

The Second Circuit Defines “Interactive” Digital Radio in *Arista Records v. Launch Media*

Mark Bradford (November 9, 2009)

The Second Circuit’s decision in *Arista Records, LLC, et al. v. Launch Media Inc.*,¹ came down in August 2009, eight years after the case below was commenced by most of the major American record companies existing at the time.² The case concerned a digital music service called LAUNCHcast, created and introduced in November 1999, by the defendant, Launch Media. LAUNCHcast no longer exists or operates as it did in 2001, the year the suit was brought. Yahoo! bought Launch Media that same year, and earlier in 2009, Yahoo! folded the LAUNCHcast service into a service that is administered by CBS Radio, comprising over 150 pre-programmed digital radio stations. Thus, LAUNCHcast no longer resembles the service at issue in the case.

However, before its 2009 change-over, LAUNCHcast was remarkably similar to Pandora.com, which is still very much in operation. Quite fortunately for Pandora, the latter was also never a party to the LAUNCHcast lawsuit, although the Second Circuit directly references Pandora in two footnotes.³ In fact, Pandora may be the one entity that now stands to benefit most directly from the substance of the LAUNCHcast decision. What the decision states, in brief, is that services like Pandora and LAUNCHcast (in its earlier freestanding form) are to be regarded as functionally equivalent to traditional broadcast radio stations with respect to the way their audiences may access them and, accordingly, such stations should only pay the same sort of statutory license fees for the use of music as traditional analogue radio broadcasters have long done, and need not pay individual licensing fees for the use of the sound recordings themselves.

¹ *Arista Records, LLC, et al. v. Launch Media, Inc.*, Index No. 07-2576-cv, ___ F.3d ___ (2d Cir. Aug. 11, 2009) (hereinafter, “*Arista*”). The citations herein are to the slip opinion.

² *Arista Records, LLC, et al. v. Launch Media, Inc.*, Index No. 01-cv-4450 (RO) (S.D.N.Y.).

³ See *Arista*, slip op. at 33 n.19 & 41 n.24.

The appeal of Pandora (and, ostensibly, LAUNCHcast in its earlier version) to its users is that it delivers a kind of streaming radio service that is programmed entirely through the user's input without being entirely controlled by it. Pandora will take as much information as you can give it about the artists, composers or individual songs you are interested in hearing in order for the service to tailor its programming as close to your tastes as it can make it. It will play music that, by its computations, might be deemed similar or somehow related to the artists and songs you input. It will also play this music entirely for free, notwithstanding the occasional audio commercial and pop-up ad, and – even better – this may serve to introduce you to numerous other artists and songs with which you may not be familiar that have index-able aspects similar to those artists and songs you enter into the system. More to the point, Pandora is calculated to play music you are likely to want to *buy*, and the prominent links on the interface make it remarkably easy to go directly to Amazon or iTunes and download the precise recording you were just hearing, even as you're hearing it. Unquestionably, this is a solid moneymaker for providers of paid downloads. In fact, the Second Circuit quotes Pandora CEO Joe Kennedy in one of the footnotes in the decision, claiming that “Pandora [is] ... among the top promotional partners of iTunes and Amazon.com” for music.⁴

The bottom line, however, is that Pandora does not play (nor did the original LAUNCHcast) exactly the song you want to hear *when you want to hear it*. Even if Pandora plays something you would want to own, you have no way of knowing ahead of time when it's going to be played. As such, if you want your own copy to play at will, you can't make one through a deliberate digital capture of a Pandora stream unless you essentially “leave the tape running” whenever you're running any of your Pandora-programmed “stations.” Downloads end

⁴ *Arista*, slip op. at 41 n.24.

up being far more convenient for Pandora users than trying to get around them. So, what was the record industry's problem with LAUNCHcast?

It's questionable whether the industry at large really did have much of a problem with the service itself by the time Launch Media got its favorable jury verdict on April 27, 2007. By then, the industry's far more obvious problem was its long-foreseen general implosion due to illegal downloads and file-sharing. In fact, out of all the plaintiffs in the original suit, only the BMG affiliated companies appealed the verdict.⁵ What they got for their money, thanks to the Second Circuit, was a fairly hard and clear definition of the term "interactive service" under section 114(j)(7), under the language inserted into the statute by the Digital Millennium Copyright Act of 1998 (or "**DMCA**"). To understand why that matters and why the record companies might have cared quite a bit more about it in 2001, when the case began, we need to go back to 1995.

Before 1995, section 106 did not accord holders of copyright in sound recordings any kind of right to restrict the performance of those works, in direct contrast with holders of copyright in musical compositions who had the full bundle of exclusive rights -- even including "public display." Up to that point, an exclusive performance right for sound recordings didn't make economic sense, because it would have meant collecting additional license fees from analogue broadcast radio stations, which already paid blanket license fees for compositions through ASCAP and BMI, and directly benefitted the record industry by giving the records airplay. By the mid-'90s, however, although the technology facilitating rapid digital transmission and copying of audio files was not yet widespread, it was very much on the horizon.

⁵ The ten original plaintiffs at trial were: Arista Records, Inc.; Bad Boy Records; BMG Music d/b/a The RCA Records Label; Capitol Records, Inc.; Virgin Records America, Inc.; Sony Music Entertainment, Inc.; UMG Recordings, Inc.; Interscope Records; Motown Record Company, L.P.; and Zomba Recording Corporation. On appeal, six dropped out, leaving only Arista, Bad Boy, BMG and Zomba.

Accordingly, the record industry began lobbying very hard for an amendment to title 17 that would address this sort of technology without affecting the industry's longstanding relationship with broadcast radio.

The result was the Digital Performance Right in Sound Recordings Act of 1995 (or “**DPSR**”), which first of all added subsection (6) to section 106, giving holders of copyrights in sound recordings, the exclusive right “...to perform the copyrighted work publicly by means of a digital audio transmission.” Now, by its terms, this language did not have any bearing on analogue radio broadcasts. But what about digital radio broadcasts? That was addressed under section 114 which stated that the only entities subject to compulsory licensing fees for digital audio transmissions were paid subscription services that were also “interactive.” Under the DPSR, an “interactive” service was defined 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.

The last sentence of this provision would appear by its terms to prohibit P2P file sharing without putting an onus on a radio station's request line, for instance. Playing songs requested by listeners would not subject the broadcaster to a license fee to the record company, providing ostensibly that the requester would not know when exactly the station would play it, and wouldn't be likely to record the broadcast until the song came on in lieu of buying a copy.

Under strict analysis, however, that language leaves open a number of other possibilities. Under the old Sony/“Betamax” decision, “time shifting” – or, in that case, recording a television broadcast in order to enjoy it later in roughly the same form – does not infringe copyright,⁶ and the same principle applies to recording a particular radio broadcast and listening to it at one's

⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

leisure. Far more pressing for the record industry, then and now, is any kind of transmission that would enable the listener to make a copy of something the listener wants to own, obviating legitimate purchase of the music: where, for example, the listener knows the content of the transmission ahead of time and can record it or copy it with relative ease.

Even now, you can look up playlists for certain analogue radio music programs, stream the original broadcast digitally, and - if you so desire - make a digital recording of the portion of the broadcast that you'd like to keep, instead of buying it legally. In that sense, a listener's ability to re-stream a prior broadcast in order to obtain a specific recording the listener sees on the playlist (or enjoyed on the original broadcast) is not directly proscribed by the language of the DPSR, nor would be any unforeseen technology that might take advantage of this loophole.

To foreclose the above situation, the industry continued to lobby Congress to amend the DPSR, and the result was the Digital Millennium Copyright Act of 1998 (or "**DMCA**"). Under the DMCA, the definition of interactive service under section 114(j) was significantly expanded, most relevantly, as follows:

(7) 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.

The phrase "transmission of a particular sound recording" "on request" covers downloads or file-sharing, much as the language in the DPSR does, but the key additions in the DMCA version are the surrounding phrases: "transmission of a program specially created for the recipient" and the transmission of a particular sound recording as "part of a program, which is selected by or on behalf of the recipient."

This language would – and does – apply to streaming digital audio where the recipient knows the content ahead of time. Moreover, as the Third Circuit held in the 2003 *Bonneville*

case, in support of an opinion to that effect by the Copyright Office issued in 2000, the DMCA's exemptions for "non-subscription broadcast transmissions" do not necessarily apply to digital streaming of analogue AM/FM radio broadcasts, even if the same broadcaster is responsible for both transmissions.⁷

In the same year that the Copyright Office issued the opinion ratified by the Third Circuit, the Digital Media Association (or "DiMA") petitioned the Copyright Office for an amendment to the administrative rules that would clarify what "interactive service" meant under the DMCA. The Copyright Office refused to do so, given the "rapidly changing business models emerging in today's digital marketplace," and ending with the following language:

What is not clear, however, is how much influence a consumer can have on the programming offered by a transmitting entity before that activity must be characterized as interactive. . . . Such 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.⁸

The Copyright Office also, very unhelpfully, issued two versions of the following footnote:

RIAA and DiMA discussed the services offered by Launch Media, Inc., through its LAUNCHcast service, and MTV, through its Radio SonicNet service, to illustrate the type of offerings that are in dispute. . . . From these descriptions, there is considerable doubt whether either offering would qualify as an "interactive service."⁹

As the *Arista* court later pointed out, there was another draft of this opinion where the Copyright Office also said the exact opposite. Predictably, the Court disregarded both.¹⁰

The Copyright Office issued its non-report in November 2000, after LAUNCHcast had been in operation for a solid year. The record companies filed their complaint in May 2001,

⁷ See *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 500 (3d Cir. 2003) ("Section 114(d)(1)(A)'s nonsubscription broadcast transmission's exemption implicates only over-the-air radio broadcast transmissions, and does not cover the internet streaming of AM/FM broadcast signals.").

⁸ Public Performance of Sound Recordings: Definition of a Service, 65 FR 77330-01, 77332 (2000).

⁹ *Id.* n.1.

¹⁰ *Arista*, slip op. at 21-22 & n.6 ("Whatever the etiology of the Copyright Office's inability to make up its mind, we find the Copyright Office efforts here of little help.").

claiming that LAUNCHcast was liable for copyright infringement from the time of its launch in November 1999 because it was interactive on its face under the DMCA language. Its users essentially created LAUNCHcast’s programming through their specific input, thus seeming to place the service well within the ambit of the statutory language, in that it “enables a member of the public to receive a transmission of a program specially created for the recipient.”

Given the Copyright Office’s refusal to formulate any kind of bright line rule on the “interactive service” definition – or even to give an opinion, for that matter – the progress of *Arista Records v. Launch Media* through the Southern District and the Second Circuit was appropriately eccentric. There was never a lower court decision on the issue of interactivity. Instead, the trial court jury found as an *issue of fact* that LAUNCHcast was not an interactive service under the DMCA language. On appeal, the record companies remaining in the case argued not only that this finding was in error, but also that Judge Owen had erroneously instructed the jury to reach a verdict on that issue at all, insofar as the question was properly one of law.¹¹ Curiously, the Court of Appeals agreed with the appellants that the issue was a matter of law, and then proceeded to affirm the lower court’s jury verdict in favor of Launch Media.¹²

Just as intriguing, much of the Second Circuit decision strongly resembles a finding of fact, rather than one of law. Despite the Court’s note at the outset that “[t]here is no material dispute between the parties with regard to how LAUNCHcast works,”¹³ the decision proceeds through a long and tedious summary of the data-sorting algorithms and other functions through which LAUNCHcast assessed its users’ input to generate appropriate songlists while simultaneously mediating and limiting its customers’ control over the music they streamed over the LAUNCHcast service. In truth, the technical details provide a hedge for the Court’s simple

¹¹ See *Arista*, slip op. at 4.

¹² See *id.* at 8.

¹³ See *id.* at 6.

legal formulation: a service is “interactive” if the user’s control over the programming “approximates the predictability the music listener seeks when purchasing music.”¹⁴ As the

Court states:

The language and development of the DPSR and DMCA make clear that Congress enacted both statutes to create a narrow copyright in the performance of digital audio transmissions to protect sound recording copyright holders – principally recording companies – from the diminution in record sales.¹⁵

Notwithstanding that this is as close to a bright line rule as a Court could come, the factual analysis of LAUNCHcast’s methodology also serves to restrict the rule to the facts – or, more precisely, to existing business models.

The deliberate narrowness of the Second Circuit’s decision in *Arista* mirrors the record companies’ likely motivations in bringing suit to begin with and – even in the face of LAUNCHcast and Pandora’s by then self-evident usefulness to the industry – in bothering to appeal the jury verdict. The DMCA provision was drafted broadly to keep it ahead of as-yet-unformulated business models that might escape the DPSR’s definition. The more restrictive the operative interpretation of the DMCA definition could be made to be, the less likely that a revenue stream based on a new model would escape direct licensing fees for digital audio transmissions of sound recordings, even if the definition consequently encompassed services that posed no threat to the industry. It is telling that the record companies deemed it necessary to alienate significant sources of revenue in the interests of securing an overbroad statutory scheme of very uncertain future usefulness. The Second Circuit’s *Arista* decision creditably curtails this self-defeating attempt by the record companies to make the definition unnecessarily expansive while preserving the use of the definition as against some yet unknown digital music service that

¹⁴ *Id.* at 34.

¹⁵ *Id.* at 33.

directly threatens legitimate music purchase. For the record companies, however, it is now very late in the day for the kind of prophylaxis that characterized this action at its inception.