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The Supreme Court likely would never have granted cert in *Aereo* if not for the Second Circuit's 2008 decision in *Cablevision*. Indeed, Aereo's service may have never launched in the first place absent *Cablevision*'s ''public performance'' construction. For context on both cases, Tamlin Bason interviewed Jeffrey Lamken and Robert Kry, who represented Cablevision in the earlier *Cablevision* litigation and filed a brief on Cablevision's behalf in *Aereo*.

Q&A: On Eve of *Aereo* Argument, Cablevision's Attorneys Reflect On Earlier Litigation Crucial to Current Supreme Court Row

TAMLIN BASON'S INTERVIEW WITH JEFFREY LAMKEN AND ROBERT KRY

Lamken and Kry are partners at MoloLamken LLP. Lamken has argued 21 cases before the U.S. Supreme Court on a variety of matters, including energy law, intellectual property, telecommunications, constitutional law, criminal law, bankruptcy and administrative law. Kry's practice focuses on trial and appellate litigation in a variety of fields, including intellectual property, sovereign immunity and business litigation.

What Was 'Public' Before *Cablevision*?

Bloomberg BNA: In your reply brief in *Cablevision*, you had a subsection titled: ''The RS-DVR Does Not Make 'Public' Performances Because It Does Not Make the Same 'Transmission of a Performance' Generally Available.'' When drafting this section was there any indication of how important the court's ultimate construction of ''public performance'' would be to your cause?

Jeffrey Lamken: We appreciated that this was an important issue. We argued both that (1) there is no public performance with the RS-DVR; and (2) if there is, the customer rather than Cablevision is the one ''doing'' the performing. We understood that we needed to win at least one of those two arguments for the court to uphold the RS-DVR.

Bloomberg BNA: Another thing I noticed about this section of that brief is that it is relatively short on case law. Indeed, apart from passing mentions of two cases (*On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787, 21 U.S.P.Q.2d 1545 (N.D. Cal. 1991), and *Columbia Pictures Industries Inc. v. Redd Horne Inc.*, 749 F.2d 154, 224 U.S.P.Q. 641 (3d Cir. 1984)), the section relies almost entirely on the following observation found in the 2006 edition of *Nimmer on Copyright*: ''[I]f a transmission is only available to one person, then it clearly fails to qualify as 'public,' '' 2

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Small Antennas, Large Impact

In 2008, in a case commonly referred to as *Cablevision*, the Second Circuit upheld the lawfulness of Cablevision's Remote-Storage DVR (RS-DVR), which allows subscribers to record and play back television programs they receive through their cable subscription, just as with an ordinary DVR or VCR, except that the recordings are stored remotely. The Second Circuit held that the RS-DVR did not infringe the ''public performance'' right because the only person capable of receiving a playback transmission was the subscriber who made the recording, *Cartoon Network LP v. CSC Holdings Inc.*, 536 F.3d 121, 87 U.S.P.Q.2d 1641 (2d Cir. 2008) (76 PTCJ 511, 8/8/08).

It is not disputed that Aereo Inc. designed its service in an attempt to take advantage of *Cablevision*'s ''public performance'' holding. The service, which initially launched only in areas governed by Second Circuit jurisprudence, uses thousands of individual dime-sized antennas to capture over-the-air broadcasts. It then assigns, on an as-needed basis, an individual antenna to each subscriber and allows the subscriber to stream the captured content directly to her Internet-connected device. The Second Circuit relied on its *Cablevision* decision to find the service noninfringing because the antennas transmit a single copy of a broadcast to a single subscriber, *WNET v. Aereo, Inc.*, 712 F.3d 676, 2013 BL 87728, (85 PTCJ 799, 4/5/13)106 U.S.P.Q.2d 1341 (2d Cir. 2013).

The Second Circuit denied a petition for en banc review (86 PTCJ 573, 7/19/13), leading to a petition for writ of certiorari (86 PTCJ 1231, 10/18/13), which Aereo did not oppose (87 PTCJ 378, 12/20/13), and which was granted in January (87 PTCJ 551, 1/17/14).

The Supreme Court will hear argument in the case on April 22. Analysis of the petitioners' and government's briefs (87 PTCJ 1082, 3/14/14), Cablevision's brief and other amici briefs in support of the petitioners (87 PTCJ 1084, 3/14/14), Aereo's brief (87 PTCJ 1292, 4/4/14), and amici briefs in support of Aereo (87 PTCJ 1365, 4/11/14) can be found in recent issues of this publication.

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 8.14[C][2], at 8-190.6.

Robert Kry: We also relied on the statutory text and the legislative history, but in terms of case law, those were the most relevant authorities on this point at the time in 2007. There have been a number of additional decisions since then.

Bloomberg BNA: Do you recall being concerned at the time that the lack of case law would hurt you, and does the fact that Professor David Nimmer has filed a brief on behalf of the petitioners in *Aereo* undercut his then interpretation of ''public''?

Lamken: We understood that the scope of the ''public performance'' clause was an issue of first impression in the Second Circuit at the time, although we thought we had strong arguments based on the text and legislative history, even apart from case law.

Professor Nimmer's brief in the *Aereo* case takes issue with the Second Circuit's recent holding in *Aereo*, not its prior holding in *Cablevision*. On that issue, we agree with Professor Nimmer: Aereo is offering a service that is functionally equivalent to a cable system and should have to obtain a public performance license. We do not see anything in Professor Nimmer's brief that disavows his earlier views in the context of a system like Cablevision's RS-DVR.

Does Conflation Argument Cut Both Ways?

Bloomberg BNA: The brief that you filed for Cablevision was one of the only briefs in support of the networks that did not assail the *Cablevision* decision. We can get to some of the other details later, but let's start with the following, which was argued in an amicus brief submitted by the Competitive Enterprise Institute:

> [T]he *Cablevision* court's interpretation of the Copyright Act wrongly conflates a ''performance or display'' of a work with the ''transmission'' of a performance of a work.

But in your reply brief in *Cablevision*, you argued:

> A television program is a ''work.'' 17 U.S.C. 102(a)(6). A ''performance. . . of the work'' is not the program itself but the ''show[ing]'' of it. Id. 101. Thus, if HBO premieres an episode of ''The Wire'' and later shows the same episode as a rerun, it has made two different ''performances'' of the same ''work.'' By urging liability merely because the same program may be available to different consumers at different times, plaintiffs confuse a ''work'' with a ''transmi[ssion] [of] . . . a performance . . . of the work.''

What informed your interpretation of performance at the time and is that interpretation still relevant?

Kry: It is easiest to address this question by looking at it as two issues.

First, the broadcasters argued in the *Cablevision* case that the relevant ''performance'' is the underlying television program, and not any particular ''showing'' of the program. That argument is clearly wrong because the statute distinguishes between a ''performance'' of a work (a showing) and the ''work'' itself. That is clear from the statutory text. That is the argument we were responding to in the section of our reply brief from 2007 that you quote above.

''[I]t is clear from the statute that the transmission of a performance is itself a performance.''

—ROBERT KRY

In the *Aereo* case, the broadcasters have shifted their argument somewhat. Instead of arguing that the relevant ''performance'' is the underlying television program, they now argue that the relevant ''performance'' is the prior television broadcast of a program, as opposed to the performance created by the act of transmission when the program is retransmitted to its audience. That is the argument CEI is addressing in the quote above. You can find Cablevision's response at pp. 16-24 of our *Aereo* amicus brief. As we explain there, it is clear from the statute that the transmission of a per-

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formance is itself a performance. Even the U.S. government brief agrees with us on that point. We believe that, when deciding whether there is a performance to the public, you look at the particular performance at issue—the showing—and ask whether that showing was made available to the public. We do not think you look back at a *prior* showing (an earlier performance) in making the determination.

As we explain in our *Aereo* amicus brief, looking back at a prior performance would upend the settled distinction between downloading and streaming. That would mean that an online store that offers music or video files for download over the Internet would be engaged in a public performance: It would be transmitting the prior performances of the work to the public. That is contrary to the settled understanding that such services only require reproduction and distribution licenses, not public performance licenses.

Bloomberg BNA: How should the Supreme Court approach the issue given that there have been arguments made on each side accusing the other of ''conflating'' or ''confus[ing]'' two distinct statutory provisions?

Lamken: As Robert mentioned above, we do not think it's fair to criticize the Second Circuit for ''conflating'' or ''confusing'' a performance and a transmission. The Second Circuit's analysis of the statute is unquestionably correct. It is clear from the statutory text that the transmission of a performance is itself a performance, and the U.S. government brief agrees with us on that point. Please see pp. 16-24 of our amicus brief.

Would *Aereo* Reversal Threaten Cablevision?

Bloomberg BNA: In your view, did the Second Circuit misapply *Cablevision* when it declined to enjoin Aereo, or did the appeals court's decision—that you have argued was erroneous—turn on issues entirely unrelated to what was at stake in *Cablevision*?

Lamken: Yes, we believe that the Second Circuit misapplied *Cablevision* when it ruled in favor of Aereo. The Second Circuit essentially read its earlier decision to mean that, whenever someone interposes individual copies, one per user, in a transmission stream, that converts the transmission into a ''private'' performance. That was a significant extension of *Cablevision*, which merely said that separate copies are ''relevant.''

''We understood that the scope of the 'public performance' clause was an issue of first impression in the Second Circuit at the time, although we thought we had strong arguments based on the text and legislative history, even apart from case law.''

—JEFFREY LAMKEN

Bloomberg BNA: How can the Supreme Court reverse *Aereo* but leave undisturbed a ''public performance'' interpretation that would allow Cablevision, and other similar services, to continue operating?

Kry: The Supreme Court can endorse *Cablevision*'s holding that a public performance occurs only where a service provider offers to make transmissions of content ''to the public''—and not when a cloud technology like Cablevision's RS-DVR merely offers consumers the ability to store and play back their own, personal recordings to themselves.

But the Court should hold that Aereo is offering transmissions ''to the public'' even under that narrower standard. Aereo's system is just like a cable system with respect to the ''public'' nature of its retransmissions. Just like a cable system, Aereo captures a particular pool of broadcast content and offers to transmit that same pool of content to anyone who wants to sign up for the service. The fact that Aereo processes the content through individual hard-drive copies in the course of transmission does not change the basic nature of the retransmission service it is offering.