NOTES

LAUNCH Away: Second Circuit Rules that Degree of User Influence Determines Whether a Webcasting Service Must Obtain Individual Licenses for Performing Sound Recordings

I. OVERVIEW OF THE CASE

LAUNCHcast is a free Internet radio Web site, or a "webcasting" service, which enables a user to create and modify personalized radio stations based on the user's ratings of songs, artists, and music genres.[1] On May 24, 2001, Arista Records, LLC, Bad Boy Records, BMG Music, and Zomba Recording LLC (collectively, BMG) brought suit against the operator of LAUNCHcast, Launch Media, Inc. (Launch), alleging that Launch violated provisions of the Digital Millennium Copyright Act of 1998 (DMCA).[2] Specifically, BMG claimed that LAUNCHcast was an interactive service within the meaning of 17 U.S.C. § 114(j)(7) and was therefore required to pay individual licensing fees to BMG, the copyright holders for some of the sound recordings that LAUNCHcast plays for its users.[3] BMG claimed that Launch failed to pay such licensing fees to BMG from 1999 to 2001, thereby creating an action for copyright infringement.[4] The case was tried by a jury before the United States District Court for the Southern District of New York. The court denied BMG's motion for judgment as a matter of law, and the jury returned a verdict in favor of Launch.[5]

On appeal, in a case of first impression in the federal appellate courts, a three-judge panel affirmed the judgment below, ruling that Launch was not required to pay individual licensing fees to BMG.[6] The United States Court of Appeals for the Second Circuit *held* that webcasting services, which allow users to create customized playlists, are not "interactive services" within the meaning of the DMCA if the

1. Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 150 (2d Cir. 2009).
2. 17 U.S.C. § 114 (2006); *Arista*, 578 F.3d at 150.
3. *Arista*, 578 F.3d at 150-51.
4. *Id.* at 151.
5. *Id.*
6. *Id.* at 148-50.

webcasts do not provide users with sufficient control such that the playlists become predictable, thereby encouraging users to listen to the webcasts in lieu of purchasing music. *Arista Records, L.L.C. v. Launch Media, Inc.*, 578 F.3d 138, 162-64 (2d Cir. 2009).

II. BACKGROUND

Unlike musical compositions, which have long been protected under federal copyright protection, sound recordings of musical compositions did not receive federal copyright protection until 1971.[7] Growing concerns about "phonorecord piracy due to advances in duplicating technology" prompted Congress to draft the Sound Recording Act of 1971, which established limited copyright protection for sound recordings.[8] Protected rights included reproduction, distribution, and adaptation rights.[9] However, unlike copyright holders of musical compositions, copyright holders of sound recordings (primarily record companies) did not enjoy public performance rights.[10] One reason for this lack of protection was Congress's presumption that the rights granted were sufficient to protect copyright holders against phonorecord piracy.[11] In addition, record companies benefited from radio airplay—it served as free advertising that promoted the sale of sound recordings in retail stores.[12] Because no public performance right existed for sound recordings, holders of sound recording copyrights were not entitled to obtain licensing fees from radio stations and other broadcasters of recorded music.[13] For the next two decades, the recording industry continuously sought stronger copyright protection for sound recordings, particularly in the form of a public performance copyright.[14]

With the advent and widespread use of digital recording technology in the early 1990s, the recording industry became concerned that existing copyright law for sound recordings could not safeguard the industry from music piracy.[15] Hence, in the absence of a public performance right via Internet technology, digital audio transmissions threatened to erode

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7. Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 454 (2003).
8. H.R. REP. No. 104-274, at 11 (1995).
9. *Id.*
10. Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 487 (3d Cir. 2003).
11. H.R. REP. No. 104-274, at 11.
12. *Bonneville*, 347 F.3d at 487.
13. *Id.* at 488.
14. *Id.*
15. *Id.*

recorded music sales, and in turn, the livelihood of the recording industry.[16]

Acknowledging these concerns and recognizing the high probability that digital transmissions of sound recordings would "become a very important outlet for the performance of recorded music," Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPSR).[17] The DPSR granted holders of sound recording copyrights an exclusive public performance right, limited to the performance of certain digital audio transmissions.[18] Congress established a three-tiered system explaining the contours of this right.[19] First, noninteractive, nonsubscription transmissions, including radio and television broadcasts, were exempt from the digital performance right.[20] Second, noninteractive subscription services were required to pay a statutory licensing fee set by Copyright Arbitration Royalty Panels (CARP).[21] Finally, interactive services were required to pay individual licensing fees to sound recording copyright holders for each sound recording played through a digital transmission.[22]

Under the DPSR, Congress defined an interactive service as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient."[23] House Report 274 noted that interactive services were most likely to have a negative impact on sales of recorded music and therefore threaten the livelihood of the recording industry.[24] In her article *Copyright Legislation for the "Digital Millennium,"* author Jane C. Ginsburg noted that interactive services were likely to have a negative impact on record sales because "the more *advance* information the user has about the digital transmission, the more the transmission facilitates a user's private copying . . . of the recorded performance, or, at least, enables the user to substitute listening to the targeted performance for purchasing a copy of it."[25] Consequently, House Report 274 noted that absent appropriate copyright protection, such as the DPSR, creators of new musical works

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16. *Id.*
17. H.R. REP. No. 104-274, at 12 (1995).
18. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 692 (2003).
19. *Id.*
20. H.R. REP. No. 104-274, at 14.
21. *Id.* at 18.
22. *See id.* at 21.
23. 17 U.S.C. § 114(j)(4) (Supp. 1 1995).
24. H.R. REP. No. 104-274, at 14.
25. Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 167 (1999) (emphasis added).

and sound recordings would have no incentive to create such works, thereby "denying the public some of the potential benefits of the new digital transmission technologies."[26]

Critics began calling for additional legislation soon after congressional enactment of the DPSR, arguing that the DPSR was "too narrowly drawn" and did not adequately protect sound recording copyright holders from further Internet piracy.[27] "At the time the [DPSR] was written, webcasting was only an emerging technology" that could not be fully utilized because of slow Internet connection speeds.[28] In light of the rapid growth of webcasting services, the recording industry grew concerned that such services were allowing users to copy transmitted music for free, "or to listen to [such] services in lieu of purchasing music."[29] However, webcasting services are nonsubscription services that were not considered "interactive" based on the DPSR's definition, because such services do not provide specific sound recordings on request.[30] Therefore, webcasting services were exempt from the digital performance right, and copyright holders of sound recordings had no control over the performance of sound recordings via webcasts. The recording industry feared that such services would diminish traditional record sales and threaten the industry's livelihood.[31] Statistics supported the industry's fears; in 1998, the music industry lost as much as ten billion dollars to music piracy via the Internet.[32]

Congress responded to these concerns in 1998 by enacting the DMCA, codified at 17 U.S.C. § 114.[33] Congress expanded the definition of "interactive service" to encompass a service "that enables a member of the public to receive a transmission of a program *specially created for the recipient*, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient."[34] On April 17, 2000, the Digital Media Association, which lobbies on behalf of transmitters of digital media, filed a petition with the Copyright Office, requesting that the Office amend Congress's definition of interactive "service" to state "that a

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26. H.R. REP. No. 104-274, at 13.

27. Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 154-55 (2d Cir. 2009).

28. Kellen Myers, *The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 FED. COMM. L.J. 431, 439 (2009).

29. *Arista*, 578 F.3d at 155.

30. *Id.*

31. *Id.*

32. B.J. Richards, *The Times Are a-Changin': A Legal Perspective on How the Internet Is Changing the Way We Buy, Sell, and Steal Music*, 7 J. INTELL. PROP. L. 421, 429 (2000).

33. 17 U.S.C. § 114 (2006).

34. *Id.* § 114(j)(7) (emphasis added).

service is not interactive simply because it offers the consumer some degree of influence over the programming offered by the webcaster."[35] Six months later, the Copyright Office responded to the petition by stating that no bright line rule exists for distinguishing between interactive and noninteractive services, especially given the "rapidly changing business models emerging in today's digital marketplace."[36] Instead, the Copyright Office noted that the issue of whether a service is interactive is to be determined on a case-by-case basis.[37] However, the Office did note that the law, coupled with legislative history, makes it clear that consumers may have some degree of influence over a service without making it an interactive service.[38]

III. COURT'S DECISION

In the noted case, the Second Circuit attempted to establish a framework for distinguishing between interactive and noninteractive services, based on the level of influence users have over the service.[39] The court held that LAUNCHcast was not an interactive service within the meaning of 17 U.S.C. § 114(j)(7), because the unique process behind LAUNCHcast's generation of playlists does not ensure predictability for its users, and thus is not so "specially created" that users will refrain from purchasing recorded music.[40]

After discussing the text of § 114(j)(7) and the context behind its evolution, as well as examining the complex nature of the service LAUNCHcast provides, the court turned to the issue of whether LAUNCHcast is an interactive service under the statute.[41] The court noted that LAUNCHcast would be considered an interactive service if users could either "(1) request—and have played—a particular sound recording, or (2) receive a transmission of a program 'specially created' for the user."[42] Because LAUNCHcast did not satisfy the first requirement, the court focused its analysis on the second requirement.[43]

The Second Circuit stated that "the language and development of the DPSR and DMCA make clear that Congress enacted [these] statutes

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35. Public Performance of Sound Recordings: "Definition of a Service," 65 Fed. Reg. 77,330, 77,330 (Dec. 11, 2000) (codified at 37 C.F.R. pt. 201).
36. *Id.* at 77,332.
37. *Id.*
38. *Id.*
39. Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 149-50 (2d Cir. 2009).
40. *Id.* at 164.
41. *Id.* at 162.
42. *Id.* at 160-61.
43. *Id.* at 161.

to create a narrow" public performance right for digital audio transmissions of sound recordings.[44] The purposes of this limited right are to encourage the creation of new musical works and sound recordings and to ensure the livelihood of the recording industry.[45] The court noted that the growth of interactive listening services has reduced traditional record sales, presumably because such services are capable of providing users with a sufficient degree of control over music selections such that playlists will become predictable, thereby increasing the likelihood that users will listen to webcasts rather than purchasing music.[46] Congress enacted the current version of § 114(j)(7) because webcasts are nonsubscription services that did not fall within the DPSR's definition of "interactive," thus leaving them outside the scope of copyright protection.[47]

The court then examined the language that the DMCA added to the definition of interactive service to determine which additional services or programs Congress intended to include as interactive services.[48] "[A]bsent from the DPSR['s] definition, [and] later included [in the DMCA's definition], is [the term] 'transmission of a program.'"[49] 17 U.S.C. § 101 defines a "transmission program" as "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit."[50] The Second Circuit determined that "this definition views a transmission program as a body of material presented as a single unit," rather than a collection of individual works.[51] Hence, in expanding the definition of interactive services, the court concluded that Congress intended to include "bodies of pre-packaged material, such as groups of songs or playlists specially created for the user."[52]

Applying this conclusion to the noted case, the court held that LAUNCHcast is not an interactive service within the meaning of § 114(j)(7).[53] Although playlists generated for LAUNCHcast users are personalized, the court determined that LAUNCHcast does not provide a "specially created" program for users because the webcasting service

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44. *Id.*
45. *Id.* (quoting H.R. REP. No. 104-274, at 13-14 (1995)).
46. *Id.* at 161-62.
47. *Id.*
48. *Id.* at 162.
49. *Id.*
50. *Id.* (quoting 17 U.S.C. § 101 (2006)).
51. *Id.*
52. *Id.*
53. *Id.* at 164.

does not ensure predictability such that users will choose to listen to the webcast rather than purchasing recorded music, thus eroding sales in recorded music.[54]

In support of its holding, the court first noted that LAUNCHcast users have no ability to choose or predict which "songs will be pooled in anticipation for selection to the [final] playlist."[55] The court made this observation based on rules governing the selection process.[56] For instance, LAUNCHcast generates a 50-song playlist from a pool of approximately 10,000 songs, 1000 of which are the most highly rated songs by all LAUNCHcast users, and 5000 of which LAUNCHcast randomly selects.[57] The court noted that although users can control the genres of the 5000 randomly selected songs, this degree of control is no different than traditional radio listeners expressing their preferences by selecting one station over another based on genre.[58]

In addition, a maximum of 20% of explicitly rated songs (that is, songs rated by the user) can be queued, and "no more than three times the number of explicitly rated songs divided by the total number of rated songs" can be queued in anticipation for selection to a playlist.[59] The court noted that this process "ensures that a limited [amount] of explicitly rated songs will [ultimately] be selected for the playlist."[60] Moreover, from this observation, the court concluded that the more explicitly rated songs there are, "the less [a] user can predict which explicitly rated songs will be pooled" and ultimately selected for the playlist.[61]

Second, the court observed that the selection of a "playlist is governed by rules [that prevent] the user's explicitly rated songs from being anywhere [close to] a majority of the [playlist's songs]."[62] For example, at least 20% of the songs played on the user's station are new songs that the user has not previously rated.[63] Moreover, a user cannot increase the chances of hearing a particular song by only rating a small number of songs—instead, LAUNCHcast will fill the playlist with a large number of unrated songs.[64]

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54. *Id.* at 162.
55. *Id.*
56. *See id.* at 162-63.
57. *Id.* at 162.
58. *Id.* at 162-63.
59. *Id.* at 163.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

Third, the court observed that ratings of songs include variables beyond a user's control.[65] For example, included in the playlist selection process are ratings by the user's subscribed-to DJs (that is, other users to whom a user chooses to listen).[66] In addition, "when a user rates a [certain] song, LAUNCHcast then implicitly rates all other songs by that artist."[67] Thus, the user's playlist may contain several songs that the user may not have heard or may not like.[68] Furthermore, there are restrictions on the number of times songs from particular artists or albums can appear on a playlist, as well as restrictions on consecutive play of artists or albums.[69] Also, a user cannot anticipate songs on another user's playlist, even if the user selects the same preferences and rates songs identical to the other user.[70] Finally, a user cannot log off and sign back on in order to hear a song repeated; instead, the user will hear the remainder of the playlist, provided that at least eight songs remain on the playlist.[71]

Lastly, the Second Circuit noted that LAUNCHcast randomly orders songs on users' playlists, a process that is subject to "restrictions on the consecutive play of artists or albums."[72] The court determined that this process limits the ability of users to choose desired artists or albums.[73] Furthermore, the court observed that because users are unaware of what songs will be played on their playlists, they are unable to examine their playlists and select particular songs to hear.[74]

The court mentioned that a user is able to control one aspect of his LAUNCHcast experience: if the user rates a song at zero, it will never be heard again on that particular station.[75] However, the court concluded that this feature does not constitute a violation of the copyright holder's right to compensation when the service plays a sound recording.[76]

In summary, the Second Circuit held that although LAUNCHcast creates customized playlists for its users, such a feature does not ensure predictability for users.[77] Because of the unique process by which

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 164.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

LAUNCHcast generates playlists, LAUNCHcast does not provide a service so "specially created" for its users such that users will refrain from purchasing recorded music.[78] Because LAUNCHcast is not an interactive service under § 114(j)(7), it is only required to pay a statutory licensing fee set by CARP, rather than individual licensing fees to the copyright holders of sound recordings.[79]

IV. ANALYSIS

Webcasting services, particularly Internet radio stations, have played an increasingly significant role in the World Wide Web.[80] An estimated twenty-nine million Americans (35% of the U.S. population) had tried streaming audio or video through webcasting services by 1999, a number that has surely increased over time.[81] In the noted case, a case of first impression in the federal appellate courts, the Second Circuit ruled that the degree of user control determines whether a webcasting service is interactive.[82] If such a service provides its users sufficient control such that playlists become so predictable that users would choose to listen to the webcast rather than purchasing music, the service is interactive.[83] Consequently, the webcasting service must pay individual licensing fees to the copyright holders of the sound recordings it plays for its users.[84]

The Second Circuit's ruling in the noted case clarified the level of interactivity that a webcasting service may provide its users without constituting an interactive service as defined by 17 U.S.C. § 114(j)(7).[85] Following this framework, a webcasting service can ensure that it will only be required to pay a statutory licensing fee set by CARP. Although sound recording copyright holders may not be entitled to collect individual licensing fees from webcasting services modeled after LAUNCHcast, the recording industry faces a far greater threat from file sharing.[86] Hence, as illegal file sharing continues, and as digital technology continues to advance, it is inevitable that sound recording

78. *Id.*
79. *See id.* at 150, 164.
80. *See* Myers, *supra* note 28, at 439.
81. *See id.* at 432-33.
82. *See Arista*, 578 F.3d at 149, 161.
83. *See id.* at 162.
84. *See id.* at 150.
85. *See* Arista Records v. Launch Media: Degree of User Control over Song Selections Determines Whether Webcasting Service Is Required To Pay Individual Licensing Fees for Sound Recordings, http://www.digitalmedialawyerblog.com/2009/08/arista_records_v_launch_media_1.html (Aug. 26, 2009).
86. *See id.*

copyright holders will continue to fight for broader copyright protection rights in order to promote the creation of new musical works and sound recordings, as well as to ensure the continued livelihood of the recording industry.

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