

- TURNER:: Hello and welcome back to Wisconsin Law in Action. A podcast where we discuss new and forthcoming scholarship with University of Wisconsin Law School professors. I'm your host, Kris Turner and my guest today is Professor BJ Ard who will be discussing his current work in progress about market refusal in copyright. Thank you for joining me, Professor Ard and let's get right into it. To start, let's hear about your research interests and work in general.
- PROF. ARD: : Sure. I study how the law responds to new technologies. Intellectual property is an important part of that story, but it covers a whole lot more. The law faces all sorts of uncertainties whenever people use new technologies in ways that upset whatever assumptions or whatever business models the law is built around. Take for example, reader privacy, the laws and the professional norms that have developed to protect reader privacy focus on privacy in the library. And this worked pretty well for a number of decades because libraries were the main institution that kept any detailed records of what people were reading.
- PROF. ARD: : Now that we have e-readers, now that we have people accessing so much material or searching for so much material online, the laws don't do as much to protect reading records because so many of them are outside of that library context. The law also faces institutional uncertainties with respect to whether the legal system as it's configured today is equipped to make and update the law as these technology related challenges arise. The project that I'm talking about today is one that probes the capabilities of the courts and the capabilities of private actors to grapple with the benefits and the risks of new playback and distribution technologies.
- TURNER:: Where'd you get the idea for this specific article? What drew you to explore this topic?
- PROF. ARD: : The Supreme Court's 2014 Aereo decision got me thinking about the capabilities that new playback and new distribution technologies offered to consumers. The case was focused on the doctrinal question of whether it was copyright infringement to install these thousands of tiny television antennas for subscribers to virtually tune into and stream live broadcasts to their devices. And as you look at the commentary on that case, observers took a pretty negative view of Aereo and its motives and there wasn't a whole lot of discussion of whether there was any actual value there for consumers. The content that Aereo was relaying to its subscribers was already available to the public for free, at least in the New York area where these antennas were based. It was broadcast television, but as more people have switched to computer screens and tablets and phones to watch video content, it's become harder for them to actually get that broadcast signal to their device or for them to actually tune into these TV programs that are being put out there ostensibly for free.
- PROF. ARD: : Aereo was trying to bridge that gap and the Supreme Court ultimately decided against Aereo, but the courts had been a lot more sympathetic in prior cases like *Fortnightly* where the defendant had retransmitted broadcast signals to these

parts of West Virginia that the networks had neglected. Or cases like Sony, where the defendant manufactured VCRs that consumers could use to record television broadcasts to view later at a more convenient time. I wanted to dig further into the cases and into others in the same vein to see what implications they might have for copyright policy and for copyright jurisprudence if we looked at these cases together.

TURNER:: Yeah. Reading your article, it was especially interesting to learn about the reluctance of some of these copyright holders to enter the new markets. It seems counterintuitive from a purely financial perspective, even if they are familiar with the status quo of the markets they know about.

PROF. ARD: : This was sort of an interesting thing that I came to realize as I was digging into the topic. A number of people, if they've studied the Sony case, dealing with the Beta Max, this early VCR where the Hollywood Studios sued to try to enjoin this technology. The aftermath of that is that the studios profited from these VCRs being out there. Maybe they didn't want them on the market initially, but once they were out there, once they were in millions of people's homes, they were able to sell authorized, prerecorded tapes and make a much more than they had been previously. These revenues exceeded what they were getting from the box office in a number of cases.

PROF. ARD: : As I got to looking further, this is a pattern that repeated itself a few times. Initially the music composers in the early 20th century had been resistant to allowing their music to be recorded. But of course, once it was recorded and people could purchase a prerecorded vinyl records later, 8-tracks and cassette tapes and CDs, you had this immense new revenue source and so many more people are going to buy those copies that are going to buy sheet music or take something like a cable retransmission. The television networks that broadcast networks didn't originally cover remote areas.

PROF. ARD: : We have this one case Fortnightly, dealing with two cities in West Virginia. They weren't covered by the existing broadcast networks. So the defendant in that case had established an antenna to pick up those signals, a stronger than anyone would have at home and then used cable to run that signal to people's homes so they could get the broadcast television networks. And again, this is an area that the networks weren't covering. It's not as though they were losing any subscribers in this area ... Or losing any viewers in this area, or even losing any people who would've tuned in via their television set. These were people who otherwise just wouldn't have gotten the content, otherwise wouldn't have even seen the commercials that were on these channels.

PROF. ARD: : Once cable really took off and we had so many more channels in place and we had so many more communities able to access these channels and since we have the cable stations themselves paying various fees to the broadcast networks. Again, we had another source of revenue that initially the copyright

industries had been resistant to, but they did very well, once they finally seeded to this new way of distributing content.

TURNER:: This kind of sounds like a research challenge. Were there any other surprises or challenges while you were doing your initial research?

PROF. ARD: : Another thing that sort of surprised me here was the range of perspective on this body of cases. There's a general trend here, and this was identified some time ago by Jane Ginsburg, that the courts tend to refuse copyright enforcement whenever the copyright industries are trying to shut down one of these new technologies like they did with cable retransmission or VCRs or mp3 players.

PROF. ARD: : On the other hand, they tend to award copyright enforcement when the copyright industries have made credible efforts to enter a market and that's not something that we saw in the early radio cases. It's something that we saw in cases like Napster and Grokster dealing with digital downloads and it also gives us a way to get a handle on some other more recent cases where new distribution models were in question. And what I found is that there are some really engaging theories arguing how this approach to the cases has advanced communications policy or innovation policy or how it puts the courts in this position of deciding cases on the basis of whichever party is behaving more reasonably. But, I haven't really found a theory that gives a satisfactory explanation for what's going on in these cases from the perspective of copyright. Each of these other perspectives has important insights, but there's really an opening here to re-examine this dynamic from the perspective of copyright itself.

TURNER:: Mm-hmm (affirmative). That new perspective jumped out at me as a new way to look at these cases. Would you say that this is one aspect of your forthcoming work that distinguishes it from other IP law research?

PROF. ARD: : Oh, that's right. I think it's something where I'm going to be digging into the implications that these cases have for core copyright policy. We have the standard account of copyright, which is that it's this story of balancing incentives for the creation of new work and access to those works to the public, and if we're talking about that story, well, the access side of it is pretty clear. If we're talking about technologies that make distribution easier, then we're going to see an increase in access. And on the incentives for creation side, when we look back at these decisions where the copyright industries have actually profited from the existence of these markets, we actually have more revenues coming in. These provide more incentives for producers to invest in new works and for artists themselves to be compensated.

PROF. ARD: : But, beyond that standard incentives and access story, there's also a richer account of copyright as a means of creating a more participatory or democratic culture. These new markets have facilitated that as well and they've done it in at

least three overlapping ways. Beyond just access to works, we also see an increase in autonomy where we have new capabilities like time shifting or device shifting that allow consumers to have more say in choosing what works they're going to engage with, when they're going to engage with them and how they're going to engage with them. Also, going beyond just access, we have greater inclusion. One of the things that was going on with a lot of these technologies is that they decreased the overhead costs of distribution. They decreased the price for consumers to gain access to any particular work.

PROF. ARD: : You can think about something like recorded music, which made it possible for practically anyone to hear a particular band or a particular song. Even if they couldn't afford a ticket to go to a live show, even if they lived too far from the cities for that to be an option. Likewise with something like cable television, expanding TV into remote areas and rural areas. You had previously excluded communities now participating in the same natural culture that had developed around fixtures like the CBS Evening News and also we have something going beyond the standard incentives story. In terms of the diversity of new works being created, because these new technologies did decrease the overhead costs of distributing various works and created new revenue streams, we had a greater variety in the content that was actually being produced.

TURNER:: The one thing that especially spoke to me there was growing up so far away from where I could not go see any of these concerts or buy a ticket in many cases I felt like I could take more ownership of this music by shifting the time and I'm like, okay, I'm going to play this and I'm going to love this music. That part really spoke to me about how copyright sometimes affects this kind of market entry for some of the companies because they just want to be able to control it more powerfully.

PROF. ARD: : This is sort of an interesting thing and I think this is one of the core issues that still needs to be discussed in copyright, because there are number of reasons that a copyright owner might resist these kinds of new technologies or these kinds of new markets. Maybe they want to keep greater control over programming decisions. Maybe they want to protect existing distributors or existing content intermediaries from this sort of competition that would come from having these things easier to access through alternative channels. Maybe there's just some sort of risk aversion in place and they want to avoid anything that might disrupt a particular business model.

PROF. ARD: : And these can all be valid business interests on the part of these copyright owners but they don't sound like the kind of interests that copyright is meant to protect and there hasn't really been a whole lot of attention to these issues in intellectual property scholarship. One thing that I would hope to see coming out of this article is just more of a discussion in the scholarship, exploring the proper boundaries of IP owners control. With as much concern as there is today with disruptive technologies, with their impact on the economy and on culture. We

need to be talking about whether the IP industries can assert copyright as a way to shield their business models from that sort of disruption.

TURNER:: Thank you for sharing your work with us today and I do think it'll spur further conversation on this topic. It was interesting to me, as a librarian who typically sees copyright in a different way to read about copyright and how it affects changing markets and market entries. Where can people find out more about your work?

PROF. ARD: : I post my published papers and my drafts to SSRN, and you can also find my published work at my faculty bibliography on the University of Wisconsin webpage.

TURNER:: Thank you for joining us on Wisconsin Law in Action. We've been talking about IP law with professor BJ ARD. Professor Ard's papers can be found on his SSRN page as well as on his UW Law bibliography page. A link to his SSRN page will be posted along with this podcast at wilawinaction.law.wisc.edu. You can subscribe to the Wisconsin Law in Action podcast on the Apple podcast store, Stitcher, or Google play, or find our full archive at wilawinaction.law.wisc.edu. This is just our second podcast, on our first one we discussed corporate governance with Professor Yaron Nili. Thank you again for listening. Join us next time as we turn our attention to the world of criminal law with Professor Michelle Levine. See you then and happy researching.