

16 July 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Via E-mail: info@alrc.gov.au

Re: Further Submission of Pandora Media Inc. in Response to ALRC Inquiry

Dear Sir / Ma'am:

Pandora Media, Inc. ("Pandora") welcomes this opportunity to make a further submission to the Commission, particularly in respect of a number of the draft recommendations contained in its recently released Discussion Paper on Copyright and the Digital Economy.

In this supplementary submission, Pandora:

- Makes a number of observations in respect of Section 2 of the Discussion Paper, namely:
 - The need to consider the practical distinction between creators and rights owners and the relevance of that distinction to the Commission's deliberations; and
 - The need to also consider commercial incentives for those investing in commercial distribution models for copyright material when considering the balance to be struck between the rights creators and the public benefit of access to the creators works;
- Supports the Commission's recommendation (in Section 16) to extend the operation of s.109 to non-broadcast communications and makes a number of submissions regarding the implementation of that recommendation; and
- Reiterates a number of proposals from our initial submission relating to the operation of the Copyright Tribunal.

INTRODUCTION

In our initial submission to this Inquiry, we made a number of recommendations to the Commission including the following primary recommendations:

- That a statutory licence regime be introduced for online services, at least such services that are analogous to radio broadcast services; and
- That the provisions relating to Copyright Tribunal processes be amended to streamline the operation of the Tribunal for the benefit of rights owners and users alike

In relation to the first of those recommendations, we support the Commission's draft proposal (in section 16) to extend the operation of s109 to include, relevantly, radio programs communicated otherwise than as a broadcast. In this further submission, we would like to address some of the questions raised by the



Commission in respect of this proposal and to make some additional recommendations for the Commission's consideration.

As to our recommendations in relation to the Copyright Tribunal, we note that the Commission's discussion paper did not address this issue. Whilst we accept that the processes of the Tribunal are largely (and properly) determined by the Tribunal itself, there nonetheless remains both necessity and scope for the improvement of the legislative framework within which the Tribunal operates. As such, we do seek to revisit and reiterate a number of our submissions on this question.

Finally, we will also make some miscellaneous submissions in respect of the discussion in section 2 of the Discussion Paper.

SECTION 2 – FRAMING PRINCIPLES FOR REFORM

Section 2.8

This section contains a useful discussion on the need to draw a balance between the rights of creators to manage the way in which their works are used and the competing public interest for users to have access to the work of such creators.

However, we consider that this discussion overlooks an important distinction between creators and rights owners – and the Discussion Paper appears to proceed on the basis that, for all practical purposes, they are one and the same. The reality is often quite different and many creators (such as recording artists and songwriters) assign their copyright to companies (relevantly, record labels and publishers in this example) who become the rights owners and undertake the commercial exploitation of that copyright.

We would submit that this is an important distinction to take into account in the consideration of how best to strike the necessary balance between creators and users. Specifically, as between creators and rights owners, most creators have very limited approval or veto rights over how their works are used or distributed - most such rights relate to the use of their works in films, advertisements and similar applications which involve or imply a degree of endorsement by the creator. As such, most negotiations between rights owners and commercial users of such works revolve around financial and like terms only. Indeed, creators themselves are almost never involved in such negotiations directly.

Whilst we don't seek to express any views on the appropriateness of such contractual arrangements, we would submit that they should be taken into account, especially when considering the scope and impact of statutory licences. In short, the prevalence of such arrangements should provide stronger support for the implementation of statutory licences (and mitigate any concerns regarding the application of the three step test to such licences), particularly in respect of broad based usage of works such as in broadcast and online contexts.

We would also note that, in our experience, the collective administration of such licence schemes typically also delivers greater benefits for creators specifically (many of whom are entitled to direct payments from the collecting societies irrespective of their contractual entitlements with rights owners such as record labels and publishers).

Section 2.10

Much is made in this section, quite properly, of the need for the copyright system to provide creators with the incentive to create. It is also acknowledged, quite properly, that it is not necessarily the case that, in the absence of reward, creators would cease creating. For our part, we strongly support the fair and equitable return to creators from the use of their work, especially commercial use (and we do so irrespective of whether or not creators would still create in the absence of financial return).

However, what does seem to be missing from this discussion is an acknowledgement that the financial return to creators and rights owners only comes from distribution through successful and viable businesses – the benefits for creators and rights owners cannot sensibly be considered in isolation from the need to also deliver a commercial benefit to those companies investing in making the creators' works commercially available. As such, we consider that there is a pressing need within this discussion to also acknowledge that a successful copyright system also needs to create the necessary incentives for business investment and innovation to ensure that fair returns to creators and rights owners are capable of being delivered.

Regrettably, we and many other online businesses have struggled to reach agreement with rights owners over the years regarding not only fair financial terms for the use of music, but also the scope of licences that allow us to develop our business in line with market expectations and innovations. By way of example, Pandora's sound recording licence for this territory does not permit Pandora to play any track "on demand", not even the track nominated by a user as the key track for his or her personalised station. As such, if a user wishes to commence a personalised radio station generated from, say, Bruce Springsteen's "Born In The USA", Pandora is presently not permitted to play that actual track as the first track in that radio stream (which many of our users would expect) – rather, we are obliged to stream another track that our music genome database determines is consistent with it.

Accordingly, when weighing up the balance to be struck between all of these competing interests, we do strongly submit that greater account needs to be taken of the significant investment needed (and made) in the various distribution channels and platforms (and the consequent innovation constantly required) and the need to ensure that such investment by "users" is also appropriately rewarded.

SECTION 16 – BROADCASTING

As noted in the Introduction, we support the proposal by the Commission for the operation of s.109 to be extended to, relevantly, "radio programs" communicated otherwise than by way of broadcast (eg online



or via mobile networks). We do not propose to canvass the reasons for that support as they are adequately addressed in both our initial submission and Section 16 of the Discussion Paper.

The Commission's draft recommendation on this issue gives rise to a number of questions and issues, some of which have been explicitly raised by the Commission – specifically:

- Whether there is a need for a commensurate provision in relation to musical works/compositions;
- What constitutes a “radio program” and the scope of the activity intended to be covered (or not covered) by that term;
- Whether such online use is to be covered within the concept of “broadcast”; and
- The appropriateness of the exclusion in relation to, in effect, subscription broadcasting being applied to non-broadcast transmissions; and
- The issue of statutory licences for permanent or non-temporary copies made for the purposes of communication.

In this section, we will also address:

- The Commission's alternative proposal for a repeal of s.109 and its replacement with a voluntary licensing scheme – Pandora would strongly oppose such a move; and
- The Commission's call for proposals on the possible implementation of an expanded s.109.

Background

We would refer the Commission to our initial submission and the information provided therein on the nature of the service offered by Pandora to its users in the U.S. and, more recently, in Australia and New Zealand.

Key relevant points are:

- Pandora offers users a personalised or customisable radio stream via the internet – for example, users enter the name of an artist, a particular track or a composer and the Pandora service generates a continuous stream of music that we identify as being consistent with the user's choice;
- Although the stream can be customised to some extent, that customisation is limited to functionality such as pausing or skipping tracks, rating tracks etc. Relevantly, users cannot select particular tracks to hear and have no control over the content of the radio stream generated for them by Pandora; and
- The service is offered in 2 versions – a free, ad supported version (similar to a commercial radio station) and a paid subscription version (which has additional features such as, importantly, an ad free stream).

Extension to Musical Works

As the Commission is no doubt aware, no similar provision to s.109 is to be found in the Copyright Act with respect to musical works. At the risk of stating the obvious, in all cases where a licence in respect of the use of sound recordings is required, a similar licence in respect of the underlying musical works will also be required.

As such, it is left to potential and actual licensees to negotiate with APRA in respect of, relevantly, the right to stream music via the internet within Australia. APRA is the owner of such rights and grants “blanket” licences in respect of all musical works within their catalogue.

Pandora successfully negotiated the relevant licence with APRA and, as such, it may be suggested that this supports the proposition that voluntary licensing is working and that no equivalent of s.109 for musical works needs to be considered. However, we would strongly submit to the contrary.

In the U.S. over the past 12-18 months, we have seen various rights owners withdraw “digital” rights from the U.S. equivalents of APRA (such as ASCAP and BMI) – this has had the effect (presumably intentional) of requiring Pandora and others to negotiate separate licence agreements outside the terms of the collective licence. Not only are we seeing significant increases in licence fee demands (without the capacity to seek review by the U.S. rate courts), but also changes in terms and reporting requirements that impose unnecessary and unjustifiable burdens on our business. A failure to reach agreement with an individual publisher can create enormous complications for our business as it can be quite difficult to identify with precision what tracks embody compositions owned by which publishers (particularly in the case of compositions created by multiple writers).

Whilst there is presently no evidence of the same approach being adopted by music publishers in Australia, we would simply note:

- That the music publishers who took this action in the U.S. also operate in Australia and are major publishers in this territory; and
- That the Australian Competition and Consumer Commission (ACCC) has over the years (through its authorisation reviews of APRA) imposed conditions that facilitate an easier withdrawal of rights from APRA in respect of particular compositions or catalogues of compositions.

As such, we are understandably concerned that a similar situation may arise in Australia in the near future. We would urge the Commission to guard against that possibility by recommending a provision in relation to musical works that mirrors s.109.

Definition of Radio Program

In its Discussion Paper, the Commission has recommended the extension of s.109 to the non-broadcast communication of “radio programs”, presumably to separate them from “on demand” services (which the Commission appears to consider, from para 16.96, ought to remain outside the scope of s.109).

Whilst we have no particular issue in principle with the intent of the Commission’s recommendation, we do consider that it will be important to clarify what is meant by the term “radio program” and, in particular, to confirm that Pandora’s service would fit within that concept and that such a program:

- Can be indeterminate in length (Pandora’s streams are theoretically unlimited in time – they continue until the user switches off);
- Can be personalised (ie it can be a one to one stream rather than a one to many as is typically the case with a radio broadcast);
- Does not require “pre-programming” (ie the program can be created simultaneously with its transmission); and
- Does not require a mix of music and other content (eg interviews, hosts etc) to qualify as a program

Scope of Broadcast

It is not clear in the Discussion Paper whether or not the Commission is recommending that the concept of “broadcast” be extended to include non-broadcast communications or whether they would be classed separately. We assume that it’s the latter, but in case this remains unclear, we would strongly urge the Commission to make it clear that non-broadcast communications (such as communication via the internet or a mobile network) does not fall within the definition of “broadcast”.

As the Commission is no doubt aware, the term “broadcast” is currently defined by reference to the Broadcasting Services Act – legislation which currently has no application to services such as that operated by Pandora. Accordingly, it will be very important to maintain that clear separation between traditional broadcast services (which are regulated by the Broadcasting Services Act) and non-broadcast services.

No Exclusion of Paid Services

The Pandora service is offered in two versions (ie two variants of the same offering) as explained above – a free, ad supported version and an ad free subscription version. Not surprisingly, the ad supported version, which is sufficient for the bulk of Pandora’s users, creates an incentive for some users to “upgrade” to the premium version to enjoy the service ad free and with higher audio quality. In all other respects however, the services are one and the same – the catalogue of available recordings is the same and the delivery mechanism and channel (ie via the internet) is the same.

As s.109 is currently worded, it excludes broadcasts transmitted for a fee (ie subscription broadcasters). It is unclear from the Commission’s recommendations whether or not they consider that that exception



should also extend to communications generally – we would strongly submit that it should not. In Pandora’s case (and in common with many internet streaming businesses), the paid version and the free, ad supported version are one and the same from a content perspective.

It would appear that the distinction between free and paid broadcast services in s.109 was introduced to effectively preclude subscription broadcasters (predominantly subscription television broadcasters) from being able to rely on s.109. We do not understand the rationale for that distinction. Both subscription and ad supported broadcasters are operating commercial businesses – the only difference appears to be the identity of the persons who deliver the revenues to the business, namely users or advertisers. Nonetheless, whatever the rationale, it appears to proceed on the basis that “free” broadcasters and subscription broadcasters are entirely different entities operating entirely different services (as they have historically been). However, in relation to online businesses such as Pandora, not only are the same companies likely to offer both free and paid services, they will typically be just different versions of the same service (as is the case with Pandora).

For this reason, we would strongly submit that the exclusion of subscription broadcasters from the operation of s.109 should not be extended to include subscription based communication services (at least not those that also operate versions of the service that would fall within s.109). We can certainly accept that the Copyright Tribunal may consider that a different remuneration model ought to apply for subscription based versions of a service. However, the fact that such arguments may be raised should not disentitle the service itself from the benefit of that section – all of the practical difficulties associated with negotiating a multiplicity of direct licences (as outlined in our initial submission) apply equally in the context of the subscription version of the service.

Copies Made for the Purposes of Communication

As we highlighted in our initial submission, services such as Pandora do not presently qualify for statutory protection for server copies of recordings to facilitate the exercise of its communication licence either under:

- Ss 47 and 107 (because we are not broadcasters – and even then, the right is limited in time); or
- Ss 43A/43B and 111A/111B (as they only relate to temporary copies, not permanent or semi-permanent copies).

In order to be able to stream recordings to users over the internet, server copies of all recordings need to be made. Such copying does not constitute any form of additional commercial use, but is instead the only way in which the recordings can be accessed and streamed in accordance with the commercially negotiated communication licence.

To date, we have successfully secured the necessary reproduction licences through voluntary licence arrangements. However, no licensee should be in a position where such necessary licences are at the commercial discretion of the collecting society granting the communication licence (or worse, withdrawn from that society’s mandate).

We would urge the Commission to recommend an amendment to one or more of the above sections to facilitate the creation of server copies of recordings created in pursuit of the exercise of a communication licence.

Voluntary Licensing

The Commission has raised an alternative proposal for consideration (in para 16.114 and following), namely the repeal of s.109 altogether thereby requiring the parties to engage in voluntary licensing negotiations.

For the reasons outlined in our initial submission, we would strongly urge the Commission against making such a recommendation. By way of summary, our reasons for supporting the retention of s.109 and its extension to online transmissions include:

- Legitimate concerns over the potential for rights owners to withdraw relevant mandates from the collecting society (PPCA) or the imposition of restrictions or limitations on such mandates which negate their applicability to our business or any similar business;
- The potential for Pandora and like businesses to negotiate potentially hundreds of direct licences with local rights owners if PPCA's mandates are withdrawn or limited – leaving aside the extraordinary administrative burden (and associated cost) that could be created, it may also lead to significant variations in:
 - The scope of rights offered and secured;
 - The terms upon which rights are secured; and
 - The reporting requirements to individual rights owners, such as to make the business simply unviable in this territory.
- The inability in some cases to identify or locate rights owners of particular recordings; and
- The lack of jurisdiction of the Copyright Tribunal in respect of individual negotiations – access to the Tribunal is currently only available in respect of collectively administered schemes.

In short, the balance that has been drawn between the rights of copyright owners (which, as noted previously, are typically not the creators) and users has, in the context of broadcasting, been resolved in the manner currently reflected in s.109 (since at least 1969 when the current Copyright Act was introduced). With respect, there is no evidence before the Commission which would suggest that the respective interests of rights owners and users has materially altered such as to require such a significant change as the repeal of s.109 or that such a repeal would create a more conducive environment for investment and innovation. In the absence of compelling evidence on either proposition, we would respectfully suggest that the Commission should not recommend repeal.

In this context, and whilst it is not of direct relevance to Pandora, we would strongly support the repeal of the remuneration caps discussed in paras 16.102 and following. The Commission has properly identified the arguments for repeal (as outlined by PPCA) and there appears to us to be no convincing basis for arguing their retention. Moreover, their retention provides the commercial radio sector with a significant competitive advantage over online radio services such as Pandora's (as we do not qualify for the remuneration caps and, as such, are required to pay market rates for undertaking essentially the same

activity). There is simply no justification for perpetuating this inequality, which is based solely on the distribution channel being utilised by the respective service (ie broadcast service bands v the internet). In short, a “level playing field” should be created, by either:

- The remuneration caps being repealed; or
- Their operation being extended to non-broadcast services such as that operated by Pandora.

We very much prefer and support the former approach, as it ensures a fair return to rights owners and creators alike. However, if there is to be no repeal, then market parity demands that online businesses providing the same or similar services should also receive the benefit of those caps.

Implementation of s.109 extension

Without seeking to suggest specific drafting changes, and assuming that the Commission is not persuaded that “on demand” services should also receive the benefit of s.109, we would suggest that a workable method of implementation would be as follows:

- A definition of a “relevant communication” be introduced into the section, being:
 - A broadcast (as per the current wording of the section); or
 - A communication of a radio program or TV program otherwise than by way of broadcast
- A definition of “radio program” be introduced as per our suggestion earlier in this submission – a corresponding definition of TV program could be drafted
- The section be amended to replace “broadcast” with “relevant communication”

Such amendments would, in our opinion, extend the operation of s.109 to online transmissions without the unintended consequences that the Commission was concerned may follow from a more significant series of amendments.

As noted earlier, we consider:

- That a corresponding section should be included in respect of musical works; and
- That appropriate amendments to permit server copies to be made,

and we would strongly urge the Commission to consider recommending such amendments to the Act.

COPYRIGHT TRIBUNAL

In our initial submission, we canvassed many concerns we have in respect of the current dispute resolution procedures (where licence fees and/or terms cannot be agreed) and, in particular, the current processes of the Copyright Tribunal that mitigate against a quick and commercially efficient determination. We don’t wish to repeat those concerns in this submission, but we do reiterate them.

As we noted in our prior submission, while the Copyright Tribunal can make binding decisions, the process can take many years to resolve and the Tribunal’s orders can be retroactively binding on those seeking to access or make use of copyright material. Potential entrants into the Australian market seeking to utilise copyright material can be required to commit themselves in advance to pay unknown



and unpredictable sums that may not be determined until years later, potentially exposing themselves to ruinous retroactive financial obligations.

For the reasons outlined in our previous submission, and to ensure the effective operation of the statutory schemes in a rapidly evolving business landscape in relation to online services, we would reiterate our previous suggestions that the Commission recommend amendments to the provisions of the Act relating to the operation of the Copyright Tribunal:

- To include specific provisions for the prospective establishment of licence fees (including through interim orders) applicable to the communication of sound recordings under the proposed extensions to s.109. We are aware of course that the Tribunal has power under s.160 of the Act to make interim orders. However, the provisions of s.109 (if extended to non-broadcast communications) arguably preclude the Tribunal from making an interim order that cannot be varied retrospectively by the final orders. Accordingly, perhaps s.109 should be amended to make it clear that the orders that the Tribunal may make include interim orders that can only be varied prospectively through final orders; and
- To require the Copyright Tribunal to ensure that determinations are completed within 2 years of the commencement of proceedings. Again, we understand that this may be regarded as an unusual proposal. However, we would suggest that proceedings before the Tribunal are unnecessarily protracted and are not as varied as proceedings before more traditional courts that can vary significantly in subject matter and complexity. If participants were clearly aware of time constraints, we strongly suspect that all parties would work within those constraints to their eventual collective benefit. As we highlighted in our initial submission, this is how the process is required to work in the U.S. and it does so with efficiency and efficacy.

CONCLUSION

Pandora commends the Committee for both its analysis of the complexities in the effective application of copyright law in the digital age and the clear and compelling recommendations for change contained within the Discussion Paper. In our opinion, the implementation of these proposed amendments will strongly encourage commercial development of the digital economy for the benefit of creators, rights owners and the public alike.

We would be happy to speak further to any of the proposals contained in this further submission.

Yours Sincerely,

Christopher S. Harrison

Christopher S. Harrison
Assistant General Counsel