

US Supreme Court Turns Off TV Streaming Service

The US Supreme Court recently handed down its decision in the *Aereo* case, making the television streaming service illegal under US copyright law. Jesse Gleeson and Flora Ma provide a summary of the Supreme Court's decision and compare it with the *Optus TV Now* decisions in Australia.

1. Introduction

The US Supreme Court has recently handed down its long-awaited decision in the *Aereo* case, reversing the 2013 decision of the US Court of Appeals for the Second Circuit. This decision makes *Aereo*'s free-to-air television streaming service illegal under US copyright law, following in the similar footsteps of the earlier *Optus TV Now* decisions in Australia. Both the US and Australia have held certain TV streaming services to be illegal and in breach of copyright laws in both countries respectively.

2. Background: The Internet streaming landscape so far

The *Aereo* case in the US has been followed with great interest throughout its development, particularly in the lead up to the recent US Supreme Court decision.

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Aereo was a US service that rented tiny television antennas to individual subscribers. The antennas received free-to-air television broadcast and streamed that content live to web browser and mobile devices. *Aereo* also provided dedicated personal video recorder functionality for each customer. Various US TV networks commenced copyright infringement proceedings against *Aereo*.

In 2013, the US Court of Appeals for the Second Circuit denied preliminary injunctive relief against *Aereo*, holding that *Aereo* did not infringe US Copyright Law.¹ This was mainly as the transmission of the television signal was held not to be 'to the public' – the transmission was made to each individual subscriber from their own aerial.

The judgement relied heavily on the court's previous decision in *Cartoon Network LP v CSC Holdings*² in 2008. There, the court held that creating temporary buffer copies for customers, creating permanent copies for customers and transmitting the broadcast to customers did not infringe copyright as the transmissions were provided to individual customers and not "to the public".

In *Aereo*, the Court of Appeals for the Second Circuit similarly held that *Aereo*'s service recorded and transmitted content for each sub-

scriber on an individual basis, and did not constitute transmission to the public. As a result, the *Aereo* service continued to operate legally in the US.

The 2013 *Aereo* decision was similar to the decision at first instance concerning the *Optus 'TV Now'* service in Australia.

3. Australia: *Optus TV Now*

In 2011, *Optus* developed a service called '*TV Now*' which allowed users to record certain television programs and view them later on up to four devices. The recordings were stored at *Optus*' data centre and were streamed to a user's device upon request. *Optus* retained possession and control of the recordings at all times, deleting them after 30 days.

The Australian Football League (**AFL**), National Rugby League (**NRL**) and *Telstra* began proceedings after several AFL and NRL games broadcast on television were recorded and viewed by *TV Now* subscribers alleging that the service infringed AFL and NRL's copyright in the television broadcasts of its games, as well as *Telstra*'s exclusive licence to broadcast the games via Internet and mobile technologies.

At first instance, the *TV Now* service was held not to infringe copyright in the television program.³ Justice Rares found that the copies of the television program were made by the individual service subscriber, not *Optus*, and that their use fell within the 'time-shift exception' in section 111 of the *Copyright Act*⁴ which allows a person to make a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.

However, in 2012, the Full Court of the Federal Court unanimously upheld an appeal concerning the *TV Now* service.⁵ The court held that the *Optus* service infringed *Telstra*'s copyright in the television programs by recording them and making them available to its subscribers. The copies of the cinematograph films and sound recordings were found to have been made jointly by *Optus* and their subscribers. The section 111 'time-shift exception' was found not to be available on the facts, applying only for private and domestic use and not to cover commercial copyright carried out for the benefit of others. The High Court denied special leave to appeal, leaving the Full Court of the Federal Court's judgement as the final decision on the matter.

At the time, the 2013 *Aereo* decision contrasted with the landscape in Australia in light of *Optus TV Now*. This raised uncertainties as to whether *Optus*' banned service in Australia would be legal in the US. However, the recent *Aereo* decision puts some of these uncertainties to rest.

1 *WNET v. Aereo, Inc.*, 106 U.S.P.Q.2d 1341 (2d Circuit, 2013).

2 536 F.3d 121 (2nd Circuit, 2008).

3 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34.

4 1968 (Cth).

5 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

4. US Supreme Court: Aereo

Following a similar path to the Optus TV Now proceedings, the US Supreme Court has recently reversed the 2013 Aereo decision making Aereo's free-to-air television streaming service illegal under US copyright law.⁶

In reaching their decision, six justices of the US Supreme Court, with three justices dissenting, focused heavily on the strong resemblance between community antenna television (CATV) providers and Aereo. CATV providers provided shared antennas in optimal reception locations and transmitted free-to-air broadcasts to viewers over cables. In response to a US Supreme Court decision that CATV providers did not infringe copyright, in 1976 the US Congress amended the US Copyright Act with the express aim of making CATV transmissions illegal unless licensed pursuant to a statutory licensing regime for re-transmission of broadcasts.

While the US Supreme Court's decision recognises that Aereo differs from CATV providers in that it had a dedicated aerial per subscriber and did not transmit from that aerial until receiving a customer request to do so, it held that those 'behind the scenes technological differences' did not sufficiently distinguish Aereo. Aereo was held to fall within the US Copyright Act, as amended to catch the CATV providers. The court held that even if Aereo only transmitted the signal from an aerial to a single subscriber, in aggregate it would transmit the same broadcast signal to multiple persons simultaneously – each through their own respective aerials. This was held to be sufficient to constitute 'public broadcast'.

The Supreme Court also held that both the user and Aereo transmitted the television signal, as they both 'show a television program's images and make audible the program's sounds'. As a result, Aereo was held to be a direct infringer.

5. What now?

Although both Optus TV Now and Aereo have been held to infringe copyright under Australian and US copyright law respectively, the basis for each decision is different. Perhaps anticipating issues in relation to re-transmission of live broadcasts and likely lacking Aereo's technology for using tiny antennas, Optus TV Now was designed to provide recordings of past broadcasts upon demand as early as 2 minutes after the commencement of an original broadcast, whereas Aereo's service sought to provide near-live transmissions with a delay of a few seconds from the over-the-air broadcast.

The courts in both instances held that both the service providers and their customers could be held accountable for the relevant acts of recording and re-transmission and that it will be difficult for providers to avoid liability by relying solely on user or subscriber actions and requests.

Although the Optus TV Now cases considered only the making of cinematograph films and sound recordings of the broadcast,⁷ the re-transmission provision relied upon in the recent Aereo decision has an Australian equivalent which can be found in Part VC of the Copyright Act.

5.1. ALRC Inquiry into 'Copyright and the Digital Economy'

There was some speculation after the TV Now decisions that the ALRC Inquiry into 'Copyright and the Digital Economy' may present an opportunity to review the exception under section 111 sought to be relied on by Optus. The Inquiry Report has now been delivered with the ALRC recommending the repeal of the exception stating instead that the recommended fair use or expanded fair dealing exception should be applied when determining whether a private use infringes copyright.⁸

The recommendation for fair use is for this new exception to replace the existing provisions relating to fair dealing. Alternatively, if fair use is not enacted, the ALRC has recommended expanding the fair dealing exceptions. The recommendations

for fair use centre around consideration of four 'fairness' factors rather than the specific purpose of the use of copyright material. These fairness factors are based upon the factors that are common to both the US fair use provision and the existing Australian provisions for fair dealing for the purpose of research or study. It has also been recommended that these be accompanied by 11 non-exhaustive illustrative purposes that may be considered 'fair'. The alternative recommendation for an expanded fair dealing is to introduce 11 new fair dealing purposes and provide that the same four 'fairness' factors be considered. However, neither of these recommended exceptions requiring the use or dealing to be 'fair' are likely to cover commercial services such as the Optus TV Now service.

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5.2. Alternatives

While Aereo customers are likely to be disappointed by the Supreme Court's decision, as Optus customers were by the TV Now decision, given the wide proliferation of free catch-up services, commercial streaming services and online content stores, consumers are unlikely to want for legal alternatives to sate their desire for online television content. At the same time, the Supreme Court's decision will make it that little bit easier for the creative minds behind our current golden age of television to be paid their due.

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6 *American Broadcasting Companies, Inc v Aereo, Inc* 573 US __ (2014).

7 *Copyright Act 1968* (Cth), ss87(a) and 87(b).

8 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report, Report No 122 (2014) 247.

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