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Turntable.fm — All quiet on the DMCA front?

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Turntable.fm is the recently launched online music service that caught the attention of the music industry, music-loving consumers and digital media commentators. The service enables users to become DJs in a virtual music club divided into multiple rooms, each with enough space for five DJs and an audience of listeners. The DJs take turns playing songs to the entire room, pulling from a wide catalog that Turntable.fm licenses through MediaNet. Users then interact with each other, rating the last song played and discussing the music in an in-room chat. In theory, this interaction guides the flow of the other DJs and helps to shape future music played in the room. As unique as the service is though, it appears that many of its features were designed and implemented to enable Turntable.fm to operate as a "non-interactive" service under the Digital Millennium Copyright Act ("DMCA"), similar to an internet radio station, thus avoiding the need for direct licenses from the music labels. For Turntable.fm, the distinction could mean the difference between sustaining a viable business or joining a long line of digital music services that were unable to survive because of the burden of paying license fees to the labels. While it is too early to determine if this strategy will be challenged and/or whether it will ultimately prevail, Turntable.fm's service clearly raises some unique legal issues. To qualify as a "noninteractive" service under the DMCA, a service's programming cannot be "specially created for the [user]" and cannot "substantially" consist of user-requested songs if those requests are filled within one hour of being made. On first blush, it would appear that Turntable.fm would have a difficult time meeting these criteria. After all, one of the core features of the service is the users' ability to select songs to be played in whatever room the user is visiting, essentially enabling users to be DJs in a virtual music club. However, Turntable.fm has devised various rules for the service that appear to be tailored directly to address other provisions of the DMCA which determine whether a service can be classified as "noninteractive". For example, if there is just one DJ in a room, then the DJ can only hear 30-second previews of the songs selected. This means that Turntable.fm cannot be used to provide interactive, on-demand programming solely for the user. In addition, listeners in a room cannot see what song the next DJ plans to play, which satisfies the DMCA requirement that a noninteractive service cannot reveal upcoming songs to be played and while a song is being played, artist and album information is displayed. Turntable.fm also complies with the requirement that a "noninteractive" service cannot, in any three hour period, play more than three songs from the same album (and no more than two consecutively) and no more than four songs from the same artist (and not more than three consecutively). Yet, notwithstanding the above restrictions, the DJs have complete control over

the music played and it could be argued that this type of user control is unprecedented in a noninteractive service. The leading case to address the issue of whether a streaming service should be deemed "interactive" or "noninteractive" under the DMCA involved a suit brought by Arista Records against Launch Media, which operates the LAUNCHcast service. The Second Circuit approached the issue by focusing on the potential impact that a service could have on sales of recorded music. A "noninteractive" service does not require mechanical and sound recording licenses and thus the additional revenues that the record labels would receive. Therefore, the court reasoned, at the point that a streaming music service provides "sufficient control to users such that playlists are so predictable that users will choose to listen to the [service] in lieu of purchasing music, thereby—in the aggregate—diminishing record sales," that service is no longer "noninteractive." The court went on to hold that the LAUNCHcast service is "noninteractive" stating that, "to the degree that LAUNCHcast's playlists are uniquely created for each user, that feature does not ensure predictability." In making this finding, the court pointed to the fact that 60% of the songs programmed through the service are done so with virtually no input. As the court said, "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." Whether Turntable.fm can meet the "predictability" test established by the Launch Media decision or whether it would otherwise be deemed to comply with the DMCA's requirements for a "noninteractive" service is open for debate. A reasonable argument could be made that users of the service have substantial control over the songs being played, making the programming sufficiently predictable that Turntable.fm could become a substitute for purchasing music. Beyond the Second Circuit's analysis under the Launch Media decision, other features of the Turntable.fm service do not appear to comply with certain provisions of the DMCA's definition of a "noninteractive" service. The music is programmed entirely by the user DJs and streamed within one hour of "selection" in violation § 114(j)(7) of the DMCA. More broadly, the DMCA defines an "interactive" service as one that is "specially created" for the user. It is unclear how the "specially created" element might be interpreted for a service like Turntable.fm, which has both DJ users and "audience" users. Depending on the vantage point (i.e. DJ user or "audience member" user), the "specially created" factor could come out on either side of the "interactive"/"noninteractive" divide. Of course, unless and until Turntable.fm is challenged in court, these questions may never be put to the test. But regardless of whether they are, we do not believe that the unanswered questions will slow the rapid evolution of the digital music landscape and anticipate the continued launch of new services in the coming months and years.

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