

“INTERACTIVE SERVICES”
AND
THE FUTURE OF INTERNET RADIO BROADCASTS

*“When modes of music change, the fundamental laws of the state
always change with them.”¹*

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INTRODUCTION

The twenty-first century brought endless information to our fingertips with just one click. Internet radio broadcasts such as Pandora Radio, Last.fm, Slacker, and LAUNCHcast give instant access to a variety of music to the public for “free”—but at what cost, and to whom? Internet radio stations, known as “webcasts,” allow users to design stations based on personal musical preferences through a selection of genres, bands, and sometimes even particular songs. Now that Internet radio can be streamed through a variety of mobile devices like BlackBerries and iPhones, the

1. PLATO, *THE REPUBLIC* 75 (Benjamin Jowett, trans., 2008).

music you want to hear can be played anywhere, at any time. However, this easy-access entertainment is not *always* free because our growing digital marketplace must ensure that artists are fairly compensated.

Current copyright law provides two systems for owners of sound recording copyrights to collect royalties for digital broadcasts of copyrighted sound recordings.² If a digital music service is considered an “interactive service” under the Digital Millennium Copyright Act (DMCA) the service provider is required to directly negotiate fees with a copyright holder to broadcast a sound recording.³ However, if the service is not interactive, the music provider is only required to pay a statutory licensing fee set by the Copyright Royalty Board.⁴ The features used by an Internet radio station to customize user “stations” are of substantial legal importance because the station’s design determines whether a particular radio webcast is an interactive service. This Note examines the Second Circuit’s recent decision in *Arista Records v. Launch Media Inc.*,⁵ the first case to further define the requirements of an interactive service. The decision resulted in a victory for Internet broadcasters since the court determined that LAUNCHcast’s webcasting service was not an interactive service and thus was not required to pay additional fees.⁶

Part I of this Note provides a history and overview of the copyright protection of sound recordings leading up to the most recent amendments to the DMCA. Part II explains the holding of the Second Circuit’s decision in *Arista Records*. Part III addresses problems for the recording industry and online music services after the Second Circuit’s decision, and Part IV addresses problems for recording artists. Finally, Part V offers possible solutions to provide a clearer balance between the Copyright Office’s interest in compensating the holders of sound recording copyrights while at the same time promoting artists’ work and the public’s interest in having convenient, instant access to music.

I. OVERVIEW OF SOUND RECORDING COPYRIGHT PROTECTION

A. *The Evolution of The Copyright Act of 1976*

Copyright protection originates from the constitutional grant to Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷ The first Copyright Act was passed by

2. See 17 U.S.C. § 114(d) (2006).

3. See *id.* § 114(d)(1)(A).

4. See *id.* § 114(d)(2).

5. 578 F.3d 148 (2d Cir. 2009).

6. *Id.* at 150.

7. U.S. CONST. art. I, § 8.

Congress in 1790, but has changed repeatedly since.⁸ The Copyright Act has historically given the author of a musical composition the right to exclude others from using it without the owner’s permission, including exclusive rights to reproduce, prepare derivative works, distribute copies, and perform or display the work.⁹ However, the owner of a copyright in a *sound recording* of that musical composition was not similarly protected, and sound recordings were not considered as part of the exclusive rights in the Copyright Act of 1909.¹⁰ The main objective of the Copyright Act of 1909 was to “[secure] to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies . . .”¹¹ Therefore, the 1909 Act extended copyright protection only to written musical compositions and not to sound recordings of those compositions. Composers—and not record producers—possessed the entire bundle of rights in the musical work.¹²

It was not until 1971 that Congress amended the Copyright Act to provide for a limited copyright in the reproduction, distribution, and adaptation of sound recordings.¹³ This was a critical amendment because it created two separate copyrights in a musical work: a copyright in the underlying musical composition and a separate copyright in the physical recording of that musical composition.¹⁴ The copyright in a musical composition or song protects the actual music fixed in a tangible medium of expression, and a copyright in a sound recording protects the recording of a particular song. The primary purpose of this amendment, which was retained in the revised Copyright Act of 1976,¹⁵ was to guard against the unauthorized duplication of sound recordings.¹⁶ While Congress finally recognized sound recordings as a protectable creative form, the Sound Recordings Act of 1971 did not extend copyright protection to a right of public performance.¹⁷ This is contrary to the law in most countries outside the United States, which use collection societies to disburse royalties col-

8. H.R. REP. NO. 94-1476, at 1 (1976).

9. 17 U.S.C. § 106 (2006).

10. See Copyright Act of 1909, H.R. 28912, 60th Cong. (1909)

11. H.R. REP. NO. 60-2222, at 7 (1909).

12. See Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 345-53 (2004) (providing a thorough background and history of United States copyright protection in musical compositions and recordings).

13. Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971). The amendment created a right “[t]o reproduce and distribute to the public . . . reproductions of the copyrighted work if it be a sound recording.” *Id.*

14. *Id.*

15. See 17 U.S.C. § 102 (2006). The Copyright Act of 1976 was the last major revision to United States copyright law and is currently in effect today.

16. *Id.*

17. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. § 106(6)).

lected from radio stations and other public performances of sound recordings.¹⁸

Despite efforts to include a performance right for sound recording copyright owners, a draft of the Senate bill for the 1976 Act including such a provision was met with opposition from broadcasters and music publishers.¹⁹ The purposeful omission of the right of public performance of sound recordings gave only composers and music publishers the right to royalties from radio broadcasts, and left owners of sound recordings without compensation.²⁰ Notably, performing artists are economically deprived of additional compensation for their performances and only gain a commercial benefit from ownership of a copyright in the musical composition if the performing artist is also the composer of the song.²¹ For example, when a song is publicly performed on the radio or in a bar, a royalty is paid to the music publisher, the owner of the musical composition, but not to the record company, the owner of the sound recording. Four major record companies—EMI, Sony BMG, Universal Music Group, and Warner Music Group—own most of the world's sound recordings.²²

B. The Digital Performance Right in Sound Recordings Act

As a result of widespread public use of the Internet in the 1990s, the threat of music piracy prompted the recording industry to again urge Congress to amend existing copyright law. In the early 1990s, the Copyright Office noted that an amendment was overdue because “[s]atellite and digital technologies make possible the celestial jukebox, music on demand, and pay-per-listen services,”²³ which harm sound recording authors and proprietors “by the lack of a performance right in their works.”²⁴ With the adoption of the Digital Performance Right in Sound Recordings Act of 1995 (“DPSR”), Congress gave owners of sound recordings the exclusive right to “perform the copyrighted work publicly by means of a digital audio transmission.”²⁵ This Act made two important changes affecting sound recordings: (1) it created a new digital public performance right for sound

18. For example, the United Kingdom uses a collection society called PPL to disburse public performance revenues. See PPL, <http://www.ppluk.com/en/About-Us/> (last visited Jan. 15, 2011).

19. See *Performance Royalty: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyright of the Senate Comm. on the Judiciary*, 94th Cong., 1–4 (1975).

20. See Azine Farzami, *Bonneville v. Register of Copyrights: Broadcasters' Upstream Battle Over Streaming Rights*, 11 *COMMLAW CONSPPECTUS* 203, 206 (2003).

21. *Id.*

22. Justin Bachman, *The Big Record Labels' Not-So-Big Future*, *BUSINESS WEEK* (Oct. 10, 2007), http://www.businessweek.com/bwdaily/dnflash/content/oct2007/db2007109_120106.htm.

23. S. REP. NO. 104-128, at 11 (1995).

24. *Id.* at 12.

25. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. § 106(6) (2006)).

recordings to address concerns of webcasting, and (2) it broadened the compulsory mechanical license provision to address concerns of downloadable music files.²⁶ The DPSR makes clear that transmissions and broadcasts are performances, because “[t]o ‘transmit’ a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”²⁷ A primary reason for adoption of this legislation was to respond to the concern that interactive subscription services would adversely affect sound recording sales.²⁸

The limited public performance right granted to sound recording copyright owners distinguished between interactive and noninteractive services in three different categories.²⁹ If the digital audio transmission was an interactive service, authorization from and payment to the sound recording copyright owner was necessary.³⁰ The DPSR defined an “interactive service” as:

[O]ne 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. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.³¹

If it was a noninteractive subscription service, it was only subject to a statutory license.³² And, if it was noninteractive and nonsubscription, the digital audio transmission was not within the sound recording copyright owner’s control, and the user was not required to pay for use of the sound recording.³³ The 1995 Act specifically exempted many digital audio transmissions of sound recordings produced by Internet radio stations and webcasts because they were both *noninteractive* and *nonsubscription*.³⁴ The authors of the 1995 Act apparently thought that subscription fees

26. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1295–96 (3d ed. 2003). This note does not address the concern of downloadable music files.

27. 17 U.S.C. § 101 (2006).

28. H.R. REP. NO. 104-274, at 13 (1995).

29. See Lydia P. Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 692 (2003) (explaining the limited public performance right of sound recording copyright owners as a “three tier system”).

30. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

31. *Id.* at 343–44.

32. *Id.* at 336.

33. *Id.*

34. See KOHN & KOHN, *supra* note 26, at 1299–1300.

would primarily support Internet radio stations.³⁵ In reality, these services were primarily supported by Internet advertising and were thus exempt from the statutory licensing fee.³⁶

While the DPSR gave copyright owners of sound recordings protection for use of their work on interactive and digital subscription performances, sound recording copyright holders were not protected when their work was transmitted through traditional over-the-air broadcasts or Internet radio stations that were available without subscription and were not interactive.³⁷ This arrangement reflected the idea that traditional radio broadcasting promotes interest in individual music artists and helps record sales, but failed to address the rapidly growing area of Internet radio and webcasting.³⁸

C. *The Digital Millennium Copyright Act*

Although there is currently still no general public performance right in sound recordings that requires traditional radio stations to license sound recordings, Congress addressed the concerns of Internet webcasting with the adoption of the Digital Millennium Copyright Act of 1998. The DMCA subjects noninteractive, nonsubscription digital audio transmissions of sound recordings to statutory licensing.³⁹ The required statutory license is set by the Copyright Royalty Board made up of judges appointed by the Library of Congress.⁴⁰ The DMCA amended the DPSR with the addition of “eligible nonsubscription transmission,” which was defined as:

[A] non-interactive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting . . . of performances of sound recordings . . . if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings⁴¹

35. *Id.* at 1299 (noting that this was a “major blunder by the recording industry”).

36. *Id.* at 1300. After passage of the 1995 Act, many web radio stations began operating digital audio services that they believed were exempt from paying the licensing fee to sound recording copyright owners because they appeared to fall within the nonsubscription exemption. *Id.*

37. H.R. REP. NO. 104-274, at 13–15 (1995); *see also* 17 U.S.C. § 114(d)(1)(A) (2006) (exempting nonsubscription broadcast transmissions, like traditional radio broadcasts, from infringement).

38. H.R. REP. NO. 104-274, at 13–15 (1995).

39. *See* Honorable Marybeth Peters, *Statement of Marybeth Peters: The Register of Copyrights before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary*, June 15, 2000, <http://www.copyright.gov/docs/regstat61500.html> [hereinafter Peters].

40. *See* 17 U.S.C. § 114(f) (2009).

41. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2898 (1998).

Because the DMCA’s definition encompasses webcasting, nonsubscription Internet radio broadcasts were subject to the same statutory licensing as subscription digital audio transmissions.⁴² The DMCA also placed other limits on webcasters’ ability to digitally stream copyrighted sound recordings, including the Sound Recording Performance Complement, which prohibits a webcaster from transmitting more than three songs from the same album or four different songs by the same artist in any three-hour period.⁴³ Such limits on a webcaster’s power to stream sound recordings were implemented in an effort to protect sound recording copyright owners by ensuring that the ability to listen to music on Internet radio stations would not replace sound recording copyright owners’ traditional methods of revenue.⁴⁴

1. What is a Noninteractive Service Under the DMCA?

There are two types of digital audio transmissions that are not part of an interactive service: (1) subscription transmissions and (2) nonsubscription transmissions. A noninteractive webcasting service is eligible for statutory licensing and must pay royalty fees to SoundExchange,⁴⁵ an entity created by the Copyright Royalty Board that collects royalties from webcasters.⁴⁶ The result is that a noninteractive digital music service need not negotiate directly with copyright holders but instead can be granted a license as of right to stream sound recordings after paying the statutory rate to SoundExchange. After collecting payments from webcasters, SoundExchange distributes royalties in the following manner: (1) 50% to the copyright holder;⁴⁷ (2) 45% to the recording artist featured on the sound recording;⁴⁸ (3) 2.5% to the American Federation of Musicians (AFM) for nonfeatured musicians;⁴⁹ and (4) 2.5% to American Federation of Television and Radio Artists (AFTRA) for nonfeatured vocalists.⁵⁰

42. See 17 U.S.C. § 114(d)(2) (2006); Peters, *supra* note 39 (clarifying that this amendment referred specifically to Internet radio and webcasters by noting that “[s]ection 114 of the Copyright Act was amended by expanding the compulsory license for the performance right to a sound recording to include ‘eligible nonsubscription services’ (*i.e.*, webcasters) . . .”).

43. 17 U.S.C. § 114(j) (2006).

44. H.R. REP. NO. 104-274, at 13 (1995).

45. See www.soundexchange.com for further licensing information.

46. AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1516–40 (4th ed. 2010) (summarizing SoundExchange’s compulsory licensing scheme set by the Copyright Royalty Board).

47. 17 U.S.C. § 114(g)(2)(A) (2006).

48. *Id.* § 114(g)(2)(D).

49. *Id.* § 114(g)(2)(B).

50. *Id.* § 114(g)(2)(C).

2. *What is an Interactive Service Under the DMCA?*

The DMCA also further clarified the statutory classifications of interactivity. Interactive services are not only those that provide “on-demand” songs like a traditional jukebox, but can also include a variety of services depending on the user’s degree of choice.⁵¹ For example, the user’s ability to move forward or backward between songs indicates that the service is interactive.⁵² Furthermore, the determination of whether a service is interactive should primarily focus on the predictability of the service.⁵³ A service is considered interactive even if the user does not personally select specific songs but “identif[ies] certain artists that become the basis of the personal program”⁵⁴ or “is permitted to select particular sound recordings in a prerecorded or predetermined program.”⁵⁵

The DMCA provides two models of interactive services: (1) a program that is specially created for the recipient and (2) a program that allows an individual to request a particular sound recording.⁵⁶ The new definition of interactive distinguishes between the two models:

[O]ne 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. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, *or in the case of a subscription service, by all subscribers of the service*, does not make a service interactive, *if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request*. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the

51. H.R. REP. NO. 105-796, at 41 (1998) (Conf. Rep.); *see also* Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 315 (2000).

52. H.R. REP. NO. 105-796, at 88.

53. *Id.* at 87.

54. *Id.*

55. *Id.* at 88.

56. 17 U.S.C. § 114(j)(7) (2006). The language in italics was added by the DMCA; *see also* Michael N. Lang, *The Regulation of Shrink-Wrapped Radio: Implications of Copyright on Podcasting*, 14 COMMLAW CONSPPECTUS 463, 481 (2006) (distinguishing between the two concepts of interactive services).

non-interactive component shall not be treated as part of an interactive service.⁵⁷

Because an interactive service provides a user a certain degree of control in what he listens to, there is a high risk that the user will use the service in lieu of purchasing a copy of the recording.⁵⁸ To account for this potential diminishing effect on record sales, the Act gives the owners of sound recordings the exclusive right to license digital audio transmissions that are part of interactive services, and the owner, usually a record company, can set the price for use of these recordings.⁵⁹ The record company has the right to charge what it wishes for the transmission, or instead can refuse to license the sound recording at all.⁶⁰

The line between whether a digital-audio service is interactive or non-interactive is not clear, and the distinction has been in dispute since the adoption of the DMCA in 1998.⁶¹ In April 2000, in an effort to clarify the distinction between interactive and noninteractive services, the Digital Media Association (DiMA), an organization representing webcasters, asked the Copyright Office to resolve whether certain types of programming are interactive.⁶² Specifically, the DiMA asked the Copyright Office to adopt the rule that a program is “not rendered ‘interactive,’ and thus ineligible for the statutory license, simply because the consumer may express preferences to such [digital music] Service as to the musical genres, artists and sound recordings that may be incorporated into the Service’s music programming to the public.”⁶³ However, the Copyright Office declined to adopt such a rule and stated, “no rule can accurately draw the line demarcating the limits between an interactive service and a non-interactive service.”⁶⁴ Instead, the Copyright Office emphasized that “determinations of interactivity ‘must be made on a case-by-case basis’”⁶⁵ While the DMCA provides a framework for what qualifies as an “interactive service” for copyright protection of sound recordings, the Act gives no precise boundaries of how much control a service can give an individual. This changed somewhat with the Second Circuit’s decision in *Arista Records v. Launch Media Inc.*⁶⁶

57. 17 U.S.C. § 114(j)(7) (2006) (emphasis added) The language in italics was added by DMCA.

58. KOHN & KOHN, *supra* note 26, at 1327, 1333.

59. *Id.* at 1371.

60. KOHN & KOHN, *supra* note 46, at 1513.

61. KOHN & KOHN, *supra* note 26, at 1333 (emphasizing the uncertainty between interactive and noninteractive transmissions and briefly discussing the original *Arista v. Launchcast* suit discussed in detail in Part II below).

62. *See* Marks, *supra* note 51, at 317 n.52.

63. *Arista Records v. Launch Media, Inc.*, 578 F.3d 148, 156 (2d Cir. 2009) (discussing DiMA’s lobbying efforts).

64. *Id.*

65. *Id.*; *See also* KOHN & KOHN, *supra* note 26, at 1333.

66. 578 F.3d 148.

II. DISCUSSION OF *ARISTA RECORDS V. LAUNCH MEDIA*

A. *Background to the Second Circuit Opinion*

In 2001, Arista Records, LLC, Bad Boy Records, BMG Music, and Zomba Recording, LLC (collectively, “BMG”) sued Launch Media, Inc. (“Launch”) for allegedly infringing BMG’s sound recording copyrights from 1999 to 2001 under § 114 of the DMCA, by streaming sound recordings through means of an interactive Internet music service.⁶⁷ Launch’s Internet radio website, owned by Yahoo! Inc., enables a user to “create ‘stations’ that play songs that are within a particular genre or similar to a particular artist or song the user selects.” BMG holds the copyrights to some of the songs that are played over Launch’s webcast.⁶⁸ The jury determined that Launch’s webcasting service, LAUNCHcast, did not infringe BMG’s copyrights because it was not an interactive service.⁶⁹ BMG appealed to the Second Circuit arguing that LAUNCHcast was an interactive service because it was “designed and operated to enable members of the public to receive transmissions of programs specially created for them.”⁷⁰

B. *The Second Circuit’s Interpretation of “Interactive Service”*

The Second Circuit’s opinion began with a focus on the type of interactive service in which a program is “specially created” for the recipient.⁷¹ Because a LAUNCHcast user cannot request a particular song on demand, the court did not consider the other model of an interactive service—a program that allows a user to request a particular sound recording.⁷² Noting that the term “specially created” is not easily defined, the court quickly rejected as too broad BMG’s argument that a “specially created” program is any program that reflects user input.⁷³ The court continued with a detailed analysis of copyright protection of sound recordings leading up to the 1998 DMCA, as discussed in Part I, *supra*, and Congress’s intent in employing the words “specially created,” but did not attempt to define the meaning of the phrase.⁷⁴

The court analyzed the method by which Launch Media allows users to select music in a streaming webcast. Because LAUNCHcast’s service

67. *Id.* at 150.

68. *Id.*

69. *Id.*

70. *Id.* at 151.

71. *Id.* at 152.

72. *Id.* at 161.

73. *Id.* at 152.

74. *See id.* at 152–56.

uses a complex series of steps to generate a unique playlist for each user, and the Copyright Office has previously determined that interactivity must be judged on a case-by-case basis,⁷⁵ it is necessary to briefly describe how LAUNCHcast functions. LAUNCHcast, like most Internet radio broadcasts, allows a user to create and modify a personalized radio station by selecting preferred artists and music genres.⁷⁶ Notably, the user is able to pause, skip, or delete the song being played, but cannot restart the song being played or repeat any previously played songs.⁷⁷ After a complex algorithm of steps,⁷⁸ LAUNCHcast generates a playlist for a custom-made Internet radio station.⁷⁹ After reviewing in great detail how LAUNCHcast functions, the court considered the ultimate question—whether LAUNCHcast playlists are specially created for the user and therefore interactive.⁸⁰

The court primarily focused on the degree of predictability and control a user has in generating a playlist and listening to songs, noting that “the webcasting service does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby—in the aggregate—diminishing record sales.”⁸¹ The court stipulated that as a result of Launch Media’s convoluted formula to generate a playlist, the user has “almost no ability to choose, let alone predict, which specific songs will be pooled in anticipation for selection to the playlist.”⁸² The court discounted the user’s ability to control the genre of songs as “no different from a traditional radio listener expressing a preference for a country music station over a classic rock station.”⁸³

Focusing again on the user’s inability to control the music he or she hears, the court noted that LAUNCHcast’s process of selecting songs included in the playlist prohibits the user from hearing explicitly-rated songs the majority of the time, requiring no less than 20% of the songs to be unrated.⁸⁴ Explicitly-rated songs are those that the user has rated on a scale from zero to one hundred, with one hundred being the best rating.⁸⁵ Once a user rates a particular song, LAUNCHcast implicitly rates all other songs by the same artist, and incorporates these other songs that the user

75. *Id.* at 156.

76. *Id.* at 157.

77. *Id.* at 158.

78. For the entire description of LAUNCHcast’s process to generate a playlist, see generally *id.* at 157–60.

79. *Id.* at 160.

80. *Id.* at 162.

81. *Id.*

82. *Id.*

83. *Id.* at 163.

84. *Id.*

85. *Id.* at 157.

has not rated into the final playlist.⁸⁶ The court cleverly observed how this system of incorporating songs of the same artist and genre is outside the user's control and preference, noting that "[i]t would be wrong, for instance, to assume that because a user likes the Beatles' album *A Hard Day's Night* the user would also like *The White Album*."⁸⁷ The final aspect that the court focused on is the fact that LAUNCHcast randomly orders the playlist, which is limited by restrictions such as not allowing consecutive songs of the same artists or albums.⁸⁸ The court finally concluded that the only element of certainty or predictability about the service is that the user can control which songs he or she does not want to hear.⁸⁹ By rating a song at zero, the user will not hear that particular song again.⁹⁰ The court held that this minimal amount of control was not enough to reach the level of interactivity under the DMCA that requires direct negotiations between the music service provider and sound recording copyright owner.⁹¹

III. PROBLEMS FOR THE SOUND RECORDING INDUSTRY

As the first circuit to determine whether a specific Internet webcasting service is interactive within the meaning of 17 U.S.C. § 114(j)(7), the Second Circuit's decision is the only binding authority on the definition of an interactive service. Although the Supreme Court recently denied Arista Records' petition for writ of certiorari,⁹² future appellate court interpretations of the meaning of "interactive service" could lead to a circuit split and an issue later ripe for Supreme Court review. The Second Circuit's opinion does not clearly indicate the degree of control or predictability over selection of songs that would make an Internet radio station interactive, and it leaves the recording industry uncertain as to which Internet radio stations must directly negotiate with sound recording copyright holders for performance licenses.

In U.S. copyright law, there has always been a tension between providing a monetary incentive for creative authors to write, publish, and produce creative works and allowing copyright restrictions that may inhibit these works from full dissemination.⁹³ In this case, the court has decided that the service is not "interactive" enough, and the record companies are unable to require LAUNCHcast to directly negotiate licensing fees

86. *Id.* at 163.

87. *Id.* at 163 n.23.

88. *Id.* at 164.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Arista Records v. Launch Media, Inc.*, 130 S. Ct. 1290 (2010).

93. H.R. REP. NO. 104-274, at 14 (1995).

for each song played, which would likely be much higher fees than the statutory license set by the Copyright Royalty Board. Music lovers and Internet radio broadcast services were elated by the decision, but the problem is that there is no clear line to determine when a service becomes interactive. It is interesting to note that the creators of LAUNCHcast filed a patent application for the Internet radio service and described the music service as an “individually-tailored Internet media broadcast system and method.”⁹⁴ Under the Act, it seems that a service much like LAUNCHcast would be highly likely to be determined interactive, yet the court said no.

While webcasting services do not allow a user to download specific files of music and, therefore, do not threaten direct music piracy like file-sharing services such as Napster, they do not dilute the possibility that Internet radio users will choose to listen to webcasts and forego purchasing records, which was one of Congress’s main concerns in enacting the DMCA.⁹⁵ However, there is evidence that Internet radio listeners are actually more likely to purchase music than those who do not use digital music services.⁹⁶ The Second Circuit’s decision may create a model for other webcasting services to emulate without risking excessive royalty payments, but at some point an Internet radio station may go too far in allowing interactive services and will be forced to pay significant royalty fees to sound recording copyright owners.

IV. PROBLEMS FOR RECORDING ARTISTS

The rapid growth of the Internet and webcasting has helped to promote artists and their music in many ways.⁹⁷ While there is no doubt that Internet radio is an important source of advertisement for music artists,⁹⁸ espe-

94. Petition for a Writ of Certiorari at 10, *Arista Records, LLC v. Launch Media, Inc.*, 130 S.Ct. 1290 (2010) (No. 09-619), 2009 WL 4049095. The specific invention claimed was:

1. A method for broadcasting data streams through a computer network to a user’s computer, the steps comprising:
 - a. Providing a database of data streams;
 - b. Selecting a data stream according to a selection method;
 - c. Transmitting one of said data streams to the user’s computer;
 - d. Receiving feedback expressing a preference from the user regarding said transmitted data stream; and
 - e. Updating said selection method to better reflect said preference of the user; whereby data streams transmitted to the user are biased according to said preference.

95. *Arista Records*, 578 F.3d at 157.

96. See *Music and Radio in the 21st Century: Assuring Fair Rates and Rules Across Platforms: Hearing Before the S. Comm. of the Judiciary*, 110th Cong. 13 (2008) (statement of Joe Kennedy, President and CEO of Pandora Media, Inc.) (noting that Pandora listeners are three to five times more likely to purchase music in the last 90 days).

97. *Music and Radio in the 21st Century: Assuring Fair Rates and Rules Across Platforms: Hearing Before the S. Comm. of the Judiciary*, 110th Cong. 11 (2008) (statement of Sen. Ron Wyden).

98. See generally Thomas D. Sydnor II, *A Performance Right for Recording Artists: Sound Policy at Home and Abroad*, PROGRESS ON POINT 15.2 (February 2008) (discussing the importance of a broad

cially through services such as LAUNCHcast that feature a hyperlink to enable a user to easily buy a specific song recording, it is also true that webcasting makes free music more accessible than ever before. And, if courts continue to adopt reasoning similar to the Second Circuit, which would probably find most Internet radio stations similar to LAUNCHcast noninteractive within the meaning of § 114 of the Copyright Act, artists may continue to enjoy the free advertising and ease of purchasing artists' songs that these services employ. In fact, many artists credit Internet radio and iTunes, especially when direct hyperlinks to purchase individual tracks on iTunes are found on Internet radio station websites, as influential factors in their musical success.⁹⁹ However, if another court interprets what it means to be interactive in a slightly different manner, it is possible that many webcasting stations will be forced to pay individual royalties to record companies at a price that will likely require them to shut down their services. This may have an indirect, negative effect on recording artists, whose music may no longer be as easy to access for free listening, which may lead to the purchase of songs on iTunes, tickets for live concerts, and support of other revenue streams such as merchandising.

V. SOLUTION TO PROVIDE A CLEARER BALANCE BETWEEN
COMPENSATION TO THE RECORDING INDUSTRY AND ACCESS TO THE
PUBLIC: AMENDMENT OF THE COPYRIGHT ACT

Although the United States recording industry has for many years lobbied Congress to amend the current but deficient Copyright Act to provide an exclusive right of public performance to owners of sound recordings, the industry has not won a complete victory yet. With the passage of the DPSR in 1995 and subsequent enactment of the DMCA in 1998, only a small victory was won for public performances made by means of a digital audio transmission. This limited right is insufficient in our growing technological age, and the vagueness of Congress' definition, and the court's interpretation, of "interactivity" gives little guidance to future digital music media business models. The Launch Media litigation began over eight years ago, and music on the Internet has evolved rapidly since. Other webcasting services like Pandora and Last.fm are similar to the LAUNCHcast model in that they analyze what a user likes about a particular artist or song, but it is uncertain whether such services would also be considered noninteractive under the Act.¹⁰⁰ Since the enactment of the

public performance right that would grant performance rights to traditional broadcast radio similar to those applicable to webcasting and emphasizing that both traditional and Internet radio are important avenues to promote artists' music).

99. *Id.* at 9, n.26.

100. Brad Fuller, *Inside Pandora: Web Radio that Listens to You*, O'Reilly Digital Media, Aug. 17, 2006, available at <http://www.oreillynet.com/pub/a/oreilly/digitalmedia/2006/08/17/inside->

DMCA, the availability of music on the Internet has grown exponentially and current Copyright law may no longer adequately serve its ultimate purpose—to promote the progress of the useful arts¹⁰¹—in today’s fast-paced digital age.

The Second Circuit’s decision may not have been wrong, because the outcome seems intuitively correct. An Internet radio broadcaster should not be required to directly negotiate with copyright holders to perform sound recordings over the Internet, which could be prohibitively expensive or even impossible, if the service is noninteractive because the user does not have the requisite level of control over the songs he or she chooses to listen to. The problem is, however, that current Copyright law is not clear on whether an Internet radio service is interactive and how much control or predictability can be given to the user before the service is considered interactive, and the Second Circuit’s decision does little to clarify the issue.

To address this problem, Congress should amend § 114 of the Act and the definition of interactive service. Section 114 of the Copyright Act provides that a service is interactive when it enables one to receive a program specially created for the recipient.¹⁰² The Second Circuit ignores the plain language of the statute because Launch Media was clearly transmitting programs specially created for the recipient under a fair reading of the statute. Instead, it appears the court decided that LAUNCHcast was not specially created *enough* for the recipient to rise to the level of interactivity necessary to be deemed an interactive service under the Act. Because such a reading of the Act leaves little guidance for webcasters and the recording industry, it is necessary for Congress to define the phrase “specially created for the recipient,” or eliminate it entirely.

One approach is to define *specially created for the recipient* as any service that gives the user more control than he or she would have when listening to a traditional terrestrial radio broadcast. Although the court in *Arista* explained that LAUNCHcast’s service gave no more control to the user than a traditional radio broadcast,¹⁰³ it is clear that the Internet radio station did allow considerable user control that far exceeded one’s control of the songs he or she hears over the car radio. While such a definition is not necessarily specific, it gives a threshold for the amount of control a user can have—no more control than a listener of a traditional radio broadcast. This definition would provide:

pandora-web-radio.html

101. U.S. CONST. art. I, § 8.

102. 17 U.S.C. § 114(j) (2006).

103. *Arista*, 578 F.3d 148, 163 (2d Cir. 2009).

A program is specially created for the recipient if a user has more control when selecting digitally transmitted music than choosing a terrestrial radio broadcast. Such control exists if a user has the ability to select artists or songs to play more frequently on the program. If a user can predict or control the genre of music or class of artists, such a program is not “specially created for the recipient.”

In reality, this rule may allow little to no user control, because the only control a user has when listening to a terrestrial radio station is which station to listen to. However, if Congress’ purpose in requiring direct negotiations between copyright holders and interactive Internet radio broadcasts is to ensure that artists and copyright holders are fairly compensated while at the same time preventing webcasts from replacing the user’s purchase of sound recordings, whether on-line or in the store, the suggested definition may be successful. For example, if an Internet radio station only allows a user to choose a station based on the types of bands played and the genre of music, such control is similar to the control one has over a terrestrial radio station. In that case, an Internet radio user would likely not solely listen to the Internet radio station in lieu of purchasing music on iTunes of a favorite artist. On the other hand, if an Internet radio station allows a user to rate songs and artists in order to have particular artists and songs appear more frequently on the station, similar to LAUNCHcast, such a station would likely be considered interactive because it gives more control to a user than a traditional radio station.

A better approach would be to remove the phrase specially created for the recipient entirely. This would be a very simplistic but effective change and would eliminate the DMCA’s two different models of interactive services. The court in *Arista* emphasized that a LAUNCHcast user had little control or predictability as to which specific song would be played at any given time and rested its final decision on the user’s lack of control.¹⁰⁴ The court seemed to be saying that if the user could not listen to a particular song on demand, the digital music service was not specially created for the recipient within the meaning of the Copyright Act. Such a ruling effectively eliminates any distinction between programs that are specially created for the recipient and programs that allow a user to request a particular song. The definition of interactive service under this approach would be:

An interactive service is one that enables a member of the public to receive . . . a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on

104. *Supra* part II.B.

behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.¹⁰⁵

Under this definition, if a user types in a song name and is able to listen to that particular song—not just a similar song by the same artist—the program would be an interactive service. While it is likely that any Internet radio station that allows a user to listen to any song at any time would be deemed “interactive” under the Act as it now stands, eliminating the specially created for the recipient model would prevent litigation over services such as LAUNCHcast that do give some control to the user but do not allow a user to listen to a particular song at any given time.

VI. CONCLUSION

Although the Second Circuit’s decision provides some guidance for webcasters’ future compliance with the Copyright Act to avoid being labeled as an interactive service, it is necessary for Congress to amend the Copyright Act with a definite rule. The control test set forth by the Second Circuit is not one that could easily be applied in practice, and it will be difficult for music service providers to know in advance whether the amount of control its service gives to a user crosses the boundary between noninteractive to interactive services. An amendment to the Copyright Act with a clearer definition of interactive service would not only be beneficial to Internet radio service providers trying to avoid the interactive service requirement of direct negotiations with copyright owners, but would also give peace of mind to sound recording copyright owners faced with impending lawsuits.

Digital music distribution will likely entirely replace traditional forms of listening to music in the very near future. In the end, if there is not proper protection for sound recordings and compensation to copyright holders of sound recordings streamed on digital media, it will not only hurt the artists and record companies, but perhaps more importantly, will

105. This is an edited version of 17 U.S.C. § 114(j)(7) (2006).

hurt our culture and entire economy. Companies such as Launch Media have suffered financially from litigation as a result of the unsettled law that surrounds the performance right in sound recordings. Because the interactivity requirement of § 114(j) is vaguely written and is to be interpreted on a case-by-case basis, copyright law currently deprives entrepreneurs of new media of any certainty that their efforts will not result in litigation. As the way we listen to music changes with the advent of new technology, the way we protect music under United States Copyright law must change with it.

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