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Arista Records v. Launch Media: An Analysis of the Second Circuit's Ruling on Webcast Interactivity and a Look at the Current and Future State of Interactive Webcasting Technology

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**ARISTA RECORDS v. LAUNCH MEDIA: AN ANALYSIS OF THE
SECOND CIRCUIT’S RULING ON WEBCAST INTERACTIVITY AND
A LOOK AT THE CURRENT AND FUTURE STATE OF
INTERACTIVE WEBCASTING TECHNOLOGY**

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I. INTRODUCTION

Over the years, significant advancements have been made in digital distribution technology. Increases in high speed Internet access and the presence of online digital distribution stores have given Internet users the ability to access digital content at the click of a button, often wherever and whenever they choose.¹ Music is one category of content to which users have this type of instantaneous access.² In 1995, Professor Paul Goldstein of Stanford Law School referred to the ability to instantly access music from distant locations at the click of a button as the “celestial jukebox.”³ Indeed, this has become a reality today as online distribution stores offer endless selections of music.⁴ Equally important is the fact these offerings are paired with the availability of high-speed Internet connections which allow the offered content to be rapidly, if not instantly, accessed.⁵

1. More than 100 million high-speed Internet connections have been installed in the United States. Consumer & Governmental Affairs Bureau, *Getting Broadband*, FED. COMM’NS COMM’N (Oct. 17, 2008), <http://www.fcc.gov/cgb/consumerfacts/highspeedinternet.html>. More than 30 million iPhones have been sold to date, giving people instant access to high-speed Internet on the go. Dean Takahashi, *30 Million iPhones Sold – Now That’s a Game Platform*, VENTUREBEAT, (March 17, 2009), <http://games.venturebeat.com/2009/03/17/iphone-30-event-30-million-sold-now-thats-a-game-platform/>. Online digital music stores iTunes and Amazon were among the top five music stores in the first half of 2008, with iTunes ranked number one, beating out Best Buy and Walmart. *The NDP Group: iTunes Continues to Lead U.S Music Retail Sales in First Half of 2008*, THE NDP GROUP, (Aug. 5, 2008), http://www.npd.com/press/releases/press_080805.html [hereinafter *iTunes Continues to Lead U.S Music Retail Sales*]. In the first half of 2009, iTunes digital downloads accounted for twenty-five percent of all music sold. *Digital Music Increases Share of Overall Music Sales Volume in the U.S.*, THE NDP GROUP, (Aug. 18, 2009), http://www.npd.com/press/releases/press_090818.html [hereinafter *Digital Music Increases Music Sales*].

2. See, e.g., *Digital Music Increases Music Sales*, *supra* note 1; *iTunes Continues to Lead U.S Music Retail Sales*, *supra* note 1.

3. Raffi Zerounian, Note, *Bonneville International v. Peters*, 17 BERKELEY TECH. L. J. 47, 54 & n.48 (2002) (citing PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 199 (1994)); Stanford Law School, Directory: Paul Goldstein, <http://www.law.stanford.edu/directory/profile/25/Paul%20Goldstein/> (last visited Feb. 21, 2011).

4. The Apple iTunes music store offers more than 13 million songs to download. *What is iTunes?*, APPLE, <http://www.apple.com/itunes/what-is/> (last visited Feb. 21, 2011). Pandora, a free, personalized webcasting service, has over three-quarters of a million songs in its database and adds fourteen thousand each month. See, e.g., *Pandora FAQ – How Many Songs Are There in Pandora’s Collection?*, PANDORA BLOG, <http://blog.pandora.com/faq/contents/29.html> (last visited Feb. 21, 2011); Andrey Spektor, *How “Choruss” Can Turn into a Cacophony: The Record Industry’s Stranglehold on the Future of Music Business*, 16 RICH. J.L. & TECH. 3, Fall 2009, at 57, <http://jolt.richmond.edu/v16i1/article3.pdf>.

5. The average high-speed Internet user can download a four minute song in as little as four to five seconds. Mike Paxton, *US Residential Broadband Speeds on the Rise*, IN-STAT (Feb. 2009), http://www.instat.com/mp/IN0904470MBS_Mktg_Pkt.pdf (noting the speed of broadband connections is increasing); *iTunes Store: Download Times Will Vary*, APPLE (Sep. 22, 2010),

Within this category of instantly available, digital music content are webcasts.⁶ Unlike those business models which allow users to purchase and download their content, webcasts allow users to listen to music via the Internet as it downloads, just like terrestrial radio stations allow people to listen to broadcasts over the airwaves.⁷ Certain types of personalized webcasts have emerged as advanced hybrids of traditional webcasts and terrestrial radio broadcasts. Similar to traditional webcasts and analog radio broadcasts, these personalized webcasts, which millions enjoy, allow users to listen to a variety of artists with business models based on advertising.⁸ The difference with these hybrids is users have more control over what types of music they hear.⁹

Examples of traditional webcasts where music plays without any user input, other than his or her selection of the webcast itself, include the thousands of stations American Online offers through SHOUTcast Radio.¹⁰ With these traditional webcasts, users can listen to Internet simulcasts of local radio stations or those available exclusively online.¹¹ More advanced webcast hybrids where users can offer input to influence the music he or she hears include LAUNCHcast and Pandora Radio (Pandora).¹²

When users start having a say in the styles of music played for them by providing input about what songs they like and dislike, one might assume these services are “interactive.” When webcasts become more interactive, users become more likely to rely on these services to obtain music, rather than purchasing music from a store.¹³ Thus, Congress enacted legislation through the Digital Rights in Sound Recording Performance Act (DSRA) and the Digital Millennium Copyright Act (DMCA) to ensure when a webcasting service is interactive, sound recording copyright owners are entitled to the right

<http://support.apple.com/kb/HT1577>. With these connections, users can either quickly download or stream music as part of a webcast in real-time, allowing users to begin listening to a song right away. Eric D. Leach, Comment, *Everything You Always Wanted to Know About Digital Performance Rights but Were Afraid to Ask*, 48 J. COPYRIGHT SOC’Y U.S.A. 191, 224–25 (2000).

6. Leach, *supra* note 5, at 224.

7. *Id.*

8. See, e.g., Jason Kincaid, *Pandora Radio Starts Serving Audio Ads*, TECHCRUNCH (Jan. 20, 2009), <http://www.techcrunch.com/2009/01/20/pandora-radio-starts-serving-audio-ads/>; Pandora, CRUNCHBASE, <http://www.crunchbase.com/company/pandora> (last visited Feb. 21, 2011) (noting Pandora has 32 million registered users).

9. See, e.g., *About Pandora*, PANDORA, <http://www.pandora.com/corporate/> (last visited Feb. 21, 2011).

10. See SHOUTCAST, <http://www.shoutcast.com> (last visited Feb. 21, 2011).

11. Cydney A. Tune & Christopher R. Lockard, *Navigating the Tangled Web of Webcasting Royalties*, 27 ENT. & SPORTS LAW. 20, 20 (2009). See, e.g., *SHOUTcast Radio FAQ*, SHOUTCAST, <http://www.shoutcast.com/faq> (last visited Feb. 21, 2011).

12. See Tune & Lockard, *supra* note 11, at 22; *About Pandora*, *supra* note 9.

13. *Arista Records, L.L.C. v. Launch Media, Inc.*, 578 F.3d 148, 157 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1290 (2010).

to freely negotiate individual licensing fees with the entity performing the webcast.¹⁴ While sound recording copyright owners still retain an exclusive right of performance for noninteractive webcasts,¹⁵ the copyright owners only have a right to collect reasonable, compulsory licensing fees when their sound recordings are performed via such noninteractive webcasts.¹⁶ These compulsory licensing fees are set by the Copyright Royalty Board.¹⁷

On August 21, 2009, the Second Circuit became the first, and remains the only, federal court of appeals to determine how the “interactivity” provision of the DMCA applies to webcasting companies.¹⁸ This interpretation decided whether Launch Media, Inc.’s (Launch Media) webcasting service, LAUNCHcast, which allowed users a degree of control over the type of music they heard, constituted an interactive service under the meaning of the DMCA, which would therefore require Launch Media to negotiate individual licensing fees with the copyright owners.¹⁹

In 2001, Arista Records, LLC, BMG Music, Bad Boy Records, and Zomba Recording LLC (collectively, Arista) brought action against Launch Media, alleging LAUNCHcast was interactive.²⁰ The merits of this allegation would determine whether Launch Media was liable to Arista for individual, freely negotiable licensing fees for each song it streamed to users over the Internet from 1999 to 2001.²¹ Launch Media had historically only paid the smaller, predetermined statutory licensing fees as was required of noninteractive webcasting companies.²²

To Launch Media’s relief, a jury for the United States District Court of the Southern District of New York found that the LAUNCHcast webcasting

14. *Id.* at 161–62.

15. 17 U.S.C. § 106(6) (2006) (“[T]he owner of copyright . . . has the exclusive rights to . . . perform the copyrighted work publicly by means of a digital audio transmission.”).

16. *Id.* § 114(f) (2006). Interactive webcasts do not qualify for compulsory licenses, but noninteractive webcasts do. Tune & Lockard, *supra* note 11, at 21. If a webcasting company qualifies for a compulsory licensing fee arrangement, it does not have to obtain special permission from the sound recording copyright holder. *Id.* Thus, the company does not have to negotiate with record companies to come up with a licensing fee arrangement. When a company streams interactive webcasts, compulsory licenses are not available and record companies have unfettered discretion in deciding what type of fee to impose on the webcasting company. *Id.*

17. Tune & Lockard, *supra* note 11, at 21. After the compulsory licensing fees are set by the Copyright Royalty Board, SoundExchange, a nonprofit organization set up by the Recording Industry Association of America, collects the fees. *Id.* Half of the fees set by the Copyright Royalty Board and collected by SoundExchange go to the sound recording copyright owners, with the other half going to the artists. *Id.*

18. *Arista Records, L.L.C.*, 578 F.3d at 149–50; 17 U.S.C. § 114(f) (2006).

19. *Arista Records, L.L.C.*, 578 F.3d at 150.

20. *Id.*

21. *Id.* at 150–51.

22. *See id.* at 151; Tune & Lockard, *supra* note 11, at 21.

service was noninteractive.²³ On appeal by Arista, the three-judge panel for the United States Court of Appeals for the Second Circuit was charged with interpreting the language of the DMCA to develop a test for determining what exactly constitutes an interactive service, and applying this test to LAUNCHcast.²⁴

While the court's ultimate decision relates to a lawsuit filed in 2001, it remains important as a clarification of the degree of interactivity, or lack thereof, webcasting companies can provide to listeners in a digital age where listeners' expectations of free digital media are met with intelligent delivery services such as LAUNCHcast and its even more advanced counterparts, such as Pandora, that have emerged.²⁵ Further, upon analysis of the court's reasoning in support of its holding that LAUNCHcast was noninteractive, the court may have neglected to consider an important element which influences interactivity.

Looking back on the court's analysis, it seems possible the relevant statutory framework may not ultimately achieve the end it sought if other courts utilize the same test as *Arista*, especially if advanced technology continues to influence how modern webcasts deliver music to listeners. If another circuit hears a similar case, it has free reign to take other factors into consideration that may weigh on a finding of interactivity, as *Arista*'s writ of certiorari to the Supreme Court of the United States has been denied.²⁶ In doing so, the next circuit may be wise to employ different analytical methods in arriving at a conclusion about whether a webcast is noninteractive, if it can develop a framework to do so.

II. HISTORY AND BACKGROUND

A. A Description of LAUNCHcast

1. LAUNCHcast's "Interactive" Functionality

Launch Media's LAUNCHcast allowed users to create Internet radio stations that would stream music for its users based on their musical tastes and the tastes of other LAUNCHcast users, and in quite a "complex" manner, as

23. *Arista Records, L.L.C.*, 578 F.3d at 151.

24. *Id.* at 151–52.

25. See MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, THE STATE OF MUSIC ONLINE: TEN YEARS AFTER NAPSTER 4 (2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/The-State-of-Music-Online_-Ten-Years-After-Napster.pdf (“[I]f the music market is any indication of how consumer expectations will evolve . . . the demands for free content will extend far beyond the mere cost of the product.”).

26. *Arista Records, L.L.C. v. Launch Media, Inc.*, 130 S. Ct. 1290 (2010) (denying *Arista*'s petition for writ of certiorari).

the court notes in its analysis.²⁷ Essentially, LAUNCHcast provided individual, personalized webcasts to users based on how they rated songs, genres, and the musical taste of others.²⁸ Priding itself on the degree of influence it allowed users to exert, LAUNCHcast actually marketed itself as “interactive.”²⁹ Playlists were generated for the user based on song, artist, and genre preferences.³⁰ Preferences of other users to which the user subscribed—which LAUNCHcast termed DJs—also influenced which songs would play.³¹ While the user could not see which songs were going to play next, specifically select a song previously played, skip backwards, or restart the currently playing song, once the webcast began streaming the user could pause a song, choose to never have a song play again, or skip forward to the next song.³²

2. LAUNCHcast’s Algorithm

A number of factors influenced which songs LAUNCHcast would stream to the user.³³ When a user created an account, the user could specify favorite artists and music genres.³⁴ When listening to a song, a user could “explicitly” rate it on a scale from one to one hundred, with a higher rating increasing the probability the same song, or one from the same artist or album, would play in the future.³⁵ When the user “explicitly” rated a song, LAUNCHcast “impliedly” rated other songs from the same album and by the same artist.³⁶ If the user did not like a song, the user could skip the song to prevent it from being played again.³⁷

Further, users could subscribe to “rating systems” other users—DJs—had developed for their personalized stations.³⁸ For example, if User A had fine-tuned his or her preferences by rating songs and genres, User B could

27. *Arista Records, L.L.C.*, 578 F.3d at 157.

28. *See id.*

29. *Id.* at 162 n.21; Launch Media, Inc., Registration Statement (Amend. No. 4 to Form SB-2/A) at 4 (Apr. 22, 1999). The Internet Archive, which has been archiving websites for over 10 years, has archived the LAUNCHcast homepage as it existed in 2000. *What is LAUNCHcast?*, INTERNET ARCHIVE, <http://web.archive.org/web/20001109043100/www.launch.com/launchcast/> (last visited Feb. 21, 2011). Through its homepage, LAUNCHcast advertised itself to visitors as a service that would adapt to “YOUR music tastes” and allow a user to influence how often she heard songs by rating songs, albums, and artists. *Id.*

30. *See generally Arista Records, L.L.C.*, 578 F.3d at 158–60 (describing the manner in which playlists were generated).

31. *Id.* at 158.

32. *Id.*

33. *Id.* at 158–60.

34. *Id.* at 157.

35. *Id.* at 157–58.

36. *Arista Records, L.L.C.*, 578 F.3d at 158.

37. *Id.* Songs a user skipped were rated as zero. *Id.*

38. *Id.*

subscribe to User A, a DJ, if User B thought User A might have a similar taste in music.³⁹ Songs User A rated would then be included in User B's rating database as "impliedly" rated songs.⁴⁰

Armed with a database of the user's explicitly rated songs and genre preferences, impliedly rated songs based on the user's own preferences, and based on the DJs' preferences to which the user subscribed, LAUNCHcast would generate a pool of songs from which to make a playlist for the user.⁴¹ First, all the user's explicitly rated songs and impliedly rated songs were added to the pool.⁴² Any songs which had been skipped or rated as zero by the user or DJs to which the user subscribed, along with those played in the last three hours, were excluded.⁴³ At this point, the pool contained about 4000 songs.⁴⁴ Second, 1000 of the songs rated highest by other LAUNCHcast users, whether or not they were DJs to which the user subscribed, were added to the pool, bringing the pool up to 5000 songs.⁴⁵ Third, an additional 5000 songs were added to the pool based on the genres for which the user had exhibited a preference.⁴⁶

At that point, the 10,000-song pool included explicitly rated songs, impliedly rated songs, and unrated songs.⁴⁷ While no more than 20% of the user's explicitly rated songs could be included in the final fifty song playlist, up to 80% of the user's *rated* songs, impliedly or explicitly, could be included.⁴⁸ In essence, up to forty songs in the fifty-song playlist to be webcast to the user were likely to be songs the user would enjoy.

B. Similar "Interactive" Services

While LAUNCHcast, now owned by Yahoo!, Inc.,⁴⁹ no longer provides the same functionality (or has the same name), personalized webcasts such as

39. *See generally id.* at 157–58.

40. *Id.* at 157–58. It is important to note when User B rated songs while subscribed to a DJ, the DJ's ratings were not affected. *Id.* at 158.

41. *Id.* at 158–59.

42. *Arista Records, L.L.C.*, 578 F.3d at 158.

43. *Id.*

44. *Id.*

45. *Id.* For some more complex exceptions to how the final 5000 songs are selected *see id.* at 158–59.

46. *Id.* at 158–59.

47. *Id.* at 158–60.

48. For some more complex exceptions to the general algorithm described in the text accompanying notes 34–50 *see Arista Records, L.L.C.*, 578 F.3d at 159–60.

49. *Id.* at 150 n.2. Since Yahoo!, Inc. purchased LAUNCHcast, the service has been changed to Yahoo! Radio and is powered by CBS Radio. *What is Yahoo! Radio?*, YAHOO!, http://help.yahoo.com/l/us/yahoo/music/launchcast/basics/launchcast.html;_ylt=AsmT9V.qMTACn1NXncnTbE_3oiN4 (last visited Feb. 21, 2011). Yahoo! Radio no longer offers personalized webcast stations. *Id.*; Michael Arrington, *Yahoo To Relaunch Launchcast Next Year With CBS*

Pandora and Last.fm fill the gap left by LAUNCHcast.⁵⁰ Each webcasting service allows users to create stations based on a song or artist they enjoy.⁵¹ Taking into account a user's "likes" or "dislikes," the services will determine which songs to play.⁵²

Pandora is perhaps the most advanced and pervasive example of a present-day webcasting service. While Pandora was not a party in the *Arista* case, the technology it utilizes is of interest because it exemplifies just how advanced modern webcasting services have become. The manner in which Pandora analyzes a user's musical taste goes beyond simply looking at song ratings in determining which songs to play next.⁵³ As part of its Music Genome Project, Pandora maintains "a database containing the breakdown of songs into a multitude of musical elements" and keeps "quantitative, objective analyses of songs from over 10,000 artists."⁵⁴ In a 2005 interview with Tim Westergren, the Chief Strategy Officer and Founder of Pandora Music, Inc., conducted by Professor Yvette Joy Liebesman of Saint Louis University School of Law, Westergren described the process of analyzing each song, which takes twenty to thirty minutes and twenty full-time musicians to manage updating the database.⁵⁵ Some of the four hundred musical aspects analyzed include "harmony, rhythm, structure, melody, vocals, and lyrics."⁵⁶ Further analytical breakdown examines about twenty components of harmony and thirty-five components of vocals.⁵⁷ These attributes are used to determine similarity among songs.⁵⁸ Thus, not only can Pandora stream songs for which the user

Radio, TECHCRUNCH (Dec. 3, 2008), <http://www.techcrunch.com/2008/12/03/yahoo-to-relaunch-launchcast-next-year-with-cbs-radio/>. Under its new name, the service merely offers a variety of traditional, pre-programmed webcasts. Arrington, *supra* note 49.

50. Michael A. Einhorn, *Thinking Outside the Box: The Next Generation Moves in the Music Business*, 56 J. COPYRIGHT SOC'Y U.S.A. 201, 206-07 (2008) ("Last.fm . . . is a U.K.-based Internet radio and music community Web site with over 21 million active users in 200 countries that uses a system that tracks and memorizes user tastes, and thus enables automatic recommendation among its interconnected users.").

51. *See id.*; Pandora FAQ – When Should I Give a Song "Thumbs Up"?, PANDORA BLOG, <http://blog.pandora.com/faq/contents/18.html> (last visited Feb. 21, 2011) (describing how users can give a song a "thumbs-up" to influence the type of music that will play in the future).

52. *See, e.g.*, sources cited *supra* note 51.

53. Yvette Joy Liebesman, *Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes*, 35 AIPLA Q.J. 331, 346-47 & nn.81-82 (2007) (citing telephone interview with Tim Westergren, Chief Strategy Officer & Founder of Pandora Music, Inc. (Nov. 7, 2005)); Julia Layton, *How Pandora Radio Works*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/pandora.htm> (last visited Feb. 21, 2011).

54. Liebesman, *supra* note 53, at 346-47 (citing e-mail from Tim Westergren, Chief Strategy Officer & Founder of Pandora Music, Inc., to Yvette Joy Liebesman (Nov. 5, 2005)).

55. *Id.* at 347 & n.82.

56. *Id.* at 347.

57. *Id.*

58. *Id.*

has specifically voiced a preference, but it can also recommend and play songs the user is likely to enjoy based on the scientific characteristics of songs.⁵⁹

The pervasive nature of Pandora goes beyond allowing users to listen to their webcasts on a personal computer. Users can also access Pandora through mobile devices such as an iPhone,⁶⁰ a mobile phone utilizing the Android operating system,⁶¹ or a device running Palm's webOs.⁶² Moving beyond phones, Ford Motor Company has announced purchasers of Ford automobiles which contain Ford SYNC technology will be able to access Pandora's services while driving.⁶³ In addition to supporting Pandora, Ford will allow third party companies to develop applications designed to run on Ford SYNC.⁶⁴ This means countless other webcasting companies could potentially design applications similar to Pandora and LAUNCHcast to give drivers instant access to personalized digital streams.

C. *The Evolution of the Sound Recording Copyright in Performance*

Until 1971, copyright protection did not exist in sound recordings.⁶⁵ In that year, Congress extended limited protection to copyright owners of sound recordings through the Sound Recording Act of 1971 to protect against unauthorized duplication.⁶⁶ After this enactment, owners of sound recordings only held the rights to reproduction, distribution, and adaptation.⁶⁷ No right to public performance or transmission existed.⁶⁸ Thus, traditional analog FM and AM radio stations were, and are still today, free to publicly perform or transmit

59. *Id.*

60. *Pandora on iPhone*, PANDORA, <http://www.pandora.com/on-the-iphone> (last visited Feb. 21, 2011).

61. *Pandora on Android*, PANDORA, <http://www.pandora.com/android> (last visited Feb. 21, 2011).

62. *Pandora on the Palm Pre*, PANDORA, <http://www.pandora.com/palm> (last visited Feb. 21, 2011).

63. Jennifer Van Grove, *Ford SYNC Will Soon Stream Pandora Radio*, MASHABLE (Jan. 7, 2010), <http://mashable.com/2010/01/07/ford-sync-application-ecosystem/>. See also *About SYNC*, FORD MOTOR COMPANY, <http://www.fordvehicles.com/technology/sync/about/> (last visited Feb. 21, 2011) ("SYNC is an easy-to-use in-car connectivity system that allows you to make hands-free calls and control your music and other functions with simple voice commands.").

64. Van Grove, *supra* note 63.

65. See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

66. *Id.*; *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487 (3d Cir. 2003) ("With the Sound Recording Amendment of 1971 . . . a limited copyright in the reproduction of sound recordings was established in an effort to combat recording piracy.").

67. Sound Recording Act of 1971, *supra* note 65 ("[T]his right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds.").

68. *Bonneville Int'l Corp.*, 347 F.3d at 487-88.

over the airwaves any sound recording they have legally acquired without having to pay royalties to the copyright owner of the sound recording.⁶⁹

In 1995, Congress enacted the Digital Performance Right in Sound Recording Act of 1995 (DSRA) to address concerns that new technology enabled digital transmissions to provide music for listeners in a manner which would cut into record companies' sales, thereby inhibiting the creation of new music.⁷⁰ Under the DSRA, copyright owners in sound recordings were given an exclusive, but limited, right of performance through interactive digital transmissions.⁷¹ Thus, traditional radio broadcasts over the airwaves were not affected.⁷² Interactive transmitters were left having to negotiate licensing fees on their own with the sound recording copyright owner.⁷³ The DSRA defined an interactive service as one that allowed a user to specifically select which sound recording he or she wanted to hear.⁷⁴ In summary, the DSRA placed a heavy burden on companies wanting to stream interactive webcasts because record companies could demand during negotiations any desired licensing fee.

Currently in force today, the Digital Millennium Copyright Act (DMCA) was enacted in 1998 in part to address concerns about more advanced, emerging webcasting technology.⁷⁵ Congress was concerned that if webcasting services became too advanced, users would rely on the free, advanced webcasts to obtain their music instead of purchasing it.⁷⁶ To address these concerns, the DMCA amended the definition of "interactive services" to include not only those services which allow users to select a particular sound recording, but also those which allow users to receive a transmission of a webcast specially created for them.⁷⁷ Because LAUNCHcast did not allow a

69. *Id.* Although terrestrial broadcasters do not have to pay royalties to the recording industry when they broadcast a song, they still owe royalties to the composers and songwriters. *Id.* at 487.

70. *Id.* at 488.

71. Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, sec. 3, 109 Stat. 336, 336-38 (codified as amended at 17 U.S.C. § 114(d) (2006)).

72. *Bonneville Int'l Corp.*, 347 F.3d at 488 (noting Congress had a "desire not to impose 'new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.'" (quoting H.R. REP. NO. 104-274, at 14 (1995))).

73. *See* 17 U.S.C. § 114(d)(1) (Supp. I 1995).

74. *Id.* at § 114(j)(4).

75. *Arista Records, L.L.C. v. Launch Media, Inc.*, 578 F.3d 148, 155 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1290 (2010).

76. *Id.*

77. Digital Millennium Copyright Act, Pub. L. No. 105-304, sec. 405, 112 Stat. 2860, 2898 (1998) (codified at 17 U.S.C. § 114(j)(7) (2006)) ("An 'interactive service' is 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."). As previously noted, the DSRA only

user to select a particular sound recording for its webcast, services which transmit programming “specially created” for the user are of primary concern when examining the relevant law. Notably, however, section 114(j)(7), a provision of Title 17 of the United States Code the DMCA amended, does not define what “specially created” means to assist in making a determination as to whether a program is interactive.⁷⁸

The Copyright Office has provided little help in providing a definition for “a program specially created for the recipient.”⁷⁹ While the Copyright Office has opined that Congress sought to identify a service as interactive based on how much influence a listener could have on the performance of a sound recording,⁸⁰ the Office has nevertheless noted users can still have some degree of influence over a program of play.⁸¹ Ultimately, it “is not clear . . . how much influence a consumer can have on the programming offered by a transmitting entity before that activity must be characterized as interactive.”⁸² The Copyright Office even undertook to determine whether LAUNCHcast was interactive, but remained indecisive in its conclusion.⁸³

D. Arista’s Procedural History

In 2001, Arista brought suit against Launch Media in the United States District Court for the Southern District of New York for willfully infringing its sound recording copyrights by digitally transmitting them via LAUNCHcast.⁸⁴ Arista alleged Launch Media was infringing through digital transmission because the songs were webcast as part of an interactive service when individual licensing fees were not paid to Arista.⁸⁵ As previously discussed, the DMCA requires that companies streaming interactive programs pay individually negotiated licensing fees to the copyright owner of the sound recording.⁸⁶

deemed services that allowed users to select a particular recording for transmission as interactive. See *supra* note 74 and accompanying text.

78. 17 U.S.C. § 114 (j)(7) (2006).

79. *Id.*; *Arista Records, L.L.C.*, 578 F.3d at 157 n.6.

80. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,330, 77,331 (Dec. 11, 2000) [hereinafter Definition of a Service].

81. *Id.* at 77,332.

82. *Id.*

83. See *Arista Records, L.L.C.*, 578 F.3d at 156–57. First, the Copyright Office expressed doubt LAUNCHcast was an interactive service. *Id.* at 156; Definition of a Service, *supra* note 80, at 77,332 & n.1. Later, it corrected itself, opining it doubted LAUNCHcast was noninteractive. *Arista Records, L.L.C.*, 578 F.3d at 156. Finally, the Office later expressed it doubted LAUNCHcast was interactive. *Id.* at 156–57.

84. *Arista Records, L.L.C.*, 578 F.3d at 150.

85. *Id.*

86. *Id.* (citing 17 U.S.C. § 114(d)(3)(C) (Supp. I 1995)). See *supra* text accompanying notes 74–83 (discussing “interactivity” under the DMCA).

Because Launch Media had only been paying compulsory licensing fees set by the Copyright Royalty Board, as is required for noninteractive webcasting services under the DMCA, Arista requested damages for all of the songs to which it owned a sound recording copyright transmitted by LAUNCHcast between 1999 and 2001.⁸⁷ Launch Media would have been in violation of the DMCA as a noncompliant interactive service provider if it either allowed users to request a specific song or stream a program specially created for the user.⁸⁸ It was clear LAUNCHcast was not violating the DMCA by allowing users to specifically choose which song to stream.⁸⁹ However, question still remained as to whether LAUNCHcast was a service “specially created for the recipient.”⁹⁰

The law in this area was unsettled at the time, as “the term ‘interactive’ [had] yet to be definitively construed by the courts,” and the judge for the District Court denied Arista’s motion for summary judgment.⁹¹ Instead, the question of whether LAUNCHcast provided a program specially created for a recipient was given to the jury,⁹² which found LAUNCHcast to be noninteractive.⁹³

Arista appealed the jury verdict of the lower court, arguing LAUNCHcast was interactive as a matter of law.⁹⁴

III. THE ARISTA COURT’S ANALYSIS

The Second Circuit granted Arista’s request to determine whether the lower court erred in finding LAUNCHcast was an interactive service within the meaning of the DMCA.⁹⁵ The appellate panel recognized that the DMCA provided little guidance in helping to define what constituted a program “specially created” for the listener.⁹⁶ The opinion began by looking at dictionary definitions of “specially” and “created,” but found the definitions

87. *Arista Records, L.L.C.*, 578 F.3d at 150–51.

88. *Id.* at 151.

89. *Id.* at 151–52. *See also supra* text accompanying notes 27–32.

90. *See Arista Records, L.L.C.*, 578 F.3d at 151.

91. *Arista Records, L.L.C. v. Launch Media, Inc.*, No. 1:01CV04450, 2005 WL 2898735, at *1 (S.D. N.Y., Nov. 3, 2005).

92. *Arista Records, L.L.C.*, 578 F.3d at 150.

93. *Id.*

94. *Id.* at 151. Arista also argued the jury was given a misleading jury instruction which led the jury to believe they were to develop a legal definition of “interactive” which, as the court agrees, is a task beyond the scope of its ability. *Id.* However, the appellate panel was not concerned with the jury instruction itself because it agreed the issue of interactivity was a matter of law and too complicated for a jury to handle. *Id.* at 151–52.

95. *Id.*

96. *Id.* at 152.

were largely composed of mere synonyms.⁹⁷ Thus, the statutory language itself was of little help to the court.⁹⁸ Arista argued that any webcasting service which based a transmission on user input reflected a program that was specially created, but the court did not agree.⁹⁹

In its discussion, the court began by examining the history of copyright protection in sound recordings.¹⁰⁰ The appellate panel noted owners of copyright in sound recordings do not have the exclusive right to broadcast the recordings over the airwaves because of the relationship which exists between the recording industry and broadcasters.¹⁰¹ Essentially, as the court points out, over-the-air broadcasts are free advertising for the record companies.¹⁰² Thus, there is a mutual benefit bestowed upon record companies and radio broadcasters.¹⁰³ Listeners learn about music for sale from record companies, while radio broadcasters profit from their ability to broadcast these recordings.¹⁰⁴ There was no sense of unfairness which necessitated giving record companies the right to collect licensing fees for analog broadcasts of the sound recordings in which they owned a copyright.¹⁰⁵

A. *Arista's Exclusive, but Narrow, Right in Digital Delivery*

Despite the record companies' lack of rights in over-the-air broadcasts, digital performance of sound recordings is different from analog broadcasting as certain rights are given to record companies when their sound recordings are digitally transmitted.¹⁰⁶ The court first recognized the attendant circumstances that existed before the DSRA was enacted to grant sound recording copyright owners a narrow right to digitally transmit their sound recordings.¹⁰⁷ The appellate panel concentrated on the fact the recording industry became concerned about music piracy when Internet use became prevalent amongst the public in the early 1990s.¹⁰⁸ Concerns existed that if consumers could get their

97. *Id.*

98. *Arista Records, L.L.C.*, 578 F.3d at 152. The court noted, "[a]ccording to Merriam-Webster's Collegiate Dictionary, 'specially' means: (1) 'in a special manner'; (2) 'for a special purpose'; (3) 'in particular' or 'specifically'; or (4) 'especially.' Create, the root of 'created,' means: (1) 'to bring into existence'; (2) 'to produce'; (3) to 'cause' or 'occasion'; or (4) to 'design.'" *Id.* (internal citation omitted).

99. *Id.*

100. *Id.*

101. *Id.* at 152–53 (citing *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487 (3d Cir. 2003)).

102. *Id.*

103. *Id.*

104. *Arista Records, L.L.C.*, 578 F.3d at 152–53.

105. *Id.*

106. *Id.* at 153–54.

107. *Id.* at 154 (citing H.R. REP. NO. 104-274, at 12, 13–14 (1995)).

108. *Id.* In 1995, less than 18 million adults had access to the Internet, compared to over 184 million today. HARRIS INTERACTIVE, FOUR OUT OF FIVE ADULTS NOW USE THE INTERNET

music for free over the Internet, they would stop purchasing songs.¹⁰⁹ Much like Professor Paul Goldstein's reference to the future of the Internet as the "celestial jukebox," the United States Register of Copyrights "referred to the Internet as 'the world's biggest copyright machine'" during this time.¹¹⁰ However, this comparison was made when Internet users did not have high speed Internet access to facilitate high quality music downloads or webcasts.¹¹¹ In 1994, downloading a song typically took twenty minutes.¹¹²

Despite bandwidth limitations, concerns existed that unauthorized digital delivery of music content would increase as bandwidth increased.¹¹³ If this occurred, music would be much easier to download without permission from the sound recording copyright owner because high bandwidth connections could, and do today, facilitate quick downloads and high quality webcasts.¹¹⁴ As a result, record companies would lose money from sales.¹¹⁵ This in turn would inhibit the creation of new sound recordings.¹¹⁶ Ultimately, without some kind of protection, both record companies and consumers would be at a disadvantage.¹¹⁷

As the court noted, in 1995 the DSRA was the solution to protect both consumers and record companies from unauthorized digital distribution and transmissions of sound recordings.¹¹⁸ Thus, under the DSRA, copyright owners of sound recordings now had "an exclusive but 'narrow' right to perform—play or broadcast—sound recordings via digital audio

(2008), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Internet-Penetration-2008-11.pdf>.

109. *Arista Records, L.L.C.*, 578 F.3d at 153.

110. *Id.* (quoting Stephen Summer, *Music on the Internet: Can the Present Laws and Treaties Protect Music Copyright in Cyberspace?*, 8 CURRENTS: INT'L TRADE L.J. 31, 32 (1999)).

111. *Id.* (citing Judy Holland, *Music Industry is Encouraged*, STATES NEWS SERV., Jul 24, 1994).

112. *Id.* If it took twenty minutes to download a 3 minute song, it was impossible to stream the song in real time, due to bandwidth limitations, since the user would not be able to download enough of the song in order to play it in real-time as it downloaded. While quality of a song could be reduced to stream or download in real time, the song quality would not be as pristine as that of one streamed on today's higher bandwidth connections.

113. *Id.*

114. *Id.*

115. *Arista Records, L.L.C.*, 578 F.3d at 153.

116. *Id.* (citing *Digital Performance Right in Sound Recording: Hearing on H.R. 1506 Before the H. Comm. on the Judiciary, S. Comm. on Courts and Intellectual Prop.*, 104th Cong. 39 (1995) (statement of Jason Berman, President, RIAA)).

117. *Id.* (citing *Digital Performance Right in Sound Recording: Hearing on H.R. 1506, supra* note 116).

118. *Id.* at 153–54.

transmission.”¹¹⁹ However, this narrow right did not apply to free, noninteractive services.¹²⁰

The DSRA provided a more basic and less instructional definition of an interactive service than that which exists under today’s DMCA.¹²¹ Under the DSRA, as the court noted, interactive services were simply those which allowed a member of the public to request a specific sound recording be played.¹²²

The court first recognized that if users know what song is going to play next, they can be better prepared to make digital copies of the performance.¹²³ Second, it recognized that even if listeners were not making copies, they would be more likely to replace purchasing copies of sound recordings with listening to the interactive services.¹²⁴ This second recognition would become a major factor in the court’s ultimate test in determining whether or not LAUNCHcast’s webcasts were interactive.¹²⁵

After acknowledging the implications of and the Congressional intent behind the DSRA, the court next turned to the DMCA. In 1998, the DMCA was enacted to provide further protection to record companies.¹²⁶ Under the DMCA, interactive services were deemed not only to be those that allowed users to request specific songs, but also those that provided a program of play created specially for the listener.¹²⁷

LAUNCHcast did not allow users to request specific songs.¹²⁸ Rather, it allowed users to provide a certain degree of input that influenced which songs were webcast.¹²⁹ Thus, in the interest of determining whether a webcast was interactive, the court looked at whether a user had enough control in creating a webcast specially created for him or her to replace purchasing sound recordings.¹³⁰

119. *Id.* at 154 (quoting H.R. REP. NO. 104-274, at 12, 13–14 (1995)).

120. *See id.*

121. *See Arista Records, L.L.C.*, 578 F.3d at 154.

122. *Id.* (citing 17 U.S.C. § 114(j)(4) (Supp. I 1995)).

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

124. *Id.* (citing Ginsburg, *supra* note 123, at 167).

125. *Id.* at 164.

126. *See id.* at 155–56. *See also* H.R. REP. NO. 105-796, at 87 (1998).

127. *Arista Records, L.L.C.*, 578 F.3d at 155–56.

128. *See supra* text accompanying notes 27–32.

129. *Id.*

130. *Arista Records, L.L.C.*, 578 F.3d at 162 (“[T]he ultimate issue [is] whether the LAUNCHcast playlists, uniquely generated for the user each time the user selects a station, are specially created and therefore interactive.”).

B. No Bright Line Rule for a Right to Performance with Interactive Webcasts

To aid in developing a standard for determining whether a user would forgo purchasing sound recordings because of the degree of input in the webcast's program of play, the court referred to a House report which recognized users do not have to be able to select a specific song during a webcast for the webcast to be deemed interactive.¹³¹ For example, according to the House report, if a listener could move both forward and backward between songs during a webcast, the webcast would be considered interactive.¹³² Importantly, the court noted in 2000 the Copyright Office wrote in a letter that because "of the rapidly changing business models emerging in today's digital marketplace, no rule can accurately draw the line demarcating the limits between an interactive service and a noninteractive service."¹³³

The appellate panel also referred to the Copyright Office's statement that the Office could not easily point to a service to give an example of a transmission that was interactive or noninteractive.¹³⁴ These statements were released in response to the Digital Media Association's request that section 114(f) to Title 17 of the United States Code be amended to state that webcasting services are not interactive just because they allow listeners to offer a preference for the recordings that are webcast.¹³⁵ Although the Copyright Office did not want courts to draw a bright line rule, it "did opine that in . . . enacting the §114(j)(7), 'Congress sought to identify a service as interactive according to the amount of influence a member of the public would have on

131. *Id.* at 156 (citing H.R. REP. NO. 105-797, at 88-89).

132. *Id.* (citing H.R. REP. NO. 105-797, at 87-88). Launch cast did not allow users to skip backward and replay a song, but it did allow users to skip forward to the next song. *Id.* at 158. However, when skipping forward, the user did not have a list of songs to identify what was next in the program of play. *Id.*

133. *Id.* at 156 (citing Definition of a Service, *supra* note 80, at 77,332-33).

134. *Id.*

135. *Id.* at 157. The Digital Media Association is "the lobbying arm of the transmitters of digital media such as Launch." *Id.* The Digital Media Association's specific request was as follows:

A Service making transmissions that otherwise meet the requirements for the section 114(f) statutory license is not rendered 'interactive,' and thus ineligible for the statutory license, simply because the consumer may express preferences to such Service as to the musical genres, artists and sound recordings that may be incorporated into the Service's music programming to the public. Such a Service is not 'interactive' under section 114(j)(7), as long as: (i) Its transmissions are made available to the public generally; (ii) the features offered by the Service do not enable the consumer to determine or learn in advance what sound recordings will be transmitted over the Service at any particular time; and (iii) 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.

Definition of a Service, *supra* note 80, at 77,331.

the selection and performance of a particular sound recording.”¹³⁶ The court also noted the Copyright Office stated that listeners can still have some degree of influence over the songs played before the webcast becomes interactive.¹³⁷

Taking all of these observations into consideration, the court recognized the purpose of this copyright legislation was “to prevent the outright piracy of music of new digital media that offered listeners the ability to select music in such a way that they would forgo purchasing records.”¹³⁸ Ultimately, this was the test the court employed to determine whether or not a webcast was interactive.¹³⁹

C. Was LAUNCHcast on the Interactive End of the Spectrum?

Having developed this listen-in-lieu-of-purchasing test, the court analyzed in detail the manner in which LAUNCHcast functioned to determine if there was enough interactivity to allow outright piracy by allowing users to choose music as a means of replacing purchases.¹⁴⁰ As explained in Part A of Section II, the pool of songs selected by LAUNCHcast’s algorithm from which the final playlist was drawn to stream to the user approximately based 50% on songs previously rated by the user, 10% random, and based approximately 40% on the user’s genre preferences.¹⁴¹ In the final fifty-song playlist, up to 80% of the songs could be songs for which the user had previously expressed a preference.¹⁴²

The fact that a user could not pick exactly which song he or she wanted to hear clearly eliminated the possibility that LAUNCHcast could be deemed interactive under the first part of section 114(j)(7), defining interactive services as those which allow users to select a particular sound recording.¹⁴³ But was LAUNCHcast considered a transmission specially created for a recipient? If so, LAUNCHcast would still be considered interactive under section 114(j)(7).¹⁴⁴

136. *Arista Records, L.L.C.*, 578 F.3d. at 156 (quoting Definition of a Service, *supra* note 80, at 77,332).

137. *Id.*

138. *Id.* at 157.

139. *Id.* at 164.

140. *Id.* at 157. For a detailed description of the algorithm LAUNCHcast utilized to determine which songs to play for the user, *see supra* text accompanying notes 33–48.

141. *Id.* at 157–60. The court noted “[i]t is hard to think of a more complicated way to ‘select songs,’ but this is the nature of webcast music broadcasting in the digital age.” *Id.* at 160.

142. *Arista Records, L.L.C.*, 578 F.3d at 159.

143. 17 U.S.C. § 114(j)(7) (2006). The only thing a user could absolutely ensure with regard to specific song play was that a song would not play again by rating that song with a zero. *Arista Records, L.L.C.*, 573 F.3d at 164.

144. 17 U.S.C. § 114(j)(7); *Arista Records, L.L.C.*, 578 F.3d at 162.

In developing a test for interactivity in terms of programs specially created for the recipient, the court wanted to make sure listeners were not replacing their purchasing habits with listening to the webcast. The court reasoned “[i]f the user has a sufficient control over the interactive service such that she can predict the songs she will hear, much as she would if she owned the music herself and could play each song at will, she would have no need to purchase the music she wishes to hear.”¹⁴⁵ Essentially, the court’s main concern was record sales would decrease if a webcast provided a listener with enough input which allowed the user to “approximate the predictability the music listener seeks when purchasing music.”¹⁴⁶ According to the court, only if this were possible would the users forgo purchasing music.¹⁴⁷

If webcasting services indeed served as replacements, then individually negotiable licensing fees would be necessary to make up for the loss in sales caused by a predictable webcasting service.¹⁴⁸ Thus, the court focused on whether the features of LAUNCHcast provided a sufficient means for a listener to forgo making music purchases by listening to the webcasts.¹⁴⁹ Ultimately the court did not feel there was enough predictability in the music a LAUNCHcast user could expect to hear.¹⁵⁰ The court concluded, stating “[i]n short, to the degree that LAUNCHcast’s playlists are uniquely created for each user, that feature does not ensure predictability.”¹⁵¹ The appellate panel noted the only thing which can be predicted with certainty is by assigning a rating of zero to a song, the user will not hear that song again.¹⁵² Further, the court felt LAUNCHcast was even less predictable than radio broadcasts because these broadcasts honored special requests.¹⁵³ Therefore, the court held that LAUNCHcast was not interactive under the meaning of section 114(j)(7) and affirmed the ruling of the district court for Launch Media.¹⁵⁴

IV. AUTHOR’S ANALYSIS OF THE *ARISTA* DECISION AND A LOOK FORWARD

A. *The Arista Court Overlooks an Important Aspect of Predictability*

In determining whether or not LAUNCHcast was interactive within the meaning of section 114(j)(7), the *Arista* court sensibly undertook to determine whether or not users were forgoing purchasing music from the sound recording

145. *Arista Records, L.L.C.*, 578 F.3d at 161.

146. *Id.* at 161.

147. *Id.*

148. *See id.* at 161.

149. *Id.* at 164.

150. *Id.*

151. *Arista Records L.L.C.*, 578 F.3d at 164.

152. *Id.*

153. *Id.*

154. *Id.*

copyright owner by using LAUNCHcast's services.¹⁵⁵ According to legislative intent, it makes sense a loss-in-profits inquiry should be the overarching focus when analyzing whether or not a webcasting service is interactive.¹⁵⁶ Why disturb a business model if profits are being equitably distributed?

The purpose of the interactivity amendments under the DMCA was to protect sound recording copyright owners as access to the Internet increased and digital webcasting technology became more advanced.¹⁵⁷ If the degree of input a user is allowed to exert, paired with the intelligence of a webcasting service, does not encourage the user to rely on the webcast's services for the user's musical needs in lieu of purchasing music from the sound recording copyright owner, then it would be difficult to argue there is a problem at all.¹⁵⁸ Record sales would not decline as a result of the webcast. Thus, there would be no causal relationship to a sound recording copyright owner's loss of profits, which would in turn inhibit creation of new music by artists.

While the *Arista* court sensibly presented the overarching inquiry by determining whether LAUNCHcast caused a decline in sales, it only looked at a single factor that could influence such a decline: whether or not LAUNCHcast allowed enough user input to accurately predict which song or songs would play.¹⁵⁹ An additional factor the court failed to consider was whether LAUNCHcast allowed users enough input to where they could accurately predict they would *enjoy* the music being webcast to them to a degree they would forgo purchasing music by simply relying on the intelligent recommendation system of the webcast.

When the DSRA was enacted, it defined an interactive service as one that allows a user to *specifically* request which song the user wants to hear.¹⁶⁰ Three years later, the DMCA amended the definition of an interactive service to also include in its definition that an interactive service is one which provides a program of play specially created for the recipient.¹⁶¹ With these two definitions in mind, it would make sense something other than "specific song predictability" in a webcast may influence a user's music purchasing habits.

If Congress was only concerned about a user's ability to specifically pick or accurately predict the specific song a webcast would stream next in a program of play, it would seem the DMCA's amendment to the definition of

155. *See id.* at 157.

156. *Id.*

157. *Arista Records, L.L.C.*, 578 F.3d at 154–55.

158. *See generally id.*

159. *Id.* at 161.

160. 17 U.S.C. § 114(j)(4) (Supp. I 1995); Digital Performance Right in Sound Recording Act of 1995, *supra* note 71, at 343–44.

161. 17 U.S.C. § 114(j)(7) (2006); Digital Millennium Copyright Act, *supra* note 77, at 2898.

an interactive service largely has no effect on an interactivity analysis.¹⁶² If the *Arista* court's logic that a program specifically created for the recipient was one that would merely allow the user to successfully guess the song that would play next,¹⁶³ it would logically follow that the recipient's music needs are being satisfied because the recipient wanted that song to play next.¹⁶⁴ If the recipient wanted that song to play next, then that must have been a song the recipient would have *specifically* requested. As a result, the two definitions of an interactive service would serve the same function. Thus, the amended definition under the DMCA of an interactive service would seem to go beyond specific song predictability,¹⁶⁵ contrary to the court's conclusion that specific song predictability should be the primary test for interactivity.¹⁶⁶

In terms of moving beyond a specific song predictability analysis and focusing on "enjoyment predictability" in the context of interactive webcasts, if a user was confident that a webcasting service was intelligent enough to recommend music based on the user's input, the user could predict he or she would enjoy a program of play specially created for the user. Thus, the user might decide it is simply not worth the expense and trouble of purchasing music. Was this the case for LAUNCHcast? This question is difficult to answer.

LAUNCHcast utilized a complex algorithm so that the "user [was] able to create and modify personalized radio stations."¹⁶⁷ The *Arista* court itself noted, "[i]t is hard to think of a more complicated way to 'selected songs,' but this is the nature of webcast music broadcasting in the digital age."¹⁶⁸ Despite the appellate panel's acknowledgement that LAUNCHcast was more advanced than a service which just randomly picked out songs to play for the user, the court's focus remained on whether the user could predict the program of

162. Congress's concern was that record sales would be at a loss, not simply that a user could pick a particular song. *Arista Records, L.L.C.*, 578 F.3d at 155.

163. *Id.* at 164 (discussing the lack of a user's ability to predict the songs LAUNCHcast would stream in its conclusion).

164. If a user was not going to enjoy the song that played next, the ability to merely guess the song would be of little value.

165. See 17 U.S.C. § 114(j)(7) (2006).

166. See *Arista Records, LLC*, 578 F.3d at 164 ("In short, to the degree that LAUNCHcast's playlists are uniquely created for each user, that feature does not ensure predictability. Indeed, 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. LAUNCHcast listeners do not even enjoy the limited predictably that once graced the AM airwaves on weekends in American when 'special requests' represented love-struck adolescents' attempts to communicate their feelings to 'that special friend.' Therefore, we cannot say LAUNCHcast falls within the scope of the DMCA's definition of an interactive service created for individual users.").

167. *Id.* at 157.

168. *Id.* at 160.

play.¹⁶⁹ Some of the factors the court examined while looking at LAUNCHcast's algorithm could have at least been considered to determine whether LAUNCHcast provided a program of play the user could predictably enjoy.¹⁷⁰

As an example of one factor that could have been considered, up to 80% of the songs in each playlist generated for a user were songs for which the user had expressed some type of preference, whether it was an explicit preference, an implied preference, or a genre preference.¹⁷¹ The fact that the playlist took so many of the users preferences into account would seem to move LAUNCHcast's predictability, in terms of enjoyment, beyond "the limited predictability that once graced the AM airwaves on the weekends in American when 'special requests' represented loves-struck adolescents' attempts to communicate their feelings to 'that special friend.'"¹⁷² While it may have been easier to request a specific song by calling in to an AM broadcast, it seems doubtful with an algorithm such as that of LAUNCHcast that a user would find the same amount of "enjoyment predictability" with a traditional airwave broadcast by only being able to *request* a song be played every so often. These broadcasts do not take an *individual* listener's preferences into consideration at all when the vast majority of songs are being broadcast.

Despite the possibility that a user could have found enough "enjoyment predictability" with LAUNCHcast, it would have been difficult for the court to go down this route, especially because "new technologies often are developed faster than the courts can adapt."¹⁷³ How would a three-judge appellate panel go about determining whether users generally enjoyed LAUNCHcast so much they decided to stop purchasing music? Nevertheless, it may have been helpful to the next court who hears a similar case, as technology continues to advance, to at least acknowledge that it is possible for enjoyment predictability to affect record sales.

B. *Looking Ahead*

While it remains debatable as to whether LAUNCHcast could have been considered interactive with regard to a user's ability to predict that he or she would enjoy a program of play, the *Arista* court's overarching interactivity test—whether the webcast service encourages users to forgo purchasing

169. *Id.* at 164.

170. *See id.* at 157 (explaining up to eighty percent of the songs played can be songs which have been previously rated).

171. *Id.*

172. *Arista Records, L.L.C.*, 578 F.3d at 164.

173. Shane Wagman, *I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace*, 17 J. INTELL. PROP. L. 95, 106 (2009).

music—¹⁷⁴leaves open an interesting question. Could more advanced webcast hybrids, such as Pandora or Last.fm and those to come in the future, be considered interactive if another court were to hear a case and consider a user's ability to predict that he or she will enjoy the webcast so much he or she would forgo purchasing music?¹⁷⁵ If so, not only would they likely have trouble operating, because it is much easier to maintain a business model when only statutory licensing fees are owed to the sound recording copyright owner, as opposed to the individual licensing fees that must be paid when a service is interactive,¹⁷⁶ but they would also fail to meet society's expectations of how digital music should be acquired.¹⁷⁷

In its analysis of current trends in our digital age, the Pew Internet and American Life Project notes 75% of teens have an expectation that music should be free and “wonders if a generation weaned on free music will ever consider music worth paying for.”¹⁷⁸ Surely there is a market for free music, especially as technology enables delivery in innovative ways while being funded by intelligent, targeted advertising systems which allow companies to earn higher profits based on valuable data collected about their users.¹⁷⁹

The Project also refers to five factors that influence how users go about obtaining their music,¹⁸⁰ which in turn could influence how likely a user is to rely on a free webcasting service to obtain music in place of purchasing music. These factors include cost, portability, mobility, choice, and remixability.¹⁸¹ In terms of cost, consumers naturally want the price to be “zero or approaching to

174. *Arista Records, L.L.C.*, 578 F.3d at 164.

175. See Einhorn, *supra* note 50, at 206–07 (describing the “interactive” features of Last.fm).

176. Wagman, *supra* note 173, at 108–09 (explaining music distributors often have difficulty raising enough revenue to pay individually negotiated licensing fees and even when webcasting companies are only required to pay compulsory royalty rates, expenses can exceed income). For example, in 2007, the Copyright Royalty Board increased compulsory licensing fees, causing Pandora to express concern it would be unable to operate. *Id.*

177. Madden, *supra* note 25, at 15.

178. *Id.*

The Pew Internet & American Life Project is one of seven projects that make up the Pew Research Center, a nonpartisan, nonprofit “fact tank” that provides information on the issues, attitudes and trends shaping America and the world. The Project produces reports exploring the impact of the internet on families, communities, work and home, daily life, education, health care, and civic and political life.

About Us, PEW INTERNET & AMERICAN LIFE PROJECT, <http://www.pewinternet.org/About-Us.aspx> (last visited Feb. 21, 2010).

179. See Heather Osborn Ng, *Targeting Bad Behavior: Why Federal Regulators Must Treat Online Behavioral Marketing as Spyware*, 31 HASTINGS COMM. & ENT. L.J. 369, 371–73 (2009) (describing how targeted advertising works on the internet). See, e.g., Erick Schonfeld, *Google Now Lets You Target Ads at Yourself*, TECHCRUNCH (Mar. 11, 2009), <http://techcrunch.com/2009/03/11/google-now-lets-you-target-ads-at-yourself/>.

180. Madden, *supra* note 25, at 4.

181. *Id.*

zero.”¹⁸² With regard to portability and mobility, consumers want access to their content on any device, and they want to be able to access their content wirelessly from mobile devices.¹⁸³ In terms of choice and remixability, consumers want “access to any song ever recorded” and the “freedom to remix and mashup music.”¹⁸⁴

Indeed, with at least four of these factors—price, choice, portability, and mobility—consumers’ ideal music services are close to, if they are not already, becoming reality through webcasts available today. Because of its pervasiveness, Pandora serves as a prime example of the technology in webcasting that exists today. Pandora offers free music to users.¹⁸⁵ Thus, consumers’ expectations about price are being met.¹⁸⁶ Pandora adds 14,000 new songs each month to its library,¹⁸⁷ giving users access to an extremely large amount of music, fulfilling society’s expectations they should have access to almost any song.¹⁸⁸ Satisfying portability and mobility expectations, Pandora also give users access to its webcasts through wireless smart phones and cars in addition to offering its services to personal computer users.¹⁸⁹

An additional factor that may prove to be influential to users in the future is “intelligence.” The more a webcasting service can learn about a user’s musical tastes and preferences, the more likely it is the user will be satisfied with the service. It would only be natural for “intelligence” to at least become a consumer preference, if not an expectation. Not surprisingly, Pandora is also highly intelligent.¹⁹⁰

182. *Id.*

183. *Id.*

184. *Id.*

185. *Is Pandora Free?*, PANDORA BLOG, <http://blog.pandora.com/faq/contents/15.html> (last visited Feb. 21, 2011). In the limited case where a user listens to over forty hours of music in one month she can elect to pay ninety-nine cents for the remainder of the month or pay thirty-six dollars per year for the premium unlimited service called Pandora One, but the cost is still approaching zero. *How Do I Pay for Unlimited Monthly Listening Hours?*, PANDORA BLOG, <http://blog.pandora.com/faq/contents/1494.html> (last visited Feb. 21, 2011). While remixability does not readily appear to be a factor that is being satisfied through modern webcasts like Pandora, it would not seem this factor would preclude the general user’s reliance on a webcast for obtaining music. In general, remixing and mashing up songs is not a practice in which a majority of listeners engage. However, if a user wanted to listen to remixes and mashups through a webcast such as Pandora, she could simply voice a preference for artists that engage in the remixing and mashing-up of music.

186. Madden, *supra* note 25, at 4.

187. Spektor, *supra* note 4, at 57.

188. See Madden, *supra* note 25, at 4.

189. See *supra* notes 60–64 and accompanying text.

190. Spektor, *supra* note 4, at 1–2 (describing Pandora as an interactive service and thus illustrating how it would not be difficult for one to consider Pandora interactive).

As previously explained, Pandora goes beyond simply analyzing a user's tastes in terms of songs, artists, and albums, but also looks at the actual artistic aspects of the songs for which a user has expressed a preference.¹⁹¹ Its Music Genome Project maintains "a database containing the breakdown of songs into a multitude of musical elements" and keeps "quantitative, objective analyses of songs from over 10,000 artists."¹⁹² These analyses involve experts examining the "harmony, rhythm, structure, melody, vocals, and lyrics" of each song in the database.¹⁹³ Songs for which the user has expressed a preference are compared to other songs in the database, in terms of the quantitative, objective qualities, in order to determine which song the user is likely to enjoy next.¹⁹⁴ This technology is so advanced attorneys have asked the founder of Pandora, Tim Westergren, to use the quantitative analyses contained in the database in copyright infringement disputes for the purposes of comparing two songs to determine if infringement occurred.¹⁹⁵

While Pandora's method for analyzing the similarity between music is proprietary and protected as a trade secret,¹⁹⁶ much attention has been devoted to developing models for the physical and mathematical analysis of musical components in songs.¹⁹⁷ Attempts to dissect the musical characteristics of songs even dates back to the 1930s and continue today.¹⁹⁸ Professor Liebesman of Saint Louis University School of Law has proposed both a Mega-Element Analysis (MEA) and a Mathematical Modeling Analysis (MMA) approach to analyzing the artistic and scientific aspects of songs, respectively.¹⁹⁹ In short, the MEA approach involves an analysis much like that which Pandora employs where experts examine the artistic aspects of the song.²⁰⁰ If more aspects of a song are examined and recorded in a database, then a webcasting service can be more precise in comparing a song for which a user has expressed a preference to with the rest of the database in order to find more songs the user is likely to enjoy.

191. Liebesman, *supra* note 53, at 346–47.

192. *Id.*

193. *Id.* at 347.

194. *Id.* at 346–47.

195. *Id.* at 349 n.86. The idea behind using this technology in a copyright infringement dispute would be to examine the attributes of song A that is alleged to be infringing on song B, and see if there is a substantial degree of similarity to support that there was copying. *See id.* at 347–48.

196. *Id.* at 347 & n.82.

197. Liebesman, *supra* note 53, at 355–56 (noting much research has been devoted to mathematically modeling songs, many articles have been written on the subject, and computer programs have been developed to write music).

198. *Id.* at 346 & n.74.

199. *Id.* at 345, 353.

200. *See id.* at 347–49.

The MMA approach is a much more advanced, scientific analysis which involves “the mathematical modeling of the physical attributes of a song.”²⁰¹ In short, footprints of the sound waves which make up a song are recorded and compared to the sound wave footprints of other songs.²⁰² Future webcast databases could use these footprints to find songs similar to the ones for which a user has expressed a preference by comparing the footprint of a “liked” song against the rest of the database. Much like how attorneys wanted to borrow Pandora’s database of music analyses for copyright infringement use,²⁰³ future webcast services could borrow more advanced models, such as those proposed by Professor Liebesman, for use in developing an intelligent webcasting service.

Thus, webcasts could move even more towards the interactive end of the spectrum by employing these advanced algorithms which are capable of delivering music to users they are likely to enjoy. As more advanced methods for determining users’ musical preferences continue to evolve to provide free webcasting services users can access almost anywhere they choose, “enjoyment predictability” might start to encourage users to forgo purchasing music.

C. *Could an “Enjoyment Predictability” Test Be Sensibly Employed?*

1. The Question as a Matter of Law

It is worth acknowledging that the *Arista* court’s specific song predictability test does have some advantages over an “enjoyment predictability” test. Analytically, it is much easier for a court to determine whether or not a user can predict a specific song or program of play as opposed to undertaking to determine if the average user would enjoy a webcast to the point he or she would stop purchasing music. Specific song predictability is an objective test dissecting the algorithm employed to select songs, while “enjoyment predictability” is generally more of a subjective test. The likelihood users in general will replace making music purchases with the webcasts will depend on the average user, but the average user may be difficult for the judges to approximate.

If courts are not able to keep up enough with technology and industry trends to determine whether the average user would displace some or all music purchases with an intelligent webcast,²⁰⁴ it could be argued it is simply better to leave the enjoyment question alone, rather than come up with an arbitrary

201. *Id.* at 349, 353.

202. *See id.* at 353.

203. Liebesman, *supra* note 53, at 349 n.86.

204. *See* Wagman, *supra* note 173, at 106.

determination based solely on how the judges feel a webcast would please the average user.²⁰⁵

Even as online music sales increase, overall music sales still continue to decline.²⁰⁶ This could suggest free access to music is affecting music sales in the aggregate.²⁰⁷ While this might be a result of webcasts which are approaching the interactive end of the spectrum, it would be difficult, if not impossible, to identify the specific webcasts responsible for the overall decline in sales.²⁰⁸

2. Letting the Jury Decide

It is possible the *Arista* court was too quick to decide the question of interactivity was not for the jury, but rather a matter of law.²⁰⁹ A jury might be better suited than the judges to actually listen to a webcasting service and decide if it was “interactive” enough to where they enjoyed the service enough to replace some or all of their music purchases, thus finding something more than compulsory licensing fees need to be paid to the sound recording copyright owner. However, the downside of this approach would be that a jury is an extremely small sample of the population and may find a different degree of satisfaction in the webcast than the general population. This could lead to arbitrary and inconsistent results among cases and circuits. Furthermore, the jury would have a vested interest in finding the webcast was noninteractive, due to society’s expectations of how free music should be acquired—for free.²¹⁰

3. Borrowing the MEA or MMA Approach

Just as Professor Liebesman proposes that the MAE and MMA models for analyzing music be employed in copyright infringement disputes between two similar songs,²¹¹ similar models could be used to present data to the jury or judges to help cure problems with an overly subjective finding of whether or

205. This would be especially true if other courts agree with the *Arista* court interactivity is a question of law and not for the jury. See *Arista Records, L.L.C. v. Launch Media, Inc.*, 578 F.3d 148, 151–52 (2d Cir. 2009), *cert. denied*, 103 S. Ct. 1290 (2010).

206. Madden, *supra* note 25, at 7–8.

207. If free access to music is not affecting music sales, it would have to be a general distaste for music that was affecting music sales, which seems unlikely.

208. The court would have to know the total amount of money consumers using the alleged infringing service spent on music before using the service, as well as the amount of money they spent after they adopted the service as a means of listening to music. Because of the vast number of free music sources on the Internet, it would be hard to point the finger at any one specific service.

209. See *Arista Records, L.L.C.*, 578 F.3d at 151–52.

210. See Madden, *supra* note 25, at 4.

211. See Liebesman, *supra* note 53, at 345, 347, 349, 353.

not the webcast allows enough satisfaction to displace sales. Different test cases could be developed based on hypothetical users. Certain musical preferences could be assigned to these hypothetical users. For example, under an MMA analysis, footprints of songs the hypothetical user is “known” to enjoy could be presented to the judge or jury. Then, a streaming sequence could be presented. The judge or jury could then examine the similarities that exist from song to song.

This data might help to cure a completely subjective finding on part of a judge or jury on the question of “enjoyment predictability.” However, caution must be taken with this approach. The fact that two songs appearing back-to-back have the same elemental or scientific footprint may not necessarily correlate with such a high degree of satisfaction the general user forgoes purchasing music. Likely, a webcasting service will not want to stream multiple songs in a row to a user that have mirroring footprints, otherwise it would almost be as if the user were listening to the same song over and over. A solution to this problem would be for the judge or jury to look at a large sample of music that would stream to the hypothetical user and see if certain elements or footprints tend to reoccur intermittently, while being aware of the musical elements the hypothetical user enjoys. This method would likely allow a finder of fact to determine how much a user would enjoy the program of play because she would be aware of the footprints the user enjoys and thus be able to determine how often these footprints occur during the webcast.

While the MEA and MMA approaches, originally proposed for copyright infringement analysis between songs, are not yet used in courts today, it may be feasible to do so and the resources exist for these to be developed.²¹² If courts choose to look at “enjoyment predictability,” the MEA and MMA methods, due to their shift away from a subjective analysis, could prove to be acceptable methods for courts to test “enjoyment predictability” in a more accurate and uniform manner, thus avoiding arbitrary results from circuit to circuit. Because of their shift toward an objective approach, determination of interactivity as a matter of law would be more appropriate when employing these methods.

Notwithstanding the possibility that the MAE and MMA methods of testing for interactivity would work, these approaches have not yet been implemented. Thus, the *Arista* court’s failure to examine “enjoyment predictability” might seem more acceptable, as tools for a proper “enjoyment predictability” analysis were not readily available.

212. *See id.* at 349, 356–57.

V. CONCLUSION

From the DSRA to the DMCA, it is clear Congress intended to protect sound recording copyright owners from services that utilize advanced technology to digitally stream music to listeners at the expense of the copyright owners through its grant of an exclusive right to owners to digitally transmit music as part of an interactive service.²¹³ Before *Arista*, what remained unclear was what exactly constituted an interactive service. The *Arista* court did a good job of clarifying Congressional intent behind the DSRA and the DMCA by articulating that a webcast should not be considered interactive unless the users' input triggers enough predictability in the webcast to render the users' need to purchase music nonexistent.²¹⁴ However, in focusing so narrowly on "specific song predictability," the court neglected to even acknowledge that users may cut back on their music purchasing habits if a webcast could provide a program of play, based on their input, which was tailored to their musical preferences.

From 1999 to 2001, the period during which the alleged infringement by LAUNCHcast occurred,²¹⁵ some important factors which influence consumers today to rely on free music services did not exist—portability, mobility, and choice.²¹⁶ Smart phone technology did not exist as it does today to give users access to LAUNCHcast from anywhere, wirelessly, and for free.²¹⁷ Nor were intelligent webcasts making their way into automobile systems.²¹⁸ The number of songs LAUNCHcast offered is dwarfed by the 14,000 songs Pandora adds to its database each month.²¹⁹ On top of all of this, technology exists today that could offer even more advanced music recommendation systems than even that of Pandora, which takes LAUNCHcast's recommendation system to the next level, as evidenced through Professor Liebesman's proposed MEA and MMA systems.

Taking into consideration all of the advancements in webcasting technology that have evolved since LAUNCHcast, it would be difficult to argue that intelligent and pervasive webcasting services do not encourage users to replace at least some of their purchasing habits with webcasting services even though they cannot predict the exact song that will play next. Even if users are not forgoing purchasing music today, the possibility remains as we look ahead, considering the advancements that have occurred in online music distribution since the DMCA was enacted.

213. See *Arista Records, L.L.C.*, 578 F.3d at 157.

214. See *id.*

215. See *id.* at 151.

216. See Madden, *supra* note 25, at 4.

217. See *supra* text accompanying notes 60–64.

218. See *supra* text accompanying notes 63–64.

219. Spektor, *supra* note 4, at 57.

If intelligent webcasting technology arrives at the point at which it is clear “enjoyment predictability” is influencing users to stop purchasing music, the same technology which allows intelligent webcasts to function could be used by courts in an MEA- or MMA-type analysis to determine whether “enjoyment predictability” is sufficiently present in a webcast to affect sales. If today’s pervasive webcasting technology becomes one of society’s primary channels for listening to music tomorrow, it will be especially important for the next court who hears a similar case to consider employing an “enjoyment predictability” test in order to not only satisfy Congressional intent, but to also curb record companies’ continued problems with a decline in sales at the expense of digital technology.²²⁰

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220. See generally Madden, *supra* note 25, at 8.

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