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Copyright's Relevance in the Internet Age: Some Lessons from *Aereo*, *Alice*, and *Authors Guild*

By Owen Prell

“From its beginning, the law of copyright has developed in response to significant changes in technology.”

—Justice John Paul Stevens, from his 5-4 majority opinion in *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 430 (1984), ruling that the sale of Betamax recorders to the public does not constitute contributory infringement of copyright.

Lynn White, the late professor of medieval history,¹ claimed that the pace of technological change might *seem* faster to a modern observer but that it has always appeared this way, whether you are a caveman gawking at sparks made by a stone of flint² or a Mainz burgher marveling at the latest book printed by a local metal smith named Guttenberg. But with due respect to the esteemed historian, one wonders how well his theory is faring in the digital age. When interpreting intellectual property laws, even the finest minds seem to struggle to keep up in a world

of exponential innovation. Some recent cases before the US Supreme Court call into question what copyright will mean in the near future. Accordingly, any practitioner with a client whose business involves creative content—and that’s an increasingly broad category—should assume little.

IP lawyers often get divided into one of two camps: entertainment or technology.³ But really, when it comes to copyright in the Internet age, it’s an eternal golden braid: Technology inextricably intertwined with content, and lots of money at stake. Yes, that is indeed an allusion to *Gödel, Escher, Bach: An Eternal Golden Braid* by Douglas Hofstadter.⁴ *GEB*, as its aficionados came to refer to it, toyed with aspects of science and art, and considered (among other things) how formal rules can systematize concepts. It was published in 1979, a simpler time. There were no cell phones, just phone answering machines that used—gasp—cassette tapes. Remember how the tape would jam and unspool, requiring you to rewind the cassette with a pencil? Books consisted solely of the paper and glue variety that you bought, in person, from a bookseller that thought of Amazon as a South American river. Not only was Napster⁵ not even a gleam in the eye of its founder, but Shawn Fanning hadn’t even been born yet. Thankfully

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Wolters Kluwer

Copyright

Reed Hastings (the eventual founder of Netflix) had, but he was watching *Star Wars* the way folks did back then—in a movie theater for \$2.50.

Things are very different now. We feel hip if we listen to music on Spotify and get our news from Twitter and Facebook feeds. Meanwhile iPhones enable a virtual, 24/7 office that you can escape by donning a FitBit to try some novel form of surfing, recorded in HD on a GoPro Hero that you post on YouTube or stream live on Periscope or Meerkat. Some call this progress.

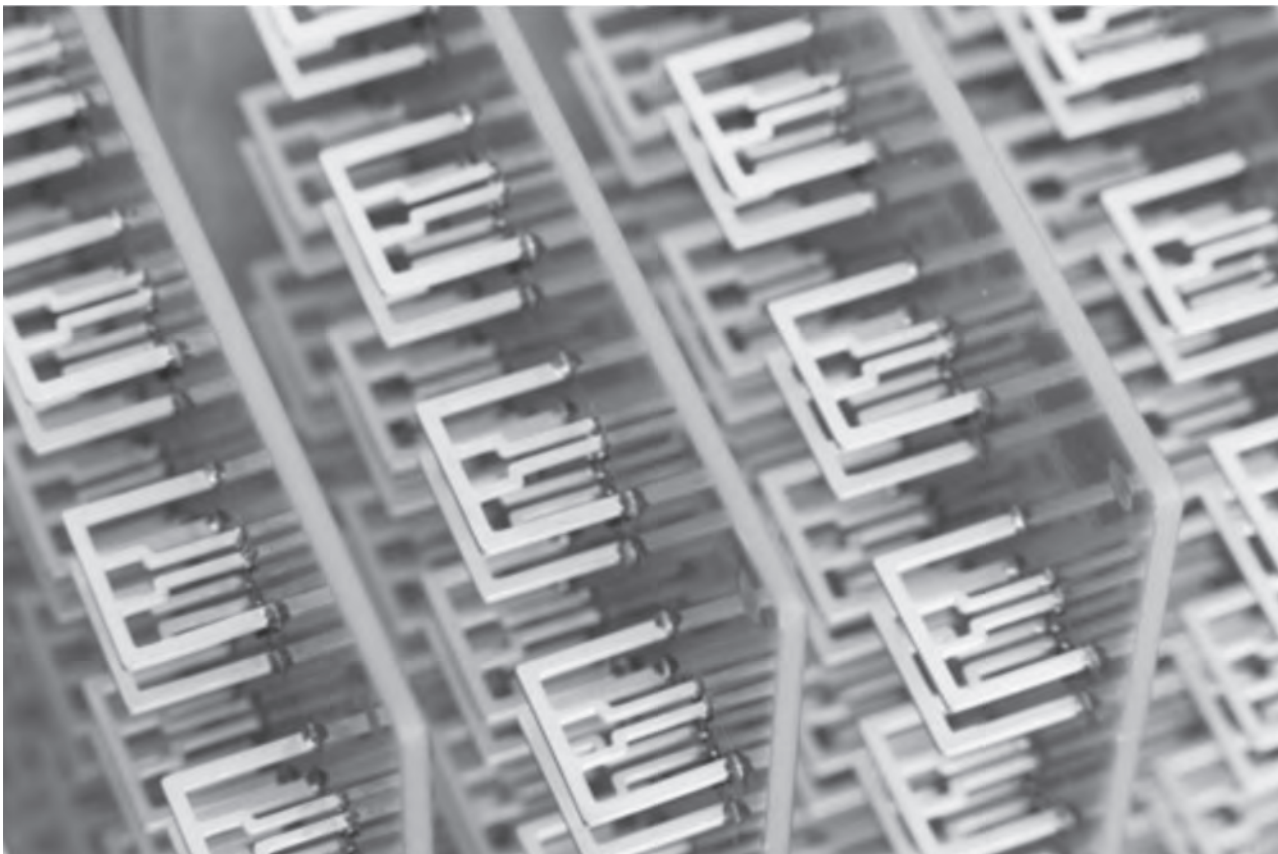
And if we're struggling to make heads or tails of this (r)evolution in technology, what say the justices of the US Supreme Court, the final arbiters of disputes invoking federal intellectual property, whose average age (until very recently) was 70? Can copyright as we understand it remain relevant when a start-up might be created, funded, and acquired for billions of dollars in the period of a single Supreme Court term, and where the watchword of Silicon Valley is "disruption" without any concern for the harm caused to established content or existing channels of distribution? Let's see if recent case law provides any clues.

Aereo

The first case for our consideration is *American Broadcasting Companies, Inc. et al v. Aereo, Inc.*⁶ Aereo was a technology company (please note the past tense) founded in 2012 that conceived the clever business model of allocating to each customer a tiny remote personal television antenna with which to view live programming and play back recorded shows. How tiny? We're talking dime-sized, with thousands of the little wire loops arrayed on multiple rows of circuit boards, something more suited to Bletchley Park in *The Imitation Game* than Menlo Park in *The Social Network*.⁷ [See Exhibit 1.]

Aereo set up shop in Brooklyn and began charging subscribers \$12 per month to essentially ditch their cable service and freeloader off over-the-air broadcasts. The reaction from the establishment entertainment industry across the East River—networks, cable companies, and television producers—was understandable and swift. A bevy of top-drawer litigators was dispatched to sue Aereo in the Southern District of New York for copyright infringement, seeking both injunctive relief and

Exhibit 1 Aereo's miniature "rabbit ears" circuit board array: too clever by half.



damages. As we all know, injunctive relief is difficult to obtain, but the plaintiffs believed they had firmly established copyright law on their side. They were wrong, at least according to both the trial and appellate courts.

The sole factual dispute before the District Court concerned the operation of Aereo's antennas. After Judge Alison Nathan found that each antenna indeed functioned separately to receive the incoming broadcast signals, she turned to the legal issues and similarly identified only one significant question to answer in ruling on the preliminary injunction: Whether the Second Circuit's prior *Cablevision* ruling, which upheld the legality of a cable company's remote storage DVR system, applied to Aereo. Seems straightforward, right? Hardly. Her opinion required 52 pages of painstaking analysis to hold that the plaintiffs had not adequately distinguished *Cablevision* nor shown likely success on the merits, notwithstanding the irreparable harm they faced.⁸

Imagine for a moment the likely reaction to Judge Nathan's ruling in the executive offices of ABC on West 66th Street in Manhattan. Until the 1970s, ABC was the upstart network, playing the perpetual also-ran to CBS and NBC,⁹ but its later programming successes led to the purchase of ESPN in 1984, a merger with Capital Cities in 1985, and acquisition by The Walt Disney Company in 1996. By 2012, Disney was the ultimate media and entertainment conglomerate, worth scores of billions of dollars, and it had long prided itself on shrewdly protecting its intellectual property. Not for nothing is the Copyright Term Extension Act of 1998 also known as the "Mickey Mouse Protection Act."¹⁰ So losing the motion for injunctive relief to a renegade start-up headquartered in a Brooklyn warehouse could not have gone over well. But surely the Second Circuit would set Judge Nathan straight, right?

Wrong. In a 2-1 decision, the Second Circuit affirmed Judge Nathan's ruling that Aereo's system was not materially distinguishable from the RS-DVR system it deemed non-infringing in *Cablevision*.¹¹ Interestingly, the lone dissent came from Judge Denny Chin, the (then) District Court judge who had been overruled by the Second Circuit in *Cablevision*.¹² In his *Aereo* dissent, Judge Chin seemed very much bothered by Aereo operating without any authorization from the television broadcasters. He minced no words, calling its antenna array a "sham" and 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."¹³

Strong words, indeed, but cold comfort for the plaintiffs. Upon learning of the ruling, CBS and Fox actually threatened to go off the air. Meanwhile their lawyers

filed an *en banc* petition, but this was denied in a single paragraph without explanation other than to cite lack of a majority in favor of review. Judge Chin, however, wrote a dissent from the denial that ran—wait for it—31 pages, wherein he largely reiterated the arguments in his prior dissent and added one more: *Cablevision*¹⁴ was wrongly decided and should be tossed out.¹⁵

The plaintiffs in *Aereo* still had their underlying claims to fall back on, of course, but as they watched in dismay as Aereo rolled out its "Rube Goldberg" service in Boston, they launched a Hail Mary pass—a *cert* petition to the Supreme Court on the denial of injunctive relief. The odds must have seemed daunting, given the plaintiffs in *Cablevision* had failed to tempt the justices to accept their *cert* petition, but the consequences of Aereo operating unfettered seemed catastrophic. (Trivia Question: Who was the Solicitor General who filed a well-reasoned brief opposing the *cert* petition in *Cablevision*? Hint: She now occupies Justice Stevens's seat on the Court.)

To the presumed gratification of Judge Chin and the jubilation of the television industry, the Supreme Court granted the plaintiffs' *cert* petition in *Aereo* and reversed the Second Circuit in a 6-3 ruling on June 25, 2014. On June 28, Aereo suspended its services and less than five months later it departed from script and availed itself of federal law by filing for Chapter 11 bankruptcy protection. Things sure do move fast in the Internet age.

Justice Breyer, writing for a majority in *Aereo* that included former Solicitor General Kagen (of course you knew), focused the Court's reasoning on whether Aereo "publicly performed" works within the meaning of the Copyright Act of 1976, finding Congress had specifically enacted key provisions of the Copyright Act to regulate public performances of works by cable companies. The Court then grappled with the distinction between cable systems that broadcast continuously and Aereo's system that remains inert until a subscriber summons a particular program before concluding that Aereo was more like a cable company than not in the aspects that matter. Uncharacteristically, Breyer's opinion struggles at times to retain logical footing,¹⁶ and it isn't difficult to understand why. The Court was facing cutting-edge technology that the Copyright Act never anticipated. The common-sense response was to side with Judge Chin: No question this was copyright infringement! What else could you call a miniature antenna farm that mimics a private rooftop antenna and DVR combo while it sidesteps the cable companies by streaming Napster-like over the Internet? And yet the legal basis for such a ruling wasn't all that obvious.

The dissent, written by the late Justice Scalia, had no such qualms. According to Scalia, the case was just

the “latest skirmish in the long-running copyright battle over the delivery of television programming”¹⁷ and Aereo was akin to a copy shop that provides its patrons with a library card. The dissent conceded that Aereo enabled infringement in a way that ought not be allowed, but concluded that Aereo was exploiting “what must be considered a loophole in the law.”

So what are the lessons of *Aereo*? Or is it one of those classic examples of hard cases making bad law? Justice Breyer seemed to acknowledge as much in his majority opinion when he said the Court could not now answer more precisely how the Copyright Act will apply to new technologies, and that questions involving cloud computing, remote storage DVRs, and other novel issues “should await a case in which they are squarely presented.” But he also noted that courts often apply a statute’s highly general language in light of the statute’s basic purposes, and that with respect to the Copyright Act the doctrine of “fair use” can help prevent inappropriate or inequitable applications.

In this author’s opinion, *Aereo*’s lessons are twofold. First, technological advancements are outpacing the ability of our legal framework to apply accepted notions of copyright ownership, thereby creating massive uncertainty in the business community. Second, even if a group of mostly septuagenarian jurists can agree on the equities, if not the legalities, of copyright, all bets are off when a younger generation weaned on Grokster and Pinterest spawns active, rather than reactive, copyright reform, of the type promulgated by Lawrence Lessig and others. You might recall that Professor Lessig¹⁸ is one of the foremost proponents of the “free software” and “copyleft” movement. Lest you think this sort of thing belongs in the ivory tower and not the business world, consider, for example, Red Hat, an open-source software company that has more than a billion dollars in annual sales.

Alice

The second case for our consideration is *Alice Corporation Pty. Ltd v. CLS Bank International et al.*¹⁹ In *Alice*, the eponymous petitioner owned four patents on electronic methods and computer programs for financial-trading systems on which trades between two parties who are to exchange payment are settled by a third party in ways that reduce “settlement risk”—the risk that one party will perform while the other will not. Distilled down, Alice’s patents essentially described how a computer could perform an escrow function, a concept that has been used in business for centuries, but Alice never created any software to implement the patents. [See Exhibit 2.] Instead, Australian inventor Ian Shepherd formed Alice Corporation to own the patents he’d received in 1999,

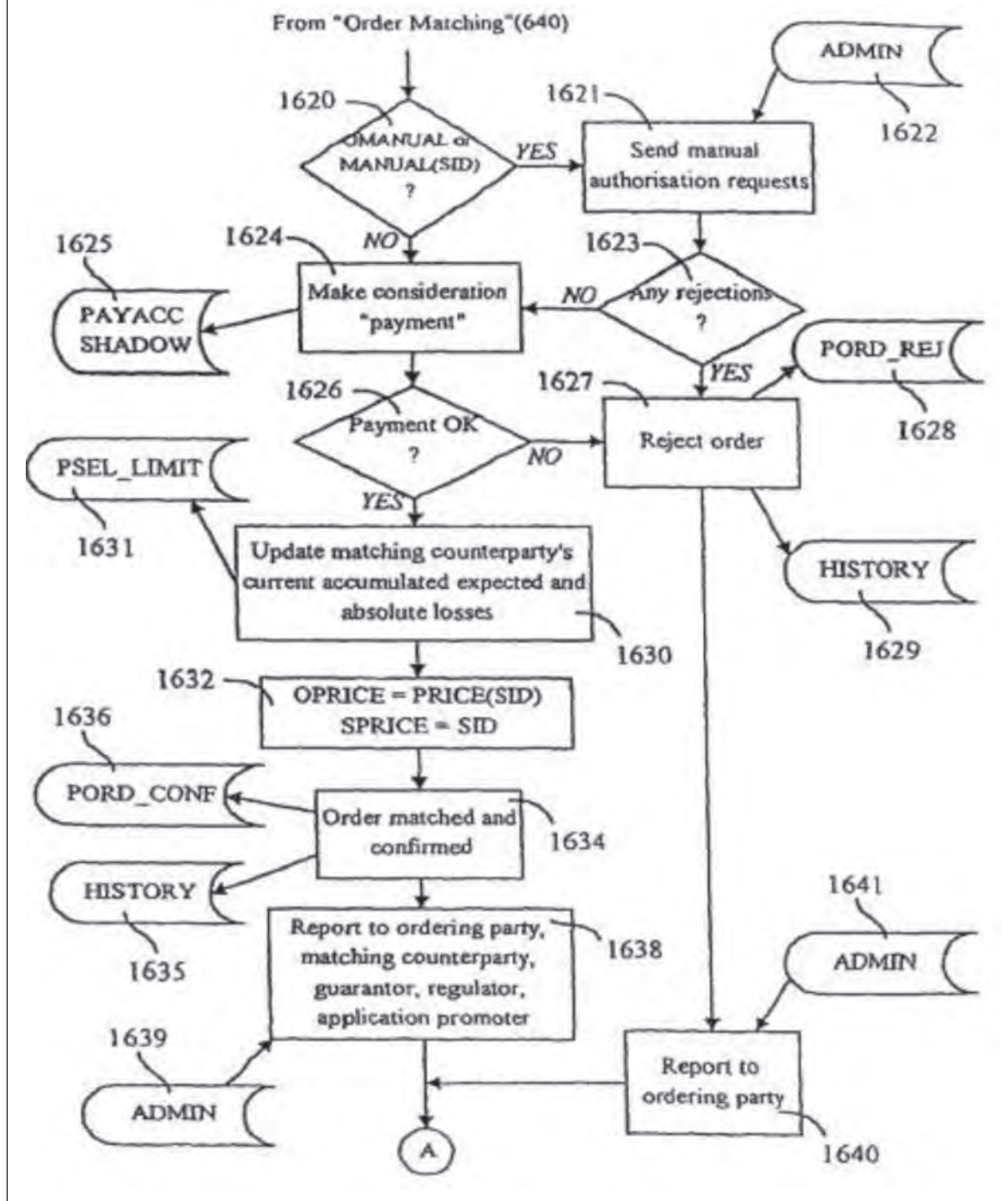
and then accused CLS, a consortium of banks that actually developed a computer escrow system, of infringing on the patents. Alice, you see, is what is known pejoratively as a “patent troll” or, if you prefer a more politically correct euphemism, a “non-practicing entity.”

Wait, you might say: What has this got to do with copyright law? Isn’t this a patent case? It is, indeed, but *Alice* has a direct bearing both on the viability of copyright and how courts resolve intellectual property matters in light of rapidly evolving technology. Besides, you might need to advise a client on whether to prosecute a software patent and, after you understand *Alice* you can tell them not to bother. Just kidding . . . but not entirely.²⁰

By the time *Alice* came along, business method patentability was both controversial—for example, Amazon’s infamous “One-Click Purchase” patent—and legally precarious.²¹ In a procedural patent case involving eBay’s “Buy It Now” feature, Justice Kennedy wrote a widely cited concurring opinion in which he accused many business method patents of “potential vagueness and suspect validity.”²² In the later *Bilski* case, Justice Stevens wrote a concurrence that said business methods should categorically be excluded from patentability.²³ Given that his father, grandfather, and great-uncle had all been highly successful businessmen in Chicago, this was undoubtedly a fitting manner for Justice Stevens to end his 35 years of illustrious service on the Court.

In *Alice*, DC District Judge Rosemary Collyer granted the bank consortium’s motion for summary judgment by finding that Alice was essentially trying to patent an abstract idea—the concept of escrowing funds—in software form. The court stated that a method “directed to an abstract idea of employing an intermediary to facilitate simultaneous exchange of obligations in order to minimize risk” is a “basic business or financial concept,” and that a “computer system merely ‘configured’ to implement an abstract method is no more patentable than an abstract method that is simply ‘electronically’ implemented.”²⁴ With so much money at stake, Alice had no choice but to appeal, and its gamble was rewarded when the DC Circuit panel reversed Judge Collyer in a 2-1 decision.²⁵ By now an *en banc* rehearing was almost a foregone conclusion, and the DC Circuit outdid itself, affirming the District Court—if you can believe it—with a (so-called) *per curiam* opinion²⁶ that elicited one concurring opinion, three separate opinions concurring in part and dissenting in part, one dissenting opinion, and a discursive set of folksy reminiscences with the repeated admonition to, “when all else fails, consult the statute!” titled “Additional Reflections of Chief Judge Rader.”²⁷ But you needn’t bother reading all 135 pages, because the Supreme Court soon granted Alice’s *cert* petition, not to overrule the holding but to clarify the rationale.²⁸

Exhibit 2 Method to Alice's Madness: a software algorithm for risk management from business method patent no. 7,725,375.



If *Bilski* was the death rattle of business method software patentability, then *Alice* drove the final nail in the coffin. Writing the majority opinion in a unanimous holding, Justice Thomas offered a two-part test for patentability. An examiner must first determine whether

the patent claim under consideration contains an abstract idea, such as an algorithm, method of computation, or other general principle. If not, the claim is potentially patentable, subject to the other requirements of the patent code. If the answer is affirmative, the examiner must

proceed next to determine whether the patent adds to the idea “something extra” that embodies an “inventive concept.” Justice Thomas emphasized that ordinary and customary use of a general-purpose digital computer is insufficient to show inventiveness.²⁹

In a nod to now-retired Justice Stevens, Justice Sotomayor wrote a concurring opinion (joined by Justices Breyer and Ginsburg) that essentially said business methods do not belong within the patent system. But because they agreed that the claimed subject matter was an abstract idea, they also joined the main opinion.

So what are the lessons of *Alice* with respect to copyright in the age of digital technology? This author believes there are two. First, the case (together with its predecessors) demonstrates how fiendishly difficult it is for government-sanctioned intellectual property monopolies—which is what copyrights, trademarks, and patents are—to adapt to rapid technological change. Second, *Alice* actually serves to reinvigorate copyright as the traditional and proper home for software protection. True, copyright cannot protect an underlying innovative concept the way patent can, just its particular fixed expression, but as *Alice* stressed, merely requiring computer implementation fails to transform an abstract idea into a patent-eligible invention. So better a startup seeking investment can claim the protections of copyright for its new software than nothing at all.

Authors Guild

The third and last case for our consideration is *Authors Guild v. Google, Inc.*,³⁰ where the lower court rulings now stand after the Supreme Court denied *certiorari* in 2016.³¹ Despite the denial, the case is of such significance for our topic that it is worthwhile explaining why.

The Google Books Library Project began in 2004 with the kind of grandiose purpose that only a corporation of Google’s power and vision could undertake: to scan and make digitally searchable as many books as possible. It is estimated Google has now scanned more than 20 million books. The project has been alternatively praised for its potential to democratize information, facilitate research, and protect what may become the largest online body of human knowledge, as well as criticized for violating copyright and failing to correct the many errors introduced into the scanned texts by its OCR process.

Despite Google’s reassurances to the publishing industry that it would only allow users to view and download entire works in the public domain, the inclusion of numerous so-called “orphan” works and the online availability of large amounts of still-protected text as “snippets”³² caused great concern among writers, literary agents, and editors. [See Exhibit 3.] In late 2005, the Authors Guild of America and the Association of American Publishers separately sued Google in the Southern District of New York citing “massive copyright infringement.”³³

Exhibit 3 Google Books: fair use of a “snippet” from an “orphan” or Big Brother doing evil?

The screenshot shows a Google Books search interface. The search bar at the top contains the text "big brother orwell snippet". Below the search bar, the "Books" section is visible. On the left, there is a sidebar with a "BUY BOOK - \$3.82" button, a "Get this book in print" link, and a book cover for "Book Analysis: 1984 by George Orwell: Summary, Analysis and Reading Guide". The main content area displays the search results for "big brother orwell snippet". The first result is "Result 1 of 1 in this book for big brother orwell snippet". The snippet text reads: "The protagonist of the story, Winston quickly assumes the role of a rebel. His protest, which he knows to be dangerous, takes place in two stages: Denunciation in writing. By writing snippets of his past and his total rejection of Big Brother in his notebook, Winston automatically becomes an opponent of the laws and institutions set up by the regime. He is nevertheless aware of the illegality of his act, which is why he carries out this work out of range of his telescreen; Denunciation by adultery. By responding positively to Julia's advances, Winston is actively betraying the ideology of the Party. He maintains sexual relations with another person while still officially married and, even worse, he does so for pleasure. The special, yet risky, moments he spends with the young woman in Charrington's room are an opportunity for him to escape from the control and oppression exercised by the leader of Oceania for a few moments. Imprisoned and tortured, he is cured of his hate for Big Brother, despite his resistance and his love for Julia. He is released some time later and subsequently shot." Below the snippet, the name "JULIA" is displayed in all caps. The bottom of the snippet reads: "Also a Party official, aged 26, Julia works in the Fiction Department where she prints books on behalf of the regime. Like Winston, she has divergent thoughts concerning the Party and".

To fully describe the contours of the Google Books litigation would require dozens if not hundreds of pages,³⁴ but to skip very quickly forward, in 2013 a motion for summary judgment on fair use was finally heard in the Authors Guild case by Judge Denny Chin (yes, the very same, now sitting by designation).³⁵ Judge Chin ruled in favor of Google, applying the following statutory four-factor test:³⁶

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.³⁷

Judge Chin emphasized the “transformative” aspect in the first factor and deemphasized the “commerciality” aspect in the fourth factor, relying heavily on the landmark Supreme Court decision addressing fair use, *Campbell v. Acuff-Rose Music*.³⁸ In *Campbell*, the Court found that 2 Live Crew’s rap parody of Roy Orbison’s rock ballad, “Oh, Pretty Woman,” qualified as fair use owing to its transformative nature. *Campbell* was important in two respects. First, it approvingly cited a now-seminal *Harvard Law Review* article³⁹ by Second Circuit Judge Pierre Leval that reasoned “transformativeness” should be the key factor.⁴⁰ Second, Justice Souter included with the opinion the complete lyrics to both the Orbison and 2 Live Crew songs, thus marking the first (and presumably) only time the phrase “big hairy woman you need to shave that stuff” has been published in the United States Reports.

The Authors Guild wasn’t ready to capitulate, so their lawyers appealed the ruling to the Second Circuit. And then probably held their collective breath to see who would form the three-judge panel. A lump must have formed in their throats when they saw that one of the judges picked was none other than... Judge Pierre Leval. Not surprisingly, Judge Leval (along with his two colleagues) affirmed Judge Chin’s holding.⁴¹

The Authors Guild filed its *cert* petition with a moral fervor, joined by a gaudy list of prize-winning authors such as Malcolm Gladwell, Margaret Atwood, and Stephen Sondheim. Their argument, boiled down to its essence, was a sort of incredulous plea: How can any erudite federal judge, sworn to uphold constitutional

law, permit Google to copy, verbatim, 100 percent of their works, while posting goodly chunks of them online for anyone to search for free?⁴² Given the Court’s prior admiration of Judge Leval’s fair use jurisprudence, the Guild’s *cert* petition seemed an act of quixotic stubbornness. As Cervantes made clear in his novel, tilting at windmills may make you feel principled but it has no practical benefit. Petition denied.

So what are we to conclude from the three cases we’ve examined? It would seem to be this: The digital revolution has made content *less* copyright-protected (by permitting more alternative uses), but at the same time has made copyright *more* relevant for the software that manipulates the content (by curtailing patent protection). This perhaps makes sense when you visualize what the interior of a home looked like in the 1990s versus today. Then, living room shelves were stacked with books, music CDs and DVDs (for movies and games) and the coffee table displayed magazines and newspapers. There was a television and maybe a cell phone in your pocket, but both were “dumb” (*i.e.*, not Internet-connected). Today, the periodicals, books, CDs, and DVDs are largely gone, replaced by a multiplicity of smart devices. You no longer own physical copies of content; you stream it fleetingly from cloud-based Web sites with apps that require software.

This article began with a quote from the landmark 1984 *Betamax* case. Sony famously lost the VCR marketing battle against its VHS-based rivals despite winning the case and possessing the technologically superior product, but somehow Betamax found a niche among “prosumers.” In March 2016, however, Sony finally ceased sales of Betamax cassettes after 41 years of continuous production. As with Kodachrome film,⁴³ this marks the end of an era. Justice Stevens was right. Technology marches on, with copyright playing catch-up.

Notes

1. Professor White served on the faculty at Princeton, Stanford, and UCLA.
2. A “flintstone” is apparently a term reserved for the Hanna-Barbera characters Fred and Wilma.
3. Thereby begging the question, which image would an IP lawyer prefer to evoke, that of a sexy Hollywood starlet or a geeky software coder? Some consider this a rhetorical question.
4. Published by Basic Books in 1979, *GEB* won the 1980 Pulitzer Prize for general non-fiction and 1980 National Book Award for science.
5. Napster was a pioneering online peer-to-peer sharing service for MP3 music files. It was found liable for contributory and vicarious infringement of copyright and forced to shut down. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001).

6. American Broadcasting Companies, Inc. et al v. Aereo, Inc., 573 U.S. ___, 134 S.Ct. 2347 (2014).
7. Curiously, Sean Parker, a co-founder of Napster, also was a significant early figure at Facebook, as portrayed by Justin Timberlake in *The Social Network*.
8. ABC, Inc. v. Aereo, Inc., 874 F.Supp. 2d 373, 377–379 (S.D.N.Y. 2012).
9. *The Flintstones*, mentioned earlier, was as close as ABC got to a prime-time hit in the 1960s.
10. Lawrence Lessig, “Copyright’s First Amendment,” 48 *UCLA L. Rev.* 1057, 1065 (2001).
11. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013). Writing for the panel majority, Judge Christopher Droney emphasized the technological similarity: unique digital copies of programs being stored remotely by customer request for later playback. The majority was unpersuaded by the plaintiffs’ argument that Cablevision had a license to transmit programming in the first instance, unlike Aereo, because the underlying question was not whether the transmissions were *licensed* public performances, but whether they were *public* performances of the work itself, as that term is defined by the “Transmit Clause” of the 1976 Copyright Act. A clause that Congress had specifically added, Judge Droney pointed out, to address two Supreme Court decisions (*Fortnightly* in 1968 and *Teleprompter* in 1974) holding that under the then-current 1909 Copyright Act, a cable television system did not “perform” the works and therefore could not infringe a copyright holder’s public performance right.
12. *Cablevision* is, quite simply, a head-scratcher. The defendant (a cable company) centralized in a remote facility the set-top hard drives that enabled customers to record and play back (“time shift” as it is called) broadcast programs. Plaintiff cable networks alleged copyright infringement and filed a motion for summary judgment. Judge Chin, then on the Southern District of New York bench, scheduled an expedited hearing on the motion but only after this bizarre bargain was struck between the parties: The plaintiffs agreed to allege only direct, not indirect, copyright infringement, and the defendant agreed not to assert any “fair use” defense. It’s as if the two sides were to engage in a wrestling match with one hand tied behind their backs, which must have seemed especially awkward given the complexity of the issues at stake and the caliber of law firms involved (Cravath was representing CNN and Arnold & Porter appeared on behalf of Fox). On the sole issue in dispute, whether Cablevision’s RS-DVR system directly infringed on the copyrighted works, Judge Chin granted the motion for summary judgment in favor of the plaintiffs. *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F.Supp. 2d 607 (S.D.N.Y. 2007). His opinion is, to say the least, unusual. Not content to merely describe the RS-DVR system, Judge Chin went into page after page of exhaustive detail using all manner of technological jargon (one learns of buffer memory packets on Arroyo servers, modified VOD platforms, eSRMs, ADS queries to OPRDs, AMP communiqués to Vitria servers, etc.), leading one industry observer to accuse Judge Chin of “geeking out on the technical details.” Moving on to applicable law, he distinguished the landmark *Betamax* Supreme Court decision by finding that, unlike Sony in selling stand-alone VCR machines to consumers for personal use, Cablevision’s RS-DVR system required a continuous relationship with the customer and physical control of the recording and playback equipment. Judge Chin then cited several other pertinent cases in his decision, including a ruling that a hotel’s system of electronically delivering movie videos to its guests constituted a “public” performance even though a single guest might be doing the viewing in the privacy of his room. *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F.Supp. 787 (N.D. Cal. 1991).
13. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 697 (2d Cir. 2013).
14. The Second Circuit ruled Judge Chin had erred in relying on cases where copies of works had become “fixed” for a period of more than “transitory” duration, as defined by the Copyright Act. The panel instead concluded that although copyrighted works might be “embodied” in the buffer of Cablevision’s RS-DVR system, no data remains in any buffer for more than 1.2 seconds, a mere “transitory” period. The court further ruled that Judge Chin had erred in finding Cablevision had transmitted performances of copyrighted works “to the public” because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by the subscriber. *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). *Cablevision* is significant for more than how you actually watch Steven Colbert without staying up until 11.30 each night; it provided a legal basis for cloud-based storage of copyright-protected content, as long as each user’s files are stored separately and users control when files are uploaded and downloaded. Amazon and Google both subsequently introduced services that allowed users to store their music online and listen to it on any device. File storage companies such as Dropbox could rely on the decision for aspects of their operations. And *Cablevision* provided an almost perfect blueprint for Aereo to engineer around the cable companies themselves.
15. WNET, Thirteen v. Aereo, Inc., 722 F.3d 500, 506–511 (2d Cir. 2013).
16. See, e.g., Comment on *Aereo* at 128 *Harv. L. Rev.* 371, (Breyer’s opinion introduced unpredictability into the law by ignoring doctrinal distinctions and adopting an approach that lacks a clear focus and scope.)
17. *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).
18. Lessig teaches at Harvard Law School, when he isn’t running hapless presidential campaigns.
19. *Alice Corp. Pty. Ltd v. CLS Bank Int’l et al.*, 573 U.S. ___, 134 S. Ct. 2347 (2014).
20. Note to my patent bar colleagues: This is known as gallows humor.
21. In the lead up to the dotcom bubble at the end of the last millennium, the USPTO was deluged with computer and Internet-related applications in the category of “business method” patents. Prior to the 1980s the PTO had taken the position that “methods of doing business” were not patentable,

- but with the prevalence of computers in business the PTO decided it was no longer practical to determine if a particular computer-implemented invention was a technological invention or a business invention. Consequently, its examiners no longer had to query whether a claimed invention was a method of doing business or not; they would simply ascertain patentability based on the same statutory requirements as any other invention. Overwhelmed by the sheer number and variety of e-commerce applications, the PTO approved a great many of them to the consternation of more than a few observers. The most infamous was the so-called “One-Click Purchase” patent granted to Amazon in September 1999 that allows an online shopper to purchase an item in his or her shopping cart without having to manually re-input billing and shipping information. This patent, which the European Union rejected as non-inventive, enabled Amazon to gainfully sue Barnes & Noble for infringement (settled out of court) and to reap enormous license royalties from Apple.
22. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).
 23. Bilski v. Kappos, 561 U.S. 593, 657 (2010). *Bilski* involved patent claims for a method of hedging risks in commodities trading. Everyone from the Supreme Court on down to the original PTO examining attorney agreed the claims were patent ineligible, but that’s about all they agreed on. The examiner had relied on a “technological arts” test but the Board of Patent Appeals decided the test should be “if there is a transformation of physical subject matter from one state to another” that produces “a useful, concrete, and tangible result.” The Federal Circuit affirmed the rejection of the claims, after taking the unusual step of ordering an *en banc* rehearing *sua sponte* after the initial panel heard the case, and then issued a 9-3 majority opinion that made “machine-or-transformation” the sole applicable test for patent-eligible subject matter, thereby indirectly overruling its widely criticized *State Street Bank* decision. The Supreme Court rejected “machine-or-transformation” as the sole test, however, at least in Justice Kennedy’s plurality opinion. The Court was unanimous that the specific claims at issue were not patentable, but Justice Breyer’s concurring opinion cast doubt on whether *any* business processes were. Justice Stevens was unequivocal in his concurrence: He would categorically exclude business methods from patentability.
 24. CLS Bank Int’l v. Alice Corp. Pty. Ltd., 768 F. Supp. 2d 221 (D.D.C. 2011).
 25. CLS Bank Int’l v. Alice Corp. Pty. Ltd., 685 F.3d 1341 (2012).
 26. CLS Bank Int’l v. Alice Corp. Pty. Ltd., 717 F.3d 1269 (Fed. Cir. 2013).
 27. *Id.* at 1333-1336.
 28. The grant of *cert* in *Alice* elicited a veritable torrent of *amicus curiae* briefs. Amazon, Google, Hewlett-Packard, LinkedIn, Microsoft, Adobe, and IBM all weighed in on what ought to be the proper test for enterprise software patentability, while others just begged the Court to provide some kind of clarity.
 29. *Alice*, 134 S.Ct. at 2357-2359.
 30. Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
 31. The Authors Guild, et al. v. Google Inc., No. 15-849, U.S. Sup. (April 18, 2016).
 32. Google safeguards “snippets”—a 1/8 segment of each page—so that an online searcher can scan for but not *see* more than three snippets per search and never 10 percent of a book in multiple searches.
 33. One of the named plaintiffs was Jim Bouton, a former Yankees pitcher, who penned a memoir titled “Ball Four.”
 34. To summarize it in one word, one might call it a morass. The fact that there were two separate lawsuits conducted as class actions complicated things inordinately. The untimely death of Judge Sprizzo after the parties reached a long-sought comprehensive settlement in 2008 certainly didn’t help, nor did the nature and complexity of the proposed settlement, which ran for more than 200 pages and introduced new questions regarding antitrust, privacy, and inadequacy of the proposed classes of authors and publishers. As part of the settlement, Google agreed to shell out \$125 million in immediate damages, pay ongoing royalties, and include author “opt out” provisions. The settlement pleased no one, including the Justice Department. The respected science fiction writer Ursula K. Le Guin, for example, announced her resignation from the Authors Guild over the settlement, claiming the leadership of the Guild had “sold us down the river” and that the settlement threatened “the whole concept of copyright.” Meanwhile, Google continued to scan books.
 35. Judge Chin also teaches legal writing at Fordham Law School and has authored, together with his wife, Kathy Hirata Chin, a partner at Cadwalader, Wickersham & Taft, several dramatic interpretations of infamous cases involving Asian Americans, such as the treason trial of Iva Toguri D’Aquino, the former Girl Scout and UCLA graduate who became known as “Tokyo Rose.”
 36. An adequate definition of fair use has bedeviled legal scholars for generations. The traditional test uses four factors of analysis, derived from a 1841 Massachusetts court opinion (*Folsom v. Marsh*) by eventual Supreme Court Justice Joseph Story in which the defendant had copied 353 pages from the plaintiff’s 12-volume biography of George Washington in order to produce a separate two-volume work of his own. (Judge Story, no surprise, found this was not fair use.)
 37. Authors Guild v. Google, Inc., 954 F. Supp. 2d 282, 290 (S.D.N.Y. 2013).
 38. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).
 39. “Toward a Fair Use Standard,” 103 *Harv. L. Rev.* 1105 (1990).
 40. By Judge Leval’s own admission, when he was a district judge he made several significant fair use rulings (including one involving the personal letters of *Catcher in the Rye* author J.D. Salinger) without truly understanding the proper scope of the defense, decisions that the Second Circuit overruled in opinions (in his estimation) as confused as his own, all of which motivated him to research and write his 1990 *Harvard Law Review* article.
 41. Authors Guild v. Google, Inc., No. 13-4829 (2d Cir. 2015).
 42. Authors Guild v. Google, Inc., Petition for Writ of *cert*, Amicus Brief for authors Malcolm Gladwell et al. at 9.
 43. Kodachrome was introduced by Kodak in 1935 and discontinued in 2009.

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