

Optus TV Now

Banned 'TV Now' likely to be legal in the USA

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In a major blow for US TV networks, the US Court of Appeals for the Second Circuit has refused to grant a preliminary injunction against streaming television provider Aereo. This presents a contrast with the Australian Full Federal Court decision in relation to the Optus TV Now service.

Online video is now mainstream and looks set to take a more significant share of eyeballs from conventional TV. For example, Netflix's recent political thriller *House of Cards*, starring Kevin Spacey and directed by David Fincher (*The Social Network*), which had a production budget of more than \$100 million, is only available online.

Free-to-air and pay TV providers are making huge amounts of video available through their own services (see ABC's iView and Foxtel GO), and also services like Apple TV.

This presents huge opportunities and challenges for content owners and broadcasters. Indeed, companies are launching services which try to avoid licensing content. One way to do this is for companies to contend that their services are internet-based equivalents of watching and recording television at home.

Australia is not immune. For instance, Telstra paid approximately \$153 million for the online and mobile rights for AFL games and a significant amount for similar rights in relation to NFL. However, Optus subsequently launched an unlicensed service which allowed its users to view broadcast AFL and NFL matches, without paying a cent in licence fees. Optus's TV Now service was essentially an online video recorder operated by Optus and its subscribers, which allowed customers to record their own individual copies of free-to-air television content on Optus's servers and view it later on mobile devices. Particularly important for time-sensitive content such as AFL matches, customers could stream near-live.

Australian television networks and content owners commenced proceedings in the Federal Court. While the trial judge held that the service was legal by virtue of time shifting exceptions in the *Copyright Act*, the Full Federal Court overturned that decision and the High Court then denied special leave.

A similar service is offered by Aereo, a US service provider. Aereo provides each subscriber with remote access to a tiny dedicated television aerial, which receives free-to-air television broadcasts, and streams that content live to web browsers and mobile devices. It also offers personal video recorder functionality much like Optus did. Various US TV networks commenced copyright infringement proceedings against Aereo.

The US Court of Appeals for the Second Circuit just handed down a decision denying preliminary injunctive relief against Aereo. While the proceedings will likely continue on (and further appeal avenues exist for the plaintiff broadcasters), the court's judgment suggests that services such as Aereo's will ultimately be held to be legal in the US.

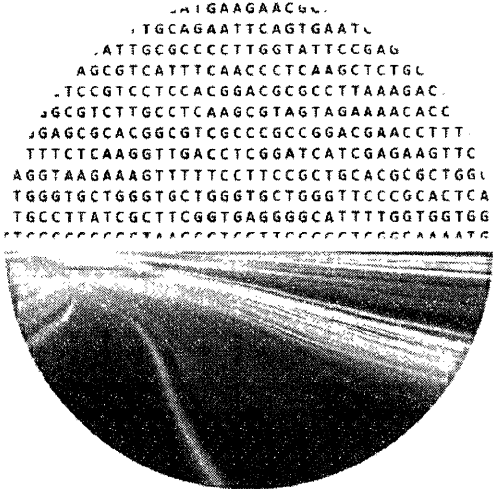
The *Aereo* decision relies heavily on the same court's decision in the *Cartoon Network LP v CSC Holdings* (the *Cablevision Case*) decision in 2008. There, the court held that creating temporary buffer copies for customers, creating permanent copies for customers and transmitting the broadcast to customers did not infringe copyright. In *Aereo*, the plaintiffs only pressed the transmission argument in the preliminary injunction application. That argument relies on the transmission being 'to the public'. The court held that Aereo's service records and transmits content for each subscriber individually, and did not constitute transmission to the public.

In the Australian TV Now case, it was not necessary for the plaintiffs to prove transmission to the public. It was sufficient that copies of the broadcasts were made. The key controversy was whether Optus could rely on the time shifting exception in section 111 of the Copyright Act, and in turn on whether it was Optus or the subscriber (or both) making the relevant recordings.


Notwithstanding Aereo's litigation success thus far, it would take a brave entrepreneur to set up a similar service in Australia, at least as the law in Australia currently stands. The Australian Law Reform Commission is looking at this issue in the context of a broader review of digital copyright issues, with a report due in November 2013. We would not bet on any consequent legislative changes paving the way for Aereo-type services.

Sub-licences – Underestimated and Overlooked?

Thus, while networks and content owners doing business in Australia face significant challenges from piracy and also legitimate online competitors, their shareholders can sleep a little easier knowing that they will not likely have to compete with services like Aereo.



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