

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

In the Matter of  
Study on the Right of Making Available

Docket No. 2014-2

**COMMENTS OF CABLEVISION SYSTEMS CORP.**

Cablevision Systems Corp. (“Cablevision”) respectfully submits the following comments in response to the Copyright Office’s Request for Additional Comments, published at 79 Fed. Reg. 41,309 (July 15, 2014). This submission addresses the following two issues on which the Copyright Office requested further 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?
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*?

**BACKGROUND**

Cablevision provides cable television service in the New York metropolitan area and elsewhere. Pursuant to license agreements with television networks and other content providers, it distributes copyrighted programming over its cable system. Cablevision also developed the Remote Storage Digital Video Recorder (“RS-DVR”) that the Second Circuit upheld against a copyright challenge in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). The RS-DVR allows each subscriber to record television programs he is

entitled to watch over cable as they air — just as he could with a VCR or set-top DVR. Each subscriber can then play back his own personal recordings for private viewing — again just as he could with a VCR or set-top DVR. Unlike those earlier technologies, however, the RS-DVR stores the subscriber’s recordings remotely on Cablevision’s premises.

Cablevision has a unique — and uniquely balanced — interest in these proceedings due to its role as both a provider of licensed cable service and a supplier of cutting-edge technologies that subscribers use to make fair-use copies. On the one hand, Cablevision complies with the statutory licensing scheme Congress established in the 1976 Copyright Act and has opposed attempts to circumvent that scheme. Cablevision thus participated as an amicus curiae *against* Aereo in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), urging the Supreme Court to find that Aereo engaged in infringing public performances by offering an unlicensed television retransmission service.

On the other hand, Cablevision opposes efforts to expand the public performance right so broadly as to encompass legitimate cloud technologies, such as virtual music lockers and remote DVRs, which have not traditionally been understood to require a public performance license. Cablevision therefore agreed with the technology-sector amici in *Aereo* that the public performance right should not be expanded to impair those technologies.<sup>1</sup>

Cablevision agrees with the Supreme Court’s bottom line in *Aereo*. The Court held that a television retransmission service like Aereo’s must obtain a public performance license, even if the television programming is delivered on an individualized basis. At the same time, the Court made clear that its holding did not extend to cloud-based technologies where the subscriber has

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<sup>1</sup> Cablevision’s position on the public performance right is set forth in detail in the White Paper it issued in December 2013. See Cablevision Systems Corp., *Aereo and the Public Performance Right* (Dec. 12, 2013), [www.cablevision.com/pdf/cablevision\\_aereo\\_white\\_paper.pdf](http://www.cablevision.com/pdf/cablevision_aereo_white_paper.pdf).

previously acquired a copy of a work and is merely using the technology to store and play back that copy to himself. The Court further held that a service provider like Aereo may be held liable as a direct infringer based on the particular history of the public performance right in the television retransmission context, while declining to disturb the volitional conduct standard that courts use to identify direct infringement in other contexts.

Cablevision submits these comments to explain why, in its view, the questions *Aereo* decided are largely irrelevant to the question the Office convened these proceedings to address — namely, whether U.S. law adequately protects the “making available” and “communication to the public” rights in the WIPO treaties. The questions the Office raised would arise notwithstanding *Aereo* and are unaffected by that decision. The issues are separate, and Cablevision urges the Office not to conflate them.

### **RESPONSES TO REQUEST FOR ADDITIONAL COMMENTS**

#### **I. AEREO’S CONSTRUCTION OF THE PUBLIC PERFORMANCE RIGHT DOES NOT AFFECT THE UNITED STATES’ IMPLEMENTATION OF THE RIGHTS OF MAKING AVAILABLE AND COMMUNICATION TO THE PUBLIC**

*Aereo* addressed what it means for a transmission of a performance to be “to the public” under the Copyright Act. But that same phrase also appears in the WIPO treaties, which cover only communications “to the public” and making available “to the public.” It is thus common ground between U.S. law and the WIPO treaties that the relevant act must be done “to the public,” and there is no reason that phrase should be interpreted any differently. Where U.S. law arguably diverges from the WIPO treaties is in a separate respect: its use of the term “perform” rather than “communicate” or “make available.” Whatever the extent of that difference, it is an issue wholly separate from the one that *Aereo* addressed.

## A. United States Law

Under the Copyright Act's Transmit Clause, one way to "perform . . . a work 'publicly'" is to "transmit or otherwise communicate a performance . . . of the work . . . *to the public.*" 17 U.S.C. § 101 (emphasis added). The Clause thus draws a distinction between transmissions to members of the "public" and those to a private audience.

A transmission of a performance may be "to the public" even if "the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. *Aereo* thus reaffirmed that a transmission may be public even if the service provider "transmit[s] a performance through multiple, discrete transmissions." 134 S. Ct. at 2509. That interpretation is consistent with longstanding industry practice. For example, cable providers (including Cablevision) offer video-on-demand services in which the cable provider selects a library of movies or other content and offers to transmit that content to any subscriber willing to pay. Even though those video-on-demand services deliver content by means of individualized transmissions, they are still widely understood to require a public performance license. *See, e.g., Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991); *Warner Bros. Entm't, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011).

At the same time, *Aereo* made clear that a cloud technology provider does *not* transmit content "to the public" merely by providing a service that enables a consumer to store and play back content he previously acquired. In such cases, the service provider's system is not transmitting content to a subscriber in his capacity as a member of the public, but rather as an "owner or possessor" with some prior relationship to the work. The Court explained: "[A]n

entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to ‘the public,’ whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.” *Aereo*, 134 S. Ct. at 2510.

Thus, for example, if a subscriber lawfully purchases a song from Amazon’s MP3 Store and then stores it in his personal remote storage space on Amazon’s Cloud Player, Amazon does not engage in a public performance merely by enabling the subscriber to play back his own lawful copy of the song to himself. That is true even if multiple customers happen to purchase and play back their own separate copies of the same song. The critical point is that Amazon’s Cloud Player is not a service that holds out a library of recordings to the public. It merely enables consumers to play back their own libraries of songs to themselves.

Similarly, if a cable subscriber exercises his fair use rights under *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), to record a particular television program for later viewing, the cable provider does not engage in a public performance merely by enabling the subscriber to play back his own lawful recordings to himself. That is true whether the cable system stores the recordings locally in the set-top box or remotely in a central server. The critical point is that the service provider is not transmitting content to a subscriber in his capacity as a member of the public. It is merely providing a mechanism for a consumer who already had lawful access to the programming through his cable subscription to make and play back his own lawful time-shifting recordings to himself.

That distinction — between services that deliver content in the first instance and services that merely allow a subscriber to store and play back content with which he has some prior relationship — is fully consistent with copyright holder interests. For example, when a

customer purchases a song from Amazon’s MP3 Store and then plays it back from Amazon’s Cloud Player, the copyright owner obtains royalties from the initial sale of the song. Similarly, when a cable subscriber uses a remote DVR to record and play back a program, copyright holders are compensated through the monthly fees the subscriber pays for his cable subscription, a portion of which go to cover statutory licensing fees.

In both cases, the requirement of a “prior relationship” helps ensure that copyright holders are compensated. The only consequence of not deeming the playbacks to be transmissions “to the public” is that copyright holders do not obtain a *second* royalty when the subscriber plays back the content — a royalty that would unfairly disadvantage subscribers who use remote-storage rather than local-storage technology. That is a reasonable outcome that appropriately balances the interests of copyright holders, technology providers, and consumers.

## **B. The WIPO Treaties**

Like U.S. law, the WIPO treaties limit the scope of the communication and making available rights by imposing a “to the public” requirement. Article 8 of the WIPO Copyright Treaty provides that “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication *to the public* of their works . . . , including the making available *to the public* of their 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.” WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65 (emphasis added). Similarly, the WIPO Performances and Phonograms Treaty states that “[p]erformers shall enjoy the exclusive right of authorizing the making available *to the public* of their performances . . . in such a way that members of the public may access them from a place and at a time individually chosen by them,” WIPO Performances and Phonograms Treaty art. 10, Dec. 20, 1996, 36 I.L.M. 76 (emphasis added), and that “[p]roducers of phonograms shall

enjoy the exclusive right of authorizing the making available *to the public* of their phonograms . . . in such a way that members of the public may access them from a place and at a time individually chosen by them,” *id.* art. 14 (emphasis added). Neither of those treaties purports to cover *private* communications or *private* acts of making available.

The explanatory notes accompanying the original draft of the treaties explains: “One of the main objectives of [Article 8] is to make it clear that *interactive on-demand acts of communication* are within the scope of the provision. This is done by confirming that the relevant acts of communication include cases where *members of the public may have access to the works from different places and at different times.*” WIPO Doc. No. CRNR/DC/4, Explanatory Notes ¶ 10.11 (Aug. 30, 1996) (emphasis added); *see also* WIPO, *Guide to the Copyright and Related Rights Treaties* § CT-8.6, at 208 (2003) (“Further clarification was needed in respect of the notion of the ‘public,’ more precisely in respect of what is to be considered to be made available (accessible) ‘to the public.’ It had to be made clear that *on-demand transmissions were also covered.*” (emphasis added)). That is precisely what the U.S. Copyright Act does as well, by clarifying that a transmission of a performance may be “to the public” even if “the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101.

There is no reason to think that the phrase “to the public” in the WIPO treaties means anything different from what it means in the Transmit Clause under U.S. law. Both cover public performances delivered by individualized on-demand transmissions — *i.e.*, transmissions held out generally for members of the public to receive at a time and place of their choosing. Neither suggests any intent to expand the exclusive right beyond those systems to the sorts of cloud

technologies that *Aereo* distinguished — technologies that merely allow consumers to store and play back their own previously acquired content privately to themselves.

That the WIPO treaties are reasonably construed to exclude such systems is apparent from the fact that some foreign courts have construed “making available” rights even more narrowly than the Supreme Court construed the public performance right in *Aereo*. In *RecordTV Pte Ltd. v. MediaCorp TV Singapore Pte Ltd.*, [2010] SGCA 43, the Singapore Court of Appeal upheld a system that, although labeled an “Internet-based DVR,” resembled *Aereo*’s system in significant respects. RecordTV’s system was not a mere recording-and-playback technology for some underlying *lawful* distribution system; it distributed content in the first instance. *See id.* ¶¶ 5-9.

Even so, the court upheld the service. The broadcaster challenging the service had relied on provisions of Singapore law that, like the WIPO Copyright Treaty, grant an exclusive right to “communicate [the work] to the public” and define “communicate” to include “the making available of a work.” [2010] SGCA 43 ¶¶ 12, 33 (citing Copyright Act §§ 7(1)(c), 83(c), 84(d)). The court held that those terms did not encompass RecordTV. “RecordTV’s iDVR service was not a video-on-demand service whereby RecordTV shared a library of recorded works with Registered Users. Rather, a Registered User was only allowed to access and view time-shifted recordings of the specific MediaCorp shows which he had requested to be recorded.” *Id.* ¶ 26. “[T]hose shows were communicated to the relevant Registered Users privately and individually. The aggregate of private communications to each Registered User is not, in this instance, a communication to the public.” *Id.* ¶ 28.

Cablevision does not mean to suggest that it agrees with the outcome in *RecordTV*, or that other countries interpreting similar text would necessarily reach the same result, or even that



the Singapore Court of Appeal would necessarily reach the same result in light of *Aereo*. Many courts may well conclude that RecordTV communicates or makes available transmissions “to the public.”<sup>2</sup> The relevant point is simply that courts applying “communication” and “making available” rights to various Internet-based technologies are engaging in essentially the same task the Supreme Court undertook in *Aereo*: deciding where the universe of *public* on-demand content distribution systems ends and the universe of *private* recording-and-playback technologies begins. That is fundamentally a question of what it means for something to be “to the public.” It has nothing to do with whether the “something” is a performance, a communication, or a making available.

For that reason, Cablevision urges the Office not to digress into addressing issues not material to the questions presented. The scope of the public performance right relative to the making available right has significance primarily in situations where a party offers to transmit or distribute a work to the public but there is no evidence of an actual, completed transmission or distribution. Cablevision takes no position here on whether mere offers should constitute performances or distributions. The important point is that that question has nothing to do with the one addressed in *Aereo* — what it means for a performance to be “to the public.”

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<sup>2</sup> Professor Ginsburg goes too far in describing *RecordTV* as an “outlier.” Comments of Prof. Jane Ginsburg at 6 n.12 (Apr. 7, 2014). Other cases to strike down *Aereo*-type systems have either (1) done so without reaching the “to the public” question, *see, e.g., Nat’l Rugby League Invs. Pty Ltd. v. Singtel Optus Pty Ltd.*, [2012] FCAFC 59 (Austl.) (deeming provider directly liable for making copies); (2) involved systems even more extreme than *Aereo*’s, *see, e.g., ITV Broad. Ltd. v. TVCatchup Ltd.*, No. C-607/11 (CJEU 2013) (retransmission system with no individual copies or antennas at all); or (3) turned on details of domestic copyright law that are not relevant here, *see, e.g., Wizzgo v. Metropole Television* (Paris Ct. App. Dec. 14, 2011) (dispute over applicability of transient copy exception under French law).

## **II. AEREO’S ANALYSIS OF THE VOLITION REQUIREMENT DOES NOT AFFECT THE UNITED STATES’ IMPLEMENTATION OF THE RIGHTS OF MAKING AVAILABLE AND COMMUNICATION TO THE PUBLIC**

For similar reasons, *Aereo*’s analysis of the volitional conduct requirement sheds no significant light on the United States’ compliance with WIPO treaty obligations.

### **A. United States Law**

The Copyright Act grants authors exclusive rights “to do” six enumerated acts. 17 U.S.C. § 106. A person who actually “does” one of those acts without permission or exemption is a direct infringer. *See id.* § 501(a); 7 *Patry on Copyright* § 25:87 (2014). Thus, the person who “perform[s]” an audiovisual work is the one who “show[s] its images in any sequence or . . . make[s] the sounds accompanying it audible.” 17 U.S.C. § 101. By contrast, “parties who have not themselves engaged in the infringing activity” are subject to secondary liability. *Sony*, 464 U.S. at 435. Providing the “means” to infringe — such as the equipment another person uses to engage in infringing conduct — is one traditional basis for secondary liability. *See 3 Nimmer on Copyright* § 12.04[A][3][b] (2012); 2 *Goldstein on Copyright* § 8.1.2.1 (3d ed. 2012).

The Copyright Act’s text and basic structure thus compel a distinction between persons who actually do the infringing act themselves and persons who merely provide the means for others to infringe. If a customer walks into a full-service copy shop and asks a human employee to photocopy a document for him, it is natural to think of the copy shop employee as the one “doing” the copying. *See Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1384 (6th Cir. 1996) (en banc). By contrast, if a customer walks into a self-service copy shop and uses a self-service photocopier to make a copy himself, no one would say that the copy shop “does” the copying; the customer does. *See Cablevision*, 536 F.3d at 131. The same holds true for a library that offers both books and self-service photocopiers: No one would say the library

“does” the copying merely because a patron uses the library’s photocopier to duplicate pages from a library book. *See 3 Nimmer on Copyright* § 12.04[A][3][b].

Similarly, if the employees of a news clipping service record programs for sale to the public, the clipping service “does” the copying and may be held directly liable. *See L.A. News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992). But where a company merely provides the means for consumers to record programs — as when Sony sold the Betamax VCR — the consumer “does” the copying. *See Sony*, 464 U.S. at 434-42. The same is true for a cable company that offers both set-top DVRs and cable service: The cable company does not “do” the copying when a subscriber uses his set-top DVR to record a show. *See Cablevision*, 536 F.3d at 132.

The test that courts have applied to capture that distinction is the volitional conduct test: To be a direct infringer, the defendant or its employees must actually engage in the volitional conduct that constitutes the infringing act. It is not enough merely to supply the means that others use to infringe. *See, e.g., Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1067-68 (9th Cir. 2013); *Cablevision*, 536 F.3d at 130-34 (applying volition standard to reproduction right but reserving judgment as to public performance right); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 548-52 (4th Cir. 2004); *Parker v. Google, Inc.*, 242 F. App’x 833, 836-37 (3d Cir. 2007); *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1368-70 (N.D. Cal. 1995).

That rule does not mean that parties can contribute to infringement with impunity. It simply means that courts must apply the more flexible doctrines of secondary liability traditionally applied to such conduct. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). One important limitation of those doctrines is that a service provider cannot be liable when the consumer’s conduct is fair use. *See Sony*, 464 U.S. at 434-35.

Like the “to the public” requirement, the volitional-conduct standard provides a sensible basis for distinguishing between on-demand content distributors and legitimate cloud-technology providers. On the one hand, a video-on-demand operator who selects a particular library of content, loads it into his video-on-demand system, and then offers to transmit that content to any subscriber willing to pay is fairly regarded as engaging in sufficient volitional conduct to render him a direct infringer. That is because the volitional steps of selecting the content and loading it into the system are fairly viewed as the initial steps in the process of “show[ing]” the work to the public. 17 U.S.C. § 101.

By contrast, a cloud-technology provider that merely provides remote storage and transmission facilities does not “do” the transmitting when a consumer uses the service to download his own files from a remote location or stream his own files back to himself. Just as an Internet Service Provider does not “do” the transmitting when a customer uses its facilities to send an email, a remote-storage service like Dropbox does not “do” the transmitting when the customer downloads his own files.

Sometimes, of course, a company may act in multiple capacities. For example, Amazon is the one “doing” the distributing when it selects a library of songs and sells them under license from its MP3 Store. But when a customer buys a song, stores it remotely in Amazon’s Cloud Player, and then streams it back to himself, the customer is the one “doing” the transmitting; Amazon merely provides the means. Likewise, Cablevision is the one “doing” the transmitting when it selects channels and distributes them over its cable system. But when subscribers use the RS-DVR to store and play back recordings of their own choosing, the subscriber is the one “doing” those acts — just as he would with a VCR or set-top DVR.

Nothing in *Aereo* is at odds with those settled principles. Based largely on the distinct treatment of cable providers in the 1976 Act, the Court held that *Aereo* was “not just an equipment supplier” and was actually doing the performing. 134 S. Ct. at 2507. But the Court limited that holding to cable providers and their equivalents. “In other cases involving different kinds of service or technology providers,” the Court stated, “a user’s involvement in the operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act.” *Id.* Thus, courts will no doubt continue to apply volitional conduct standards in other contexts.

## **B. The WIPO Treaties**

Nothing in the WIPO treaties eliminates the distinction between direct infringement and secondary liability. The treaties require signatories to protect the exclusive right to “communicate” or “make available,” but they do not suggest that a person or entity does the “communicating” or “making available” merely by providing the means for *others* to engage in those acts.

To the contrary, the WIPO Copyright Treaty expressly recognizes volitional conduct principles in its Agreed Statement to Article 8: “It is understood that the *mere provision of physical facilities for enabling or making a communication* does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.” WIPO Copyright Treaty art. 8 agreed statement, Dec. 20, 1996, 36 I.L.M. 65 (emphasis added). The guide elaborates: “This agreed statement states something obvious, since it has always been evident that, if somebody carries out an act other than an act directly covered by a right provided for in the Convention . . . , he has no direct liability for the act covered by such a right. It is another matter that, depending on the circumstances, he may still be liable on the basis of some other forms of liability, such as contributory or vicarious liability.” WIPO, *Guide to the Copyright and*

*Related Rights Treaties* § CT-8.19, at 211 (2003). The Agreed Statement thus makes clear that (1) the WIPO treaties distinguish between direct and secondary liability just like U.S. law does; and (2) in drawing that distinction, what matters is whether the defendant has communicated the work himself or merely furnished the means for others to do so.

The explanatory notes draw a similar distinction: “The relevant act is the making available of the work by providing access to it. What counts is *the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals.*” WIPO Doc. No. CRNR/DC/4, Explanatory Notes ¶ 10.10 (Aug. 30, 1996) (emphasis added). Those references to “server space” and “communication connections” encompass a variety of cloud-based technologies. The explanatory notes thus draw the same distinction the Supreme Court drew in *Aereo* between services that provide remote storage space for consumers to store and play back content they previously acquired and services that deliver content in the first instance.

In *RecordTV*, the Singapore court held that the service provider was not the one “doing” the communicating when subscribers used the system to play back recordings to themselves. The court focused on the fact that consumers were responsible for determining the content of the transmissions by virtue of their prior decision to record particular shows: “[S]ince the only MediaCorp shows that were ‘communicated’ were those shows that appeared on each Registered User’s playlist, and since the exact make-up of each playlist depended on the specific shows which the Registered User in question had requested to be recorded, ‘the person responsible for determining the content of the communication at the time the communication [was] made’ would

be that Registered User himself.” [2010] SGCA 43, ¶ 36.<sup>3</sup>

As with the “to the public” requirement, therefore, the same volitional conduct issue arises under both U.S. law and the WIPO treaties. Whether the right at issue is the right to publicly perform, to communicate to the public, or to make available to the public, a court must still decide *who is doing* the act of performing, communicating, or making available.

Where a service provider selects a library of content and loads it into his system for on-demand transmission, he is the one “doing” the making available. Similarly, as explained above, such a provider is fairly viewed as the one “doing” the performing under U.S. law as well, since by selecting the particular library of content and loading it into the system, he has taken the first steps in “show[ing]” that content to the public. 17 U.S.C. § 101. On this point too, whether the public performance right is coextensive with the making available right has little relation to the question of volitional conduct.

Finally, the WIPO treaties also reflect U.S. law in underscoring the importance of the distinction between direct and secondary liability. As explained above, one reason that distinction matters is that a service provider cannot be held liable for contributing to consumer copying when that copying is fair use. For example, because Cablevision’s subscribers have a fair-use right to record television programs for later viewing under *Sony*, Cablevision cannot be held liable for providing the means for subscribers to make those recordings. But no similar principle applies where the service provider directly engages in an infringing act.

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<sup>3</sup> In *National Rugby League Investments Pty Ltd. v. Singtel Optus Pty Ltd.*, [2012] FCAFC 59, the Federal Court of Australia reached a contrary result, declining to apply a volitional conduct standard to the reproduction right. But even that court described the question as a close one: It “found the questions raised in the appeals to be of some difficulty and considerable uncertainty.” *Id.* ¶ 9.

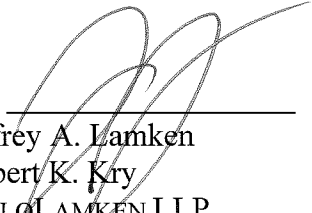
The WIPO Copyright Treaty provides in Article 10 that “[c]ontracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.” WIPO Copyright Treaty art. 10(1), Dec. 20, 1996, 36 I.L.M. 65. That provision serves as the basis for fair use rights under a signatory’s domestic law. *See* WIPO, *Guide to the Copyright and Related Rights Treaties*, Glossary, at 289 (2003) (“The exceptions granted under the concept of ‘fair use’ are regarded as corresponding to [Article 10].”). Thus, for the same reason the distinction between direct and secondary liability is important to the protection of fair use under U.S. law, that same distinction is also important to the structure of the WIPO treaties.

Ultimately, those issues are beyond the proper scope of this proceeding. The WIPO Treaties are clearly limited to communicating and making available “to the public,” and they require that the defendant be the one who communicated or made available the work. Therefore, regardless of whether U.S. law is coextensive with those rights, those same issues will arise. Whether U.S. law protects the WIPO treaty rights is an important question but entirely separate from the issues *Aereo* addressed.



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