with which you are familiar, ranging from your local college radio station to the digital stations available through services like Yahoo!Music and Pandora. Whether they are eligible to rely on the statutory licenses turns on their diligent compliance with the complicated provisions of the statute.

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

WESLEY, J.: We are the first federal appellate court called upon to determine whether a webcasting service that provides users with individualized internet radio stations — the content of which can be affected by users' ratings of songs, artists, and albums — is an interactive service within the meaning of 17 U.S.C. §114(j)(7). If it is an interactive service, the webcasting service would be required to pay individual licensing fees to those copyright holders of the sound recordings of songs the webcasting service plays for its users. If it is not an interactive service, the webcasting service must only pay a statutory licensing fee set by the Copyright Royalty Board. . . .

Background[2]

On May 24, 2001 Arista Records, LLC, Bad Boy Records, BMG Music, and Zomba Recording LLC (collectively, "BMG") brought suit against Launch Media, Inc. ("Launch") alleging that Launch . . . willfully infring[ed] sound recording copyrights of BMG from 1999 to 2001. . . .

Launch operates an internet radio website, or "webcasting" service, called LAUNCHcast, which enables a user to create "stations" that play songs that are within a particular genre or similar to a particular artist or song the user selects. BMG holds the copyrights in the sound recordings of some of the songs LAUNCHcast plays for users. . . .

An "interactive service" according to the statute "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." 17 U.S.C. §114(j)(7). The statute provides little guidance as to the meaning of its operative term "specially created." According 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."

These definitions indicate that a "specially created" program is a program produced or designed specifically for the user — not much help defining the terms of the statute in this case. BMG sees the issue as a simple one. BMG argues that any service that reflects user input is specially created for and by the user and therefore qualifies as an interactive service. But we should not read the statute so broadly. Justice Oliver Wendell Holmes once wrote that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Holmes's observation seems pertinent here.

2. Plaintiffs-Appellants appeal the judgment of the United States District Court for the Southern District of New York (Owen, *J.*), entered on May 16, 2007, and from interlocutory orders merged into the judgment, finding in favor of Defendant-Appellee Launch Media, Inc., now owned by Yahoo!, Inc. ("Yahoo").

The meaning of the phrase in question must significantly depend on the context in which Congress chose to employ it. . . .

With the inception and public use of the internet in the early 1990s, the recording industry became concerned that existing copyright law was insufficient to protect the industry from music piracy. At the time, the United States Register of Copyrights referred to the internet as "the world's biggest copying machine." 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). What made copying music transmitted over the internet more dangerous to recording companies than traditional analog copying with a tape recorder was the fact that there is far less degradation of sound quality in a digital recording than an analog recording. *See id.* . . . If an internet user could listen to music broadcast over, or downloaded from, the internet for free, the recording industry worried that the user would stop purchasing music. Jason Berman, president of the Recording Industry Association of America (the "RIAA"), the lobbying arm of the recording industry, . . . warned that "digital delivery would siphon off and eventually eliminate the major source of revenue for investing in future recordings" and that "[o]ver time, this [would] lead to a vast reduction in the production of recorded music." Digital Performance Right in Sound Recording: Hearing on H.R. 1506 Before the H. Comm. on the Judiciary, Subcomm. on Courts & Intellectual Prop., 104th Cong. (1995) (statement of Jason Berman, President, RIAA). . . .

In light of these concerns, and recognizing that "digital transmission of sound recordings [were] likely to become a very important outlet for the performance of recorded music," Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (the "DPSR"), giving sound recording copyright holders an exclusive but "narrow" right to perform — play or broadcast — sound recordings via a digital audio transmission. H.R.Rep. No. 104-274, at 12, 13-14. The right was limited to exclusive performance of digital audio transmissions through paid subscriptions services and "interactive services." *See* 17 U.S.C. §114(d) (1995). While non-interactive subscription services qualified for statutory licensing, interactive services were required to obtain individual licenses for each sound recording those interactive services played via a digital transmission. *See* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L.REV. 673, 692 (2003). . . .

The House report noted that the DPSR was enacted to address two related concerns. First, without "appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies." H.R.Rep. No. 104-274, at 13. Second, "certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work." *Id.* With regard to the latter concern, the House noted that "interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." *Id.* at 14. . . .

Fairly soon after Congress enacted the DPSR, critics began to call for further legislation, charging that the DPSR was too narrowly drawn and did not sufficiently protect sound recording copyright holders from further internet piracy. For instance, webcasting services, which provide free — i.e., nonsubscription — services that do not provide particular sound recording on request and are therefore not interactive within the meaning of term under the DPSR, at that time fell outside the sound recording copyright holder's right of control. . . .

In light of these concerns, Congress enacted the current version of §114 under the DMCA in 1998. The term "interactive service" was expanded to include "those that are specially created for a particular individual." H.R.Rep. No. 105-796, at 87 (1998) (Conf.Rep.).

As enacted, the definition of "interactive service" was now a service "that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." 17 U.S.C. §114(j)(7).

According to the House conference report,

> The conferees intend that the phrase "program specially created for the recipient" be interpreted reasonably in light of the remainder of the definition of "interactive service." For example, a service would be interactive if it allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners.

H.R.Rep. No. 105-796, at 87-88 (Conf.Rep.).

The House report continued that a transmission is considered interactive "if a transmission recipient is permitted to select particular sound recordings in a prerecorded or predetermined program." *Id.* at 88. "For example, if a transmission recipient has the ability to move forward and backward between songs in a program, the transmission is interactive. It is not necessary that the transmission recipient be able to select the actual songs that comprise the program." *Id.* . . .

In sum, from the SRA to the DMCA, Congress enacted copyright legislation directed at preventing the diminution in record sales through outright piracy of music or new digital media that offered listeners the ability to select music in such a way that they would forego purchasing records.

Armed with the statute's text and context, we must examine the complex nature of the service LAUNCHcast provided. . . .[8]

After creating a username and password, and entering basic information and preferences unrelated to the music LAUNCHcast provides, a LAUNCHcast user is able to create and modify personalized radio stations. First, the user is prompted to select artists whose music the user prefers. The user is then asked which music genres the user enjoys and asked to rate the genres on a scale. The user is also asked the percentage of new music — songs the user has not previously rated — the user would like to incorporate into the user's station (the "unrated quota") and whether the user permits playing songs with profane lyrics. The minimum unrated quota is 20%, meaning no less than 20% of the songs played can be unrated.

Once LAUNCHcast begins playing music based on the user's preferred artists and genres, the user rates the songs, artists, or albums LAUNCHcast plays between zero and 100, with 100 being the best rating. Below the rating field are hyperlinks termed "history," "share," and "buy." The history hyperlink allows the user to see a list of the songs previously played, and the buy hyperlink facilitates the user's purchase of the songs. The share hyperlink allows the user to share the station with other users. This feature facilitates the "subscription" of one user to another user's station. When user A subscribes to the station of user B, user B becomes a "DJ" for user A. . . . While a song is playing, the user has the ability to pause the song, skip the song, or delete the song from the station by rating the song zero. Notably, the user may not go back to restart the song that is playing, or repeat any of the previously played songs in the playlist.

8. Federal judges are appointed for life. U.S. CONST. art. III, §1. Our familiarity with the ever-changing terms and technology of the digital age is, to say the least, varied. We have attempted to portray the processes and procedures of LAUNCHcast in lay terms, understandable to ourselves and the public.

Whenever the user logs into LAUNCHcast and selects a station, LAUNCHcast generates a playlist of fifty songs based on several variables. LAUNCHcast does not provide a list of the pool of songs or of the songs in the generated playlist, and therefore, the user does not know what songs might be played. LAUNCHcast selects the songs by first looking to the unrated quota and whether to exclude songs with profane lyrics or songs that cannot be transmitted over the user's bandwidth. Next LAUNCHcast creates a list of all the potential songs that can be put in the playlist (called a "hashtable"). LAUNCHcast then generates a list of all songs played for the user within the last thirty days, a list of all DJs, genres, and radio stations to which the user subscribes, and a list of all the ratings of all the songs, artists, and albums rated by either the user or any DJ to which the user subscribes. Songs that the user has rated are "explicitly rated" songs. LAUNCHcast "implicitly rates" songs that appear in an album that the user or a subscribed-to DJ has rated and songs that appear in the same album as another song the user has already rated.[12] All of these songs are initially added to the hashtable. LAUNCHcast then excludes: (1) all songs that the user, or a DJ to which the user subscribes, requests be skipped permanently (rated as zero) and (2) songs played within the last three hours for the user on any LAUNCHcast station. This yields approximately 4,000 songs.

LAUNCHcast then adds to the hashtable the 1,000 most popular songs — songs most highly rated by all LAUNCHcast users — in the bandwidth specified by the user, provided those songs are not already on the hashtable. [The court describes in detail the creation of the hashtable, which eventually contains approximately 10,000 songs. To create a playlist of 50 songs LAUNCHcast randomly selects songs from the hashtable and tests each song to determine if it should be discarded based on a set of rules. — EDS.] . . .

. . . . LAUNCHcast does not play the same song twice in a playlist [and] LAUNCHcast excludes a song from a playlist if three other songs by that artist have already been selected for the playlist. In other words, if the Beatles' "Here Comes the Sun," "A Day in the Life," and "Eleanor Rigby" have already been selected for the playlist, no other Beatles' song could be added to the playlist. . . . LAUNCHcast excludes a song from a playlist if two other songs from the same album have already been selected for the playlist. . . .

Finally, once all fifty songs are selected for the playlist, LAUNCHcast orders the playlist. The ordering of the songs is random, provided LAUNCHcast does not play more than two songs in the same album or three songs by the same artist consecutively.[17]

It 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. Given LAUNCHcast's format, we turn to the question of whether LAUNCHcast is an interactive service as a matter of law. As we have already noted, a webcasting service such as LAUNCHcast is interactive under the statute if a user can either (1) request — and have played — a particular sound recording, or (2) receive a transmission of a program "specially created" for the user. A LAUNCHCAST user cannot request and expect to hear a particular song on demand; therefore, LAUNCHcast does not meet the first definition of interactive. But LAUNCHcast may still be liable if it enables the user to receive a transmission of a program "specially created" for the user. It comes as no surprise to us that the district court, the parties, and others have struggled with what Congress meant by this term. . . .

12. In other words, if the user rates the band U2 or U2's album The Joshua Tree, then U2's song "With or Without You" on the album will be implicitly rated. Likewise, if the user rates Gordon Lightfoot's song "Rainy Day People" but does not rate Lightfoot's iconic song "Canadian Railroad Trilogy" — found on a different album — "Rainy Day People" will be explicitly rated while "Canadian Railroad Trilogy" will be implicitly rated.

17. This brings LAUNCHcast into compliance with the "sound recording performance complement," which limits webcasters to playing no more than three selections from a given record in a three-hour period. 17 U.S.C. §114(d)(2)(C)(i), (j)(13).

Launch does not deny that each playlist generated when a LAUNCHcast user selects a radio station is unique to that user at that particular time. However, this does not necessarily make the LAUNCHcast playlist specially created for the user. Based on a review of how LAUNCHcast functions, it is clear that LAUNCHcast does not provide a specially created program within the meaning of §114(j)(7) because the webcasting service does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby — in the aggregate — diminishing record sales.

First, the rules governing what songs are pooled in the hashtable ensure that the user has almost no ability to choose, let alone predict, which specific songs will be pooled in anticipation for selection to the playlist. At least 60% of the songs in the hashtable are generated by factors almost entirely beyond the user's control. The playlist — a total of fifty songs — is created from a pool of approximately 10,000 songs, at least 6,000 of which (1,000 of the most highly rated LAUNCHcast songs among all users and 5,000 randomly selected songs) are selected without any consideration for the user's song, artist, or album preferences. The user has control over the genre of songs to be played for 5,000 songs, but this degree of control is no different from a traditional radio listener expressing a preference for a country music station over a classic rock station. LAUNCHcast generates this list with safeguards to prevent the user from limiting the number of songs in the list eligible for play by selecting a narrow genre. . . .

Even the ways in which songs are rated include variables beyond the user's control. For instance, the ratings by all of the user's subscribed-to DJs are included in the playlist selection process. When the user rates a particular song, LAUNCHcast then implicitly rates all other songs by that artist, subjecting the user to many songs the user may have never heard or does not even like.[23] There are restrictions placed on the number of times songs by a particular artist or from a particular album can be played, and there are restrictions on consecutive play of the same artist or album. Finally, because each playlist is unique to each user each time the user logs in, a user cannot listen to the playlist of another user and anticipate the songs to be played from that playlist, even if the user has selected the same preferences and rated all songs, artists, and albums identically as the other user. . . .

Finally, after navigating these criteria to pool a hashtable and generate a playlist, LAUNCHcast randomly orders the playlist. This randomization is limited by restrictions on the consecutive play of artists or albums, which further restricts the user's ability to choose the artists or albums they wish to hear. LAUNCHcast also does not enable the user to view the unplayed songs in the playlist, ensuring that a user cannot sift through a playlist to choose the songs the user wishes to hear.

It appears the only thing a user can predict with certainty — the only thing the user can control — is that by rating a song at zero the user will not hear that song on that station again. But the ability not to listen to a particular song is certainly not a violation of a copyright holder's right to be compensated when the sound recording is played.

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 predictability that once graced the AM airwaves on weekends in America 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. . . .

23. It would be wrong, for instance, to assume that because a user likes the Beatles' album A Hard Day's Night the user would also like The White Album.

NOTES AND QUESTIONS

1. Why did the court need to detail the manner in which LAUNCHcast selected the music to be played for a listener? Do you agree with the court's determination that LAUNCHcast was not an interactive service? Recognize what is at stake in the determination: The defendant will need to pay some license fee; the question is whether it will be able to use the statutory licenses negotiated by SoundExchange and published by the Copyright Office, or whether it will need to obtain individually negotiated licenses.

2. How interactive are music webcasting services like Pandora or Yahoo!Music? How would an entity seeking to be more interactive go about negotiating all of the required licenses? Would the transaction costs involved make such a venture prohibitive for all but the entities that already own vast collections of rights in sound recordings?

3. Review Question 1, page 441 *supra*. If a third party wants to stream Adam Lambert's version of "Mad World" over the Internet, from whom must it obtain permission? Do you want to know in what context the streaming will occur? What if there are moving images accompanying the sounds, such as a video posted on YouTube?

4. Radio broadcasts made over traditional analog sound waves obviously do not infringe the §106(6) right because they are not *digital* transmissions. If the radio station converted the over-the-air signal to a digital one, it can rely on the broadcast exemption in §114 for the performance of the sound recordings. Note that the station will still need authorization to publicly perform the musical works. When the station simultaneously transmits its broadcast via the Web, that broadcast is not exempt. Should it be? How would that affect competition in the webcasting market?

5. A Performance Rights Act has been pending in Congress for the past several years. The legislation would provide owners of sound recording copyrights with full performance rights covering the use of their sound recordings by over-the-air broadcasters. If enacted, the proposed Performance Rights Act would remove a longstanding limitation that benefits conventional radio stations. The proposed bill would amend §106(6) of the Copyright Act to read as follows: "in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission." As drafted, the bill provides relief for noncommercial radio stations, including public, educational, and religious stations, by giving those stations the option of a nominal annual flat fee. It provides similar relief for commercial stations whose annual revenue is under $1.25 million, which currently comprise approximately three-fourths of all music radio stations. Finally, the proposed legislation seeks to amend the §114 statutory license for digital public performances to ensure the preservation of royalties payable to songwriters or copyright owners of underlying musical works. Most other industrialized countries already provide similar protection for performance rights for sound recordings. The bill has enjoyed broad support, including from quarters traditionally resistant to the expansion of copyright rights. However, the National Association of Broadcasters has attacked the legislation, calling it a "performance tax" and seeking pledges from legislators to oppose the bill. If you were a legislator, how would you vote?