

Music Copyright Alert: Unpredictable Playlist Dooms Sound Recording Copyright Holders' Infringement Claim

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On August 21, 2009, in a case of first impression for the federal appellate courts, the U.S. Court of Appeals for the Second Circuit held that LAUNCHcast's webcasting program lacks sufficient user-control over playlists and therefore is not an "interactive service" within the meaning of the Digital Millennium Copyright Act of 1998 (the DMCA). As a result, the webcasting service need only pay a single statutory licensing fee, rather than licensing fees to each copyright holder for every song played. *Arista Records, Inc. v. Launch Media, Inc.* (Docket No. 07-2576 (2nd Cir. Aug. 21, 2009)).

Background

In May 2004, Arista Records, LLC, Bad Boy Records, BMG Music, and Zomba Recording LLC (collectively, BMG) filed a lawsuit against Launch Media, Inc. (Launch), alleging that Launch violated provisions of the DMCA by willfully infringing sound recording copyrights of BMG from 1999 to 2001. Launch operates an Internet radio website ("webcasting") service called LAUNCHcast, which enables users to create "stations" that play songs based on individual preferences. BMG holds the copyrights in the sound recordings of some of the songs LAUNCHcast plays for users.

LAUNCHcast selects songs to play on user-created stations through a complex system that identifies songs based on several variables. A user first creates a new station by choosing preferences for artists and genres, and identifying a minimum amount of "new" music (songs not previously rated by the user) that should be included in the station. Each time a user logs into LAUNCHcast and selects a station, a playlist of 50 songs is generated out of a potential playlist (hashtable) of approximately 10,000 songs. The hashtable is created using various formulas that take into account the user's bandwidth availability, profane lyrics preference, "new" unrated songs minimum, songs played within the last 30 days, genres, DJs and stations to which the user subscribes, user ratings, and the most popular songs as rated by all LAUNCHcast users. Once songs are played on a station, the user has the opportunity to rate them (from 0-100). Songs rated zero are deleted from the station and are not included on subsequent hashtables or playlists. Once the 50-song playlist is generated, LAUNCHcast randomly orders the songs. When listening to a playlist, users may not go back to restart a song, or repeat any of the previously played songs.

"Interactive" vs "Non-Interactive" Service

Webcasting services that provide an “interactive service” must pay a licensing fee to the copyright holders of the sound recordings of each song played. However, webcasting services that do not provide an interactive service must only pay a statutory licensing fee set by the Copyright Royalty Board.

An “interactive service” is defined in the DMCA as 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... which is selected by or on behalf of the recipient.” 17 U.S.C. § 114(j)(7). BMG argued that LAUNCHcast is an interactive service.

Copyright Protection for Sound Recordings

Copyright protection for sound recordings was first created in 1971 under the Sound Recording Act, which addressed concerns regarding “phonorecord piracy due to advances in duplicating technology.” Then, in 1995, concern regarding the insufficiency of copyright law in light of the inception of the Internet led to the enactment of the Digital Performance Right in Sound Recordings Act (the DPSR). Congress was specifically concerned with the potential harm to traditional record sales which would likely discourage the creation of new sound recordings. The DPSR gave sound recording copyright holders an exclusive but “narrow” right to perform (play or broadcast) sound recordings via a digital audio transmission. The right was limited to exclusive performance of digital audio transmissions through paid subscription services and “interactive services.”

In 1998, Congress enacted the DMCA to address concerns that the DPSR was still insufficient to protect sound recording copyright holders from Internet piracy. The DMCA expanded on the original definition of “interactive services” in the DPSR by adding the term “transmission of a program specially created for the recipient...” A House conference report stated that the phrase should be interpreted “reasonably.” The report further explained that a transmission should be considered “interactive” if the user “is permitted to select particular sound recordings in a prerecorded or predetermined program.”

The Second Circuit’s Decision

On appeal, the Second Circuit affirmed.

The Second Circuit held that a webcasting service is “interactive” under the DMCA if a user can either (1) request, and have played, a particular sound recording, or (2) receive a transmission of a program “specially created” for the user. The Second Circuit found that a LAUNCHcast user cannot request and expect to hear a particular song on demand, due to the complex system through which LAUNCHcast plays songs in random order. Therefore, the program did not meet the first definition of “interactive.”

To address the second definition of “interactive,” the Second Circuit noted that Congress intended, in part, that the DPSR and the DMCA would prevent significant reductions in record sales. Therefore, the concern with an “interactive” service is that it provides a user a degree of

predictability regarding what songs will be played. Additionally, the Second Circuit determined that the addition of the term “transmission of a program” to the definition of “interactive” indicated an intent by Congress to include “bodies of pre-packaged material, such as groups of songs or playlists specially created for the user.” The Second Circuit held that LAUNCHcast does not provide a specially created program because the 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.

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