CLASS 16: THE RIGHTS OF PUBLIC PERFORMANCE AND DISPLAY
Class Outline

• Scope of §106(4)-(6) – exclusive rights of public performance & display
• Cable and satellite retransmission
• The public display right and *de minimus* use
“[T]he owner of copyright … has the exclusive rights to do and to authorize any of the following: …

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”
§101 on “perform” and “display”:

- To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

- To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.
§101 on “publicly”:

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. [<- “the Transmit Clause”]
Cartoon Network v. CSC Holdings

Feed from cable TV channels → Cablevision servers → Buffers (1.2 secs) → Hard Drives

Live stream to individual subscribers → Instruction to record separate copy on server → Later playback
Really? Wow.

Imagine the antenna on your roof or rabbit ears on your TV was somewhere you never had to see them. Aereo makes that possible. Here’s how:

1. **We made the TV antenna unbelievably small**
   
   So small it fits on the tip of your finger. But it still gets awesome HD reception.

2. **We connected these antennas to the Internet**
   
   We engineered a way to put tons of these antennas in data centers, along with massive amounts of storage and super-fast Internet connections.

3. **We give you control**
   
   We built a simple, elegant interface to let you control your antenna. Through the Internet. With any device you want. All without cords, cables, or boxes.
AEREO ANTENNA!!!

Image obtained from www.aereo.com
(1) Is what Aereo does when a subscriber requests a program a “performance?”

(2) If so, is the performance “public”? 
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.
(a) **CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.**—The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if—(1) the secondary transmission is not made by a cable system, and… (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content… or… (4) the secondary transmission is made by a satellite carrier… or (5) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization…
(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

[106(5): “the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly...]
We have THOUSANDS of images of the most beautiful natural women in the world.

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The “server test”: 

“a computer owner that stores an image as electronic information and serves that electronic information directly to the user... is displaying the electronic information in violation of the 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.”