

Content meets the cloud:

What is the legality of cloud TV recorders?

Updated in light of recent cases, including Aereo

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Content meets the cloud – join the conversation

We recognise that new technologies and business models like cloud PVRs are stretching the legal framework, opening up new opportunities but also creating real challenges for the TV industry. We want to influence change and lead the conversation on these new technologies and business models to put our clients at a competitive advantage, not just sit back and advise on the “black-letter law”.

Olswang has established a commanding reputation for its expertise in emerging TV technologies and business models. Across our network of international offices, lawyers with a unique combination of technology, media and intellectual property expertise advise clients from major Hollywood studios and international channel businesses through to industry associations, collecting societies and platforms. We are ranked in the top tier by legal directories across media and technology and many of our lawyers are viewed as world experts in their fields.

Is your organisation wrestling with the challenges and opportunities arising from disruptive change in TV? Do you have a strong view on the direction that the industry is heading in? If so, we'd love for you to join the conversation.

You can do so by getting in touch with us.

The copyright question

Do cloud recording services infringe copyright? This is the question that has been asked in a number of courts around the world since the services were first launched commercially more than five years ago.

On the one hand are the service providers, who argue that cloud video recorders (or "cloud PVRs") are in effect no different to in-home, hard drive-based set-top boxes, in that they simply enable the time-shifting by users of broadcast TV. On the other hand are the content owners, whose position has been that cloud PVR services operating without appropriate content licences amount to an infringement of their copyright.

Since the commercial launch of cloud PVRs, service providers and content owners have been engaged in litigation around the world, from the USA to Asia-Pacific. Where cloud PVR services are launched, litigation seems to follow soon after. Despite the different business models and technologies being used, all of the cases come down to one key question: do cloud PVR services infringe copyright? It isn't just the courts that are wrestling with this issue. We are also seeing governments seeking to legislate to bring clarity to the subject, although some of the technical nuances in play – such as how to apply private copying exceptions where the services provider as well as the customer may be said to be making copies - are proving difficult to address through legislation.

We round up here the case law from around the world to try to establish the state of play in the market, picking up on common issues emerging across jurisdictions and considering how these issues will shape the industry as content meets the cloud.

What is a cloud PVR?

But first, what do we mean by “cloud PVRs” (also commonly referred to as “network PVRs”, “nPVRs”, “nDVRs” “Remote PVRs”, “Remote Storage PVRs” or “RS-PVRs”)?

Like in-home personal video recorder (PVR) set-top boxes, cloud PVR services allow for the time-shifting and/or place-shifting of broadcast television. The key difference between cloud PVR services and PVR set-top boxes is that in a cloud PVR service the physical recording is made not in the user’s home on a hard drive built into their set-top box but, rather, remotely, in the cloud. The content is then streamed from the cloud to one or more user devices. Services tend to fall into two broad categories, as shown below, although with technology and business models evolving rapidly, we are seeing services pop up that do not neatly fall into any existing categorisation.

Model A

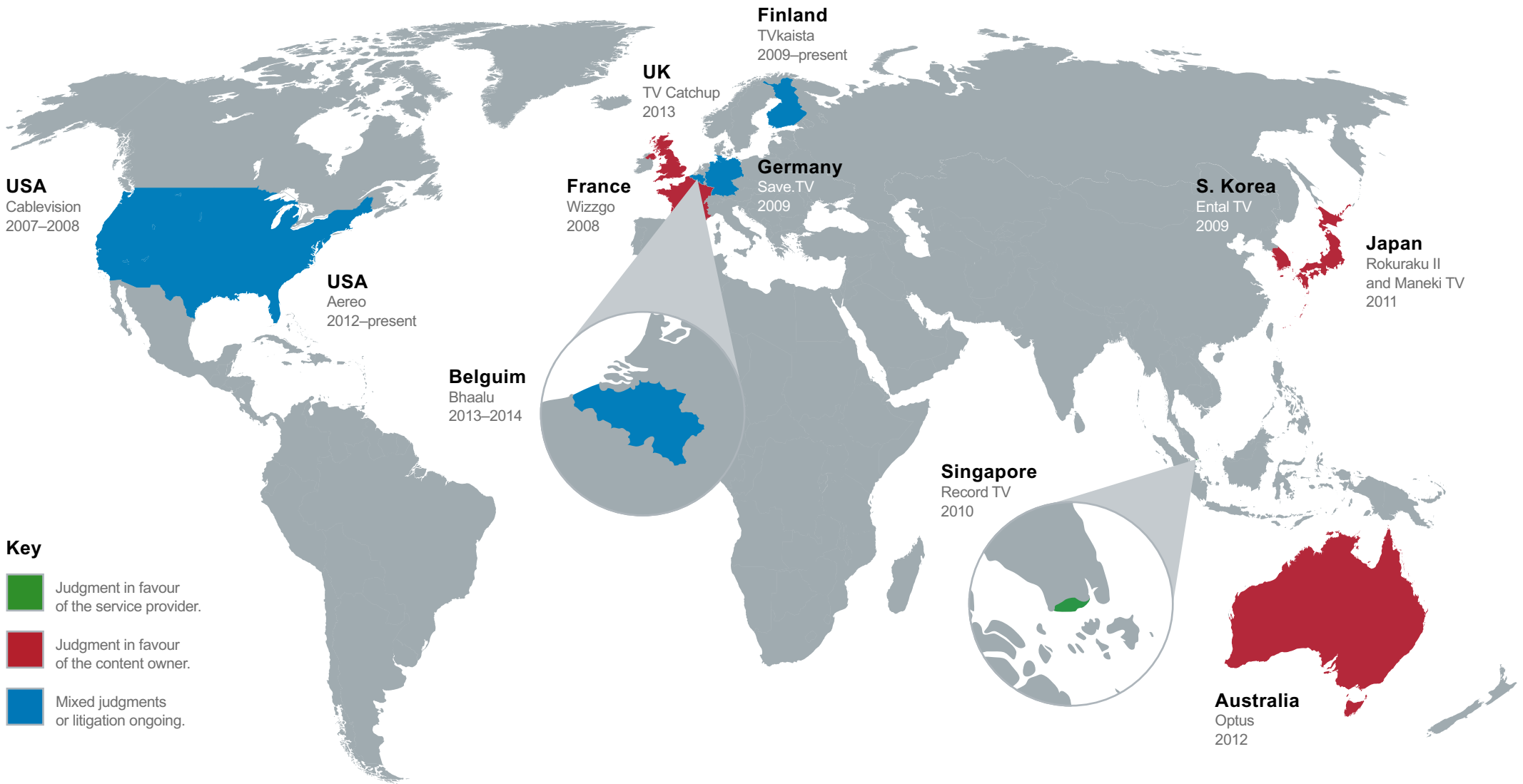
User-Initiated – Like a set-top box, only remote

A user initiates a recording of broadcast television, as they would with their PVR set-top box. The recording is then made and stored remotely and the recorded programme is only accessible to the user that initiated the recording, in their own "private cloud".

Model B

Non-User Initiated – Everything is recorded

All content on specific channels is captured centrally by the cloud PVR service provider as that content is broadcast, without being initiated by the end user. End users can access the programmes, either via simultaneous streaming or in some cases on demand.



The state of play:

Rounding up cloud PVR litigation from around the world



2007–2008

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Country

USA

The service

Cablevision

Service description

Cablevision streamed their existing digital TV service onto a second server, which identified requested content then copied and streamed this content onto permanent storage for later retrieval. Content requested by a particular user was stored separately and independently for that user and replayed only to the user who requested it.

The case

Cablevision was sued by a consortium of TV and movie copyright holders including Fox, Universal and Disney, who were initially successful. However, on appeal, the service was held not to infringe copyright on the following grounds:

- The content held on Cablevision's storage buffer was only held for a transitory duration (1.2 seconds) and therefore did not constitute copying under US copyright law.

- The copies held on Cablevision's servers were made by the users as the recording was carried out at their request.
- There was no "public performance" of the content as each viewer made a separate copy of the content for individual use.

Status

Judgment in favour of the service provider.

2008



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Country

France

The service

Wizzgo

Service description

In May 2008, Wizzgo launched a cloud DVR platform, the first of its kind in France. Users could record programmes to their own “private cloud” as long as they requested that the programme be recorded before it started. The copy included the original advertising.

The case

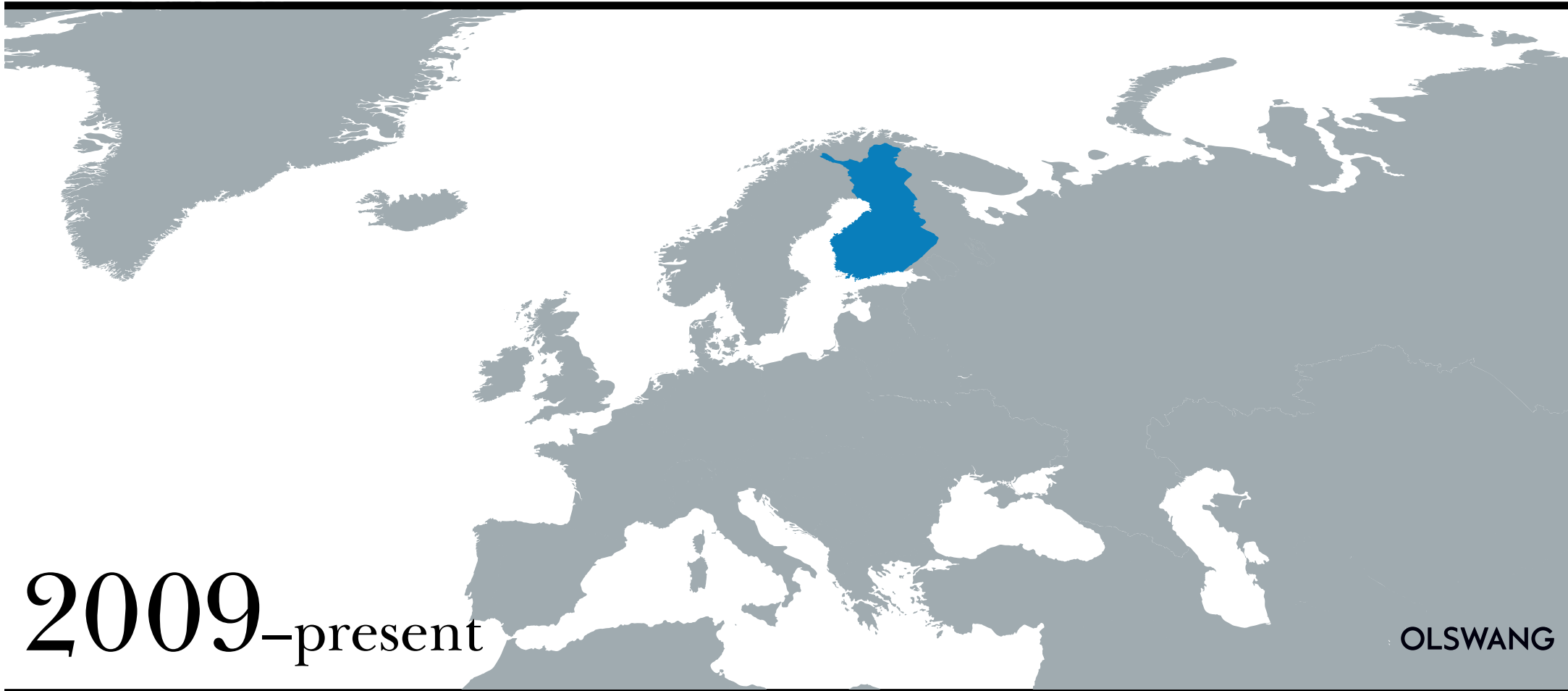
A consortium of French content owners including France Television, brought proceedings against Wizzgo alleging copyright infringement. Wizzgo’s defence was that its service fell within the scope of two exceptions under French copyright law:

- Transience – it argued that it only provided users with a temporary, transient copy of the program, assisting them to save their own private copies.
- Private copying – it argued that each copy (because it was only available to the user in question) was private.

The Court found in favour of the content owners, determining that the “exceptions” referred to were just that and were not “rights” capable of being transferred. By November 2008, the Tribunal de Grande Instance de Paris had declared the final summary judgments against Wizzgo and imposed fines, in response to which Wizzgo ceased operating.

Status

Judgment in favour of the content owners.



2009-present

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Country	The service	Service description	The case		Status
Finland	TVKaista	TVKaista allows users to play back recordings of all TV programmes broadcast on specific channels over the previous two weeks.	The Helsinki Times reported in November 2012 that the executives of TVKaista would face criminal charges for providing content protected by the copyright of several Finnish media companies.		The current position remains somewhat uncertain.

2009–2014

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Country

Germany

The service

Save.TV
Shift.TV

Service description

Both services allow subscribers to record television content for a monthly fee. Upon initiation of the recording by the user, the services capture the real-time broadcast via satellite receivers, convert the signal and store the broadcast on the user's "private cloud", where it is accessible via download or stream.

Neither Save.TV nor Shift.TV have acquired any licenses by the major German broadcasters (RTL and ProSiebenSat.1) for the use of their content. The broadcasters consequently initiated a number of proceedings against Save.TV and Shift.TV claiming the infringement of Copy- and ancillary rights under the German Copyright Act.

The cases

The proceedings eventually reached the German Federal Supreme Court (BGH), which, in a series of judgments, laid down the following principles:

1. The operation of a cloud PVR service does not infringe the broadcasters' right to reproduce and the right to make the work accessible to the public, if (a) the recording is initiated by the user and the operator does not interfere manually with the recording process, and (b) no "master copy" of the recorded broadcast is stored centrally, meaning that – for each user – an individual copy has to be created from the very beginning of the recording process. The BGH held that these

conditions were met in the case of Shift.TV, while Save.TV was based on a "master copy"-system.

2. The operator of a cloud PVR service requires a retransmission license from the broadcaster, as the transmission of the signals from the operator's satellite receiver to the user's "private cloud" constitutes a retransmission under German Copyright Law (despite the fact that viewing takes place at a later date).

Status

As the BGH did not decide whether the requirements for a compulsory retransmission license are met, but instead referred this question back to the Courts of Appeal, the final judgment is still open. Note: the mentioned decisions do not touch upon the rights of the authors/producers of the TV content.

2009

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Country

South Korea

The service

Ental TV

Service description

Internet-based recording service. Users requested a recording which was then recorded by Ental TV in the cloud and streamed to the user in question.

The case

Ental argued that it merely leased the recording system to its users and that it is the users who actually recorded and used the programmes, something that would constitute private copying under Korean law.

The Korean courts disagreed. They found that it was Ental TV, not the individual user, that recorded and copied the TV programmes because it owned and managed all of the facilities used for the recording. Ental TV was also found to have infringed the content owners' public retransmission rights.

Status

Judgment in favour of the content owners.

2010

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Country	The service	Service description	The case	Status
Singapore	Record TV	Record TV is a free service which allows users to initiate the recording of a live broadcast, which is stored on Record TV's server for later streaming by the user.	<p>The Court of Appeal held that Record TV's service did not infringe copyright as the process was considered no different from the use of a traditional DVR, as it was the user who carried out and remained in control of the copying.</p> <p>The Court also held that communications between Record TV and its users were made privately and upon request, and there was no reason why the aggregate of such requests should be seen as a communication to the public.</p>	<p>Finally, the Court found that Record TV did not authorise its users to infringe copyright as it took adequate steps to prevent infringement by specifying in the Terms of Use that the service was only for recording shows that could be legally viewed and that the content for was private domestic viewing. In the light of these precautions, knowledge of infringing use of the service, in the absence of proof or express knowledge, could not be attributed to Record TV.</p> <p>Judgment in favour of the service provider</p>

2011

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Country

Japan

The service

Rokuraku II
and Maneki TV

Service description

These “place-shifting” services enabled programmes to be recorded and then streamed to other devices, whether domestically within Japan or for expats abroad.

The case

In overturning earlier judgments, the Japanese court ruled that both services were illegal, finding that it was not the individual users who were deemed to have copied and transmitted the TV content but, rather, the service providers, because they managed the facilities and made them available to users.

Status

Judgment in favour of
the content owners.



2012

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Country

Australia

The service

Optus

Service description

Optus launched "TV Now", a service giving its mobile customers access to a digital TV guide and the ability to schedule programmes for recording to the Optus cloud. The recording could then be played back as many times as the user wanted within a 30 day period, upon which it would be deleted. Users could only watch programmes that they set to record.

The case

Optus pre-emptively brought proceedings to determine the legality of the service and was initially successful, with the trial judge finding that it was not Optus that "made" the infringing copy but, rather, the user of the TV Now service, and that this activity fell within the private copying exception under Australian copyright law.

This decision was overturned on appeal. Drawing analogies with the *Rokuraku II* case in Japan, the court found that Optus' role in copying, storing and making available the programmes without permission from the content owners meant that the service infringed copyright. The judgment concluded that "it is not apparent to us why a person who designs and operates a wholly automated copying system ought...not be treated as a 'maker' of an infringing copy where the system itself is configured designedly so as to respond to a third party command to make that copy".

Status

Judgment in favour of the content owners.

2012–present

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Country	The service	Service description	The case	Status	
USA	Aereo	Aereo's service allows customers to either view live streamed broadcasts or to initiate recordings for later viewing. Each user has two tiny individual antennae, located at Aereo's data centre (one for watching live TV and one for recording). When a user tunes into a channel through the Aereo app, it instructs that antenna to tune to that channel and start recording the programming to the DVR. Aereo charges users around \$12 per month.	<p>March 2012: A number of broadcasting networks filed claims against Aereo for copyright infringement.</p> <p>July 2012: The broadcasters' request for a temporary block on Aereo's transmissions was rejected by the Federal Court. The judge considered the Cablevision decision to be a binding authority on the subject. However, in September 2012: Cablevision filed a statement in support of the broadcasters stating that Aereo's failure to pay any licence fees for re-broadcasting the programme or to obtain permission from the broadcasters was a "critical legal difference" between the Aereo service and the Cablevision service.</p>	<p>2013: A number of legal battles were fought through 2013. Broadcaster attempts to obtain a rehearing of the earlier New York ruling failed. There were dissenting judgments, however, describing the Aereo service as a "sham". In October 2013, broadcasters petitioned the US Supreme Court to block Aereo from rebroadcasting their programmes to users. 2014: In January 2014, the US Supreme Court agreed to hear the case.</p> <p>On 25 June 2014, the US Supreme Court found in favour of the content owners in a split 6-3 decision. The court determined that Aereo's services were really no different to those of a cable TV company, putting it squarely within the restrictions of the Copyright Act and effectively shutting it down.</p>	Judgment in favour of the content owners.

2013

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Country

UK

The service

TV Catchup

Service description

TV Catchup's service permits users to receive live streams over the internet of free-to-air broadcasts. The service is funded by advertising, with a pre-roll advertisement preceding the live channel stream.

The service has indicated that it will be launching PVR-type recording functionality in the near future.

The case

Several British TV broadcasters brought proceedings against TV Catchup for breach of copyright in their content. Amongst other things, the broadcasters argued that the service constitutes a communication to the public without their consent. The High Court asked the Court of Justice of the European Union (CJEU) for confirmation on this point.

In March 2013, CJEU confirmed that by retransmitting terrestrial TV broadcasts over the internet using a different technical means from that of the original communication constitutes a separate "communication" and is therefore subject to authorisation. Further, it constitutes

a communication to the public because it is aimed at everyone in the UK who has an internet connection and who claims to hold a TV licence. In other words, **TV broadcasters can prohibit the retransmission of their content by another company via the internet.**

Status

Judgment in favour of content owners.

2013-2014

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Country	The service	Service description	The case		Status
Belgium	Bhaalu	Bhaalu is an Internet-based Digital Video Recorder Set-Top Box that gives access to all TV content one is entitled to view via a subscription to a distributor. With Bhaalu, one can view recordals from any channel back 60 days, and from any location through a laptop, tablet or mobile device and television.	<p>Bhaalu is strongly criticised by the broadcasters (Medialaan, VRT and SBS) who are of the opinion that Bhaalu should have obtained their consent.</p> <p>Bhaalu claims that it can invoke the exception of private copying provided by the Belgian Copyright Act since one can only (i) use Bhaalu if one has subscribed to the particular channel, (ii) watch its own recordals and (iii) watch its recordals within the “family circle”.</p> <p>Whether or not the storage of the content takes place within the “family circle” is being doubted. The content is stored on the cloud and the CVR</p>	<p>Client Boxes of the Bhaalu Community members. Hence such member is viewing content either collectively stored in the cloud, either stored on CVR Client Boxes of the Bhaalu Community members.</p> <p>The broadcasters' position therefore is that the content could be considered as being shared outside the “family circle”.</p> <p>The broadcasters also believe that Bhaalu should have requested their authorization to use their signal in order to comply with the Flemish Decree on Signal Integrity.</p>	<p>TV Vlaanderen (satellite distributor) vs. Bhaalu: judgment in favour of the service provider but with very limited scope (unfair market practices and competition).</p> <p>Broadcasters vs. Bhaalu: proceedings ongoing - based on violation of copyright law and the Flemish Decree on Signal Integrity.</p>

Catching up with the cloud – where next for cloud PVRs?

Cloud PVR services are not new. They have been commercially available for more than five years (more in some countries). However, despite predictions that they would eventually replace the set-top box hard drive PVRs in homes, they have not yet achieved the level of mainstream take-up that many expected.

Legal uncertainty is undoubtedly one of the key reasons for this. Operators have had limited cause to be confident that their services will be backed by the courts and likewise content owners have had more difficulty than many expected in securing judgments against operators. In other words, there are very few “clear winners” on either side of the debate and the position remains uncertain in most markets, with major decisions often turning on seemingly very minor technological details. Nonetheless, some clear trends are emerging from case law around the world:

- Services that only make the recording upon a user’s request and as a separate copy are in most territories less likely to be deemed to infringe copyright than those that record and retransmit programming on more of a blanket basis.
- A key defence for service providers (but one that has not worked in every jurisdiction) is that they are merely acting on the user’s behalf, and that any copying is effectively being done by the user within the scope of private copying exceptions. Courts that have been convinced by this argument have, when finding in service providers’ favour, often also concluded that the services are in effect no different to in-home set-top boxes recorders.

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- The existing legal framework is being stretched. The “letter of the law” is leading to some unique (some would say strange) technologies and business models that would probably not exist if they were not developed with a statute book in hand. Perhaps the best example is Aereo’s “antennae farm”.
 - The new business models and technologies will continue to challenge the existing legal framework and create scope for even more litigation.
 - Multi-territory offerings are going to be extremely challenging for the foreseeable future because of the territorial nature of copyright law. Although judges have drawn upon decisions in other territories, the principles have often been applied differently from one territory to another.
 - In the meantime, and pending clarification from legislators, it would appear that the best hope for the development of cloud PVRs as a legitimate market internationally remains for the key stakeholders to find business models that appropriately reward content owners whose content is distributed through those platforms whilst enabling service providers to monetise innovative platforms. That level of agreement does, however, seem relatively unlikely, at least in the short-term, so the position is likely to remain uncertain for some time to come.

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