

Before the
**Library of Congress,
U.S. Copyright Office,
Washington, DC 20559**

Study on the Right of Making Available;)
Request for Additional Comments) Docket no. 2014-2

Comments of

**Public Knowledge and the
Electronic Frontier Foundation**

Public Knowledge and the Electronic Frontier Foundation submit the following in response to the questions posed in the Copyright Office’s Request for Additional Comments.

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?

The Supreme Court’s *Aereo* decision does not affect the relationship between the exclusive rights of copyright holders outlined in section 106 and the requirements of the Berne Convention and the WIPO treaties for making available and communication to the public.

It is uncontroversial that the combination of exclusive rights in section 106 meets all international obligations to generally provide for rights of communication to the public and making available. As the Office has noted in its Request for Additional Comments, there is a broad consensus among participating stakeholders that current U.S. law provides rights “equivalent to the rights of making available and communication to the public.”¹ The decision in *Aereo* does not narrow exclusive rights in any way; thus, U.S. law’s relationship to the requirements of the Berne Convention and the WIPO treaties remains unchanged.

This is not to say that a decision *for Aereo* would have had any different result. Every exclusive right granted to authors is subject to limitations and exceptions, both internationally and domestically. Those limitations and exceptions can take the familiar form of positively-stated uses of copyrighted works that do not require the authorization of a rightsholder (such as fair uses, statutory licenses, or post-exhaustion distribution), but they can also take the form of limitations within the definitions of those exclusive

¹ Study on the Right of Making Available; Request for Additional Comments, 79 Fed. Reg. 41309 (July 15, 2014).

rights. This will include not only doctrines surrounding the distinctions between unprotectable ideas and protectable expressions, but also simple limits that define the exclusive rights. For instance, the rights of performance and display are explicitly limited to those displays and performances that are “public.” Likewise, distributions are not cognizable under section 106 unless they are of “copies or phonorecords” and “to the public.” Even reproduction is not itself encompassed within the exclusive rights of section 106 unless it is reproduction “in copies or phonorecords.”²

These sorts of limitations are necessary in order to define the exclusive rights and remove harmless or independently valuable activities from copyright’s scope *ab initio*. Varying interpretations of these limitations should not jeopardize any country’s compliance status. The determination of whether a particular service is acting publicly or privately does not undermine the exclusive rights any more than a limitation or exception on educational uses or private copies would. The Berne Convention’s requirement, for instance, that signatories must grant authors the exclusive right of reproduction “in any manner or form” does not prevent any country, the United States included, from requiring that a reproduction be non-fleeting or non-transitory.

The fact that different countries will, in many cases, come to different conclusions about whether and how copyright law applies is a natural and necessary consequence, and not a flaw, of international law. Countries implementing the treaties need not incorporate their language by reference.³ As non-self executing treaties, the Berne Convention and relevant WIPO treaties sit at a remove from judicial implementation in domestic law—that remove being at least the width of the Copyright Act, sitting as it does between its implementation of treaty language and the courts’ interpretation of *its* language.⁴

Aereo’s potential effect on U.S. compliance with international instruments is further limited, if not obviated, by the explicitly limited scope of the decision’s holding. The opinion’s interpretation of the transmit clause was explicitly limited to cases involving “cable companies and their equivalents,”⁵ while pointedly declining to interpret the transmit clause with respect to “technologies not before” the Court.⁶ This unequivocal limitation on the scope of the holding further indicates that the decision should have little effect on U.S. compliance with international requirements.

² *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127-30 (2d Cir. 2008).

³ U.S. copyright law further emphasizes that traditional distinction between the language of the Berne Convention, which outlines legal objectives, and the statutory language of Title 17 that implements them 17 U.S.C. § 104(c).

⁴ See *Medellin v. Texas*, 522 U.S. 491 (2008); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster v. Neilson*, 27 U.S. 253, 314 (1829). Even if there were an active conflict between the Copyright Act and any relevant treaty, the language of the Act would prevail. See Brief for Law Professors and Scholars as Amici Curiae Supporting Respondents, *Am. Broad. Co. Inc., v. Aereo*, 134 S. Ct. 2498 (April 2, 2014) (demonstrating that the *Charming Betsy* canon is inapplicable to the Copyright Act, in which Congress has expressed its intent that international obligations do not control U.S. law).

⁵ *Am. Broad. Co., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2510 (2014).

⁶ *Aereo*, 134 S. Ct. at 2511.

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*?

A. *The Aereo Decision Has Little Effect on the Volitional Conduct Requirement Outside of the Context of Cable Systems.*

“Interactive transmissions of content over the Internet” encompasses an extraordinary range of activities, including those by which these comments are being submitted to the Copyright Office and those by which the vast majority of copies will be conveyed from the Office to the public. However, as noted above, *Aereo*’s reach is not nearly so broad.

Not only was *Aereo*’s overall holding based upon the unique placement of the service vis-à-vis a perceived exchange between the Court and Congress; the findings on volition are also explicitly tied to inferences about Congressional intent specific to cable systems. In particular, the Court takes its prior findings from *Fortnightly* and *Teleprompter* and then assumes, since Congress intended to overturn the result of those cases, that Congress intended (and properly acted to ensure) that all sufficiently similar systems reach the same result—regardless of whether the text of the Copyright Act actually does so.

In *Fortnightly*, the Court drew a sharp distinction: “Broadcasters perform. Viewers do not perform.”⁷ By essentially classifying the CATV systems at issue in *Fortnightly* on the viewer side of that dichotomy, the Court thus found that they did not infringe the right to publicly perform for a profit. The 1976 Act superseded this ruling by defining public performance as it exists in title 17 today, including the transmit clause. After quoting the language of the statute, the Court proceeds by stating that “[c]able system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended this language to cover.” Citing language from a House report on the proposed Act, the Court notes a Congressional intent that a broadcaster sending a signal and a viewer at home turning on a TV would *both* be making performances of the copyrighted work.⁸

Beyond this, however, the Court did not specify what characteristics might exclude an actor from being considered the “performer” of a work, simply saying that making a program’s images visible and its sounds audible is sufficient to “perform,” but not delineating what actions would be sufficient to be considered “showing” under

⁷ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398 (1968).

⁸ This, however, also does not provide additional guidance as to whether either activity falls within the scope of section 106(4), however, since clearly a viewer at home turning on a “receiving set” is, in nearly all instances, making a *private* performance. The Court’s later discussion of the distinction between public and private, like its discussion of who the performer might be, engages in the same direct comparison of *Aereo* to a cable company, without specifying what characteristics might serve to differentiate any of the other services it says its holding here will not affect.

section 101.⁹ This does not provide a guide as to what sort of causal relationship is necessary to link an actor with the performance. Supplying electrical power to a business that contains televisions or computers certainly “makes audible” a program’s sounds and makes visible its images. So would providing third-party hosting to a customer, or rooftop real estate on which a receiving antenna might be raised. Certainly Cablevision, in the *Cartoon Network* case, was making television programs visible and audible when it implemented user commands to play back remotely-stored recorded programs. Yet it was found not to be making a performance by the Second Circuit, and the Supreme Court deliberately avoided contradicting that holding in its *Aereo* opinion:

In other cases involving different kinds of service 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.¹⁰

Between this disclaimer and the more general insistence later in the opinion that the holding does not affect any technologies that are not identical to *Aereo*, the effect of the decision upon other services, if any, is highly limited. Certainly, content that would not have been considered a cable system by the Court in *Fortnightly* or Congress in 1976 is not bound by *Aereo*. If anything, given the difference between the more interactive nature of the service in *Cartoon Network* and the less selective nature of the service at issue in *Aereo*, it would seem that interactive services are largely outside the scope of the *Aereo* holding.

B. The Volitional Conduct Requirement Restrains Potentially Limitless Liability.

Without the volitional conduct requirement, liability under the public performance right (or, for that matter, nearly any other exclusive right) could be unworkably broad. Take, for example, the Betamax videocassette recorder at issue in *Sony*. There, a theory of liability that would have styled the defendant as a direct infringer would necessarily implicate numerous blameless parties in any case of infringement. Sony’s Betamax made copyrighted audio and video perceptible, which means that, under a broad interpretation of the *Aereo* rule, Sony “performed” the work when a user pressed play on the device. Such a broad rule would find a whole chain of manufacturers and service providers exposed to liability if a single end user streamed a film hosted on Netflix over her residential account to her laptop and displayed it on a projector in her front yard, charging admission for attendees. Netflix, Netflix’s internet access provider, the infringing user’s internet access provider, and the manufacturers of the user’s computer and projectors would all have had a hand in what was ultimately an unauthorized public performance. Naturally, the law, as reflected in *Cartoon Network*, *Costar v. LoopNet*, *Fox v. Dish*, and

⁹ *Aereo*, 134 S. Ct. at 2505-06. The court alludes to a theoretical distinction in a user’s ownership of a copy—though the significance of that allusion is unclear, especially since in *Aereo* there were no findings regarding the user’s ownership of any copies or licenses.

¹⁰ *Id.* at 2509.

elsewhere does not allow liability to accrue to actors who do not engage in any affirmative conduct causing the particular infringement.¹¹

The concept of volitional conduct is not merely a creature of domestic law's implementation of international obligations, either. It is contained within the WIPO Copyright Treaty as well. The Agreed Statement concerning the right of communication to the public states that merely providing facilities for making or enabling a communication does not amount to making that communication.¹² That agreed-upon limitation to the treaty-defined right is thus represented in substantial part by the volition requirement. As implemented in U.S. law, though, this general principle applies regardless of the exclusive right at issue, and remains and should remain good law.

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 theories of copyright liability do not directly impact the relationship between the section 106 rights and the requirements of protecting the rights of making available and communication to the public. The section 106 rights of reproduction, distribution, public display, and public performance fulfill these requirements regardless of any doctrines of secondary liability.

To the extent that the Request for Additional Comments asks about the relationship between secondary liability and those aspects of section 106 that implement treaty obligations, their existing doctrines provide a number of safeguards that prevent overbroad application of liability.

The volitional requirement of copyright infringement is necessarily linked conceptually with secondary liability doctrines. After all, if the purpose of a volitional act requirement is to prevent the over-application of liability, doctrines that can hold parties liable for the infringements of others must be subject to even more stringent limiting factors.

For example, providing a device or service cannot create contributory infringement liability where that device or service is capable of significant noninfringing uses.¹³ Nor can a defendant be found liable for inducing infringement absent a clearly expressed intent to foster and promote the use of a device or service for infringement.¹⁴

¹¹ *Cartoon Network*, 536 F.3d at 130-31; *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1066-68 (9th Cir. 2014).

¹² WIPO Copyright Treaty, April 12, 1997, agreed statements concerning Article 8, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166.

¹³ *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

¹⁴ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005).

These limitations allow secondary liability to operate within defined bounds. To the extent that secondary liability already extends beyond the bounds required by any international agreement, these boundaries pose no conflict with them.

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?

Section 101 defines both “copies” and “phonorecords” as “material objects.” The exclusive rights of distribution and reproduction in section 106 both require the use of “copies or phonorecords” for a use to be within their scope. Logically, this means that an unauthorized reproduction of a copyrighted work is not infringing if that reproduction is not embodied in a material copy or phonorecord. Likewise, since the distribution right requires distribution of copies or phonorecords, no infringing distribution can occur without the transfer of possession of a material object.

This is the plain and unambiguous language of the statute, and these limitations on the section 106 rights are more than historical accident. We can see the usefulness of their operation in ensuring that merely transitory reproductions that are not fixed in material objects do not implicate the reproduction right,¹⁵ and that digital displays or performances of copies or phonorecords are not double counted as distributions as well.¹⁶

The requirement that a transfer of material objects take place in order for an act to be deemed a distribution is further borne out by the results of the *ReDigi* case: if online transfers of phonorecords were distributions and not reproductions, ReDigi, a secondary reseller of digital music files, should have (provided sufficient attention was paid to ensure that no reproduction resulted in a material object containing the work) been able to avail itself of section 109’s limitation on the right of distribution.¹⁷ As it is, the same definition that makes litigation slightly more burdensome in the digital environment makes first sale nearly impossible in that same realm.

The limitation of the distribution right to copies and phonorecords has raised concern by rightsholders that it may require more effort in litigation against online infringers, since demonstrating that an infringing reproduction was made requires more investigation than merely demonstrating that a digital file was transferred (or even merely offered for transfer). However, any desire, for policy purposes, to newly accommodate

¹⁵ *Cartoon Network*, 536 F.3d at 127.

¹⁶ *See, e.g., United States v. Am. Soc’y of Composers*, 627 F.3d 64, 73 (2d Cir. 2010) (finding that a downloaded digital file was not simultaneously a public performance). It is worth noting that the court in *ASCAP* primarily discussed the distinction between the downloads being reproductions and public performances; the issue of distribution was not relevant to the discussion in the opinion, since the reproduction right adequately (and most accurately) accounted for the rights implicated in a download. *ASCAP*, 627 F.3d at 75 n. 11.

¹⁷ *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 649 (S.D.N.Y. 2013) (“It is simply impossible that the same ‘material object’ can be transferred over the Internet. Thus, logically, . . . the Internet transfer of a file results in a material object being created elsewhere at its finish.”).

non-material transfers of ownership or a right of granting of access to works would require an alteration to the law.

If that course is taken, it would be a significant and substantial task—essentially redrawing the boundaries of the section 106 rights. Doing so requires a holistic view of their scope and interaction, and would require engaging in issues that reach far beyond the narrow discussion of distribution and making available, and certainly beyond the even narrower lens of the factual situations of online filesharing and a single case about a would-be cable system.

For better or worse, section 106, and all that flows from it, was built upon an inherent understanding tied to material copies. Altering that bedrock principle requires questioning which exclusive rights should be granted at all.

For instance, a hypothetical Copyright Act based around the concept of access and not distribution would have little need for an exclusive right of reproduction. Any user can make a multitude of reproductions of a copyrighted work; so long as no other person can gain access to any of those new copies (i.e., so long as they are not made available to another) no economic or moral harm is visited upon the copyright holder. Structuring rights around access, rather than copy creation and distribution, should obviate the reproduction right entirely. The same would be true for the preparation of derivative works. Absent any access to them, they would be legally and economically insignificant.

A purely access-based right could, however, also harm several objectives enshrined within the current law. Creating an exclusive right to grant access would undermine the benefits of the first sale doctrine—in the freedoms¹⁸ it accords to the lawful owners of the physical property that are copies and phonorecords, as well as the informational and economic efficiencies in being able to transfer those objects without requiring permission of the copyright holder. A right of access exercisable against the lawful owner of a copy or phonorecord would therefore have to have limitations and exceptions in place to preserve these beneficial effects.

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?

In so-called filesharing cases, many courts have held that a plaintiff must present evidence that someone downloaded the shared file from the defendant in order to establish liability for an infringing distribution.¹⁹ Although these cases contradict the

¹⁸ In preserving the traditional chattel rights of a copy owner over a copy, the first sale doctrine protects that owner's privacy, rights of alienability, and ability to innovate, in addition to promoting preservation and access to works and lowering consumer costs by creating a secondary market for copies. *See, e.g.,* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. 889, 894-901 (2011).

¹⁹ *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *National Car Rental Sys., Inc. v. Computer Assoc. Int'l*, 991 F.2d 426, 434 (8th Cir. 1993); *Atlantic v. Howell*, 554 F.Supp.2d 976 (D. Ariz. 2008); *London-Sire Records v. Does*, 542 F.Supp.2d 153 (D. Mass. 2008).

plain words of the statute by finding distribution without a transfer of any material object, the requirement to show downloading mitigates some overbreadth problems. By removing from liability mere “offers” or “attempts” at distribution, and many other circumstances where distribution was not contemplated or intended, the evidentiary requirement helps limit distribution liability to conduct causing real harm, and it curtails opportunistic or abusive litigation.

None of the section 106 rights, including the distribution right, include any notion of “offers” or “attempts.” The distribution right encompasses only the actual distribution of certain things (“copies or phonorecords”), to certain people (“the public”), in certain ways (“by sale or other transfer of ownership, or by rental, lease, or lending”). When Congress means to prohibit offers to act, as well as the acts themselves, it has done so expressly.²⁰ The history of the Patent Act is instructive. As originally enacted, the Act allowed patent owners to exclude only someone who “makes, uses, or sells” a patented invention. However, effective January 1, 1996, Congress added “offer[s] to sell” to the list of a patentee’s rights of exclusion.²¹ Congress has amended the Copyright Act numerous times since 1996, including many amendments intended to address challenges presented by the Internet, but it has never added “offers to distribute” or “attempts to distribute” to Section 106. Since merely placing a copyrighted work in a publicly available shared folder is, at most, an offer or attempt to have others copy it, it cannot be a distribution under Section 106.

A rule that merely placing a file in a shared folder amounts to distribution could create liability for commonplace and harmless activities such as the use of common file storage in a business setting, or personal use of Internet-based “cloud storage” systems that may inadvertently be accessible by the public. Because direct copyright infringement liability does not require any showing of intent, inadvertent or unintended use of shared file storage would create liability if no downloading need be shown. For example, simply changing the permission setting on a folder within a corporate storage system, causing its contents to be accessible by multiple users, could lead to liability if the folder contained a copyrighted article or video. The potential for such liability would likely chill investment in and development of shared data storage systems.

Dispensing with the requirement to show downloading would also promote litigation abuse. Over the past several years, attorneys for adult film distributors, independent film studios, and photo archives have begun using litigation, and threats of litigation, as a profit-making enterprise that far outstrips the commercial value of the works at issue. These suits have been characterized by judges as “essentially an extortion

²⁰ See, e.g., 17 U.S.C. § 901(a)(4) (“to distribute [semiconductor mask works] means to sell, lease, bail, or otherwise transfer, or to offer to sell, lease, bail or otherwise transfer”); 35 U.S.C. § 271(a) (exclusive right of a patent owner reaches anyone who “without authority makes, uses, offers to sell, or sells any patented invention . . .”); 17 U.S.C. § 1201(a)(2), (b) (prohibiting trafficking in circumvention tools and services, including the act of “offer[ing] to the public”).

²¹ *3D Sys., Inc. v. Aarotech Laboratories, Inc.*, 160 F.3d 1373 (Fed. Cir. 1998).

scheme.”²² The profitability of these techniques depends on the ability to identify large numbers of Internet users through automated scanning of traffic, joining many of them into mass lawsuits, and attempting to extract monetary settlements from as many as possible at minimum expense.²³ Given the scale of these unscrupulous businesses, the high-pressure tactics they use, and the defendants’ relative lack of legal sophistication, misidentification of actual infringers is likely and rarely challenged.

When challenges have been raised, courts have begun to respond by *increasing* evidentiary requirements for these suits. For example, the Court of Appeals for the District of Columbia Circuit held that joinder of defendants in filesharing cases involving the BitTorrent protocol required evidence that the defendants had used BitTorrent simultaneously.²⁴

Removing the requirement to show downloading to prove distribution would be a step in the wrong direction, increasing the volume and likelihood of these abusive lawsuits and increasing misidentification of infringers. Investigators acting on behalf of these plaintiffs rarely disclose their methods, and are almost never compelled to do so in a court. Moreover, some of the investigators may themselves have a profit motive to identify as many putative infringers as possible at the expense of accuracy.²⁵ Requiring evidence of downloading gives wrongfully accused persons a key means of defending against a filesharing lawsuit, and encourages more careful and accurate investigation before filing suit.

6. Additional comments on the nature of copies, works, performances, and files

The background section of the Request for Additional Comments mentions discussion of whether a digital file is or is not a material object for the purposes of the statutory definitions of “copies” and “phonorecords.” This particular phrasing might be read to suggest that digital files either are categorically material objects or are not. This is a false dichotomy, however.

A digital file is an abstract representation of information, not a physical, material object. While it can be stored in material objects, like RAM, hard drives, or CDs, it need not be tied to those specific objects. If I made an exact copy of a document on my hard drive and placed it upon a memory stick, we would, in the normal usage of the term, say that both the hard drive and the memory stick contained the same “file.” Nevertheless, there would be two copies of that one file: one embodied in the material of the magnetic platter on my hard drive, and the other in the semiconductors of the memory stick.

²² *Malibu Media v. Does 1-10*, No. 12-cv-3623, 2012 WL 5382304, at *4 (C.D. Cal. June 27, 2012); see also *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014) (“Sometimes individuals seek to manipulate judicial procedures to serve their own improper ends.”).

²³ See generally Matthew Sag, “Copyright Trolling: An Empirical Study,” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404950.

²⁴ *AF Holdings*, 752 F.3d at 997-99.

²⁵ <http://fightcopyrighttrolls.com/2014/06/01/defense-guardley-is-steering-us-copyright-trolling-operations/>.

However, that does not mean that a file can be equated to a work. For instance, the same work can be contained in different files: if a single work—say, a specific edition of *Moby Dick*—was encoded once in .txt format and again in .epub format, we would refer to each of those informational structures as a separate file, even though they contained the same work.

Ordinary use of the term may differ from occasion to occasion; some may refer to two bit-for-bit copies of a particular work the same file; others may not. This lack of precision is not ordinarily a problem. However, it can become so if policymakers attempt to map this imprecise term onto the precisely defined terms used in the Act.

A similar problem surfaces in discussions of “performances,” and, indeed does so in the *Aereo* opinion’s attempt to construe the transmit clause. The Court seems to consider a public performance the making available, to the public, transmissions of a *work*:

So whether Aereo transmits from the same or separate copies, it performs the same *work*; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it transmits *a performance* to all of them.²⁶

However, section 101 does not require this result. In order for a singular performance to be transmitted “to the public,” it must be transmitted to more than one person. The existence of multiple transmissions to different people, even of a single work, does not mean that a single performance has gone to multiple users. For instance, a video rental store that provided a video player along with video rentals would, with each rental, be making a performance available to members of the public, by a particular means or process, at different times. Yet this activity also falls outside of the transmit clause, since each particular viewing by subsequent renters is a *separate, private* performance, though the work remains the same.²⁷

If two people separately recorded a television program on Cablevision’s RS-DVR and each played their copy back—one later that night, one the next day—Cablevision would be making transmissions of a single work to two different people, each a member of the public. Yet this does not rise to the level of a public performance because the transmissions originated from multiple, separate performances of the work. In this case, the performances would each emanate from a separate copy, with each copy capable of being performed only to one household. Thus, any performance emanating from any one of those copies would necessarily be a private one.

By contrast, a video-on-demand service like Netflix makes a public performance of a work by transmitting video from a finite number of copies to a larger number of

²⁶ *Aereo*, 134 S. Ct. at 2509 (emphasis added).

²⁷ The fact that this rental simultaneously constitutes a distribution of the copy of the work does not eliminate the fact of the private performance. See *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278 (2d Cir. 1989).

households. In this case, the performances are offered to the public—the access to the copy is available to any subscriber, not merely the one who made, purchased, or was given or licensed the particular recording. Even if one particular copy may only be accessed by one user at a time, the fact that it will later, at a different time, be transmitted to another user means that that single copy will be exposed—and thus performed—to different members of the public.

A better interpretation of public performance would have it be the making available to the public a transmission of a *copy* of a work, not merely transmissions of a given work. Aereo's compartmentalization of its antennas, signals, and copies therefore should have resulted in a finding that it was not making a public performance. However, an insistence that a performance correspond to a work prevented that finding.

Granted, this particular analysis could make theoretically possible a somewhat absurd video-on-demand business that purchased individual copies of movies for every single possible subscriber and transmitted those movies to their private households or devices. Given that this would require legally purchasing untold copies of the works or licensing the rights to make sufficient copies for this model, it would—just as a traditional video rental service operating under section 109, result in no harm to copyright holders.²⁸

In this discussion, we can see the concept of making available and the concept of copy or phonorecord ownership relying upon each other within the scope of public performance. Attempting to expand or contract either of those concepts could result in far-reaching, unintended consequences for the scope of the exclusive rights.

²⁸ That at least one company did, in fact, attempt something similar to this absurdity indicates a continuing demand for legal access to copyrighted works online. *See Warner Bros. Entm't, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011).

Conclusion

The *Aereo* decision, while raising a number of pertinent questions about the intersection between copyright law and national video distribution policy, has limited impact on the existing contours of the public performance and distribution rights in all cases except for those involving cable systems or their narrow equivalents. It has even less effect upon the relationship between the section 106 rights and treaty language about the rights of making available and communication to the public. To the extent that parties wish to create an exclusive right based merely upon the granting of access in any form to a copyrighted work, this would entail a wholesale refiguring of the exclusive rights, potentially altering, consolidating, and even eliminating some of the section 106 rights as they exist today.

Respectfully submitted,
Public Knowledge
Electronic Frontier Foundation

By

/s/

Sherwin Siy
Public Knowledge
1818 N St. NW
Suite 410
Washington, DC 20036
(202) 861-0020

Mitch Stoltz
Electronic Frontier Foundation
815 Eddy St.
San Francisco, CA 94109
(415) 436-9333

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