



**Before the
UNITED STATES COPYRIGHT OFFICE**

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Library of Congress)	
United States Copyright Office)	
Request for Comment)	
Study on the Right of Making Available)	Docket Number: 2014–2
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**Comments of the Internet Commerce Coalition in
Response to Request for Additional Comments**

I. Introduction

The Internet Commerce Coalition (“ICC”) appreciates the opportunity to respond to the Copyright Office’s Request for Additional Comments in this proceeding.

We were pleased by the broad consensus at the roundtable noted in the Request for Additional Comment that “current U.S. law . . . provides rights that are equivalent to the making available and communication to the public rights required by the WIPO Internet Treaties.” As noted in our opening comments, this was Congress’ understanding when it decided to ratify the WIPO Treaties.

We comment here to address questions raised by the additional request for comment -- in particular, its questions regarding the significance, if any, of the *Aereo* decision on the scope of U.S. implementation of the WIPO Treaties and on the separate question of whether some act of downloading must be established to demonstrate a violation of the Section 106 public performance and transmission rights.

First, we must make clear that any attempt to link the *Aereo* decision to any discussion of the possible expansion of the scope of exclusive rights, or theories of copyright liability is not an appropriate line of inquiry. We firmly believe that, as the Supreme Court majority itself noted repeatedly in its opinion, the *Aereo* decision is of limited relevance outside of the specific facts at issue in the case. On the separate question of whether downloading must be proven to establish a violation the public performance or transmission rights the Copyright Act does not prohibit



attempts to transmit or distribute. Copyright plaintiffs, therefore, must prove that an act of transmission or distribution in fact occurred. However, proof may be established through an investigator actually downloading one or more copyrighted works, as in that case a distribution occurs.

II. Response to the Questions in the Request for Comment

Question 1. The Supreme Court's limited ruling in *Aereo* has no bearing on the current RFC. The Supreme Court's construction of the right of public performance in *Aereo* makes clear that there is no "hole" in that right that would permit mass dissemination of broadcast or cable programming through the deliberate creation of a large-scale relay system closely resembling the operation of a cable system. The majority made clear that the decision is very narrow, and technology-specific. The decision was limited to two narrow questions -- whether *Aereo* was performing and if so, whether there was a performance to the public. *Aereo* was found liable for providing services the Court found substantially similar to those of CATV companies. The [Transmit] Clause thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals." *Id.* at 2506.

The majority also took steps to make clear that the decision was not meant to impede future innovation in "cloud" or other services. As the Court explained, "We agree that Congress...did not intend to discourage or to control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect. [...] For one thing, the history of cable broadcast transmissions that led to the Transmit Clause informs our conclusion that *Aereo* 'perform[s],' but it does not determine whether different kinds of providers in different contexts also 'perform.' And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content." *Aereo*, 134 S. Ct. at 2510-2511.

As noted above, although the majority was quite clear that its holding "**would not determine whether different kinds of providers in different contexts also 'perform'**," it is troubling that the Copyright Office is using the *Aereo* decision as the basis to ask sweeping questions about the scope and possible expansion of public performance rights and theories of liability. Although we welcome further discussion of the state of U.S. law on the concepts of "making available" and "communication to the public" under the WIPO treaties, any further discussion of should occur on its own, untethered from the limited holding in *Aereo*.

Further, *Aereo* certainly does not relieve rights-owners from establishing that their copyrighted work was actually transmitted or downloaded.



Question 2. *Aereo* does not suggest that volitional conduct is no longer part of plaintiffs' burden of proof under Section 106. The Court held that *Aereo*'s entire business was premised on deliberately transmitting copyrighted works it had not acquired lawfully. *Aereo* set up a large network of transmitters for this express purpose and marketed its service as enabling viewing of broadcasts. It was not passively transmitting communications of third parties. As the Court explained, "When an *Aereo* subscriber selects a program to watch, *Aereo streams* the program over the Internet to that subscriber. *Aereo* thereby 'communicate[s]' to the subscriber, by means of a 'device or process,' the work's images and sounds. And those images and sounds are contemporaneously visible and audible on the subscriber's computer [thus constituting a transmission]." *Aereo*, 134 S. Ct. at 2508 (emphasis added).

As noted above, questions of volitional conduct and direct liability were limited to the facts of this case and to senders and receivers of cable retransmissions. That *Aereo*'s business model was directly analogous to that of a cable operator was absolutely central to the Court's decision. The idea that the opinion would excuse establishing a volitional act is untenable. Indeed, the Court expressly stated that "In other cases involving different kinds of services or technology providers, 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." *Id.* at 2507.

Furthermore, it defies reason to read into the Supreme Court intended a sweeping departure from the volitional act precedent in a decision that repeatedly stresses how narrow it is. The Court went to great lengths to examine the legislative history of Congress' 1976 amendment to the Copyright Act which enacted the Transmit Clause, specifying that an entity performs publically when it "transmit[s]...a performance...to the public." *Aereo*, 134 S. Ct. at 2506; *See also* 17 U.S.C. § 101 (defining "[t]o 'transmit' a performance" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"). The Court noted that cable system activities were at the heart of the activities that Congress intended this language to cover. As such, the Court found that the Clause clearly implicates cable television systems as well as their equivalents. *Aereo*, 134 S. Ct. at 2506. To further illustrate the Congressional intent to bring cable systems and their equivalents within the ambit of the Copyright Act, the Court made reference to the complex licensing system of Section 111 of the Copyright Act under which cable systems may retransmit broadcasts. *Id.*

This lengthy discussion of congressional intent behind the Transmit Clause is essential to a correct reading of the *Aereo* decision. As noted above, the Court considered *Aereo*'s activities to share an overwhelming similarity to those of a cable system (notwithstanding the Copyright Office's subsequent provisional finding that *Aereo* is not a cable system for purposes of Section 111 Retransmission Licenses). Letter from Jacqueline C. Charlesworth, General Counsel and Associate Registrar of Copyrights, U.S. Copyright Office to Mr. Matthew Calabro, Director of FP&A and Revenue, *Aereo, Inc.*, <https://www.documentcloud.org/documents/1222903-aereo-letter.html> (July 16, 2014)). Thus, by retransmitting user-selected content without obtaining the



necessary permissions required by the Copyright Act to operate the equivalent of a cable system, Aereo's conduct violated the provisions of the Transmit Clause.

Thus, it is clear that the Court's decision must not be read as altering the requirements to establish copyright infringement, such as volitional conduct, nor as a decision broadly applicable across the increasingly diverse spectrum of digital content delivery technologies. Furthermore, the facts of *Aereo* plainly in no way support this sort of strained reading. It can in no way be said that Aereo's conduct was non-volitional. Aereo went to great lengths to establish a complex network of hardware capable of providing subscribers with the equivalent of cable television. As evidenced by Aereo's conduct and the promotion of its services, it deliberately sought to assume the role of a cable provider without obtaining the permissions required under the Copyright Act.

Question 3. Existing theories of secondary liability significantly broaden the reach of the WIPO Treaty rights in the United States. They make expansion of the underlying Section 106 rights under U.S. law unnecessary. We would urge the Copyright Office to exercise caution in maintaining the distinction and balance between theories of direct infringement and secondary liability. As Justice Scalia noted in the *Aereo* dissent:

"Internet-service providers are a prime example. When one user sends data to another, the provider's equipment facilitates the transfer automatically. Does that mean the provider is directly liable when the transmission happens to result in the 'reproduc[tion],' §106(1) of the copyrighted work? It does not. The provider's system is 'totally indifferent to the material's content,' whereas courts require 'some aspect of volition' directed at the copyright material before direct liability may be imposed." *Aereo* at 2513. He also correctly observed that "the distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act." *Id.* at 2514.

Question 5. To prove copyright infringement in the infringing filesharing context, there needs to be some actual distribution or performance of the work, not an "attempt," as the Copyright Act nowhere prohibits attempted infringement. "While the Copyright Act does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner's rights, it nonetheless requires *conduct* by a person who causes in some meaningful way an infringement." *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004). See also, 17 U.S.C. § 501.

However, this can be shown quite easily through evidence that an investigator downloaded a copy of the work. See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1218 (D. Minn. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) ("Unless a copy of the work changes hands in one of the designated ways, a 'distribution' under § 106(3) has not taken place"). Given the high level of statutory damages, this sort of proof provides ample relief to rights owners in real world lawsuits and avoids astronomical infringement awards that could violate due process.



Moreover, even in the egregious context of child pornography distribution on the Internet, to “knowingly distribute” content, an individual must consciously (of their own volition) make a file available for others, and such files must in fact be downloaded by others for one to be liable for distribution. U.S. v. Husmann, Crim. No. 13-2688, at 11 (3d Cir. Sept. 3, 2014) (citing United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012)). Furthermore, as in the copyright context, courts have repeatedly held that a law enforcement agent’s downloading of such content meets the requirements to establish a distribution (similar to an investigator’s download of infringing material from a defendant). Husmann, at 12-13.

Question 6. Given the potential threat of overbroad interpretations of the *Aereo* decision on innovation, which the Supreme Court clearly took steps to avoid its opinion, the Copyright Office should be wary of reading this decision broadly. Aereo, 134 S. Ct. at 2511. The Court was careful to limit its holding to cable-equivalent systems to address *amici* concerns that applying the Transmit Clause to *Aereo*’s conduct would impose copyright liability on other technologies, including new technologies, that Congress never intended to reach. Id. at 2510. To address these concerns, the Court stated explicitly that while Congress intended the Transmit Clause to apply broadly to cable companies and their equivalents, it did not intend to discourage or control the emergence or use of different kinds of technologies, and reiterated that the holding was limited to the application of the equivalent of cable television systems. Id. In fact, the Court stated that while the “history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that *Aereo* ‘perform [s],’ but it does not determine whether different kinds of providers in different contexts also ‘perform.’” Id.

The Copyright Office should conclude this inquiry – which was requested by a member who no longer serves in Congress -- by confirming for the third time that the U.S. Copyright Act as interpreted by a clear majority of U.S. courts fulfills the United States’ obligations under the WIPO Treaties. The Copyright Office must abide by current Supreme Court precedent. It should not attempt to wring from the *Aereo* decision meaning other than the Supreme Court’s very limited holding on the merits in the case, as described above.

Respectfully submitted,

A handwritten signature in black ink that reads "Jim Halpert".

Jim Halpert, Counsel