark Lemley first characterized as "overlapping rights" where the act of distribution also may constitute *reproduction, public performance* or *public display.*
- Capitol Records, LLC v. ReDigi Inc., _ F. Supp. 2d _, 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013)
  - Created a secondary market for the re-sale of digital music
    - Open vs closed ecosytem
  - ReDigi's transfer of music files over the Internet constituted reproduction
  - Fair use defense inapplicable
  - First sale doctrine inapplicable to reproduction (first sale addresses *distribution*)
  - ReDigi held liable for direct, contributory and vicarious liability on summary judgment
- Same principles may apply to re-sale of virtual goods
- Can you construct a marketplace for the re-sale of digital goods?

SECONDARY COPYRIGHT LIABILITY FOR USER CONTENT

- Copyright Inducement
  - (1) intent to bring about infringement, (2) distribution of a device suitable for infringing use, and (3) evidence of actual infringement by recipients of the device. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); Columbia Pictures Industries, Inc. v. Fung., 710 F.3d 1020 (9th Cir. 2013); Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398 (S.D.N.Y. 2011).
- Direct Liability
  - Volitional conduct (causation): Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995); CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544 (4th Cir. 2004); Perfect10, Inc. v. Amazon.com, 487 F.3d 701 (9th Cir. 2007) (server test).
- Contributory Infringement
  - Imposed where a person or entity "induces, causes or materially contributes to the infringing conduct of another. . ." Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 686 (N.D. Cal. 1994); see also UMG Recordings, Inc. v. Bertelsmann, 222 F.R.D. 408 (N.D. Cal. 2004)(must show (1) direct infringement by a third party, (2) actual or constructive knowledge by the defendant, and (3) substantial participation by the defendant in the infringing activities); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (reasonable knowledge; knew/should have known on system; failed to act to prevent viral dist'n); Perfect10, Inc. v. Amazon.com, 487 F.3d 701 (9th Cir. 2007) (actual knowledge that specific infringing material is available where the service could have taken simple measures to prevent further damage but did not do so); Perfect 10, Inc. v. Visa Int'l, 494 F.3d 788 (9th Cir. 2007), cert. denied, 553 U.S. 1079 (2008).
- Vicarious liability
  - May be imposed where the defendant (1) has the right and ability to supervise the infringing activity, and (2) has a direct financial interest in such activities. E.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Perfect10, Inc. v. Amazon.com, 487 F.3d 701 (9th Cir. 2007) (no financial benefit or ability to control merely because of the AdSense program); Perfect 10, Inc. v. Visa Int'l, 494 F.3d 788 (9th Cir. 2007), cert. denied, 553 U.S. 1079 (2008).

Inducement (BitTorrent)

- Columbia Pictures Industries, Inc. v. Fung, 710 F.3d 1020 (9th Cir. 2013) (the first circuit court inducement case)
  - Distribution of a *device* or *product*
    - Clarifies applies to a service
  - Acts of infringement
  - With the object of promoting its use to infringe, as shown by clear expression or other affirmative steps
    - Rejects argument that these are two separate requirements
  - Causation
    - A plaintiff need only prove that acts of infringement by third parties were caused by the product distributed or services provided
    - "[I]f one provides a service that could be used to infringe copyrights, with the manifested intent that the service actually be used in that manner, that person is liable for the infringement that occurs through the use of the service"
    - The court recognized this was a "lax causation requirement" and therefore (1) cautioned that proof of intent is paramount, (2) discussed the temporal dimension to causation (*dicta*), (3) cautioned that *Grokster* contemplated a single producer
  - Scope of injunction
  - DMCA – inducing actions do not *per se* render a defendant ineligible for the DMCA safe harbor but may make it impossible to qualify

Inducement in Context

- MGM, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005): One who distributes a device with the object of promoting its use to infringe copyright, as shown by "clear evidence or other affirmative steps taken to foster infringement," is liable for the resulting acts of infringement by third parties
- (1) intent to bring about infringement, (2) distribution of a product suitable for infringing use, and (3) evidence of direct liability
- Proof: Advertising. In *Grokster*:
  - marketed product to former Napster users
  - No attempt to develop filtering tools or other mechanisms to diminish infringement (footnote 12)
  - Defendants' business model
- *Sony* "Safe Harbor"
  - Not applicable to the facts of *Grokster*
  - Disagreement among concurring opinions about *Sony*'s applicability to contributory infringement cases (Ginsburg; Breyer)
  - In fact the Safe Harbor should only apply in a small number of cases where liability is premised on the nature and character of a product or service (with no direct evidence of inducement)
- Columbia Pictures Industries, Inc. v. Fung., 710 F.3d 1020 (9th Cir. 2013)
- MGM, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966 (C.D. Cal. 2006) (liability)
- MGM, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197 (C.D. Cal. 2007)
  - Permanent injunction granted mandating acoustical fingerprinting, file hash filtering, keyword filtering, video filtering and a quality improvement process
- Arista Recordings LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009)
- Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398 (S.D.N.Y. 2011) (granting SJ)
- Handful of district court cases from the Southern District of New York and one judge in the Central District of California (and now a Ninth Circuit opinion)
  - Services with an overwhelming amount of infringing material – 90% or more infringing content in all cases to date
  - Affirmative encouragement to engage in infringement
  - Failure to take simple steps to deter it
- Raised in litigation as a way to broaden the scope of discovery
- Two courts in 2013 ruled that the DMCA *potentially* applies to inducement claims, but where there is proof of inducement it would be almost impossible to qualify for the safe harbor

The Digital Millennium Copyright Act

DMCA Service Provider Liability Limitations

- Threshold requirements:
  - Adopt a policy providing for the termination of "repeat infringers" "in appropriate circumstances"
  - Inform subscribers and account holders of the policy
  - The policy must be "reasonably implemented"
  - The policy must accommodate and not interfere with "standard technical measures"
    - Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090 (W.D. Wash. 2004) (not necessarily a failure of implementation if an infringer sidesteps a service provider's policy and is able to sign back on under a new user ID)
- User Storage
  - Must respond expeditiously upon receipt of a notification to disable access to or remove allegedly infringing material
  - Service provider must not "receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity . . ." Formerly divergent views reconciled:
    - Objective and subjective component – "something more" than the ability to block and remove content, without respect to knowledge (Viacom v. YouTube)
    - Right and ability to control requires specific knowledge (Shelter Partners); On reconsideration adopted the Second Circuit view
    - Columbia Pictures Indus. v. Fung, 710 F.3d 1020 (9th Cir. 2013): ineligible because Fung was aware of facts and circumstances from which infringing activity was apparent and had a financial interest and the right and ability to control (inducement)
  - May not have "actual knowledge" or be "aware of facts or circumstances from which infringing activity is apparent . . ." or, upon obtaining such knowledge, act expeditiously to remove or disable (Red Flag)
    - Knowledge of specific files or activity, not generalized knowledge (Viacom v. YouTube; Shelter Partners)
    - Perfect 10, Inc. v. ccBill, 488 F.3d 1102 (9th Cir.), cert. denied, 552 U.S. 1062 (2007)
    - Willful blindness – (Viacom v. YouTube; Columbia Pictures Indus. v. Fung) (turning a blind eye to infringement/ willful ignorance is inconsistent with the red flag requirement; no evid. of expeditious response)

DMCA - Recent Case Law

- Columbia Pictures Industries, Inc. v. Fung, 710 F.3d 1020 (9th Cir. 2013)
- UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013) (reconsidering the panel's 2012 ruling and harmonizing Ninth Circuit law with the Second Circuit's ruling in YouTube)
  - Ninth Circuit had originally said there needed to be knowledge of specific files to find right and ability to control. Adopted the Second Circuit approach – for evaluating knowledge or red flag awareness a service provider must have knowledge or awareness of specific files , but knowledge or awareness of specific files is NOT required to show right and ability to control. – "Something more" than the ability to block and remove content, without respect to knowledge, must be shown.
- Obodai v. Cracked Entertainment Inc., 522 Fed. App'x 41 (2d Cir. 2013)
- Capitol Records, LLC v. Vimeo, LLC, 2013 WL 5272932 (S.D.N.Y. Sept. 18, 2013)
- Disney Enterprises, Inc. v. Hotfile Corp., No 11-20427 (S.D. Fla. Sept. 20, 2013)
- Viacom Int'l Inc. v. YouTube, Inc., _ F. Supp. 3d _. 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013) (granting summary judgment again for YouTube, this time on remand from the Second Circuit)
  - Although YouTube bore the burden of proving entitlement to the DMCA, Viacom bore the burden of notifying YouTube of any infringing files on its service. Viacom presented evidence of a large number of allegedly infringing files on YouTube, but neither side could prove or disprove whether YouTube had knowledge or awareness of these files and failed to act to remove them. The court held that Viacom bore the burden of showing a failure to act in the face of knowledge or awareness or "substitute equivalents" such as willful blindness or right and ability to control.
  - Right and ability to control – every service provider is presumed to have the ability to honor takedown requests. To fall outside the safe harbor "right and ability to control" means exerting substantial influence on the activities of users without necessarily acquiring knowledge of specific infringing activity.
    - Alleged decision to stop proactive monitoring not enough given the volume of files being uploaded and section 512(m)
    - "There is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity.
  - Syndication of clips to Apple, Sony, Panasonic, TiVO and AT+T did not take YouTube outside the safe harbor (YouTube transcoded clips that were accessed from its website from various mobile and other devices)
    - Compare: syndication to Verizon where YouTube manually removed selected videos from its service and hand delivered them to Verizon
- Capitol Records, Inc. v. MP3Tunes, Inc., 2013 WL 1987225 (S.D.N.Y. May 14, 2013) (granting reconsideration of the court's prior orders in light of YouTube)
  - Reversing SJ for defendants in light of the Second Circuit's YouTube decision (1) on those works that were not subject to valid takedown notices for consideration of whether the defendant was willfully blind; (2) on the issue of whether defendants had red flag awareness;
  - The court notes the tension between section 512(m), which provides that service providers have no affirmative obligation to monitor their sites and the Second Circuit's conclusion that willful blindness could deprive a service provider of safe harbor protection

DMCA Service Provider Liability Limitations

- Does the DMCA apply to common law copyright claims?
  - Capitol Records, Inc. v. MP3Tunes, LLC, 821 F.Supp.2d 627 (S.D.N.Y. 2011), modified on reconsideration on other grounds, 2013 WL 1987225 (S.D.N.Y. May 14, 2013)
    - No DMCA protection for infringing music copied from unauthorized websites where provider had actual knowledge of infringing files stored by users
    - DMCA applies to state common law copyright claims for pre-1972 sound recordings
  - UMG Recordings, Inc. v. Escape Media Group, Inc., 964 N.Y.S.2d 106 (N.Y.A.D. Apr. 23, 2013)
    - Construed section 512 as not applying to common law copyrights based on the language of the preemption provision set forth in 17 U.S.C. § 301 which excludes from the Copyright Act's broad preemption of equivalent state remedies claims based on pre-1972 sound recordings
    - Disagreed with Capitol Records, Inc. v. MP3Tunes, LLC, 821 F.Supp.2d 627 (S.D.N.Y. 2011)
    - The Copyright Office, in a December 2011 letter to Congress recommending that the Copyright Act be extended to cover pre-1972 sound recordings and the DMCA be made applicable to this new provision, took the position that MP3Tunes was wrongly decided, which likely was influential
  - The final word will come from the NY Court of Appeals, Second Circuit or Congress
  - What should service providers do with respect to pre-1972 sound recordings?
  - Interplay between the CDA and DMCA?
    - Owners of common law copyrights will sue in state court in New York, not in the Ninth Circuit
    - The NY Court of Appeals or Second Circuit (or Congress) likely will have the last word on the applicability of the DMCA to common law copyrights

TELEPHONE CONSUMER PROTECTION ACT CLASS ACTION LITIGATION

TCPA Suits

- Suits filed over text message advertisements and confirmatory opt-out messages
- The TCPA prohibits and person from making a call (including a text message)
  - other than for emergency purposes or with the "prior express consent of the called party"
  - using an *automatic telephone dialing system* . . . . 47 U.S.C. § 227(b)(1)(A)(iii)
- ATDS: equipment which has the capacity—**(A)** to store or produce telephone numbers to be called, using a random or sequential number generator; and **(B)** to dial such numbers.
- Mims v. Arrow Financial Services, LLC, 132 S. Ct. 740 (2012)
- Gager v. Dell Financial Services, LLC, 727 F.3d 365 (3d Cir. 2013)
- Lawyer-driven cases (opt in, opt out and lawsuit all in less than a month)
- Ibey v. Taco Bell Corp., Case No. 12-CV-0583-H, 2012 WL 2401972 (S.D. Cal. June 18, 2012), appeal dismissed,), Docket No. 12-56482 (9th Cir. Nov. 28, 2012)
  - TCPA does not impose liability for a single confirmatory text message
  - Insufficient allegation of use of an ATDS
  - Strategy
- In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Docket No. 02-278 (FCC Nov. 26, 2012)
- Up to $500 "per violation" – trebled where the defendant violated the statute "willfully or knowingly"
- Most lawyers settle these cases – I recommend a different strategy

DATA PRIVACY, SECURITY BREACH AND BEHAVIORAL ADVERTISING CLASS ACTION LITIGATION

Privacy Class Action Litigation

- Common weakness: Standing? Injury?
  - Clapper v. Amnesty International USA, 133 S. Ct. 1138, 1147 (2013)
  - In re Google Privacy Policy Litig., 2012 WL 6738343 (N.D. Cal. Dec. 28, 2012)
  - Pirozzi v Apple Inc., 2012 WL 6652453 (N.D. Cal. Dec. 20, 2012)
  - In re iPhone Application Litig., Case No. 11-MD-02250-LHK, 2011 WL 4403963 (N.D. Cal. Sept. 20, 2011) (dismissing for lack of Article III standing, with leave to amend, a putative class action suit against Apple and various application providers alleging misuse of personal information without consent)
  - Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010), cert. dismissed, 132 S. Ct. 2536 (2012)
- ECPA – 18 U.S.C. §§ 2500, 2700 *et seq.*
  - Only protects the *contents* of communications
    - In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1062 (N.D. Cal. 2012) (dismissing plaintiff's claim because geolocation data was not the contents of a communication)
  - Also: no interception (Wiretap Act) and for advertisers no access (Stored Communications) (alleged communication is between widget provider and user's hard drive); for many websites and advertisers, consent (including from TOU or Privacy Policy)
  - Lazette v. Kulmatycki, _ F. Supp. 2d _, 2013 WL 2455937 (N.D. Ohio 2013)
  - Low v. LinkedIn Corp., No. 11–cv–01468–LHK, 2012 WL 2873847 (N.D. Cal. July 12, 2012)
  - Joffe v. Google, Inc., _ F.3d _, 2013 WL 4793247 (9th Cir. 2013)
  - In re Google Inc. Gmail Litig., Case No. 13–MD–02430–LHK, 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013)
- CFAA - 18 U.S.C. § 1030
  - $5,000 minimum injury
  - Yunker v. Pandora Media, Inc., No. 11-CV-03113 JSW, 2013 WL 1282980 (N.D. Cal. Mar. 26, 2013)
- Video Privacy Protection Act – 18 U.S.C. § 2710
  - **In re Hulu Privacy Litig., No. C 11-03764 LB, 2012 WL 3282960** (N.D. Cal. Aug. 10, 2012)
- State claims (CAFA)
  - Unfair competition, contract claims: Need injury and damage. In re Facebook Privacy Litig., 791 F. Supp. 2d 705 (N.D. Cal. 2011)
  - Breach of contract – must be more than nominal damages. Rudgayer v. Yahoo! Inc., 2012 WL 5471149 (N.D. Cal. Nov. 9, 2012)
  - Common law invasion of privacy: no claim if disclosed in Privacy Policy
- Class certification: Harris v. Comscore, Inc., _ F.R.D. _, 2013 WL 1339262 (N.D. Ill. Apr. 2, 2013) (certified a class of users who downloaded Comscore software since 2005; SCA, ECPA I, CFAA)
- Targets? App and mobile providers, social networks (UUID), any advertiser

Security Breach Litigation Against Companies

- Suits for breach of contract, negligence and potentially implied contract
  - Patco Construction Co. v. People's United Bank, 684 F.3d 197 (1st Cir. 2012) (holding defendant's security procedures to not be commercially reasonable)
  - Anderson v. Hannaford Brothers Co., 659 F.3d 151 (1st Cir. 2011)
    - Allowing negligence, breach of contract and breach of implied contract claims to go forward
    - Implied contract by grocery store to undertake some obligation to protect customers' data
    - Class certified: In re Hannaford Bros. Co. Customer Data Sec. Breach Litigation, 2013 WL 1182733 (D. Me. Mar 20, 2013)
- Standing in Putative Class Action Cases
  - Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008) (finding standing where plaintiff's information was posted on a municipal website and then taken by an identity thief, causing actual financial loss fairly traceable to d's conduct)
  - Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012) (standing where plaintiffs had both been identity theft victims)
  - Pisciotta v. Old National Bancorp., 499 F.3d 629 (7th Cir. 2007) (finding standing in a security breach class action suit against a bank based on the threat of future harm)
  - Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010) (finding standing in a suit where plaintiffs unencrypted information (names, addresses and social security numbers) was stored on a stolen laptop)
  - Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011) (finding no standing in a suit by law firm employees against a payroll processing firm alleging negligence and breach of contract relating to the risk of identity theft and costs to monitor credit activity), cert. denied, 132 S. Ct. 2395 (2012)
    - Distinguished environmental and toxic tort cases

Subpoenas and Discovery – Cloud, Mobile and Social Networks

- Third parties seeking your information stored on a third party's servers in the cloud
- Evidence in Litigation (ECPA, 18 U.S.C. § 2700 et seq.)
  - ECS/ RCS (Twitter, Facebook, mobile and cloud providers)
  - Civil/ Government
  - Contents vs. non-content data
    - Contents: information concerning the substance, purport, or meaning of a communication
      - Email, IM and text messages
      - Videos (if set to private)
      - Social network communications
    - Non-content data: A record or other information pertaining to a subscriber or customer *
      - Name, address, social security number, credit card number and a certification that a user accessed a site or service at a particular time
      - Historical cell tower data, geolocation information
  - Suzlon Energy Ltd. v. Microsoft Corp., 671 F.3d 726 (9th Cir. 2011)
  - Bower v. Bower, 808 F. Supp. 2d 348, 349-50 (D. Mass. 2011) ("Faced with this statutory language, courts have repeatedly held that providers such as Yahoo! and Google may not produce emails in response to civil discovery subpoenas.")
  - Juror No. One v. Superior Court, 206 Cal. App. 4th 854 (2012)
  - The oxymoron of *compelled consent* in California

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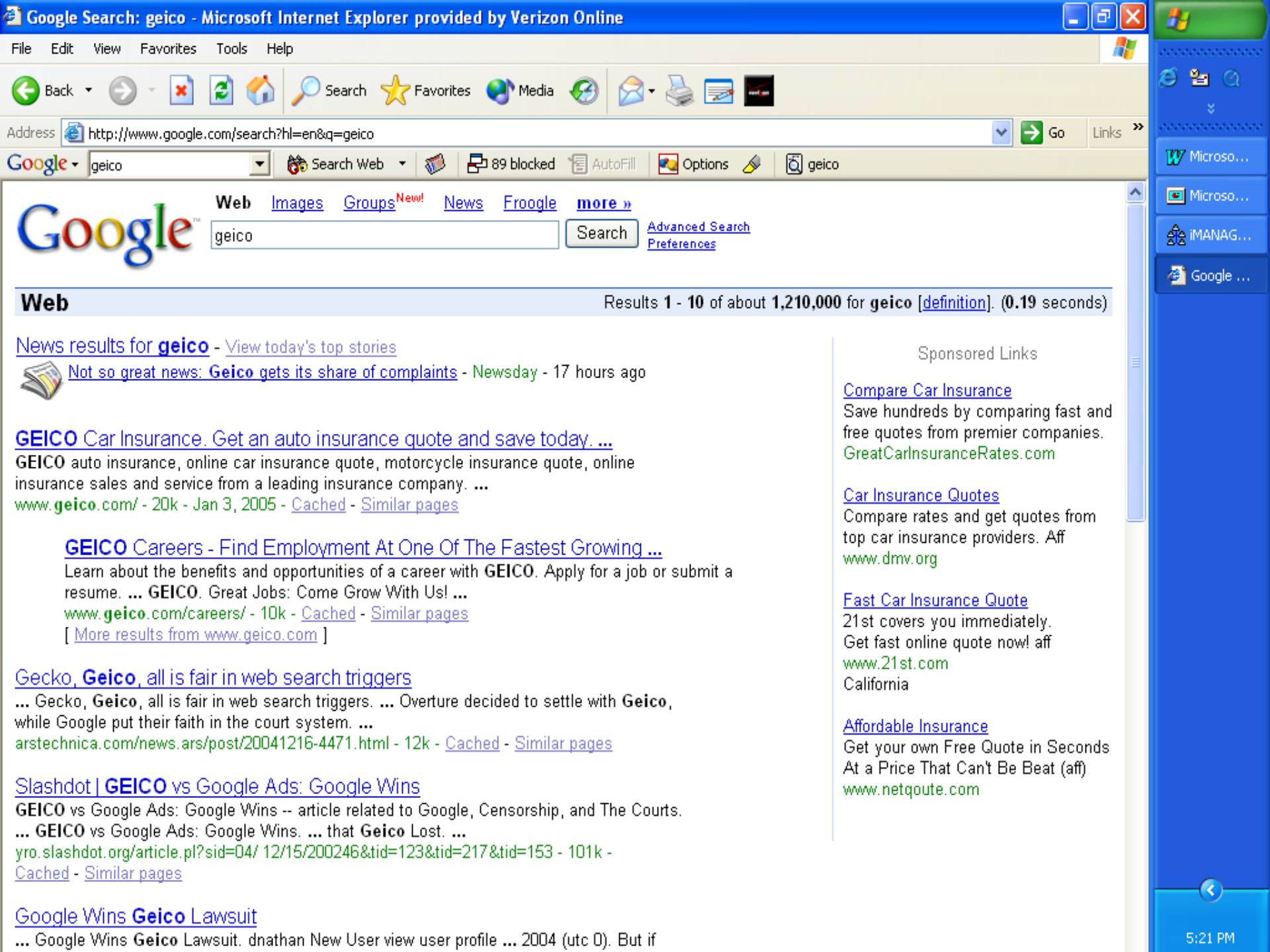
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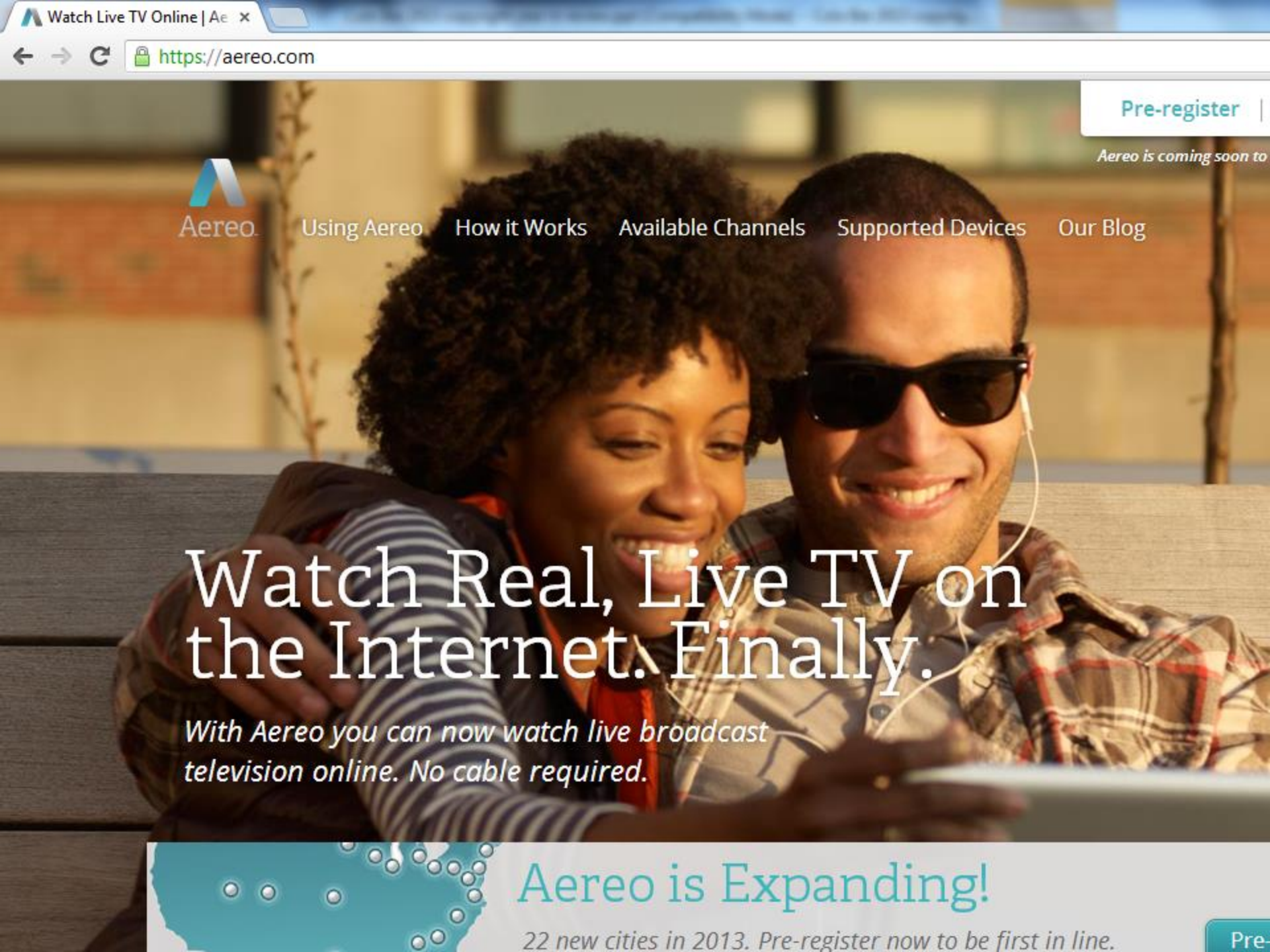
- 1-800-Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229 (10th Cir. 2013)
  - Summary judgment for the defendant affirmed on direct and vicarious liability
    - Failure of proof - initial interest confusion occurred at most 1.5% of the time
    - Lens.com advertisement was generated by one of nine challenged keywords and therefore could not be said to likely lure consumers in search of the plaintiff's product to those of the defendant
  - Reversed on the issue of whether Lens.com could be held contributorily liable for an advertisement placed by a Lens.com affiliate without authorization, which included plaintiff's 1-800-Contacts mark in the body of the advertisement
- Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144 (4th Cir. 2012)
  - Claims not barred by the functionality doctrine
  - Judge weighed facts, which is inappropriate when considering summary judgment
  - Case settled
- Network Automation, Inc. v. Advanced Systems Concepts, Inc., 638 F.3d 1137 (9th Cir. 2011)

RETRANSMISSION OF TELEVISION SIGNALS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Access your local over-the-air channels - all the major broadcast networks and over 20 other channels - in HD quality.

See all available channels...

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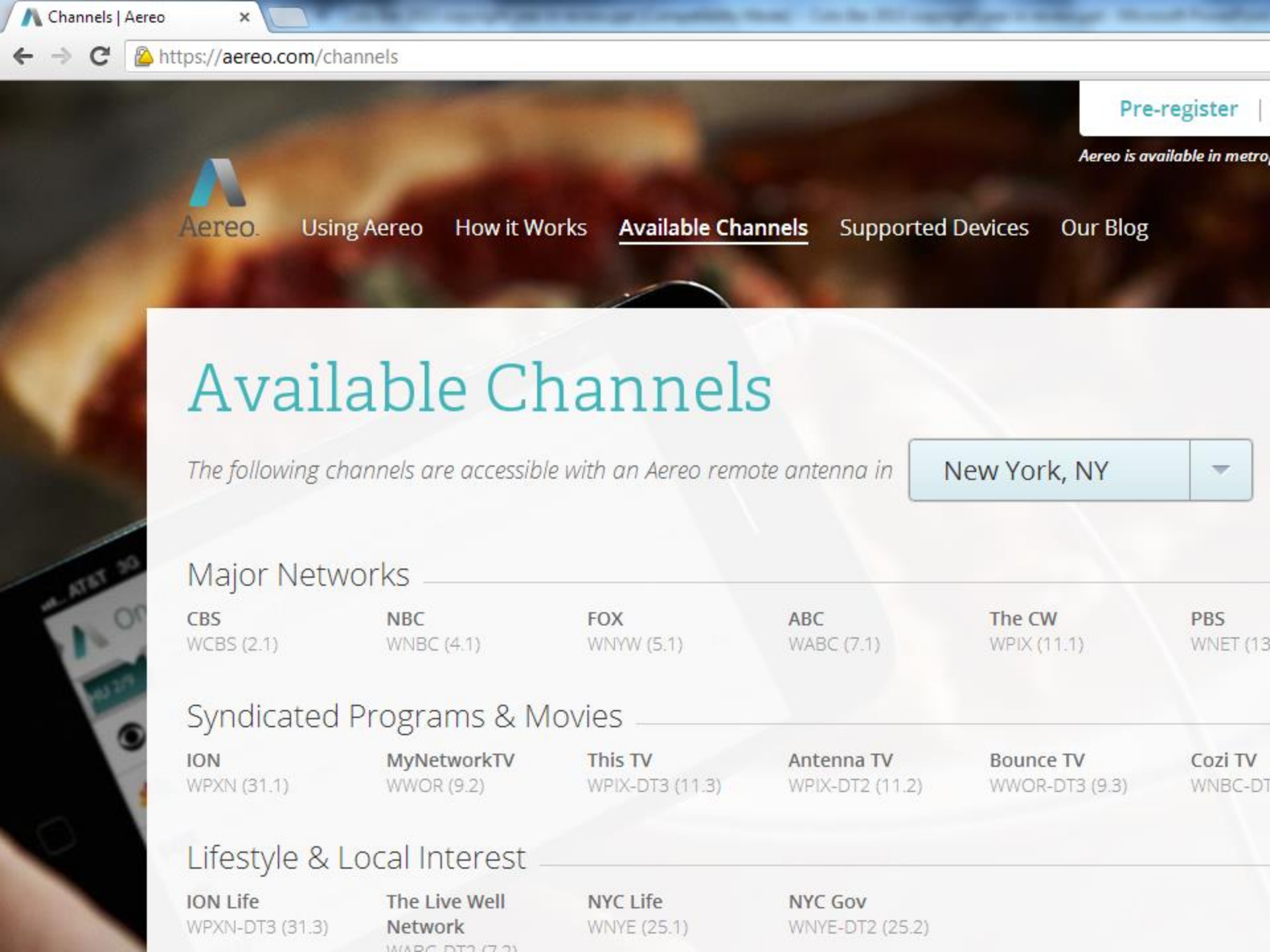
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https://aereo.com/channels
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WCBS (2.1)
NBC
WNBC (4.1)
FOX
WNYW (5.1)
ABC
WABC (7.1)
The CW
WPIX (11.1)
PBS
WNET (13
Syndicated Programs & Movies
ION
WPXN (31.1)
MyNetworkTV
WWOR (9.2)
This TV
WPIX-DT3 (11.3)
Antenna TV
WPIX-DT2 (11.2)
Bounce TV
WWOR-DT3 (9.3)
Cozi TV
WNBC-DT
Lifestyle & Local Interest
ION Life
WPXN-DT3 (31.3)
The Live Well Network
NYC Life
WNYE (25.1)
NYC Gov
WNYE-DT2 (25.2)

Retransmission of Television Broadcasts

- WNET v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013)
  - Business built around Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008): Aereo transmits to subscribers broadcast television over the Internet, which subscribers may watch on their computers or mobile devices
  - Aereo has no license to record or transmit broadcasts. It uses individual antennas to allow users to watch and create individual DVR recordings of over the air broadcasts in individual cities over the Internet on computers and mobile devices
    - Individual antenna assigned to each user
    - Individual antenna is used to create an individual copy (even when two people are watching the same program, two separate copies are made)
    - A user can only see his or her own individual copy and no other person can view that copy
  - Affirmed the lower court's ruling – no violation of the public performance right (reproduction not challenged): Aereo's retransmissions of unique copies of broadcast television programs created at its users' requests and retransmitted while the programs are still airing on broadcast television are not 'public performances' under Cablevision
  - Dissent by Judge Chin: Technology platform is 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."
  - Cablevision involved a cable company that had paid statutory licensing and retransmission fees
- FOX Television Stations, Inc. v. BarryDriller Content Systems, PLC, _ F. Supp. 2d __, 2012 WL 6784498 (C.D. Cal. Dec. 27, 2012)
  - Rejected lower court's analysis in *Aereo,* concluding that the networks were likely to prevail on their claims of copyright infringement
  - Follows a Northern District of California case in concluding that defendant's Aereo-like service was engaged in public performances
- Framed by Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) but that case (by stipulation) only addressed direct infringement, not secondary liability
  - Ninth Circuit might have a different view of *public performance*
- Barry Diller v. Barry Driller, Inc., No.CV 12-7200 ABC, 2012 WL 4044732 (C.D. Cal. Sept. 10, 2012) (enjoining Barry Driller Inc. and Aerokiller from using any name or term confusingly similar to the name or likeness of Barry Diller)

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