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**THE QUANDARY OF BEING INTERACTIVE: THE IMPACT OF ARISTA RECORDS
V. LAUNCH MEDIA ON THE VIABILITY OF WEBCASTING SERVICES**

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I. Introduction

The advent of the Internet helped spawn an age of user based interactivity that brought forth a new venue for the public performance of sound recordings, and with it a whole new set of complexities and questions for the recording industry and the holders of copyrights. Adding a further layer to the query, various methods and means came into use that allowed the transfer and streaming of music in ways that had been unimaginable to both the recording industry and to lawmakers just a decade prior. A commentator has noted, “The legal implication raised by the Internet's lack of centralized control is the resulting difficulty for copyright owners to... ‘track use of intellectual property.’”¹ Copyright violations became “commonplace,” and “moreover, the anything goes attitude held by many Internet users, many of whom [consider themselves] ‘huge music enthusiasts,’ complicated the process of enforcing copyright protection.”² At the turn of the millennium the focal point in the mainstream media that captured the attention of the general public was that of the litigation war that took place over peer to peer file sharing.³ The record

¹ Kenneth D. Suzan, Comment, *Tapping to the Beat of a Digital Drummer: Fine Tuning US Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 794 (1995) (quoting Mike Godwin, *The Law of the Net: Problems and Prospects*, INTERNET WORLD, Sept.- Oct. 1993, at 52, 54, available at http://w2.eff.org/Misc/Publications/Mike_Godwin/law_of_the_net_godwin.article).

² *Id.*

³ See Anita Hamilton, *The Pirates of Prime Time*, TIME, Feb. 25, 2002, available at <http://www.time.com/time/magazine/article/0,9171,1001876,00.html>.

industry relentlessly pursued Internet users who exchanged digital copies of entire songs through centralized mechanisms such as Napster and Aimster.⁴

Beyond mere peer to peer file sharing, another concern that caught the attention of the record industry was that of “streaming audio,” or “webcasting.” Streaming allows an Internet user to listen to music via the web without having to download and permanently store audio files onto their computers, essentially giving the listener access to whatever is playing on that station at that moment.⁵ A basic summation of webcasting is that “audio is transmitted over the Internet bit by bit, but never as a complete file,” thus preventing a “listener from record[ing] or sav[ing] a copy of the audio file.”⁶ The recording industry became increasingly concerned that the traditional balance that had existed between radio broadcasters and themselves would be disturbed, and that consumers would find alternative avenues to purchase music or at least find ways to circumvent the entire process of purchasing that would extract the recording industry’s products and “thus erode sales of recorded music.”⁷ Webcast streaming has evolved in different stages, resulting in several attempts by Congress, through multiple amendments to the Copyright Act of 1976, to categorize and more narrowly define the limitations of web streaming and its applications to copyright law.⁸

On one hand, the earliest inception of streaming was found in what is known as Internet Radio, “a medium that resembles the AM/FM industry in terms of the relationship between the

⁴ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, HN 8 (West 9th Cir. 2001) (finding that “[u]ploading and downloading of digital audio files containing copyrighted music, through Internet services that facilitated transmission and retention of such files by its users, was not fair use of copyrighted works, in that use was commercial and could save users the expense of purchasing authorized copies”); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. E. Div. 2002); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

⁵ Samuel Fifer & Gregory R. Naron, *Changing Horse in Mid-Stream: The Copyright Office’s New Rule Makes Broadcasters Pay for “Streaming” Their Signals over the Internet*, 3 VAND. J. ENT. L. & PRAC. 182, 184 (2001).

⁶ Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161, 170 (2005).

⁷ *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 488 (3rd Cir. 2003).

⁸ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended in sections throughout 17 U.S.C.); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified throughout sections of 17 U.S.C.).

recording industry and its abilit[ies] to generate record sales.”⁹ This particular medium directly resulted in litigation with implications that were felt in small market stations, massive conglomerates, and the independent webcasters streaming from their own homes.¹⁰ In many cases, these internet radio stations were owned by actual radio stations who simultaneously broadcasted their regularly scheduled programs.¹¹ A major hurdle that faced webcast services broadcasting via the Internet resulted from the Librarian of Congress’ issuing of new royalty rates for Internet radio stations in June, 2002.¹² These new rates placed simultaneous Internet retransmissions of over-the-air AM or FM radio broadcasts, as well as original transmissions through webcasters, at seven cents per musical performance.¹³ As a result of these rates, many Internet radio stations ceased to exist, citing operations costs that could not afford the payment of the rates per song.¹⁴ Essentially, what was left of webcasting services were those webcasters who provided users with individualized stations. These services allowed web users to affect the content of these individualized stations through means such as user ratings of songs, artists, and albums.¹⁵

It is the latter type of internet radio station, not those simply broadcasting simultaneously traditional radio programs, but instead providing individualized stations, which this note focuses on. As the Second Circuit’s recent opinion in *Arista Records v. Launch Media, LLC* demonstrates, the debate over royalties continues as the growth of the Internet and the services of

⁹ Emily D. Harwood, Note, *Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L.J. 673, 675 (2004).

¹⁰ See, e.g., *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 766 (E.D. Pa. 2001).

¹¹ See generally Harwood, *supra* note 9.

¹² Copyright Office, Library of Cong., Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings, http://www.copyright.gov/carp/webcasting_rates_fi-nal.html (last visited Nov. 12, 2009).

¹³ Allison Kidd, Recent Development, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 353-54 (2003).

¹⁴ *Id.* at 352.

¹⁵ *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 149 (2d Cir. 2009).

webcasting expand with it.¹⁶ The question facing the *Arista* court was whether the webcasting service, LAUNCHcast (“Launch”),¹⁷ was an “interactive service” as defined by the Digital Millennium Copyright Act (“DMCA”).¹⁸ This critical distinction served to categorize webcasting services as either interactive services or non-interactive services for a multitude of purposes, one of which was the paying of royalty fees as determined by the Copyright Royalty Board.¹⁹

This note will examine the Second Circuit’s analysis of *Arista*. As the first federal appellate court called upon to determine this question, the decision provides guidance to how future courts facing similar webcast service questions can follow the basic structure laid out by the analysis. By finding that Launch was “not an interactive service as a matter of law,”²⁰ similar webcast services who have been engaged for years in a struggle to pay copyright fees and have been on the brink of collapse, potentially have been given a safe harbor within the DMCA. The court’s analysis sheds light upon certain elements that can distinguish what these webcast services must demonstrate in order to fall under the statutory language of non-interactive services. Part II will consider the legislative history and its influences on webcasting services. Part III will analyze the Second Circuit’s holding in *Arista*, with a focus on how Launch, through its composition, distinguishes itself as a non interactive service. Finally, Part IV will look at the future of webcast services and how *Arista* will affect their ability to remain viable under current copyright law.

¹⁶ *Id.*

¹⁷ *Id.* at 150 (noting that LAUNCHcast is a service owned by Launch Media, Inc. which is owned by Yahoo!, Inc.).

¹⁸ *Id.*

¹⁹ 17 U.S.C.A. § 114(j)(7) (West 2009).

²⁰ *Arista*, 578 F.3d at 150.

II. The Emergence and Evolution of Webcast Law

A. Interactive Under § 114(j)(7)

The implication of the *Arista* decision on webcast services that provide individualized stations is significant, as the potential to be categorized as a non-interactive service could affect the viability and survival of these services. The decade following the passage of the DMCA has burdened webcasters with enormous copyright fees that have left the majority of services on the brink of financial ruin, much akin to the fate of many simultaneous radio broadcasters who could not afford the copyright fees.²¹ Had Launch been adjudged to be interactive by the Second Circuit, “the service would have been required to pay individual licensing fees to those copyright holders of the sound recordings of songs the webcasting service play[ed] for its users.”²² If not, then the “service [would] only pay a statutory licensing fee set by the Copyright Royalty Board.”²³ The crux of the analysis hinged on the definition of “interactive.”²⁴ The court stated that, “The meaning of the phrase in question must significantly depend on the context in which Congress chose to employ it.”²⁵

B. Sound Recording Rights Under Copyright Law

Article I of the U.S. Constitution grants Congress the power 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.”²⁶ Congress adopted the first Copyright Act in 1790, which gave minimal protection to various works, such as books, and resulted in the majority of these works being copyrighted for only fourteen years before becoming a part of the

²¹ See Kidd, *supra* note 13.

²² *Arista*, 578 F.3d at 150.

²³ *Id.*

²⁴ 17 U.S.C.A. § 114(j)(7); *Arista*, 578 F. 3d at 152.

²⁵ *Arista*, 578 F. 3d at 152.

²⁶ U.S. CONST. art. I, § 8, cl. 8.

public domain.²⁷ The Copyright Act of 1909 was the first to recognize copyrights for music, and in doing so granted protection for the musical composition, essentially the right to the “original words and arrangements of the music.”²⁸ This allowed copyrights to be granted to author of a work.²⁹ Today, “virtually every creative work imaginable is automatically copyrighted,”³⁰ including musical recordings.³¹

The content of the majority of webcasts, including webcast services such as Internet Radio, is music.³² There exist two privileges in each musical recording.³³ In order for a webcaster to play a recorded piece of music, they are required to obtain licenses for both of these copyrights.³⁴ The first, as was recognized in the Copyright Act of 1909, is the copyright in the “*musical work*.”³⁵ This entails the lyrics and music as they were written by the composer and lyricist.³⁶ When a song is broadcast over the airwaves by radio stations, every play of that song is worth money in the form of royalties to the songwriter and publisher.³⁷ The composers of these songs tend to license their rights to associations such as the American Society of Composers, Authors, and Publishers (ASCAP) or Broadcast Music, Inc. (BMI), who collect these licenses, giving them the ability to negotiate for copyright royalties.³⁸ As a result, businesses such as

²⁷ Edward L. Carter, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in Bonneville International Corp. v. Peters*, 2002 BYU L. REV. 1155, 1156-57 (citing Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1062 (2001)).

²⁸ Kidd, *supra* note 13, at 345; see Copyright Act of 1909, ch. 320, § 35 Stat. 1075, 1075 .

²⁹ Jeffrey R. Houle, Note, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad “Rap?”*, 37 LOY. L. REV. 879, 887 (1992).

³⁰ Harwood, *supra* note 9, at 676 (citing Carter, *supra* note 27, at 1157).

³¹ *Id.* at 676.

³² Astle, *supra* note 6, at 171.

³³ Jay L. Bergman, *Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right for the Digital Transmissions of Sound Recordings*, 24 SW. U. L. REV. 351 (1995).

³⁴ Astle, *supra* note 6, at 171.

³⁵ 17 U.S.C. § 102(a)(2) (2006) (lists “musical works, including any accompanying words” as a category for which copyright protection exists).

³⁶ Astle, *supra* note 6, at 171.

³⁷ Kimberly F. Craft, *The Webcasting Music Revolution Is Ready to Begin, As Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT L.J. 1, 4 (2001).

³⁸ *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 487 (3rd Cir. 2003).

restaurants, bars, hotels, and radio stations purchase licenses from these associations which authorize them to perform musical works that are found in the associations' catalogues.³⁹ The associations then collect fees from the users and distribute them in the form of royalties to the songwriters and publishers.⁴⁰

The second copyright privilege is the recorded performance of the song, called the “*sound recording*.”⁴¹ The Copyright Act states that while all other copyrighted works are fixed in “copies,” sound recordings are fixed in “phonorecords.”⁴² The Copyright Act defines phonorecords as “material objects in which sounds...are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁴³ Congress granted the first copyright protection for sound recordings with the passage of the Sound Recordings Act of 1971 (SRA) in an attempt to fight back against recording piracy.⁴⁴ This copyright is applied to the physical recorded final product such as compact discs, cassettes or MP3s,⁴⁵ and recognizes a right in the actual recorded version of the song.⁴⁶ Within the music industry, the sound recording copyright is usually owned by record labels who are members of the trade association, the Record Industry Association of America (RIAA).⁴⁷

³⁹ Craft, *supra* note 37, at 5.

⁴⁰ *Id.*

⁴¹ Astle, *supra* note 6, at 171.

⁴² Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 686 (2003).

⁴³ 17 U.S.C. § 101 (2006). “Copies” under the statute are defined as material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed. *Id.*

⁴⁴ *Bonneville*, 347 F.3d at 487.

⁴⁵ Joshua D. Levine, Note, *Dancing to a New Tune, a Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 627-28 (1996).

⁴⁶ Harwood, *supra* note 9, at 676.

⁴⁷ Loren, *supra* note 42, at 686. The record labels identified as the “Big 5” include: Sony Music Entertainment, Warner Brothers Music, EMI Group, Universal Music Group, and BMG Entertainment. Loren quotes the RIAA mission statement, which now states that its “members create, manufacture and/or distribute approximately 85% of

Even though a copyright in the reproduction of sound recordings had been established by the SRA, a significant limitation that continued to exist was that the sound recording copyright owner was not granted a right to control the public performance of the work.⁴⁸ Thus, while radio stations were able to pay copyright royalties to the composers of songs through the copyright of the “musical work” to have the right to broadcast the music, they did not have to pay the RIAA royalties for the same broadcast.⁴⁹ Without copyright protection, owners of sound recordings were left with no legal recourse when they encountered a copyright infringement of their work,⁵⁰ nor did they have a right to receive any financial compensation.⁵¹

In attempt to address this disparity, and influenced by heavy lobbying from the recording industry, the 1976 Copyright Act originally included a full public performance right for sound recording copyright owners with a compulsory licensing system.⁵² Outright opposition from broadcasters and music publishers played a significant role in defeating the provisions.⁵³ As a result, “the recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings.”⁵⁴ As part of this symbiotic relationship, broadcasters would be liberated from paying fees, licensing or otherwise, to the recording industry for the right to play the songs on the air.⁵⁵ This tremulous position would

all legitimate recorded music produced and sold in the United States.” RIAA, Who We Are, <http://www.riaa.com/aboutus.php> (last visited Apr. 20, 2010).

⁴⁸ *Bonneville*, 347 F.3d at 487.

⁴⁹ *Id.*

⁵⁰ Stuart Talley, *Performance Rights in Sound Recordings: Is There Justification in the Age of Digital Broadcasting?*, 28 BEVERLY HILLS B. ASS’N J. 79, 84 (1994).

⁵¹ June Chung, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music’s New Form of Distribution*, 39 ARIZ. L. REV. 1361, 1363 (1997).

⁵² William H. O’Dowd, Note, *The Need for a Public Performance Right in Sound Recording*, 31 HARV. J. ON LEGIS. 249, 253-54 (1994).

⁵³ Loren, *supra* note 42, at 687.

⁵⁴ *Bonneville*, 347 F.3d at 487.

⁵⁵ *Id.* at 488.

remain for nearly two decades, only to be disturbed by the technological advancements and emergence of the Internet in the 1990s.⁵⁶

During the interlude between the passing of the Copyright Act of 1976 and the Digital Performance Right in Sound Recording Act of 1995 (DPRA), Congress considered and ultimately rejected the issue of a performance right in sound recordings on three separate occasions.⁵⁷ This repeated rejection, and the acceptance by all parties, can be attributed to the existence of that symbiotic relationship, as during this near two decade period the lack of performance right in sound recording did not generate economic loss for the industry as a whole.”⁵⁸

C. Digital Performance Right in Sound Recordings Act of 1995

The introduction of digital technology into mainstream culture forced Congress to once again revisit the question of performance rights for sound recordings.⁵⁹ In October of 1991, at the request of the Chairman of the Subcommittee on Patents, Copyrights, and Trademarks, the Copyright Office issued a report on the copyright implications of digital audio broadcasts and cable services.⁶⁰ The report stated: “Technological changes have occurred that facilitate transmission of sound recordings to huge audiences. Satellite and digital technologies make possible the celestial jukebox, music on demand, and pay-per-listen services....Sound recording authors and proprietors are harmed by the lack of a performance right in their works.”⁶¹

⁵⁶ Harwood, *supra* note 9, at 679.

⁵⁷ WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 89-93 (1st ed. 1994) (citing H.R. REP. NO. 1805- 97 (1981); H.R. REP. NO. 997-96 (1979); H.R. NO. 6063-95 (1977)); *see* Chung, *supra* note 51, at 1363.

⁵⁸ N. Jansen Calamita, Note, *Coming to Terms with the Celestial Jukebox: Keeping the Sound Recording Copyright Viable in the Digital Age*, 74 B.U. L. REV. 505, 513 (1994).

⁵⁹ Rebecca F. Martin, Note, *The Digital Performance Right in Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 740 (1996).

⁶⁰ *Id.*; S. REP. NO. 104-128, at 11 (1995).

⁶¹ S. REP. NO. 227-104 (1995) (submitted by Sen. Hatch, Committee on the Judiciary), *available at* [http://www.ipmall.fplc.edu/hosted_resources/lipa/copyrights/The%20Senate%20Report%20on%20the%20Digital%](http://www.ipmall.fplc.edu/hosted_resources/lipa/copyrights/The%20Senate%20Report%20on%20the%20Digital%20)

This report laid the groundwork for Congress to embark on a path towards a resolution over adding protection to sound recordings in the new digital age.⁶²

In 1993, the National Information Infrastructure Task Force was instructed by President Clinton to create a report that would incorporate a new strategy for technologies of interactive networks and future developments.⁶³ The report recommended that Congress not exempt on-line service providers from strict liability, as this would prematurely deprive the system of an “incentive to get providers to reduce the damage to copyright holders by reducing the chances that users will infringe by educating them, requiring indemnification, purchasing insurance, and, where efficient, developing technological solutions to screening out infringement.”⁶⁴ “Denying strict liability in many cases would leave copyright owners without an adequate remedy since direct violators could act anonymously,” and further, may not have the financial resources to pay a judgment.⁶⁵ The findings of the report played a significant role in the consideration of Congress during the debate and passing of the DPRA.⁶⁶ Furthering this was a push from the music industry which sought to subdue possible threats from interactive and subscription webcasts, “fearing that allowing listeners to hear the songs of their choice on demand would cut into record sales.”⁶⁷

The House of Representatives Report for the DPRA declared that the concerns posed by the music industry were the catalyst for the decision of Congress to develop new legislation to

20Performance%20Right%20in%20Sound.pdf (citing Register of Copyright, Report on Copyright Implications of Digital Audio Transmission Services 154-55 (Oct. 1991)).

⁶² Martin, *supra* note 59, at 740-41.

⁶³ Douglas J. Mason, *Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work*, 71 IND. L.J. 1049, 1055 (1996); *see* Chung, *supra* note 51, at 1364.

⁶⁴ Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., 907 F. Supp. 1361, 1373 n.19 (N.D. Cal. 1995).

⁶⁵ *Id.*

⁶⁶ Chung, *supra* note 51, at 1365.

⁶⁷ Astle, *supra* note 6, at 172.

amend the Copyright Act.⁶⁸ This change came in large part from the recognition that the shifting landscape of music, in which the trend within the industry towards digital transmission of sound recordings, was likely to become an important outlet for the performance of recorded music, and needed to be addressed.⁶⁹ The Report stated that while new digital transmission technologies could permit consumers to enjoy performances of a broader range of high quality recordings than ever possible, “in the absence of appropriate copyright protection in the digital environment, the creation of a new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies.”⁷⁰ An important rationale focused on by the House Report was the need to enact legislation addressing the potential impact on the prerecorded music industry of digital subscription an interactive services.⁷¹ The report noted:

Copyright owners of sound recordings should enjoy protection with respect to interactive and certain digital subscription performances. By contrast, free over-the-air broadcasts are available without subscription, do not rely on interactive delivery, and provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters’ license.⁷²

Certain types of subscription and user controlled interactive audio services had the potential to adversely affect sales of recordings and erode copyright owners’ ability to control and be paid for use of their work.⁷³ The House further stated that “interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record

⁶⁸ See H.R.REP. NO 104-274 (1995).

⁶⁹ *Id.* at 15.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 16.

⁷³ *Id.* at 13.

sales.”⁷⁴ The language of the DPRA addressed a multitude of digital services, but focused specifically on the knowledge of the user prior to the playing of a song, concluding that “the more advance information the user has about the digital transmission, the more the transmission facilitates a user’s private copying...or, at least, enables the user to substitute listening to the targeted performance for purchasing a copy of it.”⁷⁵

What the DPRA did do was extend a limited public performance right to sound recordings, “allowing the owner of a copyright in a sound recording to receive royalty payments for the first time.”⁷⁶ One of the major criticisms of the DPRA, however, was that the new sound performance right created by the amendments was too narrowly drawn and included far too many exceptions.⁷⁷ The DPRA created three categories of digital audio transmission. The first was that of interactive services, the category that had caused the greatest amount of concern to the industry in the buildup to the amendment’s passage.⁷⁸ The DPRA 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. 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 the interactive service.⁷⁹

⁷⁴ *Id.* at 14; *see* *Arista Records, LLC. v. Launch Media, Inc.*, 578 F.3d 148, 154 (2d Cir. 2009) (quoting H.R. REP. NO. 104-274, at 13); S. REP. NO. 104-128, at 13-17 (1995)). The Senate expressed similar concerns as the House on this issue.

⁷⁵ Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J.L. & ARTS 137, 167 (1999).

⁷⁶ Kidd, *supra* note 13, at 348.

⁷⁷ *Arista*, 578 F.3d at 154-55.

⁷⁸ Astle, *supra* note 6, at 172.

⁷⁹ 17 U.S.C.A. § 114(j)(7) (West 2009).

For this category there were no exceptions, requiring instead a webcaster to “negotiate a license with the holder of the copyright in the sound recording, who could legally withhold permission.”⁸⁰

The second category under the DPRA was that of non-interactive subscription services, in which a user would pay for access to a webcast service, but had little to no control over which music would be selected.⁸¹ The DPRA allowed webcasters and record companies in this category to come together and negotiate royalty rates.⁸² If those negotiations proved to be fruitless, then a federal Copyright Arbitration Royalty Panel (CARP) would be convened by the U.S. Copyright Office to decipher the proper rate.⁸³

The final category included services which were non-subscription, non-interactive digital transmissions that included radio broadcasts available free of charge.⁸⁴ Services that fell under this categorization were completely exempt under the DPRA.⁸⁵

D. Digital Millennium Copyright Act

What the DPRA did not include in the amendments to the Copyright Act was regulation of webcasting services, which “were exempted both from the sound recording copyright owner’s right of control, and from the obligation to secure a statutory or negotiated license.”⁸⁶ By contrast, “webcasters remained liable to composers of the underlying music if the recordings were transmitted without a license from the music copyright holders.”⁸⁷ Since webcasting services were non-subscription, in that they provided no particular sound recording at the user’s

⁸⁰ Astle, *supra* note 6, at 172.

⁸¹ *Id.*

⁸² Kidd, *supra* note 13, at 348.

⁸³ *Id.*

⁸⁴ Harwood, *supra* note 9, at 680.

⁸⁵ *Id.*

⁸⁶ Ginsburg, *supra* note 75, at 167.

⁸⁷ *Id.* at 168.

request, they did not fall under the purview of the DPRA's definition of being interactive.⁸⁸ This quickly became a cause for consternation amongst the recording industry in the wake of the DPRA's passage, as the focus of these webcast services would either allow users to figure out a method to record or copy webcast music that was being transmitted via the free service,⁸⁹ or they had the possibility of foregoing the purchase of music altogether and simply listen to the webcasts free of charge.⁹⁰ This fear of lost profits for the music industry was reflected by the claim of the General Counsel of the RIAA when she stated that "the record industry was losing one \$1 million a day due to music piracy."⁹¹

In response to these fears, Congress once again enacted legislation that amended the Copy Right Act. The DMCA extended the performance right under the DPRA to webcasters who do not charge their listeners subscription fees.⁹² A webcaster who provided a non-interactive service and followed the guidelines laid out by the amendments would be able to attain a compulsory license, allowing the webcaster to avoid having to pay each recording company that had the sound recording copyright for each song played.⁹³ Those webcasters who allowed users to select, download, or have the ability to alter the programming list of music were not permitted to attain the compulsory license.⁹⁴ Instead, these interactive services incurred full copyright liability under the performance right, and were "forced to conduct arm-length negotiations with the copyright owners of the sound recordings for a license before making a digital transmission

⁸⁸ *Id.* at 167.

⁸⁹ Chung, *supra* note 51, at 1367.

⁹⁰ Craft, *supra* note 37, at 12-13.

⁹¹ *Arista Records LLC. v. Launch Media, Inc.*, 578 F.3d 148, 155 (2d Cir. 2009) (citing *Copyright Piracy in the Internet: Hearing on H.R. 2265 Before H. Comm. on the Judiciary, Subcomm. on Courts & Intellectual Prop.*, 105th Cong. (1997) (statement of Cary H. Sherman, Senior Executive Vice President and General Counsel of the RIAA)).

⁹² Kidd, *supra* note 13, at 349.

⁹³ Craft, *supra* note 37, at 15.

⁹⁴ *Id.* at 16.

of a sound recording.”⁹⁵ These outcomes came about because the definition of an interactive service was altered under the DMCA.⁹⁶ It was expanded to include services which are specially created for an individual.⁹⁷ The new definition of an “interactive service” under the amendment was: “One 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.”⁹⁸

The definition immediately became a point of contention between the RIAA and the Digital Media Association (DiMA).⁹⁹ On April 17, 2000 DiMA filed a Petition for Rulemaking with the Copyright Office.¹⁰⁰ The petition sought to have the Office amend the rule that defined the term “service” because copyright holders of sound recording had taken “the untenable position that consumer-influenced webcasting of any nature is not eligible for the DMCA statutory license.”¹⁰¹ DiMA’s proposed amended rule established guidelines that would essentially find that a service would not be interactive merely because it offered the consumer a degree of influence of a streamed programming.¹⁰²

Although it rejected the DiMA proposal, the Copyright Office noted that it agreed with DiMA that consumers could express preferences for certain musical genres, artists, or even songs

⁹⁵ Public Performance of Sound Recordings, 65 Fed. Reg. 77,330, 77,331 (Dec. 11, 2000).

⁹⁶ 17 U.S.C. § 114(j)(7) (2000).

⁹⁷ *Arista*, 578 F.3d at 155 (citing H.R. REP. NO. 105-796, at 87 (1998) (Conf. Rep.)).

⁹⁸ 17 U.S.C. § 114(j)(7).

⁹⁹ Digital Media Ass’n, Mission Statement,

http://www.digmedia.org/index.php?option=com_content&view=article&id=46&Itemid=65 (last visited Oct. 26, 2009) (“DiMA Represents its members in industry negotiations and rate-setting proceedings that determine significant royalties – and which often determine whether companies are profitable.”). Some of the members of DiMA are Apple, YouTube, MTV Networks, Microsoft, Motorola, and Pandora Media.

¹⁰⁰ Craft, *supra* note 37, at 22.

¹⁰¹ Public Performance of Sound Recordings, 65 Fed. Reg. 77,330, 77,331 (Dec. 11, 2000).

¹⁰² *Id.* The proposed amendment stated that a Service would not be “interactive” under 17 U.S.C. § 114(j)(7) if (1) Its transmissions are made available to the public generally; (2) the features offered by the Service do not enable the consumer to determine or learn in advance what sound recordings would be transmitted over the Service at any particular time; an (3) its transmissions do not substantially consist of sound recordings performed within one hour of a request or at a time designated by the transmitting entity or the individual making the request. Public Performance of Sound Recordings, 65 Fed. Reg. at 77,331.

themselves without per se categorizing the service as being interactive.¹⁰³ It further cited the DMCA Conference Report, which distinguished between certain activities that had the potential to make a service interactive, but provided no substantive answer.¹⁰⁴ The question posed to the Copyright Office, the same that would be placed before the *Arista* court, was “*how much influence* can a consumer have on the programming offered by a transmitting entity before that activity must be characterized as interactive?”¹⁰⁵ The answer given by the Copyright Office was that “[s]uch a determination must be made on a case-by-case basis after the development of a full evidentiary record in accordance with the standards and precepts already set forth in the statute.”¹⁰⁶

Thus, as the *Arista* court stated, the legislative history beginning with the passing of the SRA and extending through the DMCA clearly showed that, “Congress enacted copyright legislation directed at preventing the diminution in record sales through outright piracy of music or new digital media that offered listeners the ability to select music in such a way that they would forego purchasing records.”¹⁰⁷ The only possible way to decipher whether a service was “interactive” within the meaning of § 114(j)(7) would have to be to conduct a full analysis of the actual service itself, and in doing so distinguish the level of influence that the consumer had on the programming.

¹⁰³ Performance of Sound Recordings, 65 Fed. Reg. at 77,332.

¹⁰⁴ *Id.* (citing H.R. REP. NO. 105-797, at 87-88 (1998)) (“A service would be interactive if it allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service’s transmissions a program consisting of sound recordings requested by a small number of those listeners.”).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Arista*, 578 F.3d 148, 157 (2d Cir. 2009).

III. *Arista Records, LLC. v. Launch Media, Inc.*

The *Arista* court endeavored to answer the question of whether Launch could be categorized as an interactive service within the meaning of U.S.C. § 114(j)(7). After examining and interpreting the legislative history of the amendment, the court turned to an in-depth analysis of the Launch service.¹⁰⁸

The court noted that a webcasting service like Launch “would be interactive if a user could either (1) request-and have played-a particular sound recording, or (2) receive a transmission of a program ‘specially created’ for the user.”¹⁰⁹ The primary problem facing the court in its interpretation of the definition was how to construe the meaning of the operative term “specially created.”¹¹⁰ As the Copyright Office stated in its own analysis of the statute, “No rule can accurately draw the line demarcating the limits between an interactive service and non-interactive service. Nor can one readily classify an entity which makes transmissions as exclusively interactive or non-interactive.”¹¹¹ The Second Circuit would have to do a detailed examination of the service itself. The analysis of the setup and function of Launch laid out certain factors and distinguishing features that could be beneficial to courts in other Circuits in their own interpretation of “interactive services” under § 114(j)(7).

A. LAUNCHcast

The courts analysis was predicated on the overlying theme of the legislative history and construction of the DMCA, that Congress was “clear that the statute sought to prevent further decreases in revenues for sound recording copyright holders.”¹¹² The rationale for that focus in

¹⁰⁸ See generally *Arista*, 578 F.3d 148.

¹⁰⁹ *Id.* at 161; 17 U.S.C. § 114(j)(7) (2006).

¹¹⁰ *Arista*, 578 F.3d at 152.

¹¹¹ Public Performance of Sound Recordings, 65 Fed. Reg. at 77,332.

¹¹² *Arista*, 578 F.3d at 161.

analyzing services such as Launch indicates that if a user has enough control over an interactive service that they would be able to substantially predict the songs that will be heard, and such activity would cause the user to continue to use that service in lieu of purchasing the actual record.¹¹³ Therefore, the court created a definitive link between the congressional intent of the legislation and the “concern that an interactive service provides a *degree of predictability based on choices made by the user*-that approximates the predictability the music listener seeks when purchasing music.”¹¹⁴ It is that degree of predictability that the *Arista* court sought to distinguish in its analysis.

A brief overview of how Launch operates must be outlined in order to fully appreciate the court’s findings.¹¹⁵ When a user initially logs on, they are prompted to select artists and genres of music that they prefer, rating each of these in the process.¹¹⁶ The user is asked what percentage of new music the user would like to incorporate into their station, a percentage called the “unrated quota.”¹¹⁷ Each time a user logs into the service and selects a station, a playlist of fifty songs is compiled (the “final playlist”).¹¹⁸ At no time does the user get to see what songs are in the initial pool (the “hashtable”), nor does the user get to see what songs are in the final playlist while it is being played.¹¹⁹ Thus, the user is never cognizant of what songs are on that particular station that has been generated until after the song has been played.¹²⁰

¹¹³ H.R. REP. NO. 104-274, at 13-14 (1995).

¹¹⁴ *Arista*, 578 F.3d at 161 (emphasis added).

¹¹⁵ See *id.* at 157-61 (providing an in-depth analysis of the intricacies of the algorithmic calculation of the service, and tracing the step by step process that LAUNCHcast takes once a user has logged in, from the initial entering of preferences all the way through to the final product presented to the user of a track list of fifty songs).

¹¹⁶ *Id.* at 157 (stating that other questions asked of the user are preference for exclusion of profane lyrics).

¹¹⁷ *Id.* (stating that no less than 20% of the songs played can be unrated).

¹¹⁸ *Id.* at 158.

¹¹⁹ *Id.*

¹²⁰ *Id.* (stating that LAUNCHcast provides a link to see what songs have already played on that playlist and give the option to purchase those songs).

The process of choosing the songs that will eventually make the final playlist is taken almost completely out of the control of the user.¹²¹ The hashtable is composed of approximately 10,000 songs.¹²² These songs are factored in for various reasons, the first 1000 added because they are the most popular songs as rated by all Launch users in the bandwidth that the user initially selected.¹²³ All of the songs that the user has rated (“explicitly”), or has had subscribers of his individual station have rated, and songs that appear on any of the albums containing songs rated by the user (“implicitly”) are added to the hashtable, usually amounting to around 4000 songs.¹²⁴ Then the service adds another 5000 songs by counting up all of the total number of songs in all of the genres the user specified, and dividing them by the total number of songs in the entire Launch database.¹²⁵ This ensures that “of the 5,000 random songs added to the hashtable, a sufficiently large number are for genres eligible to be selected for inclusion on the final playlist.”¹²⁶ However, if the total percentage of songs in the user’s selected genres is more than 5%, then a large number of the 5000 songs picked for the initial hashtable will be chosen randomly from the entire database, and not just from the user’s selected genres.¹²⁷

With 10,000 songs in the hashtable, Launch then sorts the songs based on three categories of ratings: (1) explicit; (2) implicit; and (3) unrated.¹²⁸ The service takes several steps through this ratings process to whittle down the amount of songs that can be played on the final playlist.

¹²¹ *Id.* at 159.

¹²² *Id.* at 158.

¹²³ *Id.*

¹²⁴ *Id.* (stating that all songs played within the previous three hours by anyone on LAUNCHcast are excluded in order to comply with 17 U.S.C. 114 § (d)(2)(C)(i), which limits webcasters to playing no more than three songs from an album in a three-hour period).

¹²⁵ *Id.* (stating that the entire database is comprised of 150,000 songs, and if the resulting quotient is less than 5% of the entire database, the LAUNCHcast picks only songs listed within the genres the user selected).

¹²⁶ *Id.* at 159.

¹²⁷ *Id.*

¹²⁸ *Id.*

For example, no more than 20% of all explicitly rated songs can be selected for the final playlist.¹²⁹

Having selected which songs from the hashtable are candidates to make the final playlist, Launch begins creating that list by picking songs at random from each of the three categories, with five restrictions.¹³⁰ First, any song whose inclusion would violate the initial mathematical calculation would be excluded.¹³¹ Second, no song can be played twice in a playlist.¹³² Third, a song is excluded if three other songs by that same artist have already been selected for the playlist.¹³³ Fourth, songs are excluded from the playlist if two other songs from that same album have been chosen already.¹³⁴ Finally, a song that might make the list is by an artist or from an album already chosen, it will be excluded unless at the end of the selection the user has fewer than fifty songs on the final playlist.¹³⁵ After the fifty songs have been set, Launch orders the final playlist, randomizes the songs, and allows the user to begin listening.¹³⁶

B. The Second Circuit’s Analysis of LAUNCHcast

The court’s examination of Launch revealed several factors that, under the statutes relevant language, helped it to arrive at the conclusion that the service was not interactive. First, the rules of the service that decides which songs would be gathered in the hashtable ensures that the user has virtually no opportunity to choose, let alone predict, which particular songs will be

¹²⁹ *Id.* (stating that another step is that LAUNCHcast selects “no more than three times the quotient of the total number of explicitly rated songs divided by the sum of implicitly and explicitly rated songs”).

¹³⁰ *Id.* at 160.

¹³¹ *Id.* at 159.

¹³² *Id.*

¹³³ *Id.* (giving an example that if three Beatles songs have already been selected, there is no possibility for a fourth Beatles song to make the final playlist).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 160.

pooled together before the final playlist is rendered.¹³⁷ The court noted that at a minimum, 60% of the songs that go into the initial hashtable were generated by factors that the user had almost no control over.¹³⁸ The fact that of the 10,000 songs that go into the hashtable, 6000 of them are selected with absolutely no consideration of the user's song, artist, or album preference suggests that user control from the initial steps has already begun to be stripped before the final playlist is even confirmed.¹³⁹ In addition, no more than 20% of the explicitly rated songs can even be selected for the hashtable, which ensures that only a limited amount of these songs will make the final playlist.¹⁴⁰ The court notes that this safeguard "effectively means that the more songs the user explicitly rates, the less the user can predict which explicitly rated songs will be pooled in the hashtable and played on the playlist."¹⁴¹ Therefore, if a user attempts to influence which songs will make the final playlist and thus create predictability by explicitly rating a high volume of songs that she wants to hear again, or even choosing a minimal amounts of genres at the outset, Launch operates in a way to nullify this attempt at predictability by building in levels of safeguards of limitation and exclusion in the formulaic selection of the songs for the hashtable.

Secondly, the rating of each song entails variables that restrict user control.¹⁴²

Restrictions exist on the number of times a songs by "particular artists or from particular albums can be played, along with restrictions on consecutive play of the same artist or album."¹⁴³ In addition, each time a user logs on to Launch a unique playlist is created for them. If a user wants

¹³⁷ *Id.* at 162.

¹³⁸ *Id.* The final playlist that includes fifty songs is created from a pool of approximately 10,000 songs, at least 6000 of which are selected without any consideration for the user's song, artist, or album preferences. Of those 6000 songs, 1000 are those that are amongst the most highly rated LAUNCHcast songs among all users, and 5000 are just randomly selected songs. *Id.*

¹³⁹ *Id.* (stating that the 6000 songs come from the 1000 highly rated LAUNCHcast songs and 5000 randomly selected songs).

¹⁴⁰ *Id.* at 163.

¹⁴¹ *Id.*

¹⁴² *Id.* An example given is that of other users (DJs) who "subscribe" to the user playlist, giving other people on the service the opportunity to listen to the user's preferred station. When a DJ rates a song on the user's playlist this rating is also added to the explicit category of rated songs, building an even larger pool for this category. *Id.*

¹⁴³ *Id.*

to hear a song from that playlist again and attempts to log off and come back on in an attempt to reset the playlist, the service will simply load the same playlist and play out its remainder from the point that the user had logged off.¹⁴⁴ Launch does not allow a user to view the unplayed songs in the playlist, nor restart a song that is playing or repeat any of the previously played songs.¹⁴⁵ In fact, the only user controlled certainty that lends itself to predictability is the user's ability to rate a song with a score of zero, thus ensuring that the song will not be heard by that user again.¹⁴⁶ Dismissing this notion of user control, the court stated, "the ability not to listen to a particular song is certainly not a violation of a copyright holder's right to be compensated when the sound recording is played."¹⁴⁷

The court therefore concluded that although the fact that Launch's playlists are uniquely created for each user, that factor alone does not ensure predictability. In fact, "the unique nature of the playlist helps Launch ensure that it does not provide a service so specially created for the user that the user ceases to purchase music."¹⁴⁸ The critical factors then in examining a webcast service such as Launch is the degree of *user control* and *predictability* of the music being played. While Launch certainly grants the user the opportunity to provide input for the overall direction that the playlist will take in order to at least give the user an enjoyable experience that is to a degree catered to their preferences, it never allows the user to predict nor anticipate what particular song, artist, or even album will be played, nor the position within the final playlist that a potential song could even be located. Therefore, by following this analysis, the Second Circuit properly found that within the meaning of the definition of "interactive service" under the DMCA, Launch does not fall into the categorization because it does not give the user enough

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 158.

¹⁴⁶ *Id.* at 164.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

control to substantively influence the service, and thus would not be a viable alternative in lieu of purchasing music that would in the aggregate diminish record sales.

IV. The Future of Webcasting and the Implications of *Arista*

The holding of *Arista* has the potential to profoundly affect the future of webcasters and their sustainability. While some commentators signaled that the determinations of higher royalty rates by CARP starting in 2002 would have such an incredibly debilitating effect on many American webcasters that it could possibly equate to the overall demise of webcasting,¹⁴⁹ the survival of webcasting services has been bolstered by recent events. The *Arista* decision allows a plethora of webcasting services, including large commodities such as Pandora and TheRadio.com, to continue to classify their services as interactive and thus not subject to the hardships that would entail negotiating separate copyright clearance deals with each copyright holder. The court outlined significant elements that must be taken into consideration in order to be classified as such, and thus future and current services have a roadmap that they can utilize to ensure they fall into the category of interactive as defined by the DMCA.

The major hurdle for non-interactive services since the passing of the DMCA, has been the negotiation of royalty fees under the statutory licensing fee set by the Copyright Royalty Board.¹⁵⁰ Such fee increases have brought services to the brink of financial ruin.¹⁵¹ For example, in 2007 the Copyright Royalty Board increased the fee to play music on webcasts from eight

¹⁴⁹ Astle, *supra* note 6, at 178 (citing Press Release, BRS Media, Inc, BRS Media's Web-Radio Reports a Steep Decline in the Number of Stations Webcasting (Sept. 12, 2002), available at <http://www.onlinebackupdir.com/news/showNews.aspx?ID=9257>)).

¹⁵⁰ 17 U.S.C.A. § 114(f) (West 2009); *Arista*, 578 F.3d at 151 (“Prior to 2004, parties were required to submit their claims for statutory licensing fees to CARP’s. This system was phased out by the Copyright Royalty and Distribution Reform Act of 2004.”).

¹⁵¹ See RU Sirius, *Closing Pandora's Box: The End of Internet Radio?* 10 ZEN MONKEYS, May 3, 2007, <http://www.10zenmonkeys.com/2007/05/03/closing-pandoras-box-the-end-of-internet-radio/> (interview with Tim Westergren, leading spokesperson for SaveNetRadio.org and founder of Pandora).

cents per song to nineteen cents per song.¹⁵² The increase left non-interactive services paying fees that in certain cases amounted to massive percentages of their projected annual revenue.¹⁵³

However, in 2009 an agreement was brokered between webcasters and SoundExchange.¹⁵⁴ The agreement offered an alternative set of comparatively high rates and terms to those issued by the Copyright Royalty Board in 2007. According to the agreement, the new formula is “good through 2014 and 2015 for different sized players, includes revenue sharing for most services – up to 25 percent of U.S. revenues in some cases – and more reporting requirements in exchange for a discount on per stream rates.”¹⁵⁵ These increased rates have caused webcast services to restructure and limit user availability to free listening.¹⁵⁶

V. Conclusion

At the present time, the survival of non-interactive webcasting services remains a possibility. However, the rising cost of licensing fees remains a lingering problem that will continue to plague webcasters in future negotiations. The recent experimental formula brokered between SoundExchange and Pandora represent only a possible, albeit temporary, solution for future royalty crisis’s, yet does little to quail the rising costs associated with operating a non-interactive webcasting service. Yet what the holding in *Arista* has done is to ensure that the statutory language of the DMCA has been properly applied to webcasting services. By putting forth an analysis that focused on user control and predictability, the court was able to establish

¹⁵² See Peter Whoriskey, *Giant of Internet Radio Nears Its ‘Last Stand,’* WASH. POST, Aug. 16, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081503367.html>.

¹⁵³ *Id.* (stating that Pandora would expend \$17 million on license fees out of their total projected revenue of \$25 million).

¹⁵⁴ Patrick Hoge, *Royalty Agreement Is Boon for Pandora Web Radio,* SAN FRANCISCO BUS. TIMES, July 8, 2009, available at <http://www.sanfrancisco.bizjournals.com/sanfrancisco/stories/2009/07/06/daily36.html>.

SoundExchange is a Washington, D.C., nonprofit organization that collects royalties for recording copyright owners.

¹⁵⁵ *Id.*

¹⁵⁶ Posting of Tim Westergren to Pandora Internet Radio, http://blog.pandora.com/pandora/archives/2009/07/important_updat_1.html (July 7, 2009, 13:24 EST) (stating that user would be limited to forty hours per month of free listening).

guidelines for interpretation of the definition of an “interactive service” under the DMCA. In doing so, the court opened the door to providing a safe harbor for all services in compliance to be categorized within the statutory exemptions, and thus have a fighting chance for survival.