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**Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with
International Norms – Part I (making available right)**

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Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms – Part I (making available right)

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Abstract

This Letter from the U.S. addresses U.S. compliance with its international obligation to implement the “making available right” set out in art. 8 of the 1996 WIPO Copyright Treaty. The “umbrella solution” which enabled member states to protect the “making available to the public of [authors’] works in such a way that members of the public may access these works from a place and at a time individually chosen by them” through a combination of extant exclusive rights, notably the distribution right and the public performance right, has not in the U.S. afforded secure coverage of the full scope of the right. Lower courts have divided over the application of the distribution right to offers to make works available for download. The Second Circuit’s interpretation of the public performance right in ABC v Aereo jeopardized application of that right to on-demand streaming. The Supreme Court’s reversal in Aereo has narrowed the gap between domestic law and international norms, but leaves many questions.

In assessing the impact of the Supreme Court’s Aereo opinion on the state of U.S. compliance with the WIPO Treaties’ “making available” right, I focus on four issues:

- a. coverage of a-synchronous transmissions;*
- b. identification of “the public” and “members of the public” consistently with their meaning in the WIPO Treaties;*
- c. interpretation of the public performance right in a way that does not limit the right to actual transmissions, but instead encompasses offers to transmit performances of works.*
- d. the relevance of a “volition” prerequisite to application of the public performance and reproduction rights, and the consistency of any such prerequisite with international norms.*

I conclude that the Supreme Court’s Aereo opinion alleviates some concerns about the conformity of U.S. copyright law with international norms, but the limited

^{*} Thanks to Dr. Rebecca Giblin, June Besek, Jeffrey Cunard, and for research assistance to Taylor Jones, Columbia Law School class of 2014, and Nell Ethridge, Columbia Law School class of 2015.

scope of the decision allows other shortcomings to persist. Thus, the Supreme Court has reaffirmed the reach of the public performance right with respect to:

near-real time individualized digital retransmissions to members of the public of broadcast content (akin to cable retransmissions);

a-synchronous transmissions to members of the public when the primary value of the service to its customers is to transmit performances of content the customers did not themselves store with the service, or regarding which the customers did not enjoy some possessory relationship to a copy or right to access

Although the Court did not expressly state that the public performance right encompassed offers to transmit performances as well as actual performances, the logic of the decision points toward the broader (and internationally harmonious) interpretation.

The majority did not apply a specific “volition” predicate to determine whether a retransmission service “performs” the content it communicates, but it acknowledged the possibility that in some instances the end-user might be deemed the “performer.”

The Court has not directly ruled on the following issues:

Whether remote storage services are publicly performing content stored at the direction of their customers (but the opinion strongly suggests those services are not publicly performing);

Whether “volition” is a predicate to determine whether a remote storage service “makes” the consumer-requested copies created and retained on its servers;

Perhaps most importantly, because Aereo concerned only the public performance right, the Court did not have occasion to address whether the distribution right encompasses offers to distribute digital copies, or is limited to actual distributions of digital copies. As a result, the greatest inconsistency between U.S. compliance and its international obligation to implement the “making available” right remains unremediated.

In the interval following the prior *Letter from the U.S.*, published in the July and October 2008 issues of the RIDA,¹ calls for major reform of the 1976 Copyright Act have grown louder and more detailed,² but so far no significant copyright legislation has emerged. This *Letter from the U.S.* therefore will address only caselaw developments since late 2008. Moreover, I will

¹ Recent Developments in US Copyright – Part I, Legislative Developments: Orphan Works, 217 *Revue Internationale du Droit d’Auteur* 99 (July 2008); Recent Developments in US Copyright – Part II, Caselaw: Exclusive Rights on the Ebb?, 218 *Revue Internationale du Droit d’Auteur* 167 (October 2008).

² See, e.g., Maria A. Pallante, *The Next Great Copyright Act*, 36 *Colum. J. Law & Arts* 3 (2013); Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 *Berkeley Tech. L.J.* 1175 (2010).

confine the discussion to the theme of U.S. compliance with its international obligations under the Berne Convention, the WIPO Internet Treaties (WCT, WPPT) and the TRIPs Accord. Two issues dominate that inquiry: first, whether the U.S.’ interpretation of the statutory scope of the distribution and public performance rights properly implements the WCT making available right, and second, whether the substantial expansion of the fair use exception exceeds the leeway that the Berne Convention, art. 9(2), WCT art. 10, and TRIPs art. 13 grant to member states to provide for exceptions and limitations to copyright. The current installment of this *Letter from the U.S.* will cover the first issue; the next installment, in a future number of the RIDA, will address the second.

I. U.S. implementation of the “making available” right

The “making available” right, as articulated in the WIPO Copyright Treaty art. 8 (and the WPPT arts. 10 and 14), applies to the offering to the public of on-demand access to a work in the form of a stream or of a download. The WCT text is clear that the right covers the offer of individualized access to works, not merely their actual communication, because the text specifies the “making available to the public of [authors’] works in such a way that members of the public *may access* these works *from a place and at a time individually chosen by them*” (emphasis supplied).³ Because the text does not distinguish between access to digital copies and access to performances, compliance with the WCT requires a member state to cover both kinds of access (streaming and downloading), and to cover not only actual transmissions of streams and downloads, but also the offering to communicate the work as a stream or a download, to members of the public separated both in space and in time.

³ See, e.g., Sam Ricketson & Jane Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, *supra*, para. 12.58: “simply offering the work on an undiscriminating basis, so that any member of the general public may access the work, should come within the scope of the right. . . . It is not necessary that the offer be accepted: ‘making available’ embraces incipient as well as effected communications.”; WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO (2003) at CT-86 (“It had to be accepted and clarified that this concept [making available] extends not only to the acts that are carried out by the ‘communications’ themselves (that is, to the acts as a result of which a work or object of related rights is, in fact, made available to the public and the members of the public do not have to do more than, for example, switch on equipment necessary for its reception), but also to the acts which only consist of making the work accessible to the public, and in the case of which the members of the public still have to cause the system to make it actually available to them.”)

The European Union has adopted the WCT art. 8 making available right verbatim, in the 2001 Information Society Directive, art. 3(1). The Court of Justice of the European Union, in *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB (Case C-466/12)* (Feb. 13, 2014), recently confirmed that the “making available” right covers potential as well as completed access to works of authorship. See para. 19: “a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity” and para. 20: “It follows that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’,” Accord, S. Von Lewinski & M. M. Walter, “Information Society Directive” in M.M. Walter & S. Von Lewinski, *European Copyright Law*, 983, par. 11.3.30-31 (Oxford University Press, 2010).

The “umbrella solution” adopted at the 1996 Diplomatic Conference that yielded the WCT and WPPT allows member states to implement the making available right through a variety of means, including, for example, an all-embracing “making available” right, or a combination of a public performance right covering streams and a digital distribution right covering downloads.⁴ Whatever the means chosen, however, the member state must ensure that its law covers the offering to the public of on-demand access to a work both as a stream and as a download.

The U.S. implementation of the making available right reveals the potential shortcomings of relying on multiple exclusive rights collectively to cover the full range of acts comprised within the making available right: some features of the right may end up left out. The U.S. has assigned the offering and communication of digital streams to the public performance right, and downloads to the reproduction and distribution rights. Implementation of the making available right through these pre-existing exclusive rights required no amendments to the Copyright Act, U.S. authorities assured, because the combination of rights sufficed.⁵ Full coverage of the making available right through a combination of rights has nonetheless proved elusive in the U.S.

At the time of ratification, however, U.S. authorities did not anticipate the difficulties that have subsequently ensued. As a study published in 2013 by the U.S. Department of Commerce (“Green Paper”) explains,

When the United States implemented the WIPO Internet Treaties in the DMCA, it did not include an explicit “making available” right, as both Congress and the Administration concluded that the relevant acts were encompassed within the existing scope of exclusive rights. In addition to the existing reproduction and public performance rights, the distribution right, adopted in the 1976 Copyright Act, applied to digital transmissions as well as the distribution of physical copies. And the legislative history indicates that this right was intended to incorporate the prior law’s “publication” right, which included the mere offering of copies to the public.

Since that time, a number of U.S. courts have addressed the “making available” right, primarily in the context of individuals uploading a work to a shared folder on a computer connected to a peer-to-peer network. A number of courts have concluded that the distribution right incorporates the concept of “making available” reflected in the WIPO Treaties. Some others have disagreed. All of these cases, however, have focused solely

⁴ The *Records* of the 1996 diplomatic conference indicate that member States may comply with the making available right either through local communication rights, or through a combination of rights, including the right to distribute copies, as the United States urged during the drafting period. (1996 Records at 675, para 301.) For extensive discussion of the “umbrella solution,” by the coiner of the term, see; Mihaly Ficsor, *The Law of Copyright and the Internet* (Oxford 2002) at 204-09, 496-509.

⁵ H.R. REP. NO. 105-551, pt. 1, at 9 (1998) (“The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.”)

on the scope of the distribution right and predate the recent academic scholarship . . . reviewing previously unanalyzed legislative history.⁶

A. “Making available” and the distribution right

The Green Paper’s hopeful coda (“All of these cases, however, have focused solely on the scope of the distribution right and predate the recent academic scholarship described above, reviewing previously unanalyzed legislative history”) signals the problem: U.S. courts have inconsistently interpreted the scope of the distribution right. The Green Paper’s hint to courts to heed academic commentators’ exploration of legislative history reveals the U.S. Administration’s fear that its uncertain caselaw may be putting the U.S. out of step with international norms.

The U.S. encounters the danger of insufficient international compliance even though it has long been recognized in the U.S., as a matter of statute and caselaw, that the exclusive right to distribute the work in copies or phonorecords (17 U.S.C. sec. 106(3)) applies to digital files as well as to material copies.⁷ But, as the “Green Paper” acknowledges, and as discussed in the October 2008 *Letter from the U.S.*,⁸ the authorities are inconsistent as to whether the distribution right extends both to offers as well as to actual deliveries of digital copies. For the moment, only federal district courts have ruled on the question, but their rulings have ranged from simply asserting that the distribution right includes a making available right,⁹ to assimilating making available to “publication” (whose statutory definition encompasses offers to distribute),¹⁰ to requiring actual downloads.¹¹ The last group of decisions thus leaves a gap in U.S. coverage of the full range of the making available right.

B. “Making available” and the public performance right

⁶ U.S. Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy (July 2013) [“Green Paper”] pp. 14-16 (footnotes omitted). The recent scholarship referred to includes, Peter Menell, In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. COPYRIGHT SOC’Y USA 1 (2011).

⁷ See, e.g., in addition to the sources cited in the “Green Paper,” 17 U.S.C. sec 115(a) (“digital phonorecord delivery”); 115(c)(3)(A) (“compulsory licensee to *distribute* or authorize the distribution of a phonorecord of a nondramatic musical work *by means of a digital transmission* which constitutes a digital phonorecord delivery” – emphasis supplied).

⁸ Jane C. Ginsburg, *Recent Developments in US Copyright – Part II, Caselaw: Exclusive Rights on the Ebb?*, 218 Revue Internationale du Droit d’Auteur 167 (October 2008).

⁹ See, e.g., *A&M Records v Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (“*Napster*”); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 191 (D. Me. 2006); *Motown Records Co. v. DiPietro*, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); *UMG Recordings, Inc. v. Alburger*, Civil No. 07-3705, 2009 WL 3152153, at *3 (E.D. Pa. Sept. 29, 2009).

¹⁰ *Elektra Entm’t Group, Inc. v. Barker*, 551 F.Supp. 2d 234 (2008).

¹¹ See *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1210, 1225 (D. Minn. 2008); *London-Sire Records, Inc. v. Doe I*, 542 F.Supp.2d 153, 169 (D. Mass. 2008) (but presuming that an actual download occurred); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981-84 (D. Ariz. 2008).

Further doubt regarding the U.S.’ compliance with its international obligations arose from some federal courts,’ particularly the Second Circuit’s, removal of certain on-demand transmissions from the scope of the public performance right. The 1976 Act’s definition of “to perform publicly” in fact was drafted in anticipation of consumer-initiated transmissions of performances. The text specifies that one performs “publicly”:

by transmitting or otherwise communicating 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.¹²

This provision, known as the ‘transmit clause’, generally applies to electronic transmissions. To “transmit” a performance or display of the work is defined as meaning “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” “Devices” and “processes” expressly include those that were developed after the law came into effect.¹³

1. The Second Circuit’s threat to U.S. compliance with the WIPO Treaties’ “making available” right

In 2008, in *Cartoon Network v CSC Holdings (“Cablevision”)*,¹⁴ discussed in the October 2008 *Letter from the US*,¹⁵ the Second Circuit nonetheless ruled that a remote video recording service’s on-demand transmissions made from “personalized” copies initially delivered by the service to its customers’ individualized cloud storage boxes did not violate the public performance right on the ground that the subsequent one-to-one transmissions were not “to the public” because they derived from the customer’s own copy and only that customer was “capable of receiving” a transmission from that copy. The court also held that the service’s storage of the personal source copies did not violate the reproduction right, on the ground that the customers, not the service, “made” the copies residing on the service’s computers, because, given the automated nature of the service, only the customers exercised specific “volition” as to what content to copy. In the October 2008 *Letter*, I suggested that the Second Circuit’s interpretations of the reproduction and public performance rights were likely to spawn new copyright-avoiding

¹² 17 U.S.C. § 101.

¹³ See, e.g., H.R. Rep. No. 94-1476, 94th Cong. 2d sess. at 64 (1976): “The definition of ‘transmit’ . . . is broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’ and *if the transmission reaches the public in [any] form*, the case comes within the scope of clauses (4) or (5) of section 106.”; H.R. Rep. No. 90-83, 90th Cong., 1st sess. at 29 (1967): the legislation anticipates “the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.”

¹⁴ *Cartoon Network v. CSC Holdings, Inc.* 536 F. 3d 121 (2d Cir. 2008).

¹⁵ Jane C. Ginsburg, *Recent Developments in US Copyright – Part II, Caselaw: Exclusive Rights on the Ebb?*, 218 *Revue Internationale du Droit d’Auteur* 167 (October 2008).

business models to exploit transmissions of copyrighted works.¹⁶ Were these new modes of offering transmissions of copyrighted works to the public to remain copyright-free, U.S. compliance with its obligation to implement the WIPO Treaties’ “making available” right would be endangered. The subsequent *Aereo* controversy, ultimately decided by the Supreme Court in June 2014,¹⁷ proved the prediction true.

In 2012, a New York City company called Aereo began a service that allowed subscribers, for a monthly fee, to access live (or recorded) broadcast television via a Web browser from the subscriber’s Internet-connected computer or mobile device or home video streaming device. The service worked by allowing a subscriber to connect to a very small antenna, located at Aereo’s data center, that received broadcast television signals. According to Aereo’s website, “When you log in, you are assigned a miniaturized, private, remote antenna. Once you’ve connected to your antenna, you can use the Aereo platform to access all major broadcast networks live in HD.”¹⁸ Aereo also provided subscribers with a remote DVR service that allowed the subscriber to record selected programming: when a subscriber chose to record a show, his assigned antenna housed at the Aereo data center would be directed to tune to the channel broadcasting the program and route the digital broadcast stream to his remote DVR. The subscriber could then later choose to view the remotely recorded program on any Aereo-supported device.

Television broadcasters sued Aereo alleging copyright infringement. The District Court ruled that *Cablevision* controlled, and that Aereo had therefore not “publicly performed” the television programs.¹⁹ A divided Second Circuit affirmed. The majority reiterated its view that “the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted.”²⁰ It also held that there were “two essential facts” which led to the holding that *Cablevision*’s transmissions were not public performances: that its RS-DVR allowed each subscriber to create unique copies of each program, and that the transmission of the recording to a subscriber was from that unique copy.²¹ These features meant that “the potential audience of every RS-DVR transmission was only a single *Cablevision* subscriber, namely the subscriber who created the copy,” and that limitation meant that the transmission was not “to the public”.²² Aereo’s system had those same two features.²³

The dissenting judge charged that Aereo’s technical architecture was “a sham”:

¹⁶ *Id.*

¹⁷ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

¹⁸ AEREO, <https://aereo.com> (last visited May 27, 2014) After the Supreme Court’s decision, the Aereo Website is no longer active.

¹⁹ 874 F. Supp. 2d 373 (S.D.N.Y. 2012)

²⁰ *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 691 (2d Cir. 2013).

²¹ *Id.* at 689.

²² *Id.* at 689-90 (citations omitted).

²³ *Id.* at 690.

The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.²⁴

Rejecting the contention that, to hold that Aereo's transmissions were not public performances would be to "exalt[] form over substance, because the Aereo system is functionally equivalent to a cable television provider,"²⁵ the majority nonetheless rejoined, "[T]hat Aereo was able to design a system based on *Cablevision*'s holding to provide its users with nearly live television over the internet is an argument that *Cablevision* was wrongly decided; it does not provide a basis for distinguishing *Cablevision*."²⁶ The majority noted that many other technology providers, particularly cloud computing services, had also designed their systems around *Cablevision*'s holdings. "Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, but this Court's decisions . . . held that technical architecture matters."²⁷ Acknowledging that it is more difficult to distinguish between public and private transmissions than when Congress enacted the transmit clause in 1976, the majority ultimately concluded that the language of the Act, as previously interpreted in *Cablevision*, dictated the conclusion that Aereo's transmissions were not public performances.²⁸

The Supreme Court reversed.²⁹ A 6-3 majority (Breyer, joined by Roberts, Kennedy, Ginsburg, Sotomayor and Kagan) held that Aereo was "performing" the broadcast programming when the service captured the programming through the users' individually-assigned antennas, then digitized, momentarily stored in individualized copies and retransmitted the programming to its subscribers at their request.³⁰ The majority also ruled that the performances were "to the public" notwithstanding each transmission's origin in a separate subscriber-assigned copy. The majority emphasized Aereo's resemblance to cable retransmission operators, a service Congress in the 1976 Copyright Act unambiguously brought within the scope of the exclusive right of public performance.³¹ Although the majority distinguished less cable-like transmission services, notably "cloud storage" models such as Dropbox, and RS-DVR services, it declined to elaborate on the implications of its holdings for these other kinds of internet-based enterprises.³² Finally, the majority posited that in appropriate cases, even if the service is deemed to be "publicly performing" third party content, the fair use doctrine might excuse the transmission.³³ The

²⁴ WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting).

²⁵ *Id.*

²⁶ *Id.* at 694.

²⁷ *Id.*

²⁸ *Id.* at 695.

²⁹ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

³⁰ *Id.* at 2506.

³¹ *Id.* at 2506, 2509.

³² *Id.* at 2511.

³³ *Id.*

dissenters (Scalia, joined by Thomas and Alito) did not address the “public” character of the performance because they contended that Aereo lacked sufficient volition to be “performing” the programming.³⁴ The dissenters distinguished video on-demand services, who exercise volition in the selection of content offered to consumers, from automated retransmission services, which simply relay an upstream transmission entity’s (in this case, the broadcasters’) selection of programming proposed to users.³⁵

2. Implications of the Supreme Court’s *Aereo* decision for U.S. compliance with the WIPO Treaties’ “making available” right

In assessing the impact of the Supreme Court’s *Aereo* opinion on the state of U.S. compliance with the WIPO Treaties’ “making available” right, I focus on four issues:

- a. coverage of a-synchronous transmissions (in accordance with the treaties’ specification that the right cover the possibility for members of the public to access works “from a place and at a time individually chosen by them”);
- b. identification of “the public” and “members of the public” consistently with their meaning in the WIPO Treaties;
- c. interpretation of the public performance right in a way that does not limit the right to actual transmissions, but instead encompasses offers to transmit performances of works;
- d. the relevance of a “volition” prerequisite to application of the public performance and reproduction rights, and the consistency of any such prerequisite with international norms.

a. A-synchronicity

The *Aereo* decision clearly establishes that communications to the public comprehended within the 1976 Copyright Act’s public performance rights³⁶ may be a-synchronous. The “transmit clause” of the U.S. Copyright Act defines “[t]o perform or display a work ‘publicly’” in relevant part as:

by transmitting or otherwise communicating 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*.³⁷

³⁴ *Id.* at 2514.

³⁵ *Id.* at 2513.

³⁶ 17 U.S.C. sec. 106(4) and (6), (and, implicitly, the sec. 106(5) public display right).

³⁷ 17 U.S.C.A. § 101 (West, current through P.L. 113-66) (emphasis supplied).

The Second Circuit in *Aereo* had understood the “it” in the Transmit Clause to mean the particular transmission communicated to the recipient, and in the case of individualized transmissions, had held that because only one person was “capable of receiving” that transmission, the performance was not “public.” Rejecting this reading, the Supreme Court clarified that the object of the right was the performance of the *work*, not a particular transmission of a performance, and ruled that

[A]n entity may transmit a performance through one or several transmissions, where the performance is of the same work. That is because one can “transmit” or “communicate” something through a *set* of actions. Thus one can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each friend or a single e-mail to all at once. So can an elected official communicate an idea, slogan, or speech to her constituents, regardless of whether she communicates that idea, slogan, or speech during individual phone calls to each constituent or in a public square.

The fact that a singular noun (“a performance”) follows the words “to transmit” does not suggest the contrary. One can sing a song to his family, whether he sings the same song one-on-one or in front of all together. Similarly, one's colleagues may watch a performance of a particular play--say, this season's modern-dress version of “Measure for Measure”--whether they do so at separate or at the same showings. By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.

The *Transmit Clause must permit this interpretation*, for it provides that one may transmit a performance to the public “whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times.” §101. Were the words “to transmit . . . a performance” limited to a single act of communication, members of the public could not receive the performance communicated “at different times.” Therefore, in light of the purpose and text of the Clause, we conclude that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes. . . . 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 “transmit[s] . . . a performance” to all of them.³⁸

To stick with Shakespeare (albeit in paraphrase), the “*work*’s the thing”: not the temporal coincidence of its performances. The Supreme Court therefore has corrected a significant error in the Second Circuit’s construction of the “transmit clause,” an error which, had it persisted,

³⁸ American Broadcasting Cos., Inc. v. Aereo, Inc., --- U.S. --- 134 S. Ct. 2498, 2509 (2014) (emphasis in third paragraph supplied).

would have placed the U.S. out of compliance with respect to on-demand communications, where transmissions would inevitably occur at different times.

b. “The public”

i. Meaning of “the public” in the Berne Convention and the WCT

The Berne Convention and WIPO Copyright Treaty mandate protection for two kinds of public communications of works: performances *in public*, and “communication” of the work *to the public* by transmission. The first kind, covered in Berne Convention articles 11, 11ter, 14 and 14bis, concerns performances in places open to the public; the public is present at these performances and therefore apprehends them directly. The second kind, “communication to the public,” provided-for in the cited Berne Convention articles as well as in Berne Convention art. 11bis and WCT art 8 and WPPT arts. 10 and 14, reaches members of the public through the intermediary of any manner of wired or wireless transmission. Neither Convention defines “the public.” But the concept implies its opposite: some performances or communications by transmission will be “private” in nature. The “private” quality of the performance or communication may be ascertained by the size of the potential audience; if only an insubstantial number of persons have the opportunity to attend the performance in person (public performance) or to receive it via transmission (communication to the public), the Berne Convention and WCT rights are not engaged.

It is important to emphasize “potential” audience: a performance in a place open to the public is a public performance, even if an insubstantial number of people in fact attend. Similarly, a transmission offered to the public at large does not become “private” if only a few members of the public in fact receive (or watch or listen to) it.³⁹ The WCT “gives greater indication than does the Berne Convention that the relevant ‘public’ is comprised of ‘members’, and, accordingly, need not be populous, although the greater the numbers to whom a work is made available, the more apparent the conclusion that the making available was to ‘the public’. But simply offering the work on an indiscriminating basis, so that a member of the public may access the work, should come within the scope of the right. Even more restricted offers, such as to all university students, or to all aficionados of obscure Australian or Estonian poetry, appeal to an audience potentially too large for a ‘family circle’ or similar exclusion.”⁴⁰ Put another way, different kinds of works may have different “publics;” the potential audience for a Hollywood action film may be far greater than the potential audience for a European “art” film (in which nothing happens), but both are directed toward persons whose only relationship to the copyright owner and to each other is their predilection for that type of work.

³⁹ Accord, H.R. Rep. No. 94-1476, at 65 (1976) (an infringer communicates a performance to the public, whether or not the “members of the public capable of receiving” it are “operating [their] receiving apparatus at the time of the transmission”).

⁴⁰ Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, para. 12.58 (2006).

The Berne Convention and the WIPO Treaties leave to member states the precise demarcation of the line between public and private communications. For example, member states may exclude from the scope of the right performances or communications to a “family circle,”⁴¹ or enlarge the “private” zone to cover not only family but also its “social acquaintance,”⁴² or define “the public” to mean “an indeterminate number of potential recipients [which] implies, moreover, a fairly large number of persons.”⁴³ But wherever a member state sets the dividing line, one may infer that the “public” character of a communication turns on the opportunity for a substantial number of unrelated persons to receive the work being communicated.

Commercial benefit furnishes another dividing line between public and private communications: if members of the public are invited to pay to receive the communication, it is unlikely to be private in nature.⁴⁴ But one should beware the negative inference: it does not follow that a not-for-profit communication is therefore not “to the public;” many non commercial performances nonetheless are amply “public.”⁴⁵ Rather, the commercial nature of the performance is a one-way street, furnishing an indicium of the “public” character of the communication, but not concomitantly permitting a characterization of a non commercial communication as not “to the public.”

ii. The meaning of “the public” in *Aereo*

The Supreme Court in *Aereo* elaborated on the meaning of a performance “to the public.” The Court emphasized that “an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle.”⁴⁶ The Court distinguished *Aereo*, which it viewed as akin to a traditional cable television retransmission service, from “an entity that transmits a performance to individuals in their capacities as owners or possessors”; such a service “does not perform to ‘the public,’ whereas an entity like *Aereo*

⁴¹ See, e.g., France Code de la propriété intellectuelle, art. L 122-5(1) («Les représentations privées et gratuites effectuées exclusivement dans un cercle de famille») («private and free performances effectuated exclusively in a family circle»)

⁴² See, e.g., 17 U.S.C. sec. 101.

⁴³ ECJ, *ITV Broadcasting Ltd. and Others v. TVCatchup Ltd.*, C-607/11 [2013], para. 32 (elaborating on the meaning of “public” in InfoSoc Directive art. 3(1)).

⁴⁴ See Ricketson & Ginsburg, para 12.02, suggesting that the “public” character of the performance or communication should be assessed in light of its economic impact: “The dividing line between ‘public’ and ‘private’ is not always easy to draw, and the Convention contains no specific guidance in this regard. However, the following general principle can be derived from a study of the structure of the Convention. Articles 11, 11*bis*, 11*ter*, 14, and 14*bis* deal with certain of the author’s pecuniary rights, that is, some of the ways in which she can exploit her work. Accordingly, the rights of public performance and of communication to the public must refer to the author’s capacity to authorize performances of the work before or communications of the work to a substantial number of unrelated persons. The larger and more disparate the audience, the greater the impact on the author’s ability to exploit the work in relation to her ‘public’, that is, those who are willing to pay for the benefit of hearing or seeing the work performed.”

⁴⁵ See, e.g., 17 U.S.C. sec. 110 (covering a variety of non commercial public performances, and providing exemptions from liability; the exemptions do not put in question the “public” character of the performances, rather they absolve the performing entity from obtaining permission or paying to engage in the public performance).

⁴⁶ *Aereo*, 134 S. Ct. at 2511..

that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.”⁴⁷

The Court’s reference to “owners or possessors” is, at best, very imprecise; the service’s customer is unlikely to be an owner of “the work” because “the work” is the incorporeal object whose “owner” is the author or other copyright owner. Presumably, based on the submissions by the *amicus curiae* briefs, including the United States’, the Court was positing the request by a customer of a remote storage service to play back a digital copy that she was entitled, by express or implied license, or under the fair use doctrine, to deposit in a digital storage locker. In that event, even if multiple customers separately stored the same content with the service, the latter’s subsequent on-demand play back of performances of the same work to those customers would not be a transmission to “the public” by the service or the customer: “[T]he term ‘the public’ . . . does not extend to those who act as owners or possessors of the relevant product.”⁴⁸ “Product” in this context apparently includes a license to access the stored content. When a digital storage service plays content acquired and stored by customers back to those customers, then, there is no public performance.

However, in addition to the customer’s entitlement of access (which the Court treated as a possessory relationship) to the customer-stored content, the Court introduced a further consideration: “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.”⁴⁹ The Court appears to be focusing on the nature of the commercial relationship between the customer and the service. Remote storage services are transmitting content to members of the public (their subscribers) when they play back the files requested by the users.⁵⁰ Unlike pay (or listen)-on-demand, however, the service for which the members of the public are paying is not the opportunity to receive transmissions of performances of particular works offered by the service, but rather to store whatever content the users post, whatever its source, and make it accessible remotely. The customers pay the same subscription fees whatever the content they store and access. Thus, while there is a public that pays in dollars or in subjection to advertising⁵¹ (or other costs of “free” commercial services), the public is not specifically paying for transmissions of performances of any given copyrighted works.

⁴⁷ *Id.*, at 2510.

⁴⁸ *Id.*

⁴⁹ *Id.*, at 2511.

⁵⁰ Arguably, if the customer is requesting playback of content she selected and stored in “her” cloud locker, the service’s role in the communication might be too passive, limited to the technical relay of the content, to be deemed the party who “performs” the content. See *Aereo*, 134 S.Ct. at 2507 (“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.”).

⁵¹ The analysis would be different, however, if the service targeted advertising to the played-back content. At that point, the “commercial relationship” between the service and the consumer would focus on particular works; the service would have foregone the content-neutrality that justifies a conclusion that the service is not publicly performing the played-back works.

Whether a service is performing “publicly,” then, appears to turn on the nature of the service for which customers are paying. The service’s customers are certainly members of the public, but the same act by the service – transmitting a performance of a given work – may or may not be a public performance depending on the existence of some kind of possessory relationship between the individual members of the public and a copy of or a license to use the content, and depending on whether the service is primarily offering streaming access to specified copyrighted works.

iii. Consistency with international norms

A reformulation of the Court’s statement that “an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle,”⁵² as an affirmative assertion – that an entity that transmits [a performance of a work] to a substantial number of people outside of a family and its social circle is publicly performing the work – seems to conform to international norms. But if the “public” character of a transmission of a performance also depends on the relationship of the customer of the transmission entity to the copyrighted work (owner of a copy; licensee of an access right), is this gloss also consistent with international norms? As discussed above, the treaties permit certain inferences concerning the size and nature of a communication’s potential audience, but do not introduce distinctions based on any possessory relationship of the members of the public to the content of the work. That said, the inquiry into the nature of the service implied by the Court’s attention to the kind of service (storage v. transmission of particular works) for which the members of the public who constitute its customers are paying is not necessarily inconsistent with international norms.

To ask whether the service is offering to transmit performances of particular copyrighted works to members of the public, or whether these transmissions instead are ancillary to some other service (storage) that does not trigger the right of communication to the public (though it may implicate the right of reproduction), is to focus on the economic dimension of the communication. The above-cited articles of the Berne Convention and the WCT all concern exploitations of the work; they confer on the author the exclusive rights to authorize various kinds of exploitations (or, in the case of art. 11bis(2), the right to be remunerated for certain retransmissions). It may follow that “the public” should correspond to “the group which the copyright owner would otherwise contemplate as its public for the performance of its work.”⁵³ Arguably, the essence of a performance “to the public” is that it is occurring in circumstances where the owner is entitled to expect payment for the work’s authorized performance because the performing entity is exploiting the work.⁵⁴ In *Aereo*, the Court’s emphasis on the resemblance between *Aereo*’s retransmission service and a traditional cable television retransmission service

⁵² *Aereo*, 134 S. Ct. at 2511.

⁵³ *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 199. See also Ricketson & Ginsburg, *supra*, para 12.02.

⁵⁴ See, e.g., *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 198-99. This characterization, however, runs the risk of circularity.

reflects a determination that if the Copyright Act entitles broadcasters to payment for cable retransmission, then broadcasters are also entitled to payment for cable-like retransmissions. By contrast, copyright owners are not entitled to expect payment when members of the public view legitimately-acquired copies of films at home; arguably it should make no difference whether the home-viewed copy is stored at home, or stored remotely.

Thus, the Court's focus on a possessory relationship between the member of the public and the source copy for the transmission enjoys some support as a matter of construction of the right of communication to the public in the Berne Convention and WIPO Copyright Treaties. Nonetheless, the analysis is problematic because it appears to make the public character of a work turn on a prior analysis of infringement: if the author is entitled to control the exploitation, then a third party's exploitation is "to the public," but if the author is not entitled to expect payment, then the communication is not to the public. As a result, the question of the prima facie application of exclusive rights may become improperly conflated with the question of copyright exceptions. But as section 110 of the Copyright Act demonstrates, a communication, for example in the course of online education, may be a "public performance" yet be subject to a narrow exemption from liability. For example, if the TEACH Act exceptions in section 110(2) apply, the copyright holder is not entitled to expect payment, but there is no question that the transmissions are to (a defined segment of) the public. *Aereo* itself did not invite this confusion of the public character of a performance with liability for infringement, but if one is to understand the Court's attention to the nature of the service as implying a distinction between uses that the copyright owner may control (because, for want of a better term, they "feel" like they belong in the public performance camp) and uses that the copyright owner may not (because they "feel" like acts transpiring in private), then it becomes important to bear in mind that a communication can be "to the public" even if, by virtue of an exception, it falls outside the copyright owner's rights.

c. Actual transmissions or offers to transmit

The *Aereo* opinion construes the Transmit Clause component of the definition of "to perform publicly" in a way which often appears to assume that actual transmissions have occurred (as was the case with the *Aereo* service). It does not, however, therefore follow that the Court has excluded offers to transmit from the scope of the statutory exclusive right. First, while the Court emphasized that "an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle,"⁵⁵ it elsewhere equated *Aereo*'s offering of its service to an infringement of the public performance right. Hence: "We must decide whether respondent *Aereo, Inc.*, infringes this exclusive right [of public performance] by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast

⁵⁵ *Aereo*, 134 S.Ct. at 2511.

over the air. We conclude that it does.”⁵⁶ What triggers the infringement is the “selling” of a service that “allows” subscribers to view the programs; the court does not require that a subscriber consummate the infringement by viewing an actual transmission.

Second, as the following analysis shows, the Court’s statements make sense only if the scope of the right includes offers to transmit performances of works. If one disregards the Court’s characterization of the infringement as occurring “by selling” a service that “allows” its subscribers to view live television, and instead takes literally the Court’s statement that “an entity does not transmit to the public if it does not transmit . . .”, it would follow there is no transmission to “the public” if the service does not in fact communicate the performance of the work to a substantial number of people. But therefore to characterize the communication as “private” is questionable: if performances of a work are offered to the public, for example, on a pay-per-view basis, the characterization of the performances as “to the public” should not turn on how many members of the public accept the offer and in fact request a transmission of the performance. If one were to understand the Court’s statement as meaning actual, rather than offered, transmissions, then the “public” nature of a performance could not be ascertained without post-hoc head-counting. Not only does such an interpretation introduce uncertainty for copyright owners and exploiters alike, but it promotes the kinds of baroque copyright-avoiding business models the Court discredited. Given the Copyright Act’s inclusion in the public performance right of discrete transmissions to the public that are separated in time, were only actual transmissions to trigger the public performance right, then the service might be permitted to make an “insubstantial” number of transmissions to paying subscribers before the number of transmissions tipped over into communicating the performance of the work to a “substantial” number of unrelated persons. If the service is in effect allowed up to, say, fifty “free” transmissions, then one might imagine the creation of a plethora of separately constituted subsidiary services each catering to no more than fifty members of the public. But if such a scenario seems unlikely to “fool” any trial judge as to the nature of the service, that is because we sense that a judge, aware of the Supreme Court’s rejection of Aereo’s attempt to render “private” the communications Aereo offered to the public at large, would focus on the offer to transmit, rather than on the actual communication of a transmission.

Moreover, although the Supreme Court conflated the two kinds of “public” in the statutory definition of “to perform publicly” – performance *in public* (where a substantial number of persons other than a circle of family and its social acquaintance is gathered); performance by transmission *to the public* – the Transmit Clause does not in fact require that the “members of the public” capable of receiving the transmission of the performance be numerous. Indeed, what matters, in determining whether the audience for a transmission is “the public,” is

⁵⁶ *Id.* at 2503. Similarly, *id.* at 2504: “Considered alone, the language of the Act does not clearly indicate when an entity “perform[s]” (or “transmit[s]”) and when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo’s performs.” Those activities include not only transmitting the content, but offering the service to subscribers.

capacity by “members of the public” to receive the transmission, not actual receipt.⁵⁷ Those who are “capable of receiving” the performance by transmission are those to whom the transmission is offered. Under this reading, the offer of streaming access triggers the public performance right; it is not necessary to await actual transmission, even to one member of the public, to ascertain if the right has been engaged.

d. the relevance of a “volition” prerequisite to application of the public performance and reproduction rights, and the consistency of any such prerequisite with international norms.

The Second Circuit’s introduction in *Cablevision* of a “volition” prerequisite to the act of reproduction, and its extension to the act of public performance advocated by *Aereo*, Inc. and the Supreme Court dissenters, could prove a significant impediment to U.S. implementation of the making available right. The right is in many respects user-focused because it targets on-demand communications. Unlike traditional “push” technologies, in which the copyright owner or licensee determines when to disseminate the content, the “pull” technologies that exploit the making available right enable the consumer to select what content she wishes, and where and when to receive it. If a “volition” predicate were to mean that the exploiter is not making a work available because the exploiter merely responds automatically to the end-user’s choice of what, when and where to receive the communication of a copyrighted work, then the “making available” right would collapse. By the same token, a determination that an online service does not “make” the copy that it offers to deliver to or store for the consumer on her request, or that it does not “perform” the offered work because the consumer decided which of the offered works she wanted transmitted to her at a place (or device) and time selected by her, eviscerates the utility of the reproduction and public performance rights to effectuate the making available right. To assess the U.S. post-*Aereo* compliance with international norms, it therefore is necessary to inquire into the current status of any “volition” predicate to the determination whether the defendant has engaged in a copyright-triggering act.

i. *Aereo*’s treatment of volition as a predicate to application of the public performance right

The *Aereo* majority’s silence on the matter of “volition” in the face of the dissenters’ emphatic interpolation of a “volition” predicate might suggest that the majority considers “volition” irrelevant to the assessment of whether the defendant has publicly performed a work. The majority’s analysis of whether *Aereo* “perform[s] at all”⁵⁸ distinguishes between the mere provision of equipment and “engag[ing] in activities like *Aereo*’s.”⁵⁹ The majority underscored Congress’ rejection in the 1976 Act of the Court’s *Fortnightly*⁶⁰ and *Teleprompter*⁶¹ precedents,

⁵⁷ As discussed above, “the public” could be the public at large, or smaller subsets, such as the fans of a particular performer, or devotees of cooking shows; what matters is that the potential audience be otherwise unrelated to the copyright owner or to each other.

⁵⁸ *Aereo*, 134 S.Ct. at 2504 (internal quotation marks omitted).

⁵⁹ *Id.*

⁶⁰ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

in which the Court had held that traditional cable television retransmission services were merely providing equipment that the customers might themselves have installed (given the Court's rather fanciful evocation of the customers' acts, such as placing an aerial on a mountaintop and stringing a wire from the mountaintop to the customer's home), and not "performing" the works that the services retransmitted to their customers. According to *Aereo*, a service "performs" copyrighted works, rather than simply supplying equipment, when it "uses its own equipment, housed in a centralized warehouse, outside of its users' homes," to transmit performances of works to viewers, even when that equipment "may . . . emulate equipment a viewer could use at home."⁶² The majority therefore appears to stress the service's active engagement in the transmission, rather than any specific "volition" with respect to the particular content transmitted.

Indeed, the majority's rejection of the dissent's characterization of Aereo's service as "a copy shop that provides its patrons with a library card,"⁶³ underscores the irrelevance of the customer's selection of which programming to watch to the determination of whether the service has "performed" the works it transmits. The court also declined to attribute any significance to the additional layer of consumer intervention involved in Aereo's system relative to cable systems: while cable systems retransmit *sua sponte*, Aereo does not activate the subscriber's antenna without the subscriber's request. Adopting a pragmatic perspective, the Court announced that "this difference means nothing to the subscriber. It means nothing to the broadcaster."⁶⁴

Nonetheless, the Court did not completely discount the role of the user in the determination of "who performs" a work: "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."⁶⁵ This statement is a far cry from adopting the kind of "volition" predicate urged by the dissent (or, for that matter, by the Second Circuit in *Cablevision*), but it nonetheless suggests that when the service is less "cable-like" than Aereo, the majority's distinction between providing the equipment that enables a performance, and actually "performing" remains uncertain.

In any event, it should be clear, even under the dissent's characterization, that specific "volition" as to the transmission of particular content is not required for the communication to be considered a "public performance." All Justices agree that video on demand services are "performing," and it should not matter how automated the process: once the service assembles

⁶¹ *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974).

⁶² *Aereo*, 134 S.Ct. at 2507.

⁶³ *Id.*, citing dissenting op. 134 S. Ct. at 2514. The dissent's analogy, and its purported distinction from pay-per-view services (which the dissent acknowledges do "perform" the user-selected works, dissent at 2513-14) is in any event highly problematic. The key distinction, for the dissent, is that video on demand services "choose the content" (*id.* at 2513, emphasis in original). But libraries choose the books that comprise their collections.

⁶⁴ *Id.* at 2507.

⁶⁵ *Id.*

the selection of the programs from which the consumer may choose and then offers them commercially to the public, the service has gone beyond merely providing transmission facilities. For the majority, cable and cable-like services still “perform” even though they did not originate the selection of programming offered to the users (the broadcasters did, though the cable operators select the source broadcast stations whose content they retransmit), and even though the users ultimately choose which programs to watch, by turning a knob on the television, or clicking on a website. (Of course, the last feature of user involvement is common to on-demand transmissions, too.) If on-demand services occupy one end of the “who performs” continuum, and cable-like services stand at an intermediate – but still “performing” – point, some services that offer remote storage (but are entirely agnostic as to the content users store) might be located at the other end.

ii. “Volition” and the reproduction right

There is another reason to interpret *Aereo* as blunting the pertinence of a “volition” prerequisite to copyright-triggering acts. While *Aereo* addressed only the public performance right, the “volition” analysis, as derived from the Second Circuit’s *Cablevision* decision, threatens significantly to curtail the effectiveness of the reproduction right as well. Indeed, if one reads *Aereo* to have no purchase on the reproduction right, the opportunities for eluding the import of the Supreme Court’s decision are readily apparent. Suppose that instead of retransmitting programming in approximately real time, an *Aereo*-like service, responding automatically to user demand, recorded the entirety of a broadcast program and then transmitted the file to the user to be viewed or heard only following (and not simultaneously with) the download of the file. *Aereo* specified that “to transmit a performance of (at least) an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work.”⁶⁶ And the Court cited with approval the Second Circuit decision that declined to characterize a transmission in the nature of a download as a “performance.”⁶⁷

In this scenario, there is no public performance, because the service is not transmitting a performance, it is distributing a copy. (In a more elaborate version of the scenario, the service would record and transmit the programming in 10-minute increments, so that the user can watch the program only 10 minutes after “real time.”) Except that, if the *Cablevision* “volition” predicate pertains, the copyright-implicating actor would not be the service, it would be the user. (On-demand services that deliver non contemporaneously perceptible files which the users choose from among a collection of works assembled by the service presumably should satisfy any “volition” requirement on the part of the service.) The *Aereo* Court declined to project the effect of its decision on remote time-shifting services, but one may query whether the posited

⁶⁶ *Id.* at 2508.

⁶⁷ *US v ASCAP*, 627 F.3d 64, 73 (2d Cir. 2010).

service is offering “time-shifting” (which may or may not be a public performance) or another Rube Goldberg-like work-around the public performance right.⁶⁸

iii. Volition and other iterations of the reproduction and public performance rights: Does an RS-DVR service make works available within the meaning of the WIPO Copyright Treaties?

Aereo avoided ruling on whether RS-DVR services were “publicly performing” the works they retransmitted, but the question remains whether the *Cablevision* precedent, if its volition analysis is in any respect still good law, places the U.S. in tension with its obligation to implement the making available right. If the activities of services like *Cablevision* and *Aereo* (in its time-shifting incarnation) are considered to make available the content of the copied and retransmitted works within the meaning of the WIPO Treaties, then the U.S. should not (for non-US works) be free to exclude those services from the reach of the public performance and reproduction rights. RS-DVR services, through a two-step process of transmission on demand, arguably engage in two series of acts covered by the making available right, first by communicating a copy of the work to the user’s storage device, and subsequently by transmitting it to the user for contemporaneous viewing.

Several foreign authorities interpreting national or EU norms, have ruled that the services “make” the copies (thus violating the reproduction right)⁶⁹ and/or make the works available to their subscribers.⁷⁰ The EU Information Society Directive has implemented the WIPO Treaties’ making available right verbatim, see art. 3; EU judicial and administrative interpretations and the interpretations of member state courts therefore are probative of the application of the making available right to RS-DVR services, but cannot yet be said to constitute controlling “state practice” within the meaning of art. 31(3)(b) of the Vienna Convention on the Law of Treaties.

⁶⁸ In fact, in the hearing on remand for a preliminary injunction, *Aereo* contended that a delay of somewhere between ten and thirty minutes would be sufficient to fall outside the Supreme Court’s characterization of a public performance. See *American Broadcasting Companies v Aereo, Inc.* 12 Civ. 01540 (AJN), *WNET v Aereo, Inc.*, 12 Civ. 10543 (AJN) Transcript of hearing on preliminary injunction, (SDNY October 15, 2014) at 28-29. The district court rejected that argument, granting a preliminary injunction which covered all transmissions made before the original broadcast was fully aired. See *Am. Broad. Cos., Inc. v. Aereo, Inc.*, opinion and order dated Oct. 23, 2014.

⁶⁹ See, e.g., *Singtel Optus v National Rugby League Investments (No 2)* [2012] FCA 34 (Aus.); *Wizzgo v. Metropole Television et autres*, Paris Court of Appeals, decision of 14 December 2011, http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3297 (France) (automated “remote video recorder” service qualifies neither for transient copying nor for private copying exceptions because service, not the end-user, is the maker of the user’s individual copy); *Rokuraku II* (Supreme Court 2011) (Japan) (copies for individualized storage at subscriber request held to be “made” by the service), the decision is discussed in Takashi B. Yamamoto, ‘Legal Liability for Indirect Infringement of Copyright in Japan’ <http://www.itlaw.jp/yearbook35.pdf>. Contra, *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (Singapore) (following *Cablevision*).

⁷⁰ Tribunale Amministrativo Regionale, Lazio Roma, sez. II, 02.3.2012, n. 2157, pp. 41-44 (Italy) (remote DVR makes works available under the meaning of the 2001 EU Information Society Directive). See also *Shift.tv*, BGH (German Supreme Court), I ZT 152/11, 11 April 2013 (remote DVR service’s transmission of original signal to subscribers’ individual storage boxes violates broadcasters’ retransmission right); *ManekiTV* (Supreme Court 2011) (Japan), in Yamamoto, *supra* (personalized transmissions by service held public transmissions).

The WIPO Treaties may therefore allow member states some leeway in determining who is the “maker” of a copy, or the “performer” of a work; a “volition” predicate may not always be inconsistent with the U.S.’ international obligations. Conformity with international norms may depend on the degree of specificity of any “volition” requirement. For example, while a *Cablevision*-style volition predicate that requires specific agency as to each work transmitted may effectively eviscerate the making available right, a volition predicate that looked to the operation and economic impact of the service as a whole might not violate the U.S.’ obligations.

The *Aereo* decision’s reference to a possessory relationship between the user and a copy of the work as a basis for distinguishing remote storage (and perhaps RS-DVR) services offers another means to reconcile an absence of copyright liability with international norms. If the user was lawfully entitled to store a copy on the service’s facilities (and the service did not initially offer the content to the user), then the service’s mere retransmission of a performance of the work from that copy might be deemed to come within the Agreed Statement to WCT art. 8’s exclusion on the ground that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication.”

In summary, the Supreme Court’s *Aereo* decision alleviates some concerns about the conformity of U.S. copyright law with international norms, but the limited scope of the decision allows other shortcomings to persist. Thus, the court has reaffirmed the reach of the public performance right with respect to:

near-real time individualized digital retransmissions to members of the public of broadcast content (akin to cable retransmissions);

a-synchronous transmissions to members of the public when the primary value of the service to its customers is to transmit performances of content the customers did not themselves store with the service, or regarding which the customers did not enjoy some possessory relationship to a copy or right to access

Although the Court did not expressly state that the public performance right encompassed offers to transmit performances as well as actual performances, the logic of the decision points toward the broader (and internationally harmonious) interpretation.

The majority did not apply a specific “volition” predicate to determine whether a retransmission service “performs” the content it communicates, but it acknowledged the possibility that in some instances the end-user might be deemed the “performer.”

The Court has not directly spoken to the following issues:

Whether remote storage services are publicly performing content stored at the direction of their customers (but the opinion strongly suggests those services are not publicly performing);

Whether “volition” is a predicate to determine whether a remote storage service “makes” the consumer-requested copies created and retained on its servers;

Perhaps most importantly, because Aereo concerned only the public performance right, the Court did not have occasion to address whether the distribution right encompasses offers to distribute digital copies, or is limited to actual distributions of digital copies. As a result, the greatest gap in U.S. compliance with its international obligation to implement the “making available” right remains unremediated.