



# Making Copyright Content Available in the Cloud: Revisiting Optus TV and Aereo

**Cheryl Foong**

1 April 2016

Lecturer, Curtin Law School

*LLB (Hons I) LLM (QUT); LLM (Columbia)*

PhD Candidate, ACU Thomas More Academy of Law

## *NRL v Optus (2012)*

(2012)201 FCR 147; [2012]FCAFC 59.



## *ITV v TVCatchup (2013)*

CJEU (Case C-607/11, 7 March 2013)



## *ABC v Aereo (2014)*

134 S. Ct. 2498 (2014)



	Act of Communication (Making Available/ “Performance”)	To the public
<b>Aereo (US)</b>	Similar to cable	Functional equivalent of cable
<b>OptusTV (Australia)</b>	? Not considered on appeal	? Not considered on appeal
<p><i>Infringement on basis of reproduction right only. Optus = ‘maker’ of the copies; s 111 not applicable</i></p>		
<b>TVCatchup (EU)</b>	Broad interpretation	‘different technical means’ – no ‘new public’ required

# Issues

- USCO report (February 2016)
  - Varied judicial decisions – uncertainties re lower limits
  - Courts to work through these issues – mere offers (access); one-to-one communications should be covered
  
- Australia
  - Mere access; one-to-one communications covered:  
*Roadshow Films v iiNet* [2011] FCAFC 23



# Problems

The 'act' of making available = ?

- Insufficient analysis of the act

'The Public' = a market

- Tied to a 'licensable' sector of the public:

The 'copyright owner's public' *Telstra v APRA* [1997] HCA 41; 191 CLR 140 (Australia)

'New public' *SGAE* (Case C-306/05); *Svensson* (Case C-466/12) (EU)



# The Future

## 'The Public'

- Need to consider impact of such concepts to development of new means of communication and potential new revenue streams

## The 'act' of making available

- Need to consider how the 'act' can be carried out through a system
  - Decisions have an impact on how the technology of the future will be designed - instead of pushing ahead blindly and avoiding a closer analysis of the technology, we need to explicitly consider them in the context of the making available right.



# Thank you

Cheryl Foong

[cheryl.foong@curtin.edu.au](mailto:cheryl.foong@curtin.edu.au)

Forthcoming article:

- Cheryl Foong, 'Making Copyright Content Available in the Cloud vs the Making of Copies: Revisiting Optus TV and Aereo' (2016) 41(3) *Monash University Law Review*

