*Before the*
**Library of Congress**
**United States Copyright Office**

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| **Request for Additional Comments on "Making Available" Right Study and *Aereo*[1]** | ) ) ) ) ) ) ) | Docket Number: 2014-2<br>August 14, 2014 |

**Comments of**
**The Internet Association**

The Internet Association is pleased to submit comments to the U.S. Copyright Office in response to its additional request for comments on its study of a "making available" right and the impact, if any, of the U.S. Supreme Court's (Court) *Aereo* [2] decision on this issue and the right of communication to the public.

We represent leading Internet companies[3] and are dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower Internet users.

In the aftermath of the Court's *Aereo* decision, The Internet Association supports the Court's intention to limit its decision to the specific facts presented before it. Given the Court's narrow ruling, its decision is irrelevant to the current "making available" right debate and should not be interpreted as an instruction or invitation to read a "making available" right into existing law. The rights codified in Section 106 of the Copyright Act sufficiently protect against copyright infringement and existing laws satisfy the United States' treaty obligations.

[1] Filed electronically at http://www.copyright.gov/docs/making_available/
[2] *See American Broad. Cos. v. Aereo,* 134 S. Ct. 2498, 189 L. Ed. 2d. 476 (2014) [hereinafter *Aereo* case].
[3] The Internet Association's membership includes: Airbnb, Amazon, AOL, Auction.com, eBay, Etsy, Expedia, Facebook, Gilt, Google, Groupon, IAC, LinkedIn, Lyft, Monster Worldwide, Netflix, Practice Fusion, Rackspace, reddit, Salesforce.com, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yelp, Yahoo!, and Zynga.

Additionally, the decision should not, and cannot, be used as a tool to unravel the United States' nascent cloud computing industry. Finally, we encourage the Copyright Office to recognize that the mere uploading of works to a cloud service is not a violation of the exclusive rights to copy and distribute works and note that information stored online should be treated as information stored in an offline context.

## I. The U.S. Supreme Court's *Aereo* decision is a narrow ruling that is limited to the specific facts presented to the Court.

The U.S. Supreme Court's 6-3 decision in *American Broad. Cos. v. Aereo,* 134 S. Ct. 2498, 189 L. Ed. 2d. 476 (2014) held that Aereo's technology had an "overwhelming likeness" to cable systems that Congress intended to regulate through amendments to the Copyright Act. The focus of the Court's holding rests squarely on the conclusion that "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach."[4] Among the factors the Court considered were the broadcasters and users' identical experience with both systems, users' ability to *contemporaneously* receive the same programs regardless of their time and location, and users' lack of ownership or possession of the underlying works.[5]

Because the Court narrowly confined its holding to the specific facts in the case, the *Aereo* ruling is irrelevant to the current "making available" right debate, which we discuss in Part IV of these comments. Further, the decision should not be read broadly as precedent for either questioning or rewriting the legal foundation for activities such as cloud computing.

## II. The *Aereo* decision should not put at risk the cloud computing industry and its great benefits for innovation, consumer welfare, and economic growth.

The Court made clear that its decision was not meant to implicate cloud technologies, stating that it "agree[d] that Congress, while intending the Transmit Clause to apply broadly... did not intend to discourage or to control the emergence or use of different kinds of technologies… we do not believe that our limited holding today will have that effect.").[6]

Cloud computing is an important, nascent technology that has myriad benefits for innovation, consumer welfare, and economic growth. For instance, by 2015, the cloud computing industry will generate about 14 million new jobs.[7] Analysts and researchers anticipate the cost-efficiencies made possible by cloud services will funnel into other aspects of

[4] *Aereo* case, *supra* note 2506.
[5] *Id.* at 2501.
[6] *Id.* at 2510.
[7] *Cloud Computing to Create 14 Million News Job by 2015,* (Mar. 5, 2012), *available at* http://www.microsoft.com/en-us/news/features/2012/mar12/03-05cloudcomputingjobs.aspx.

businesses.[8] U.S. industries have invested heavily in cloud computing technology and solutions based on a friendly legal framework, which the *Aereo* court went out of its way to state it did not intend to disrupt.

Commercial businesses are not the only entities looking to capitalize on the efficiencies afforded by cloud service. Governments around the globe also acknowledge the potential for cloud services to transform their investments in IT sources. The United States government along with Europe, Asia, and India's public sectors are taking efforts to implement "cloud friendly" policies to spur investment and deployment of cloud technologies to improve their operations.[9]

In addition to clarifying that it did not intend for its decision to impact future technologies, the *Aereo* court also admitted that it could not determine how the Transmit Clause will apply to future technologies and stated that questions related to cloud computing not currently addressed by Congress will have to be addressed when a case is brought in front of it.[10]

The *Aereo* ruling does not alter *Cablevision's* "user direction" standard for determining whether a system provider or the user is the one who "makes" the copy when assessing claims for direct copyright infringement. In *Aereo*, the Court avoided the issue entirely, deeming a volitional analysis "not critical" when a platform resembles a cable system.[11] This indicates that the Court does not intend to disturb the line of precedent that has explored how to determine volition when technologies facilitate copying or disseminating protected works.[12]

Beginning with *Religious Tech. Ctr v. Netcom On-Line Communication Services Inc.*, 907 F. Supp. 361 (N.D. Cal. 1995), courts have long established that a user's affirmative action is key to the volition requirement in a finding of direct copyright infringement.[13] Recently, in the 9th Circuit, Fox alleged that Dish Network's (Dish) Hopper services, which allow its users to

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[8] Mohana Ravindranath, *Analyst expect growth in cloud jobs,* WASHINGTON POST (Aug. 15, 2013), http://www.washingtonpost.com/business/on-it/analysts-expect-growth-in-cloud-jobs/2013/08/14/56d5715a-04fb-11e3-a07f-49ddc7417125_story.html.

[9] Kreg Nichols and Kara Sprague, *Getting ahead in the cloud,* MCKINSEY (2011), https://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/Public%20Sector/PDFS/McK%20on%20Govt/IT%20Challenge%20and%20opportunity/MOG7_Cloud.ashx.

[10] *Aereo* case, *supra* note 4, at 2511.

[11] *Id.* at 2507.

[12] *See e.g., Religious Tech. Ctr v. Netcom On-Line Communication Services Inc.*, 907 F. Supp. 361 (N.D. Cal. 1995) (introducing the concept of volition and finding that "although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party")..

[13] *See also CoStar v. LoopNet,* 373 F.3d 544 (4th Cir. 2004) (reaffirming *Netcom's* finding and stating that [s]omething more must be shown than mere ownership of a machine used by others to make illegal copies."). *See also Cartoon Network, LP v. CSC Holding*, 536 F.3d 121 (2d Cir. 2008) (reasoning that an RS-DVR customer was not "sufficiently distinguishable" from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.").

enable the service to record programming from the four major networks and automatically skip commercials, infringed the broadcast network's copyright.[14] The court affirmed the lower court's rejection of most of Fox's copyright infringement claims and found that the lower court did not abuse its discretion in denying Fox's preliminary injunction motion to halt Dish's services.[15] After the *Aereo* decision, Fox asserted that the Aereo case is "directly relevant" to its dispute with Dish.[16] However, the court again affirmed the lower court's decision.[17] There, one judge stated that Dish's technology is "completely different technology" from Aereo' and noted the Court's intention to limit its decision only to Aereo's technology.[18]

The Internet Association encourages continued recognition of *Aereo*'s limitation to prevent hindering advancement of cloud computing, remote DVRs, and other emerging services.

## III. Merely uploading a work into the cloud in and of itself does not violate a rightsholder's exclusive rights to copy or distribute a work.

In recent years, we have seen the development of cloud-based services such as "online music locker services" offered by various companies such as DropBox, Amazon, and Google. These types of services provide users with the ability to upload copies of works to their servers. Consumers are increasingly turning to cloud-based services to store their information online. According to a 2008 study by Pew Internet and American Life, about 69% of Americans online use cloud services.[19] Additionally, Internet experts predict that by 2020, most people will do their work via Internet-based applications and acknowledge that many people are already using these services to create and store their work product, upload photos, and engage in commerce.[20] Recently, the 6th Circuit in *United States v. Warshak* extended Fourth Amendment protections typically applied to information stored offline to information stored in e-mail. Given these recent trends, we believe that cloud storage should be considered no differently than storing data in one's home.

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[14] *See Fox Broad. Co. v. Dish Network,* 747 F. 3d 1060 (9th Cir. 2013).
[15] *Id.* at 1073.
[16] Letter from Richard L. Stone, Partner, Jenner & Block, to Molly C. Dwyer, Clerk of the Court, United States Court of Appeals for the Ninth Circuit (July 7, 2014).
[17] *Fox Broad. Co. v. Dish Network LLC,* No. 13-56818 (July 7, 2014), http://cdn.ca9.uscourts.gov/datastore/memoranda/2014/07/14/13-56818.pdf.
[18] John Eggerton, *Ninth Circuit Won't Block Hopper Either*, MULTICHANNEL NEWS (July 14, 2014), http://www.multichannel.com/news/technology/ninth-circuit-wont-block-hopper-either/375940.
[19] Memorandum from Pew Internet & American Life Project on "Cloud computing" takes hold as 69% of all internet users have either stored data online or used a web-based software application (Sept. 2008), *available at* http://www.pewinternet.org/files/old-media/Files/Reports/2008/PIP_Cloud.Memo.pdf.pdf. .
[20] Janna Anderson and Lee Raine, *The future of cloud computing* (June 11, 2010), *available at* http://www.pewinternet.org/2010/06/11/the-future-of-cloud-computing/.

## IV. The Copyright Act recognizes an exclusive right to make copies and distribute works but does not recognize a separate "making available" right.

In this Office's initial notice of inquiry on the "making available" right[21], a broad range of stakeholders agreed that although the Copyright Act does not include an explicit "making available" right, Section 106 exclusive rights, particularly the reproduction, distribution and public performance rights, provide rightsholders with sufficient protection of their legitimate interests in protecting their works and also meet relevant obligations under international treaties and conventions. Stakeholders point to the Copyright Act's legislative history and the history of secondary liability cases to show the strength of the remedies afforded by actual infringements of these exclusive rights.[22] Commenters warn that a "making available" right would complicate the current system by presenting problems in existing contracts where new technologies were not considered and would even question the legality of online functions such as linking and embedding.[23]

The Internet Association agrees with this reasoning and does not believe Congressional action is needed to include an explicit "making available" right.

The Copyright Office must be cautious in taking any action that could chill innovation in cloud computing or other consumer-empowering digital technologies, which are of increasing importance to individual users as well as to the arc of innovation and global economies.

Respectfully Submitted,

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[21] U.S. Copyright Office Notice of Inquiry, 79 Fed. Reg. 10,571 (Feb. 25, 2014).
[22] *See* Comments of Computer and Communications Industry Association, Copyright Office Proceeding on "Making Available" Right on May 16, 2014, *available at* http://www.copyright.gov/docs/making_available/comments/docket2014_2/Copyright_Alliance.pdf. http://www.copyright.gov/docs/making_available/comments/docket2014_2/CCIA.pdf [hereinafter *CCIA Comments*]; *See also* Comments of Software & Information Industry Association, Copyright Office Proceeding on "Making Available" Right on Apr. 4, 2014, *available at* http://www.copyright.gov/docs/making_available/comments/docket2014_2/SIIA.pdf.
[23] *See CCIA Comments; See also* Comments of Public Knowledge, Copyright Office Proceeding on "Making Available" Right on Apr. 4, 2015, *available at* http://www.copyright.gov/docs/making_available/comments/docket2014_2/Public_Knowedge_EFF.pdf.