

Before the
Library of Congress
U.S. Copyright Office
Washington, DC

In re

Study on the Right of Making Available;
Request for Additional Comments

Docket No. 2014-2

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the notice of inquiry published by the Copyright Office (the Office) in the Federal Register at 79 Fed. Reg. 41,309 (July 15, 2014), and extended at 79 Fed. Reg. 44,871 (Aug. 1, 2014), the Computer & Communications Industry Association (CCIA) submits the following comments on selected questions from the notice regarding the subject of the making available right, and the Supreme Court's recent *Aereo* decision.¹

I. 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?

Notwithstanding the frequency with which the argument is made, relatively few judicial decisions raise questions about that country's compliance with existing copyright treaty obligations. Most treaty language, including both Berne and the WIPO Copyright Treaty, has been deliberately designed to give Member States leeway in implementing their obligations. Moreover, adherence is almost always judged by legislative enactments, rather than by court decisions interpreting those enactments.

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 600,000 workers and generate annual revenues in excess of \$465 billion. A list of CCIA members, which includes *Aereo*, is available at <http://www.ccianet.org/members>.

Further evidence that the specter of international conflicts does not loom over the Court's interpretation of a U.S. statute is evident in Justice Breyer's opinion in *Aereo*. Writing for the majority, Justice Breyer made no suggestion that U.S. treaty obligations affected the Court's interpretation of the public performance right, nor that the Court's decision affected the scope of U.S. implementation of those obligations. Rather, Justice Breyer went to great pains to describe the Court's opinion as involving a "limited holding,"² one limited to the particular service in front of it based on its understanding of the legislative history of the Transmit Clause. The Court explicitly agreed "with the Solicitor General that '[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which 'Congress has not plainly marked [the] course,' should await a case in which they are squarely presented.'"³ Finally, given that the plaintiff rights-holders prevailed before the Court, their rights could not have been restricted by that victory.

In sum, the Supreme Court's construction of the public performance right in *Aereo* does not affect the United States' international obligations under Berne, which have long been satisfied, as explained in CCIA's initial comments in this docket.⁴

II. 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*?

The volitional act doctrine is a long-held principle that one is not liable for direct infringement without proof that one has actually done the infringing act. When a computer system or service is used to reproduce or perform a work in a way that may infringe, direct

² *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2510 (2014).

³ *Id.* at 2511.

⁴ See Comments of the Computer & Communications Industry Association, *In re Study on the Right of Making Available; Comments and Public Roundtable*, Copyright Office, Apr. 4, 2014, available at http://copyright.gov/docs/making_available/comments/docket2014_2/CCIA.pdf, at 3.

liability is reserved for parties whose direct and volitional act is sufficiently proximate to the infringement. Where the direct volitional action is taken by the product or service's users, the legal responsibility of the product or service provider is analyzed under long-standing general principles of *secondary* liability.⁵ The *Cablevision* decision similarly endorsed this approach, also establishing a key precedent requiring proof of direct volitional action, holding that infringement liability can only be imposed on those who perform the allegedly infringing act.⁶ The volitional act doctrine remains valid law; multiple circuits have analyzed the issue and have so held, and *Aereo*'s "narrow holding" has not changed this.

Although the majority's logic leading to the conclusion that *Aereo* "performs" appears to have been *ad hoc* and results-driven, it was nevertheless asking the right question. That is, the Court's inquiry attempts to determine whether *Aereo* was the volitional actor: was it the entity doing the performing, or was it just providing the equipment by which the subscriber did the performing. This aspect of the opinion reaffirms that volitional action remains a requirement for finding direct infringement; had the Court concluded *Aereo* was only providing the equipment to the subscriber, it would have been at most a secondary infringer.

Assessing whether a service or end user is the volitional actor isn't always obvious. The dissent in *Aereo* suggests that if an entity selects the infringing content, it is the volitional actor.

Certainly content selection is one factor in answering the question of volitional action. Both the

⁵ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) ("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. Were this not so, the Supreme Court could not have held, as it did in *Sony*..."); *Religious Tech. Ctr. v. Netcom Online Comm. Servs. Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) ("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.").

⁶ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131-32 (2d Cir. 2008) ("In determining who actually 'makes' a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct."). See also *Fox Broadcasting Co. v. Dish Network LLC*, 747 F.3d 1060, 1066-68 (9th Cir. 2014).

majority and the dissent provide ample indications that with cloud storage of user-provided content the user would be the volitional actor (and the majority further indicated that any resulting performance would not be to the public).

III. 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 doctrines here in the United States must be considered for purposes of assessing international treaty compliance. Under the U.S. Copyright Act, a person who uploads a copy of a work to a publicly accessible folder could be secondarily liable for the infringing copies made by people who downloaded the work. Depending on the circumstances, the service provider could also be secondarily liable for these infringing copies. Thus, the combination of direct and secondary liability would more than satisfy our obligation in the digital environment to grant authors the exclusive right of authorizing the making available, or the communicating, of their works to the public.

V. 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?

In the case of violation of one of the Section 106 rights, copyright owners, like all civil litigants, bear the burden of proving with evidence that their rights have been violated. If infringement is alleged, evidence is necessary. A plaintiff may not assume distribution occurred, any more than a PRO may assume a band played in an unlicensed bar. Dispensing with the

requirement to prove infringement may create liability for cloud hosting of lawfully acquired content, or for the transmission of content to the lawful owner or possessor of that content.⁷

A recent criminal appeal in the Third Circuit confirms that evidence of distribution is not optional. In *United States v. Husmann*, a criminal defendant challenged his conviction for distribution of child pornography material (but not a conviction for *receiving or possessing* the material, which had been unambiguously established). The defendant argued that the distribution conviction was unwarranted “because the government presented no evidence that anyone accessed, viewed, or downloaded files from his shared folder”. Faced with the question of “whether the mere act of placing... materials in a shared computer folder, available to other users of a file sharing network, constitutes distribution,” the court “conclude[d] it does not.” *United States v. Husmann*, 2014 WL 4347186, slip. op. at 2-3 (3d Cir. Sept. 3, 2014). Noting that the relevant statute did not define “distribution,” (similar to the Copyright Act)⁸ the court construed it “in accordance with its ordinary meaning”, *id.* at 8-10, and concluded that the word “distribution” required “actual transfer,” *i.e.*, “[w]hen an individual consciously makes files available for others to take and those files are in fact taken.” *Id.* at 11.

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⁷ Not only would this fly in the face of the *Aereo* opinion’s apparent approval of personal storage in the cloud, it would also appear to contradict *Aereo*’s “owners or possessors” language. *Aereo*, 134 S. Ct. at 2510-11 (“Further, we have interpreted the term ‘the public’ to apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted. We have said that it does not extend to those who act as owners or possessors of the relevant product. 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. See Brief for United States as Amicus Curiae 31 (distinguishing cloud-based storage services because they ‘offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired’ (emphasis in original)).”).

⁸ Section 101 does not provide a definition for “distribution” or “distribute,” which leads to the conclusion that the term, as used in Title 17, should also be construed in accordance with its ordinary meaning. The Copyright Act does differentiate between distribution and “offering to distribute”, for example, in the definition of “publication”. See 17 U.S.C § 101.

In conclusion, CCIA again advises against modifying U.S. copyright law in any manner pertaining to the subject of “making available”; existing U.S. copyright law already satisfies our international obligations, and the Court’s *Aereo* decision has not changed this.

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