

Before the
United States Copyright Office
LIBRARY OF CONGRESS
Washington, DC

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Study on the Right of Making Available:) Docket No. 2014-2
Request for Additional Comments))
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JOINT ADDITIONAL COMMENTS OF BROADCAST MUSIC, INC., THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, THE NATIONAL MUSIC PUBLISHERS’ ASSOCIATION, SESAC, INC., AND THE SONGWRITERS GUILD OF AMERICA, INC.

Broadcast Music, Inc. (“BMI”), the American Society of Composers, Authors and Publishers (“ASCAP”), the National Music Publishers’ Association (“NMPA”), SESAC, Inc. (“SESAC”), and the Songwriters Guild of America, Inc. (“SGA”) (collectively, the “Musical Works Organizations”) respectfully submit comments in response to the U.S. Copyright Office’s (the “Office”) Notice of Inquiry dated July 10, 2014 for additional written comments regarding its study on the Right of Making Available (the “NOI”),¹ specifically related to the impact of the U.S. Supreme Court’s recent decision in *American Broadcasting Cos. v. Aereo, Inc.*²

I. INTRODUCTION

A. The Musical Works Organizations

BMI, ASCAP, and SESAC are the three U.S. music performing rights licensing organizations (“PROs”) that collectively represent hundreds of thousands of songwriter, composer, and publisher members and combined repertoires consisting of millions of

¹ 79 Fed. Reg. 41309 (July 15, 2014).

² 573 U.S. ___, 134 S. Ct. 2498 (2014) (hereinafter “*Aereo*”).

copyrighted musical works. The PROs each license the non-dramatic public performance rights in musical works to their respective repertoires on a non-exclusive basis to a wide range of users, including diverse digital broadcasting entities such as radio, television, cable, satellite and Internet services. BMI and ASCAP operate as not-for-profit businesses and return all license fees collected, less operating expenses, as royalties to their respective affiliated members whose works are publicly performed. The vast majority of BMI, ASCAP, and SESAC member songwriters and music publishers are small business men and women who depend on the PROs for collecting performing right royalties on their behalf, which constitute a major portion of their income.

NMPA, founded in 1917, is the principal trade association representing music publishers and songwriters in the United States. As such, NMPA works to protect the interests of music publishers and songwriters and has served as the leading voice of the American music publishing industry in Congress and before the courts. NMPA represents songwriters and publishers of all catalogue and revenue sizes, from large international companies to small independent businesses and even individuals.

SGA is the oldest and largest U.S. national organization run exclusively by and for the creators of musical compositions, with approximately five thousand members nationwide and over eighty years of advocacy experience concerning songwriters' rights. SGA is comprised of songwriters, lyricists, composers, and the estates of deceased members. It provides a variety of services to its members, including contract analysis, copyright renewal and termination filings, and royalty collection and auditing to ensure that members receive proper compensation for their creative efforts.

B. Comments Submitted in First Copyright Office Notice of Inquiry

In comments submitted in response to the Office’s first Notice of Inquiry regarding the Study on the Right of Making Available (the “Initial Comments”),³ the Musical Works Organizations stated that: (1) the right of making available is implicit in current U.S. copyright law through both the right of public performance and the right of distribution to the public; (2) these rights must be analyzed and interpreted according to the intentions of Congress in enacting the 1976 Copyright Revision Act⁴ to have broad and strong protection for authors; and (3) U.S. courts must uphold and interpret these rights in order to adhere to the United States’ international treaty obligations to recognize and implement the right of making available. We reiterate those points. As discussed below, nothing in the recent *Aereo* decision changes our position that the making available right as set forth in the various treaties is intended to provide broad protection to rights holders online, ensuring that any means of offering copyrighted works to the public necessitates permission of the copyright owner.

II. RESPONSE TO THE NOTICE

At the outset, the Musical Works Organizations voice our agreement with the U.S. Supreme Court’s holdings that *Aereo* performed copyright owners’ works and did so publicly within the meaning of the “Transmit Clause.”⁵ In so holding, the Court gave amplitude and context to the right of public performance in Section 106(4) of the Copyright Act, sending a clear warning to those who attempt to circumvent the boundaries of the Copyright Act, that the very purposes of copyright law to grant copyright owners control over the exploitation of their works

³ Joint Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., the Songwriters Guild of America, SESAC, Inc., and the National Music Publishers’ Association (April 4, 2014).

⁴ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

⁵ *Aereo*, 134 S. Ct. at 2510.

cannot be defeated by technological loopholes. Moreover, the Court reaffirmed Congress’s intention in enacting a broad technology-neutral public performance right that comports with the broad technology-neutral making available right required of signatories to the two Internet treaties negotiated by the World Intellectual Property Organization (“WIPO”): the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”) (collectively, the “WIPO Internet Treaties”).

The Musical Works Organizations respond to the Office’s NOI and address each of the questions raised as follows regarding the right of making available as implicated by *Aereo*.

1. To what extent does the Supreme Court’s construction of the right of public performance in *Aereo* affect the scope of the United States’ implementation of the rights of making available and communication to the public?

In our Initial Comments, we emphasized that various court decisions interpreting the public performance and distribution rights brought into question U.S. compliance with international treaties including the WIPO Internet Treaties. The Supreme Court’s decision in *Aereo* is entirely consistent with the United States’ international treaty responsibilities. However, judicial decisions made prior to *Aereo* that deny distribution liability for the mere offering of files for transmission or performance liability for download transmissions serve as precedent relied upon by digital services. We reiterate our position that those decisions can be viewed to limit the scope of the Copyright Act, which may necessitate amendment to ensure our law indeed provides the minimal rights required to ensure compliance with the making available right standard set out in the WIPO Internet Treaties. The Court’s decision in *Aereo* provides a sound basis for future courts to understand statutory language in the 1976 Act and Congressional intent in its enactment.

In *Aereo*, the Court found that technological nuances in Aereo’s engineering were ultimately irrelevant to Aereo, the viewer, and especially the copyright holder whose rights were being exploited. As the Court observed, a technological service like Aereo “is not simply an equipment provider. Rather, Aereo, and not just its subscribers, perform[s] (or transmit[s])” copyrightable content publicly.⁶ Regardless of whether the service or the subscriber activates the performance, the Court noted that that distinction “means nothing to the broadcaster” and “[did] not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system” into the type of service that does not infringe on the statutory rights granted in Section 106(4).⁷

Moreover, the *Aereo* Court acknowledged the legislative history of the Transmit Clause (statutorily set forth within Section 101⁸), which confirms Congress’s view that the statutory definition of “transmit” “is broad enough to include all conceivable forms and combinations of wired or wireless communications media.”⁹

The key to the Court’s decision is that, consistent with Congress’s clear intent in its 1976 revisions to the Copyright Act and the intentions of the drafters of the WIPO Internet Treaties, the Act is neutral with regard to the specific technology required to implicate the public

⁶ 134 S. Ct. at 2506 (internal quotes omitted).

⁷ *Id.* at 2507. While the Supreme Court held that time-delayed performances were “not before” the Court, *id.* at 2503, arguably its holding also implicitly overturns the Second Circuit’s *Cablevision* decision, which had held that time-delayed performances from unique copies are not public performances. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009) (hereinafter “*Cablevision*”). There is no basis under *Aereo* to differentiate performances from a user-made copy based on the timing of when they are made, as long as the business model is one that provides transmissions to the public. The *Aereo* Court did observe the existence of doctrines like fair use and there is precedent for time-shifting under *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (hereinafter “*Sony*”), but a service carries the burden of establishing such a defense.

⁸ 17 U.S.C. §101 defines “to perform or display a work ‘publicly’” in part as “to transmit or otherwise communicate a performance or display of the work . . . 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.”

⁹ H.R. REP. NO. 94-1476, at 64, 94th Cong., 2d Sess. (1976).

performing right. The 1976 Act was enacted to stand the test of time and its drafters anticipated the development of new transmission technologies and business models for public performances.¹⁰ Because the multilateral WIPO Internet Treaties were drafted with this same intention, Congress believed that no amendments to the Act were necessary to place the United States in compliance with the making available requirements of these treaties. To that end, the Court's decision in *Aereo* affirms Congressional belief.

As we explained in our Initial Comments, the right of making available included in the WCT,¹¹ to which the United States is a signatory, is drafted broadly, applying regardless of the manner in which dissemination occurred, including if the work were offered through on-demand or "push" technologies such as streaming or downloading. The legislative history of Article 8 of the WCT emphasizes that it was intended to provide a broad, technology-neutral and exclusive right encompassing all manner and form of offering, providing, and disseminating copyrighted works to the public.¹² Overall, the exclusive right of making available is one of the most important achievements of the WCT and the WPPT¹³ and constitutes a basic requirement for the development of electronic commerce. The Court's decision in *Aereo* is on point with the technology-neutral emphasis of the WIPO Internet Treaties in correctly rejecting any notion that technological engineering can somehow limit the broad rights granted by the Copyright Act to copyright holders.

¹⁰ "Transmission" is a term of art for a vehicle that delivers a "performance." That vehicle can be "any device or process" whether "now known or later developed." 17 U.S.C. § 101. It is obvious from statutory text that Congress intended these words to have broad meaning so that it could cover technologies that were not imaginable in 1976. The legislative history is consistent with this view. See H.R. REP. NO. 94-1476 at 64, 94th Cong., 2d Sess. (1976).

¹¹ See WCT Article 8, available at <http://www.wipo.int/treaties/en/ip/wct/>.

¹² See M. FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET – THE 1996 TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION (2002).

¹³ See WPPT Articles 10, 14, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295578.

2. How should courts consider the requirement of volitional conduct when assessing direct liability in the context of interactive transmissions of content over the Internet, especially in the wake of *Aereo*?

Historically, direct copyright infringement has been a strict liability tort.¹⁴ Nevertheless, prior to the advent of the digital age, a bright-line test in the context of reproduction liability was accepted for those who merely provide physical reproduction equipment, leaving the actual reproduction to third parties: the so-called copy-shop test.¹⁵ The common sense theory was that one who merely provides equipment capable of making reproductions could not be considered as having directly made the reproductions created by third-party independent usage of the equipment. In the digital era, this concept was extended, first to certain passive Internet service providers¹⁶ and ultimately to website operators.¹⁷ In these cases, services against which liability was sought were exonerated from direct liability because, like copy shops, they acted passively and had no active role in the reproduction. Ultimately, the question in these cases focused on the extent to which a defendant service either operated akin to a common carrier that passively delivered content to subscribers at their request and therefore lacked the requisite volition or if it had any active involvement in the provision of the content that could serve as a basis for liability.¹⁸

Despite this movement towards a volitional requirement for a finding of reproduction right direct infringement liability, courts have not applied the requirement across all rights.

¹⁴See 4 NIMMER ON COPYRIGHT § 13.08[c] (2014) (“Traditionally the defendant’s mental status has played no role in determining liability for copyright infringement.”).

¹⁵ See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

¹⁶ *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

¹⁷ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

¹⁸ Compare cases finding direct liability through active involvement in the infringement such as *Playboy Enter., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997) and *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009) with those finding no volitional conduct and therefore no direct liability such as *Cablevision, supra* note 7, and *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303 (S.D. Fla. 2011). See also discussion in note 24, *infra*.

Specifically, courts have recognized the differences between various Section 106 exclusive rights. As noted by the Second Circuit in the *Cablevision* decision “the definitions that delineate the contours of the reproduction and public performance rights vary in significant ways.”¹⁹

One of those ways, as the Supreme Court correctly understood, is via the creation of broad and separate Section 101 definitions for “perform,” “publicly,” and “transmit” in response, in large part, to the *Fortnightly*²⁰ and *Teleprompter*²¹ decisions that limited the extent of the performance right in the 1909 Copyright Act. The plain meaning of those definitions and the intent of the 1976 revisions led the *Aereo* Court to its finding that the service performed despite remaining inert until, and automatically responding to, a viewer’s request. While the Court in *Aereo* acknowledged that “a user’s involvement in the operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act,”²² the Court rejected the dissent’s view that an automatic transmission made at the request of a user should be analogized to the copy shop scenario which primed the path for the volitional analysis in the reproduction cases.²³

Clearly, a volitional conduct test is incompatible with a public performing right that is broadly applicable to on-demand, interactive entertainment technologies. Inventive technicians and software programmers can always engineer transmission systems to have the user initiate the transmission. Indeed, the classic public performance paradigm – the jukebox – is user initiated.

¹⁹ *Cablevision*, 143 F.3d at 131; see also *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011).

²⁰ *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).

²¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

²² *Aereo*, 134 S. Ct. at 2507.

²³ *Id.*; see also *id.* at 2513 (Scalia, J., dissenting).

The Court's hypothesis that a user's involvement in the operation of the provider's equipment may have bearing on a finding that the provider was the performer in question seems to refer to passive carrier situations, which have always been statutory exemptions to the public performing right. It seems fairly clear that with regard to the performance right Congress created a paradigm of strict liability for all transmissions unless specifically exempted or protected by a safe harbor.²⁴

The *Aereo* Court also mentioned the relevance of the commercial purpose of the service in its determining that the performances were "to the public," including the fact that Aereo intended the performances of the copyrighted works to be received by a substantial number of people.²⁵ The Court did not dwell on whether the particular transmission is received by only one person.²⁶ Indeed, the Court specifically rejected the Second Circuit's erroneous fixation on the transmission as the performance in question,²⁷ disregarding the nature of the work being transmitted, which threatened to exclude all interactive programming – a large part of the future of the entertainment industry.

In its analysis, the Supreme Court considered Aereo's commercial objectives to be identical to those of cable companies²⁸ and noted that "Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies."²⁹ Courts have always dealt with new services on a case-by-case basis in assessing

²⁴ For example, 17 U.S.C. § 111(a)(3) specifically exempts from liability a secondary transmission made by a carrier with no direct or indirect control over the content or recipients and whose activities with respect to the transmission consist solely of providing wires, cables or other equipment – the so called passive-carrier exception. Similarly, 17 U.S.C. § 512 shields mere passive carriers from liability.

²⁵ 134 S. Ct. at 2506.

²⁶ *Id.* at 2508-09.

²⁷ *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676, 693 (2d Cir. 2013).

²⁸ 134 S. Ct. at 2508.

²⁹ *Id.* at 2509.

the business purposes of the services; if the business purposes are for providing entertainment to subscribers, courts weigh the commercial impact of those services in determining liability.³⁰

Factoring the commercial purpose of the use can assist in differentiating those businesses engaged in exploiting copyrighted works, which necessitate licensing, from private transmission scenarios involving individuals who may occasionally transmit their own files in personal, private contexts.

The Musical Works Organizations are confident that lower courts will follow the lead of *Aereo* and pay heed to these and other factors in determining liability for direct copyright infringement instead of relying on an incomplete and inconsistent “test” such as the volitional conduct test.

3. To what extent do, or should, secondary theories of copyright liability affect the scope of the United States’ implementation of the rights of making available and communication to the public?

Secondary liability should have no effect on, or relevance to, the implementation of the right of making available. It is, in our opinion, merely a method of establishing liability for the violation of copyright owner’s exclusive rights – whether that right is the right of making available or otherwise. The importance of the right of making available, however, is that it places the locus of *direct* infringement liability on the commercial service making the transmissions available to the public. As discussed above, the Supreme Court appropriately held that the *Aereo* service could be held liable as a direct infringer, not as a secondary infringer

³⁰ Following the opinion in *Aereo*, the company subsequently attempted to convince the Office that it qualified for a cable compulsory license under Section 111 even though it had continuously argued that it was not a cable operator. As the Office General Counsel noted in a letter to *Aereo* dated July 16, 2014, it is the view of the Office that “internet retransmissions of broadcast television fall outside the scope of the Section 111 license” and that *Aereo* did not qualify for the license. Consequently, *Aereo* cannot rely on the cable compulsory license as a way to retransmit broadcasts – and stay in business – following the Supreme Court’s decision. Letter from Jacqueline C. Charlesworth, Gen. Counsel and Assoc. Register of Copyrights., U.S. Copyright Office, to Matthew Calabro, *Aereo*, Inc. (July 16, 2014) (available at <http://www.washingtonpost.com/blogs/the-switch/wp/2014/07/17/no-aereo-isnt-a-cable-company-says-the-copyright-office/>).

placing the end-user as the primary target for lawsuits. The law must give copyright owners the tools necessary to enforce copyright at the level of the commercial services – and not make compliance with international treaties hinge on court-made doctrines of secondary liability.³¹

Secondary liability is, of course, critically important to copyright holders’ abilities to protect their rights. As the Supreme Court held in *Grokster*, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”³² This holding, applied to the right of reproduction, was crucial to curtail piracy where the service at issue – unlike *Aereo* – did not have a commercial relationship with its users after delivery of the software used for pirating works.

4. How does, or should, the language on “material objects” in the Section 101 definitions of “copy” and “phonorecord” interact with the exclusive right of distribution, and/or making available and communication to the public, in the online environment?

Under the definitions in Section 101 of the Copyright Act, both a “copy” and a “phonorecord” must be a “material object” in which a work or sound is “fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

In *Aereo*, the Court determined that the seconds-old copies of broadcasts did not disqualify the transmissions made by users as constituting public performances, finding that

³¹ *U.S. Copyright Office Public Roundtable on the Right of Making Available* (Washington, D.C., May 5, 2014) at 62 (testimony of Jane C. Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School) (“And I think that it is quite problematic to base our compliance with a making available right on secondary liability because it means that the end-user is the first-line infringer. And I don’t think that we should base a copyright system on making end-users the first-line infringer.”), available at http://copyright.gov/docs/making_available/public-roundtable/transcript.pdf.

³² *Metro-Goldwyn Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005); accord *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003) (finding the peer-to-peer service liable, not the “impecunious” file sharers).

whether one “transmits from the same or separate copies, it performs the same work.”³³ In so finding, it ultimately rejected the “unique copy” theory advanced by some as a result of the *Cablevision* decision but did not affect the time-shifting *Sony* rationale of fair use for home taping.³⁴ The *Aereo* decision therefore solidified the broad reach of the performance right in conformity with the WIPO Internet Treaties’ broad making available right while anticipating the potential for certain transmissions of private copies by individual users to be exempted from that reach (whether by fair use principles or otherwise). Indeed, technology will always evolve and advance, often fostering creativity but occasionally impeding it, as in *Aereo*. While the *Aereo* Court recognized the broad rights of creators, it also recognized the importance of technological advancement, specifically leaving the door open to other existing or future technologies, such as cloud storage.³⁵

5. What evidentiary showing should be required to prove a copyright infringement claim against an individual user or third-party service engaged in unauthorized filesharing? Should evidence that the defendant has placed a copyrighted work in a publicly accessible shared folder be sufficient to prove liability, or should courts require evidence that another party has downloaded a copy of the work? Can the latter showing be made through circumstantial evidence, or evidence that an investigator acting on the plaintiff’s behalf has downloaded a copy of the work?

As stated in the Musical Works Organization’s Initial Comments, proof of actual distribution of copyrighted works is not a prerequisite to a finding of infringement of copyrighted works. In the view of the Musical Works Organizations, the mere offering of works without an actual “distribution” is a violation of the right of making available.

³³ *Aereo*, 134 S. Ct. at 2509.

³⁴ See *Sony*, *supra* note 7.

³⁵ 134 S. Ct. at 2510-11. Writing for the Court, Justice Breyer noted that “We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies. [W]e do not believe that our limited holding today will have that effect.” He continued, writing that the Court has not considered whether infringement occurs when a user “pays primarily for something other than the transmission of copyrighted works, such as remote storage of content.”

While courts have long recognized that the making available right is implicated when individuals upload files that are subsequently downloaded by third-party users, some courts have found that a finding of infringement cannot be sustained without evidence of download by an end user. However, this latter, more limited interpretation of the making available right fails to provide copyright owners with a meaningful tool for protecting their rights and raises the question whether this interpretation complies with U.S. obligations under international law. Online piracy remains a major concern, and any solution requires a broad definition of the making available right. As discussed in the Initial Comments, different judicial interpretations of the making available right bring great uncertainty regarding the question of whether proof of actual distribution of the copyrighted works is necessary for a finding of infringement.³⁶ The existing ambiguity caused by conflicting judicial interpretations could be clarified by Copyright Office definitively establishing liability for those that infringe on the making available right without requiring a finding that another party has actually downloaded a copy of an uploaded work, which is in accordance with the WCT.

As stated above, the right of making available in the WCT is intended to be enforceable any time copyrighted works are offered to the public and without requiring proof of a subsequent receipt to find liability.³⁷ The broad nature of the right was drafted to ensure that: (1) all on-demand transmissions are covered; (2) the focus is on access to all works, including streams and

³⁶ Compare, e.g., *Universal City Studios Prods., LLLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006); *Motown Record Co., LP v. DePietro*, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); *Warner Bros. Records, Inc. v. Payne*, 2006 WL 2844415 (W.D. Tex. July 17, 2006); and *Interscope Records v. Duty*, 2006 WL 988086 (D. Ariz. Apr. 14, 2006) (finding that merely uploading unauthorized content without proof of actual distribution was sufficient for a finding of infringement); with, e.g., *Atl. Recording Corp. v. Brennan*, 534 F. Supp. 2d 278 (D. Conn. 2008); *London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153 (D. Mass. 2008); and *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008) (requiring proof of actual distribution in the form of a download recipient to sustain a finding of infringement).

³⁷ See SAM RICKETSON & JANE J. GINSBURG, INT'L COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND ¶ 12.58 (2d ed. 2006). See also *WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO* (hereinafter "WIPO Guide").

downloads; and (3) the mere offering of works – whether or not actually received by the public – triggers the right.³⁸ This formulation was intended to codify long-existing norms and practices with regard to the rights of making available and communication to the public.³⁹

6. Please provide any additional comments or suggestions regarding recommendations or proposals the Copyright Office might wish to consider as it concludes its study.

A robust public performance right is not a threat to cloud-based services. Indeed, the *Aereo* Court suggested in dicta that if a service is engaged in renting storage space to users for their own personal use, there may be circumstances in which the service may not have engaged in a public performance when the user transmits to itself its own content.⁴⁰ Additionally, it is clear from *Aereo* that the commercial context in which the cloud service operates – and the relationship of the service to the customer and the content – will be relevant in future cases. Finally, services may rely on safe harbors intended to address certain technologies and business models.⁴¹

However, the *Aereo* decision solved many, but not all, problems. Copyright owners and their representatives must continue to advocate for the protection of creative works from technological “shams” designed to circumvent copyright law.⁴² As additional cases arise and additional technologies are created, the basic tenets of copyright law must not be forgotten.

It should be stressed that *Aereo* did not directly address the holdings in other decisions cited in our Initial Comments that question the United States’ conformity with its treaty obligations. It is still our opinion that the Copyright Act must be interpreted in a manner that not

³⁸ Ricketson and Ginsburg at ¶ 12.58.

³⁹ *WIPO Guide*.

⁴⁰ *Aereo*, 134 S. Ct. at 2510.

⁴¹ *See* 17 U.S.C. § 512.

⁴² *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting).

only identifies and enforces the right of making available as part of our current bundle of rights but that also avoids conflict with international obligations binding on the United States.⁴³

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⁴³ See *United States v. Weingarten*, 632 F.3d 60, 64-65 (2d Cir. 2011) (“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”), quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). See also Restatement (Third) of Foreign Relations Law of the U.S. § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or an international agreement of the United States.”).