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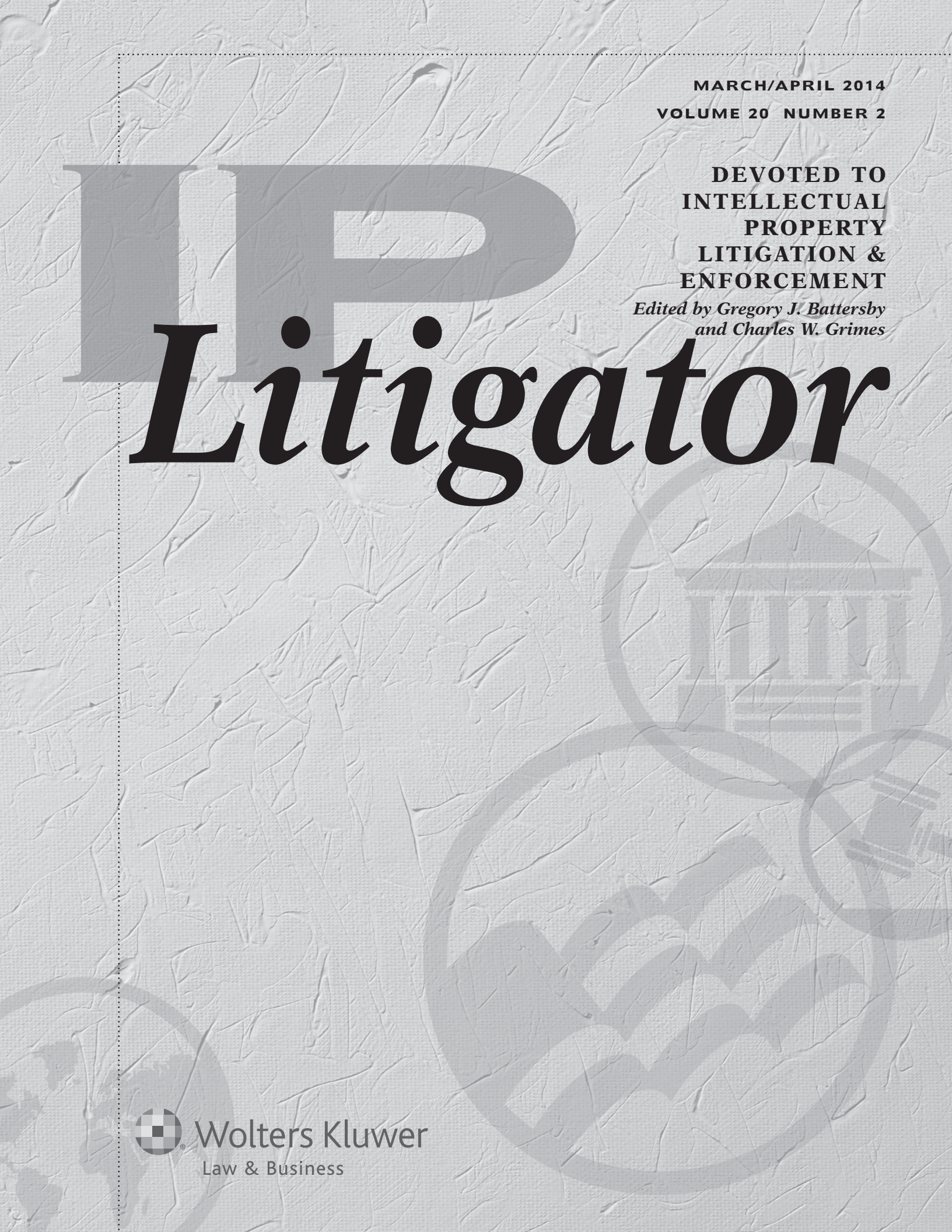

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Antennas, Broadcasting, and Copyright: The Supreme Court's Review of ABC v. Aereo

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US law provides copyright owners with a bundle of rights to protect their original works, including the exclusive right to publicly perform the copyrighted work. The question of what constitutes a public performance has become increasingly complicated in our digital world. Is the transmission of a copyrighted work *via* miniature antenna technology a performance broadcast *to the public*? What factors guide this determination? The Supreme Court's upcoming decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.* could put to rest a decades-long dispute over the meaning of a "public performance," creating a new landscape for over-the-air content providers, broadcasters, and viewers.

The Public Performance Right: Creation to *Cablevision*

A copyright holder's exclusive right "to perform the copyrighted work publicly"[1] has become one of the most valuable of the bundle of rights associated with copyright ownership and its scope has expanded dramatically over time. When the public performance right was first added to the US copyright law in 1856, its application was fairly straightforward: Copyright holders were granted the exclusive right to perform dramatic works to the public for profit.[2] Over the next 120, the "dramatic works" limitation was expanded and the profit requirement was dropped, broadening the public performance right.

The expansion of the public performance right was driven, at least in part, by rapid technological change. Public performances are no longer limited to opera houses and concert halls, but have grown from radio broadcasts, to television, to downloading and streaming original works online. Copyright law has evolved with technological advances in mind. As early as the mid-1960s, officials in the Copyright Office urged legislators to be mindful of technology, stating that "[a] real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances."[3]

A public performance presently is defined using two mutually exclusive clauses: (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."[4] The second clause, known as the Transmit Clause, brings transmission of a performance of a work under the auspices of the public performance right.[5] The phrase "any device or process" encompasses broadcast technology. However, the meaning of the term "… or to the public" is not nearly as clear. Although the Transmit Clause indicates that a transmission is itself a performance, the question presented in *ABC v. Aereo* remains: When is a transmission a *public* performance?

The issue has been explored in several cases, with inconsistent results. In *On Command Video Corp. v. Columbia Pictures Industries*,[6] the Northern District of California considered the public performance implications of a hotel video-on-demand system. This wired system connected guestroom televisions with a central console, and allowed guests to select from a number of available movies to view at their convenience, using their remote control. Although hotel rooms are considered to be private places,[7] the court held that such a system infringed the public performance right under the Transmit Clause. The *On Command* court found the actual viewing location's privacy to be irrelevant due to the public commercial relationship between the transmitter and the audience, citing congressional intent to protect public performance rights whether viewed or received "… in the same place

or in separate places and at the same time or at different times."[8]

Over a decade later, the Second Circuit came to the opposite conclusion in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (*Cablevision*).[9] Cablevision's customers could subscribe to a remote storage digital video recorder (RS-DVR) service, permitting users to store cable programs in individual files, to be viewed at times chosen by each individual user. The Second Circuit found that because Cablevision's RS-DVR system only transmits "to one subscriber using a copy made by that subscriber,"[10] such a transmission is not "to the public," and thus not a public performance. In *Cablevision*, the Second Circuit found the relevant transmission to be the single transmission of a single, dedicated copy to a single subscriber—if no two individuals can view the same transmission, there is no infringement of the public performance right. The Second Circuit based this finding on the fact that, because the potential audience for any audiovisual work is the general public, *any* transmission of such work would constitute a public performance and obviate the Transmit Clause's "to the public" limitation.[11] The *Cablevision* opinion emphasized that its holding "does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies."[12] Rather than relying exclusively on the public performance right, the Second Circuit rearticulated the importance of a strong reproduction right, suggesting that "the right of reproduction can reinforce and protect the right of public performance."[13]

More recently, in *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*,[14] the defendants, Zediva, operated a DVD "rental" service. Instead of a traditional rental, Zediva purchased individual DVDs, played those DVDs on individual DVD players for up to four hours, and streamed content directly to individual users upon request. The court rejected Zediva's contention that it was simply operating a DVD rental service, safely within the ambit of the first-sale doctrine, holding instead that its transmission of copyrighted works "to the public over the Internet" violated the plaintiffs' public performance right.[15] This appears consistent with the *Cablevision* individual-copy requirement, because Zediva users did not create individual copies, but instead streamed protected content from an existing DVD.

Free Broadcast TV Comes at a Cost

Key to understanding the policy issues in *ABC v. Aereo* is the historic distinction between cable and broadcast (or over-the-air) television, and how new technology fits within this framework. Originally, local network television stations in the United States broadcast signals over the air, using frequencies granted to them by the federal government. In exchange for these frequencies, network broadcasters, including ABC, NBC, PBS, and FOX, are subject to FCC requirements, including availability of educational programming, accessibility to viewers with disabilities, and dissemination of local public safety information.[16] Free airwaves permitted all people with a television and an antenna to capture the signals and watch television in their own homes. Because these networks broadcast programming for free, and cannot offer subscription packages, they rely heavily on advertising—showing commercials—to generate revenue. In contrast, cable television networks are subscription-based, offering television programming to viewers who pay for the service. For this reason, among others, cable companies often operate with comparatively less volatile revenue streams.

In order to ensure the continued availability of free broadcast television to consumers, the FCC has required cable systems to dedicate a portion of their channels to local, over-the-air broadcasting stations since the 1970s, *via* regulations often referred to as "must-carry" rules. These regulations were enacted into law *via* the Cable Television Consumer Protection and Competition Act of 1992.[17] Must-carry rules require cable companies to carry local television stations' signals if desired, or, alternatively, permit broadcast stations to opt out of mandatory carriage over cable and invoke retransmission consent, where cable operators can pay a fee to carry specific channels.

New technology has created more ways and places to watch television than ever. We can watch network programming streamed on any Internet-connected device, on our televisions through a cable box, or *via* Internet-based services. But, regardless how they get to our screens, at their core, network television programs still exist within the broadcast/cable distinction; unlike cable, over-the-air network programming is broadcast pursuant to must-carry rules or retransmission consent agreements with cable providers.

ABC v. Aereo and Its Practical Implications

Aereo is a paid, subscription-based service that allows users to view television programming over the Internet. Although the Internet-based Aereo operates primarily on computer screens, it can be connected to a television through a digital media player. In action, Aereo allows you to watch live broadcast television, as it appears when

viewed using a regular cable box (although at a delay). As with a DVR, Aereo has the capability to record and store programming for viewing at a later time.

Aereo differs from cable television and other streaming services because of its method of collecting and transmitting broadcast signals. Aereo utilizes an "antenna farm," a collection of thousands of dime-sized antennas, each of which is capable of capturing and transmitting one signal to one subscriber. Users can select either "Watch" mode, in which the program is not saved at the conclusion of viewing, or "Record mode, which creates a digital recording exclusively associated with the user who requested it.[18] Aereo's antennas collect—for free—the same signals as the cable providers, who, as discussed above, must carry or pay broadcast stations for retransmission rights. The growth of Aereo and similar entities "has led certain cable and satellite companies to question why they should continue to obtain permission to retransmit broadcast programming"[19] when Aereo does not.

Aereo was launched in the New York City area in early 2012, and a lawsuit was filed in the Southern District of New York in July of that year.[20] Aereo relied heavily on *Cablevision*, citing the functional similarities between its antenna system and the DVR system used by Cablevision. The District Court denied the networks' request for a preliminary injunction, holding that the copies of programming created by Aereo's system were not "materially distinguishable" from those created by Cablevision's RS-DVR technology. The Second Circuit affirmed this decision in *WNET, Thirteen v. Aereo, Inc.*[21] in April 2013.

During the ongoing *Aereo* litigation in New York, another suit was filed in Massachusetts to enjoin Aereo's spread to Boston,[22] and a similar entity was sued in both California[23] and the District of Columbia.[24] Aereo was permitted to stream in Boston, but FilmOn X, another micro-antenna programming provider, was preliminarily enjoined from operating outside of the Second Circuit—the bounds of *Cablevision*. Both the Ninth Circuit and the DC Circuit have docketed appeals, pending the outcome of *ABC v. Aereo* in the Supreme Court. In February 2014, a judge in the District of Utah issued a preliminary injunction against Aereo, but also granted Aereo's motion to stay the proceedings pending the Supreme Court's decision.[25]

In an interesting twist, both parties petitioned for *certiorari* in *ABC v. Aereo*. The networks urged the Supreme Court to consider "whether a company 'publicly performs' a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers."[26] Aereo, taking issue with the petitioners' question presented, nonetheless joined in the request for *certiorari* seeking universal affirmance and application of the Second Circuit's holding. *Certiorari* was granted on January 10, 2014, and the two sides are expected to present oral arguments on April 22.

The *ABC v. Aereo* decision may have an immediate impact on how we watch and pay for copyrighted television programming. Cable companies, media organizations, musicians, and professional sports leagues have submitted *amicus* briefs in support of the networks, underscoring the importance and breadth of the issue. The Court's decision likely will affect how broadcast networks operate going forward, and of course, whether cable-alternative companies such as Aereo will be permitted to operate.

1. 17 U.S.C. § 106(4).
2. Act of August 18, 1856, 34th Cong., 1st Sess., 11 Stat. 138.
3. Copyright Law Revision: Hearings on H.R. 4347 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 89th Cong., 1st Sess. 32-33 (1965) (testimony of George Cary, Deputy Register of Copyrights).
4. 17 U.S.C. § 101.
5. *See* 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.14[B][1], at 8-190 (rev. ed. 2013).
6. On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991).
7. *See* Columbia Pictures Indus. v. Professional Real Est. Investors, Inc., 866 F.2d 278, 281 (9th Cir. 1989) ("While the hotel may indeed be 'open to the public,' a guest's hotel room, once rented, is not.").
8. *Id.* at 790 (*quoting* H.R. Rep. No. 83, 90th Cong., 1st Sess. 29 (1967)).
9. Cartoon Network LP, LLLP v. CSC Holding, Inc. (Cablevision), 536 F.3d 121 (2d Cir. 2008).
10. *Id.* at 137.
11. *See id*. at 139.
12. *Id.*
13. *Id.* at 138.
14. Warner Bros. Enter. Inc., v. WTV Sys., Inc., 824 F. Supp. 2d 1003 (C.D. Cal. 2011).
15. *Id.* at 1009.
16. Although broadcast networks officially switched to all-digital transmission in 2009, allowing for more programming to be broadcast simultaneously, the broadcast/cable distinction remains.
17. Pub. L. No. 1102-385, § 2, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 536(a)(3), (5). The Supreme Court balanced the statute's potential First Amendment impact against its consumer protection aims and found the Cable Act to be a content-neutral, narrowly tailored antitrust measure designed to protect broadcasters from anticompetitive behavior. *See* Turner Broadcasting Sys. v. FCC, 520 U.S. 180 (1997).
18. Brief for Respondent at 3-5, Am. Broadcasting Companies, Inc. v. Aereo, Inc., No 13-471 (U.S. Dec. 12, 2013).
19. Petition for Writ of Certiorari at 34, American Broadcasting Companies, Inc. v. Aereo, Inc., No. 13-461 (U.S. Oct. 11, 2013).
20. Am. Broadcasting Companies, Inc. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012).
21. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013).
22. Hearst Stations, Inc. v. Aereo, Inc., Civ. A. No. 13-11649, slip op. (D. Mass. Oct. 8, 2013).
23. Fox Television Stations, Inc. v. BarryDriller Content Sys. PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012).
24. Fox Television Stations, Inc. v. FilmOn X LLC, No. CV 13-758, 2013 WL 4763414 (D.D.C. Sept. 5, 2013).
25. Cmty. Television of Utah LLC et al. v. Aereo Inc., No. 2:13-cv-00910 (D. Utah Feb. 19, 2014).
26. Petition for Writ of Certiorari at i, ABC v. Aereo (No. 13-461).