

The Evolution of Live Streaming

Matthew Tracey examines the treatment by the courts of three online free-to-air television streaming services in Australia, the United Kingdom and the United States of America.

Introduction

Free to air television has traditionally generated revenue for broadcasters through advertising and retransmission by subscription television. This model has been reliably protected through the copyright that subsists in a broadcast and the exclusive rights allocated to the broadcaster that allow them to charge third parties for access.

The market for online content has risen exponentially in recent years as the proliferation of bandwidth and portable devices can provide high-quality transmission for more people in more places. The precise boundaries of the copyright that subsists in a television broadcast have been tested recently in three different countries. Accordingly, the owners of those exclusive rights have had their future profitability challenged by new technological models.

This article examines the extent to which system architecture has defined the legality of three online free-to-air television streaming services: Optus' TVNow in Australia, TVCatchup in the United Kingdom and Aereo in the United States.

Optus

Optus, the number two telecommunications provider in Australia, launched 'TVNow' in late 2011. TVNow allowed Optus customers to instruct Optus servers to record live free-to-air television and store the contents in the cloud. TV Now operated as a personal video recorder in a closed IP environment. At the time of its launch, Optus made it clear that playback of the recorded content is undertaken on a one-to-one basis and is not 'broadcasting.' The TVNow service could be used to view broadcast television including sports that were available on the free-to-air channels.

The National Rugby League (the **NRL**) and the Australian Football League (the **AFL**), as the rights holders in their respective sporting codes, granted an exclusive licence to Telstra for the right to stream live NRL and AFL matches on its BigPond service. The NRL, AFL and Telstra subsequently brought proceedings against Optus in the Federal Court of Australia for breach of copyright in a broadcast. Rares J, at first instance, found that the recordings were made by the subscriber not Optus and fell within an exception to time-shift recording under section 111 of the *Copyright Act 1968* (Cth) (the **Australian Copyright Act**) which allows a person to make a recording of a broadcast for private and domestic use by watching it at a more convenient time; also known as time-shifting.

On appeal to the Full Federal Court, Rares J's decision was overturned as the Court found that the recording was made jointly by Optus and the subscriber and the s111 exception was not applicable. In a joint judgment of the Full Federal Court, Finn, Emmett and Bennett JJ noted:

we consider that Optus' role in the making of a copy – ie in capturing the broadcast and then in embodying its images and sounds in the hard disk – is so pervasive that, even though entirely automated, it cannot be disregarded when the "person" who does the act of copying is to be identified.¹

The High Court of Australia refused Optus' leave for an appeal.

In the wake of the Full Federal Court's decision, Optus has urged the Australian Law Reform Commission to amend the Australian Copyright Act so as to facilitate the sharing of copyright material amongst different technology devices and platforms:

It is important to ensure third parties that merely provide the essential connectivity between creators and users are not inadvertently caught on the wrong side of the law by virtue of activities that should not be properly considered as infringing upon right holders' interests.²

The Optus decision in the Full Federal Court is focussed more on the recording of the broadcasting by Optus (or Optus and the subscriber jointly) than on the communication of that recorded broadcast to the public. This is in part due to the defence available under s111 of the Australian Copyright Act that Optus submitted should apply to the service. The trial judge, Rares J, concluded with some brevity that the TVNow service did not constitute a communication to the public where the recording was requested by an individual and viewed by that individual for their private purposes. Despite this, the Full Federal Court's focus on the recording (as opposed to the subsequent communication) of the broadcast meant that this issue wasn't explored fully on appeal.

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TVCatchup

TVCatchup, a service offering live streaming of free-to-air television to UK residents, was found to have breached copyright in a broadcast. TVCatchup encoded separate streams for each of its users and only provides those streams to people in the UK who hold a valid TV licence - that is, those people who would otherwise be able to view the free-to-air broadcast.

The claim was initially commenced in the UK High Court of Justice (the **HCJ**) by ITV, Channel 4 and Channel 5. The HCJ considered the nature of the TVCatchup service in light of EU and UK law. Specifically, the *Copyright, Designs and Patents Act 1988* (UK) (the **UK Copyright Act**) and recital 23 in the preamble to Directive 2001/29 of the European Parliament and of the Council (the **EU Directive**):

This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.³

1 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 at paragraph 67.

2 Optus submission to the Copyright and Digital Economy Issues Paper, Australian Law Reform Commission, November 2012, http://www.alrc.gov.au/sites/default/files/subs/183_org_optus.pdf.

3 *ITV Broadcasting and ors v TVCatchup Ltd* (2013) *European Court of Justice* C-607/11, para 3.

The High Court of Justice found that while copyright subsists in a television broadcast, it was unclear whether the right of communication to the public was breached in a case where a person would otherwise lawfully be able to view the broadcast and the effect of the one-to-one nature of TVCatchup's service on existing law. In light of this uncertainty, the HCJ referred the matter to the Court of Justice of the European Union (the **CJEU**)

Not unlike Optus' TVNow service, TVCatchup relied on their technical architecture to the extent that they claimed they were not communicating to the public a broadcast in which the copyright was owned by the broadcaster. The CJEU ultimately found that, despite their system design, TVCatchup was communicating the broadcast to the public in breach of the broadcaster's exclusive rights.

In their defence, TVCatchup relied on two distinct points: one for the broadcast of public service channels and one for the broadcast of digital channels. In respect of the public service channels, TVCatchup suc-

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cessfully argued that re-transmission of Channel 3, Channel 4 and ITV was a cable service under s73 of the UK Copyright Act which allows cable operators to re-transmit those channels without a licence. In respect of the digital channels, TVCatchup contended that their service 'is merely a technical means to ensure or improve reception of the terrestrial television broadcast in its catchment area.'⁴ The CJEU acknowledged that a technical intervention that was restricted only to the improvement of reception was not a communication within the meaning of the EU Directive.⁵ Ultimately, the CJEU rejected this defence in stating that:

the intervention of such a technical means must be limited to maintaining or improving the quality of the reception of a pre-existing transmission and cannot be used for any other transmission.⁶

The technical architecture of the service was designed in order to avoid a communication to the public at large by implementing a one-to-one transmission mode. However, the CJEU focused more closely on the service as a whole (and not the individual transmissions) in finding that the service was communication to the public. In doing so, they highlighted the general nature of the term 'public':

In the second place, in order to be categorised as a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, the protected works must also in fact be communicated to a 'public'. In that connection, it follows from the case-law of the Court that the term 'public' in Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. As regards that last criterion specifically, the cumulative effect of making the works available to potential recipients should be taken into account. **In that connection, it is in particular relevant to ascertain the number of persons who have access to the same work at the same time and successively. In that context, it is irrelevant whether the potential recipients access the communicated works through a one-to-**

one connection. That technique does not prevent a large number of persons having access to the same work at the same time.⁷

The CJEU decision is an interpretation of EU law as requested by the HCJ. The answers will now inform the HCJ in reaching its final decision. However, as the HCJ did not refer the question of whether TVCatchup's operations fell within the s73 re-transmission exception of the UK Copyright Act, it appears that TVCatchup will be free to continue to re-transmit those channels to its subscribers despite the CJEU ruling.

Aereo

Aereo extends the TVCatchup and Optus technical model further by allocating each subscriber their own individual antenna. Aereo operates out of a warehouse in Brooklyn, New York where they house thousands of small antennas with a diameter of a few centimetres. Each Aereo subscriber rents an individual antenna that receives free to air television which is streamed live to the subscriber from an individual PVR. Aereo has maintained that the nature of the legal relationship with its subscribers is in the form of a licence to use the antenna and DVR services and not the underlying content. In practical terms, the Aereo model operates as a regular television except with a very long cable between the antenna that receives the broadcast and the screen that displays the content.

Aereo streams broadcast television captured by its antennas which means only local content is included. Aereo restricts its subscribers to those with a New York address but has recently announced plans to expand to New Jersey, Connecticut and Pennsylvania. Earlier this year, after the completion of a US\$38m funding round, Aereo announced that it would later expand its service to 22 more cities including Miami, Boston, Washington DC and Salt Lake City.

In July 2012, several networks including Fox, NBC and PBS sought an injunction from the United States District Court for the Southern District of New York to stop Aereo from streaming broadcasts to its subscribers. Nathan J denied the application of the broadcasters who then appealed the decision to the Second Circuit Court of Appeal. In April 2013, the Second Circuit affirmed the decision of Judge Alison Nathan in a 2-1 decision (Judge Denny Chin dissenting) thereby allowing Aereo to continue operation. The Second Circuit Court of Appeal relied on an earlier 2008 decision involving subscription television provider Cablevision⁸ where public broadcast was considered by the Court. In following the precedent, the Second Circuit has further entrenched Aereo's legal foundation to work within the bounds of the US Copyright Act within the geographic boundaries of the Second Circuit.

Judge Christopher Droney's comments below highlight the importance of Aereo's multiple antenna model:

It is beyond dispute that the transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room is private, because only that individual can receive the transmission from that antenna, ensuring that the potential audience of that transmission is only one person. Plaintiffs have presented no reason why the result should be any different when that rooftop antenna is rented from Aereo and its signals transmitted over the internet: it remains the case that only one person can receive that antenna's transmissions.⁹

A competitor to Aereo, aptly named AereoKiller, has been the subject of a similar claim by television broadcasters. However, the application

4 Ibid 27.

5 see to that effect, *Football Association Premier League and Others v QC Leisure and Others* (C-403/08) paragraph 194 and *Airfield and Canal Digitaal v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) paragraphs 74 and 79.

6 *ITV Broadcasting and ors v TVCatchup Ltd* (2013) *European Court of Justice* C-607/11, para 29.

7 Ibid 31.

8 *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2nd Cir. 2008).

has been made in the Ninth Circuit of California where the court was not bound by the Second Circuit ruling in respect of Aereo. Judge George Wu, in awarding the injunction, stated that:

Second Circuit law has not been adopted in the Ninth Circuit, and this Court would find that the Ninth Circuit's precedents do not support adopting the Second Circuit's position on the issue. Instead, the Court would find that Defendants' transmissions are public performances, and therefore infringe Plaintiffs' exclusive right of public performance.¹⁰

Aereo has publically stated they are using a 'phased' approach to expansion so the Ninth Circuit ruling may not affect their expansion plans yet. However, a negative ruling in the Ninth Circuit could restrict revenue opportunities for any live streaming entity given the large territory of that jurisdiction.

In April 2013, Fox and CBS have publically stated that they would consider withdrawing their broadcast from public airways and switch to a subscription only model.¹¹ It appears that the broadcasters would be wary of subscription television providers, who currently pay large fees for retransmission rights, implanting a similar technical model to Aereo in order to retransmit for free the content they previously were paying for.

In May 2013, the CEO of Time Warner Cable, Glenn Britt, told the Washington Post that: "what Aereo is doing to bring broadcast signals to its customers is interesting" and "if it is found legal, we could conceivably use similar technology."¹² Also in May 2013, ABC and Time Warner announced that they would be making their broadcasts available on mobile devices free-of-charge to individuals that already subscribe to a pay television service. This appears to serve two ends: first, it provides a competitive service to Aereo and for free (provided the user is a subscriber to a pay television service already) and second: it aims to familiarise end users with mobile streaming of free-to-air television ahead of any attempt by pay television operators to offering the same free-to-air television broadcast content via an 'Aereo-type' model.

Conclusion

In reviewing the judgments of the various courts around the world, the key point of difference lies in their interpretation of what it means to communicate to the public. The CJEU found that the architecture of the TVCatchup service was largely immaterial and noted that:

it is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time.¹³

Conversely, the US Second Circuit Court of Appeals found that despite many people having access to the same transmission at the same time, "it remains the case that only one person can receive that antenna's transmissions."¹⁴ While the Full Federal Court of Australia didn't directly opine on whether TVNow constituted a communication to the public, the decision at first instance appears to align more close with Aereo than TVCatchup.

It is clear that the courts are limited in their power to provide a solution to this problem. The problem, in this author's opinion, is that the justification used by the courts to allow or restrict live streaming is based upon legislation that did not contemplate providing television over a delivery mechanism that differs from traditional broadcasting. In each case, the solution lies with legislative change to give certainty to all interested parties. As the High Court drew out in *Australian Education Union v Department of Education and Children's Services*, a court must not adopt:

a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.¹⁵

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The spread of information, culture and entertainment, in whatever form, should not rest upon such a fragmented and fragile foundation. There remains some hope that the ALRC's report on the inquiry into Copyright and the Digital Economy, due to be released in November 2013, will guide the legislature in solving these problems.

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The views expressed in this article are the views of the author only and do not represent the views of any organisation.

9 WNET, *Thirteen v. Aereo, Inc.; Am. Broad. Cos., Inc. v. Aereo, Inc.* (2nd Cir. 2013) 12-2786 p29.

10 NBC Universal Media, LLC, et al. v. Barry Driller, Inc., et al. (9th Cir. 2012) 12-6950 p3.

11 New York Times, *Aereo has TV Networks Circling the Wagons*, 10 April 2013.

12 The Washington Post, *Time Warner Cable CEO wants to slim cable bundles, eyes Aereo's technology*, 3 May 2013.

13 *ITV Broadcasting and ors v TVCatchup Ltd* (2013) European Court of Justice C-607/11, para 31.

14 WNET, *Thirteen v. Aereo, Inc.; Am. Broad. Cos., Inc. v. Aereo, Inc.* (2nd Cir. 2013) 12-2786 p29.

15 *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [28].

Upcoming Copyright Seminar

The Australian Law Reform Commission is expected to release the Discussion Paper in relation to its "Copyright and the Digital Economy" inquiry by the end of May.

CAMLA and the Copyright Society will be jointly hosting a panel discussion and audience Q&A regarding the issues arising from the Discussion Paper in late June 2013.

Our panellists will discuss the potential impact of the ALRC's recommendations across a number of industry sectors and give a flavour of how industry players are grappling with the issues under review.

CAMLA and the Copyright Society hope that you will be able to join us at Gilbert + Tobin to compare notes on the recommendations.

CAMLA members will be sent further details on this event in the coming weeks or keep in touch via the CAMLA website or CAMLA's LinkedIn page.