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“Interactive Webcasting”? The Second Circuit Weighs In

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Interactive. For webcasters, it’s a word that makes a huge difference. Webcasters who provide *non-“interactive”* music services avoid a world of bureaucratic hurt when it comes to copyright royalties. Those lucky souls get to take advantage of the statutory license, which means that copyright clearance is essentially automatic – all they have to do is jump through some hoops established by the Copyright Royalty Board. But “interactive” webcasters? They have to negotiate separate copyright clearance deals with each copyright holder of each recording that they might want to play. Ouch!

Historically, it hasn’t been easy to determine precisely when a webcast service crosses the line between non-interactive and interactive. But here’s the good news: the U.S. Court of Appeals for the Second Circuit has recently become the first U.S. appellate court to consider, and shed definitive light on, the meaning of “interactive”.

Many webcasters have a very limited view of what constitutes an interactive service. They’d have you believe a service is “interactive” *only* if it lets a listener choose the exact artist and song to be heard, much like an iTunes download. In this pleasant, if not entirely realistic, view, anything else – including services offered by the likes of TheRadio.com or Pandora, where the listener can identify an artist, or even a song, and find an entire channel with similar music – is viewed as “non-interactive”.

The Second Circuit has now provided us with some guidelines to help sort this all out.

The decision was issued in a case pitting a number of record companies (think BMG, Arista, Bad Boy, Zomba) against the popular LAUNCHcast service. The record companies claimed LAUNCHcast was interactive. The court disagreed.

The Copyright Act defines an interactive service as one which “enables a member of the public to receive a transmission of a program specifically created for the recipient, or on request, a transmission of a particular sound recording . . . , which is selected by or on behalf of the recipient.” The parties agreed that LAUNCHcast, in some form, generated a list of songs to be performed based on the initial song or artist choice by the listener.

But was that enough to make it “interactive”? Nope.

The Court engaged in a searching review of the factors leading to the creation of the interactivity/non-interactivity distinction in the Digital Performance Right in Sound Recordings Act of 1995 and its refinement in the 1998 Digital Millennium Copyright Act – two seminal laws intended to protect sound recording copyright holders. The competing goals of the law are: (1) to increase the number of distribution channels for music and (2) to discourage rampant copying of music without compensation to the copyright holder.

The Court concluded that a major consideration – perhaps *the* major consideration – is the ability of a digital listener to capture and save a high quality copy of a sound recording with little to no effort if he or she knows it is about to be played. That is, if a listener can manipulate the webcast service in a way which permits him/her to snag his/her own digital copy of a song of his/her choosing, then it’s likely an “interactive” service. Stated another way, the Court focused on whether the webcasting service offers listeners an opportunity to steal music they would otherwise purchase.

Analytically, the Court reviewed factors which the Copyright Office had deemed relevant over the years. Although asked to clarify the “interactive/non-interactive” distinction, the Copyright Office has declined to take the bait, explaining that technology changes too rapidly to allow for a hard and fast rule. But it did indicate that some level of listener influence is permitted within the definition of non-interactive. In particular, the Copyright Office had even indicated that LAUNCHcast itself would qualify as “non-interactive”.

How exactly does LAUNCHcast work? The short strokes are that users:

- © Must log in with a unique username/password;
- © Must enter basic information about preferences unrelated to music;
- © Must enter information regarding the user's favorite artists;
- © Must identify the user's favorite musical genres and rating them in order of preference;
and
- © Are able to rate songs or artists they hear (or even instantly purchase a song they like).

That final step (*i.e.*, the rating process) continually refines and changes the individual stream offered to the individual listener. Based on all these preferences and refinements, the LAUNCHcast software creates a playlist of 50 songs every time the listener logs on. The listener has no idea what those songs will be or which artists will be featured.

There is actually much more to the software, involving ratios, quotients and other mathematical formulas that aid in the refinement and ordering of the playlists. The Court of Appeals spent a good ten pages describing the process in impressive detail. Though we're glossing over the particulars, we'll note that it is this very level of detail which led the Court to conclude that LAUNCHcast is *not* an interactive service. As the Court saw it, the LAUNCHcast system does *not* allow a user either to pick a song and then immediately hear that song, or to predict whether (much less when) any particular song may be played, and or (most definitely) to engage in music piracy. (Indeed, the instant-purchase function probably promotes the legal purchase of copyrighted music.)

While LAUNCHcast may be more complex than some other few music services, the Court's discussion does highlight some key characteristics which webcasters can take note of in determining whether their services may be deemed interactive:

- q In defining "interactive", Congress "intended to include bodies of pre-packaged material, such as groups of songs or playlists specifically created for the user";
- q About 60 percent of the various factors used in the LAUNCHcast programming to create and modify a user's playlist are out of the listener's control (the only absolutely certain control available to a user is the "zero" rating: by giving a song a "zero" rating, the user guarantees that he or she will not hear it again);
- q A new playlist of 50 songs is created every time the listener logs in, which prevents any ability to predict what will be heard during any particular session.

Emphasizing the limited involvement of the listener in the LAUNCHcast song selection process, the Court contrasted listening to LAUNCHcast to listening to radio back in the halcyon days. According to the Court, LAUNCHcast listeners do not enjoy even the "limited predictability that once graced the AM airwaves on weekends in America when 'special requests' graced lovestruck adolescents' attempts to communicate their feelings to 'that special friend'". Ah yes, the good old days. But the Court's comparison prompts this reminder to broadcasters who stream their over-the-air programming: be careful about inviting "special requests" from listeners, since granting such requests could lead the webcasting element of your operation to be deemed "interactive", with all that that entails.