

AUSTRALIAN LAW REFORM COMMISSION

**INQUIRY INTO
COPYRIGHT AND THE DIGITAL ECONOMY**

SUBMISSION BY PANDORA MEDIA, INC

NOVEMBER 2012

EXECUTIVE SUMMARY

Pandora Media Inc. (Pandora) is a U.S. based corporation that operates a customisable internet radio service under the brand name "Pandora". Following protracted negotiations with the relevant copyright collecting societies in Australia and New Zealand, the Pandora service was made available to users in both territories from mid-2012.

Pandora wishes to provide to the Commission information on its experiences in this territory and in the U.S. to assist the Commission in addressing some of the questions posed in this inquiry.

Specifically, in this submission, Pandora addresses the following questions raised by the Issues Paper:

- Q1 – in our view, the current absence of a statutory licence scheme which extends to online services (similar to the one which already applies for broadcasters under s109 of the Act) creates problems under each of paragraphs (a) – (d) of that question
- Q2 – we endorse some of the existing guiding principles of copyright law in Australia and submit that they should be applied to online services to facilitate easy access to copyright material for the benefit of users, licensees and creators (in the same way as the Act already provides for in respect of broadcast and public performance activities)
- Q3 – we submit that the statutory licences for reproductions made in the course of communication need to be extended to permanent server copies
- Q9 – given the increasingly blurred and artificial distinction between broadcast and online services, we support time shifting exemptions being extended to services such as those offered by Pandora (which, at a practical level, offer a service analogous to that offered by radio broadcasters, albeit on a personalised, one to one basis)
- Qs 40-43 – these are the main focus of our submission and we submit that there is a strong need for the existing statutory licence for broadcasting to be extended to personalised internet radio at the very least. We also submit that the processes of the Copyright Tribunal ought to be improved for the benefit of licensees and rights owners alike

INTRODUCTION

Background to Pandora

Pandora is a U.S. based corporation that operates a customisable internet radio service under the brand name "Pandora". It first commenced operations in the U.S. in 2005 and was originally available to users throughout the world. In 2007, access to the service was restricted to users located in the U.S. as the statutory licence under which Pandora operates in the U.S. does not extend to the transmission of the service beyond the U.S. border.

Following at times protracted and difficult negotiations with rights owners between January 2011 and June 2012, the Pandora service became available again to users in Australia and New Zealand on 29 June 2012. These territories were the first non-U.S. countries to receive the Pandora

service. Pandora intends to promote and publicise the launch of the service in Australia and New Zealand in late 2012, following the establishment of required local infrastructure.

Nature of Service

The Pandora service is delivered over the internet. It can be accessed via its website (www.pandora.com) and by any device that can connect to the internet, including mobile devices (such as iPhones, BlackBerrys and Android based mobile devices). Automakers Toyota, Honda, Nissan, GM, Ford, Hyundai, Kia, Mini, Mercedes and BMW have all publicly announced plans to integrate Pandora radio into their vehicles and over 50 models have already been rolled out with this capability in the U.S.

Pandora provides to users of its service one or more customised radio stations consisting of sound recordings, the contents of which are determined by Pandora based on a range of preferences that the user is able to express. Specifically, a user can express his or her preferences by providing one of the following inputs and, based on that selection, Pandora will stream to the user a radio station consisting of recordings determined by Pandora to be musically consistent with the preference indicated by the user. The available preference inputs are:

- The name of an artist whose music exemplifies the user's taste;
- The name of a particular recording (track) which exemplifies the user's taste; or
- A genre.

Importantly, no aspect of the service can be categorised as being "on demand" in the sense that the user can choose what artist or what track he or she wants to hear. Rather, Pandora's systems will generate a radio station of streamed recordings that it determines to be musically consistent with the preferences expressed by the listener.

The particular tracks streamed to a user are determined by Pandora's systems that (amongst other variables) compare the characteristics of a particular song or artist identified by a user against a catalogue of other recordings in Pandora's database. That database has been compiled by describing what has become known as the music genome of each recording. The creation of the music genome database requires the ongoing cataloguing of a complex series of characteristics in respect of each recording in its database. In order to create the music genome database, each recording must be assessed and analysed by a music specialist who is required to listen to that recording and describe it by reference to a series of hundreds of musical characteristics.

As such, the Pandora service is not the function of just a simple algorithm that, for example, merely suggests recordings based on popularity (eg concepts such as "people who liked this track, also liked that track"). Rather, it seeks to make a far more fundamental connection between individual recordings so that it significantly increases the likelihood that an individual user will like most, if not all, recordings streamed to him or her. Perhaps not surprisingly, the provision of the Pandora service is very labour intensive when compared to the operations of its competitors. However, that effort is reflected in its ongoing success in the U.S. It currently has over 175

million registered users in the U.S., 60 million of whom regularly use the service on a monthly basis. Similar proportionate levels of success are expected in Australia and New Zealand.

Distribution Channels

The Pandora service is delivered via the internet rather than the broadcasting services bands. It can be accessed via its website (www.pandora.com) and by any device that can connect to the internet, including mobile devices (such as iPhones, Blackberrys and Android based mobile devices). Automakers Toyota, GM, Ford, Hyundai, Mercedes and BMW have all publicly announced plans to integrate Pandora radio into their vehicles and some models have already begun to roll out with this capability in the U.S. Following the completion of local licence negotiations earlier this year (discussed below), Holden has already announced plans to launch integration of Pandora into its vehicles in Australia beginning in the first quarter of 2013.

Access to the Pandora service through mobile devices is typically undertaken via an “app” installed on that phone rather than accessing the website via a browser. Nonetheless, all access to the Pandora service is undertaken via the internet and streamed (ie communicated) to the relevant device. Beyond the buffering typically used for internet radio, no copies of recordings are stored (or are capable of being stored) on the user’s device.

Business Models

Pandora currently offers users in the U.S. two alternative versions of its service:

- Pandora – a free, ad supported service;
- Pandora One – an ad free, subscription based version of the service that has no limits on the amount of music per month that can be streamed. This service is currently offered for \$U.S.36/year for an annual subscription or \$U.S.4/month for a month to month subscription.

Pandora presently expects to offer both versions to Australian users. The free service is already available to Australian based users following the completion of licence negotiations with rights owner organisations (discussed below).

Use

In 2008, the Pandora app became one of the most widely downloaded apps in the U.S iTunes store (Apple). In January 2012, the Pandora app was the #2 all-time downloaded free iPhone app and the #7 all-time downloaded free iPad app, according to Apple. Not surprisingly, more than 75% of Pandora’s total listening hours occur via mobile and other non-traditional sources (eg in car consumer electronics devices). Today, Pandora has over 175 million registered users in the United States with more than 58 million active monthly users who account for over 1 billion listener hours per month. Pandora also has more than 70% market share of internet radio among the top 20 internet radio services in the U.S. Given that we provide a customisable service to our users, it’s instructive to note that our listeners have created more than 3.2 billion “stations” since Pandora’s launch in 2005.

Negotiation of Licences for Australia/NZ

In January 2011, Pandora determined that, having operated within the confines of the U.S. for some years, it was an opportune time to focus on international expansion of the Pandora service. It also determined that such international expansion would ideally commence with Australia.

As a first step, Pandora sought to negotiate licences with the Australian based collecting societies APRA/AMCOS (in respect of the rights in musical works) and PPCA (for sound recordings) on terms that it regarded as reasonable, in the sense that the licence fees payable to those organisations both:

- reflected the fair value of the recordings and associated musical works when used in the context of the Pandora service; and
- could reasonably be expected to permit the establishment and growth of a sustainable and profitable business in this country.

Negotiations were successfully concluded with APRA/AMCOS by mid- 2011 on terms that both Pandora and APRA/AMCOS regarded as reasonable. Pandora had expected to be operating in the Australian market early in the second half of calendar 2011.

Unfortunately, the negotiations with PPCA were far less productive. After 18 months of negotiation (including the referral of the matter to neutral evaluation in accordance with the terms of PPCA's dispute resolution policy), Pandora and PPCA were unable to agree terms. In particular, Pandora was unable to accept that the licence fees being sought by PPCA were commercially justifiable or sustainable.

Ultimately, Pandora had to obtain the necessary rights to stream its service to users in Australia from an analogous collecting society based in New Zealand. In order to do so, Pandora incorporated a New Zealand based subsidiary, established its base of operations (including the location of its servers) in New Zealand and streams its service from New Zealand (rather than from Australia as initially intended).

Pandora expects to be required to negotiate a licence directly with PPCA at the expiry of the current New Zealand based agreement – as such, matters raised in the inquiry are expected to be highly relevant to Pandora in coming years.

Issue Arising from the Negotiations

Pandora operates its service in the U.S. in accordance with the terms of a statutory licence pursuant to section 114 of the Copyright Act as amended by the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1995. (17 U.S.C. 114). Attached as **Appendix A** is an extract of the relevant legislation.

As such, the legal and rights framework in which Pandora operates in the U.S. is very different to that under which it operates in Australia and New Zealand where, presently, no statutory licence scheme operates with respect to online services. The extent and consequences of the differences between those legal frameworks with respect to online services works to impede the introduction into Australia of new and innovative business models, imposes unnecessary costs and inefficiencies upon those wanting to access or make use of copyright material and places Australia at a competitive disadvantage internationally.

Specifically:

- **Direct licensing not a practical alternative.** Although PPCA is not, strictly speaking, a monopoly provider in the sense that it exclusively controls the rights in the recordings within its catalogue, direct licences with rights owners are simply not practicable for a service like Pandora because:
 - Of the breadth of the catalogue of recordings contained within our database and which are used to create the individually personalised radio streams for each user. Negotiating direct licence agreements would, in our estimation, have required hundreds of separate licence negotiations (with no guarantee that terms could be reached in respect of all recordings within our current catalogue); and
 - Even allowing for the fact that undertaking hundreds of negotiations would have been highly impractical from a cost, time and resources perspective (especially for a relatively small market like Australia, at least when compared to the U.S.), in all likelihood there would have been a very wide variation in licence which would have been almost impossible to administer.

In short, given Australia's relatively small market size, a requirement to negotiate many different licence agreements would have been financially unworkable and Pandora would not have pursued a launch of the service in this territory.

- **Rights limitations.** The rights granted to PPCA by the labels they represent are voluntary (ie it's up to individual rights owners to determine whether or not to grant rights to PPCA and, if so, on what terms). Accordingly:
 - whilst it seems clear that PPCA's rights extend to the overwhelming majority of recordings, there are clearly recordings that they don't control (and which, they can't identify). That fact exposes any licensee in the position of Pandora with an unmanageable risk of inadvertent infringement of copyright;
 - the licence grants are subject to restrictions/conditions (including the imposition of artificial distinctions between broadcast, web based transmissions and mobile networks) which can significantly impact PPCA's ability to effectively license the service offered
- **Dispute resolution procedures unsatisfactory.** Copyright negotiations generally are not subject to quick, efficient processes for resolving disagreements on licence terms (incl licence fees). As became apparent to us when we examined options for trying to break the impasse on negotiations, the existing processes are either non-binding (in the case of PPCA's dispute resolution procedures) or cumbersome, costly and protracted (in the case of the Copyright Tribunal).

- While the Copyright Tribunal can make binding decisions, the process can take some 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.

QUESTIONS IN RESPECT OF WHICH SUBMISSIONS ARE MADE

QUESTION 1

The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- (b) affects the introduction of new or innovative business models;
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- (d) places Australia at a competitive disadvantage internationally

There are aspects of Pandora's licensing arrangements that are confidential. Nonetheless, what we've outlined in the introduction makes it clear that:

- the Australian launch of the service is running 12 months or more behind schedule due entirely to the protracted nature of the negotiations with PPCA;
- if an agreement had not been reached with the New Zealand copyright collecting society, Pandora's only options at that point would have been the abandonment of the plan for an Australian service, which option was being actively considered, or a lengthy and costly Copyright Tribunal application which would have, in all likelihood, delayed the commencement of the service in this country for some years.

Against that backdrop, we would proffer the following observations in respect of each of the sub-questions posed in the Issues Paper:

Paragraph (a)

Pandora does not seek, and has never sought, a licence that requires no payment or only nominal payment to rights holders. Pandora is committed to ensuring that rights owners (and, through them, songwriters and recording artists) are fairly remunerated for Pandora's use of their work. As such, the protracted delay in the launch of the service in this territory undeniably delayed income to songwriters and recording artists.

Further, had the agreement with the New Zealand copyright collecting society not been available to Pandora, that delay would have been inevitably extended for some years and/or possible

deferred indefinitely if we had determined that our resources could have been more effectively deployed in other territories.

Paragraph (b)

As mentioned above, the indefinite deferral of an Australian launch of the service was more than a theoretical possibility. In such an eventuality, Australian users would have been denied access to the world's market leading personalised radio service and rights owners/creators would have also lost considerable income.

Paragraph (c)

The lack of a statutory licence scheme to cover all forms of "online radio" (even in the form of the statutory defence to infringement which has been available to broadcasters since 1969 eg s109) creates an unnecessary and unjustified barrier to market entry for those creating and launching new innovative online services.

We should make it clear that there was no suggestion in our discussions with any of the collecting societies (including PPCA) that they were unwilling to grant Pandora a licence for this territory. As such, it was only a matter of the licence terms (and, in particular the appropriate licence fees) that were the subject of negotiation.

A statutory licence scheme would facilitate market entry for new services by ensuring:

- that all market entrants (and existing participants) have access to the same rights without artificial or unjustified reservations or conditions (many of which fail to take account of rapidly evolving business models and features as well as changes in technology, distribution platforms and models); and
- that licensees have the benefit of a comprehensive copyright licence that avoids the risk of inadvertent infringement of copyright (simply because, for example, the rights owner had not licensed their catalogue to the relevant collecting society or the rights owner could not be located or identified); and
- that the rights of creators and copyright owners are adequately protected by ensuring that they are and remain entitled to fair remuneration for licensed usage of their work.

A statutory licence scheme (or even a statutory defence in a form similar to that currently applying to broadcasters under s109 of the Act) would undoubtedly provide certainty and a "level playing field" for all market participants. However, such an approach still suffers from the significant commercial risk associated with the limited options available in respect of rate setting in the absence of agreement. This is particularly so in respect of new and emerging services where established markets and rates are often not available. In such cases, rights owners and licensees often have very differing views as to what constitutes fair remuneration and why.

Whilst existing statutory schemes provide access to the Copyright Tribunal to resolve such disputes, the potential licensee is at a significant commercial disadvantage because of the cost,

delay and uncertainty associated with such proceedings. Specifically, the outcome of Tribunal proceedings is, by its nature, uncertain. Whilst such uncertainty is of no real consequence for rights owners/collecting societies, licensees are in a very different position. Even if they had the benefit of a statutory licence (so that they weren't infringing), they are still necessarily required to make significant investment decisions in respect of the launch and development of their business in the market without any certainty as to whether they will be able to afford the fees eventually determined by the Tribunal as payable. For many if not most potential entrants, that risk represents an insuperable barrier to entry. Also as noted above, the current process can take some years to play out (and may even go on appeal and be delayed even further). In the rapidly evolving world of online services, a delay of some months (let alone years) can be commercially fatal. Based on a review of reported Copyright Tribunal decisions since 2003, no cases were determined in under two years and most took three or more years to be determined. Presently, a licensee in the position of Pandora, which strongly disputes the reasonableness and commercial sustainability of licence fees that are proposed, faces an almost impossible choice – it must either:

- accept the unreasonable terms to achieve certainty and avoid the delay and cost associated with Tribunal cases (and, at the same time, arguably creating some form of precedent to support the licence fees charged); or
- commence costly Tribunal proceedings and launch the service without delay – but risk ultimately being required to pay licence fees (including back payments) which are, from its perspective, commercially unsustainable; or
- commence costly Tribunal proceedings and delay the launch of the service until the Tribunal makes its determination – but risk the market having evolved to the point where the service is no longer commercially viable.

As such, an effective statutory licence scheme should also include provisions for the prospective establishment of licence fees (including through interim orders) applicable to the communication of sound recordings by online services. We note in passing that radio broadcasters have had the benefit of a long standing cap on licence fees that they can be ordered to pay by the Copyright Tribunal (see s152(8) of the Act). It may well be that some similar mechanism would be desirable in respect of the online sector to provide some certainty and guidance in the developing market for new services, such as those provided by Pandora.

Paragraph (d)

As mentioned in the introduction, Australia was scheduled to be the first territory outside the U.S. to be able to receive the Pandora service.

Although the likely financial return would ordinarily have mitigated against Australia being the first international territory to receive the Pandora service, we concluded that there were sound commercial reasons to give priority to this territory. These reasons included Australia's stable and relatively prosperous economic environment, its well developed copyright system and its demonstrated preparedness to quickly embrace new technologies and online services. As such, we had anticipated that we would have been able to successfully negotiate the necessary works

and recordings licences within a reasonably short period and launch the service in Australia in mid 2011.

As it happens, our goal of launching first in Australia was achieved despite our difficulties – but it seemed on many occasions that an indefinite deferral was a more likely outcome. Had we understood at the outset the challenge that we were likely to face in securing the necessary licences, we would not have given priority to an Australian launch.

In any event, and leaving Pandora's experiences to one side, it is clear that Australia obtains access to many international online services some years (or more) after their availability in other territories. Examples of services made available in Australia years after first launching in other territories include iTunes, Rdio and Spotify.

We would submit that the fact that the licensing procedures are no better in Australia than those in much larger markets mitigates against a decision by service providers to launch earlier in Australia – in other words, when a service operator chooses which territories to give priority to, it considers whether the territory is either a very compelling market opportunity or an easy market to enter. Given its population size, Australia will always struggle to be regarded as a top priority market opportunity for any online service. Further, for the reasons outlined above, its copyright licensing procedures are no better than those operating in much larger markets. Regrettably, those two facts combined result in Australia typically receiving access to such services much later than other developed nations.

If Australia wants to position itself at the vanguard of new online services, it needs to make its copyright licensing regime appreciably simpler and more streamlined so that the decision to launch in this territory is a simple decision from a commercial standpoint.

QUESTION 2

What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

Pandora considers it extremely important that copyright policy and law be developed within the framework of guiding principles. We understand, for example, that one of the guiding principles of the current Copyright Act is technological neutrality (see eg the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999). Further, one of the key recommendations of the recent Convergence Review was that '[t]he policy framework for communications in the converged environment should take a technology neutral approach that can adapt to new services, platforms and technologies'. Technological neutrality is a principle we strongly support particularly given the blurring of the distinctions (technological and otherwise) which used to distinguish broadcast activities from online activities and from mobile activities.

It is clear that, from at least 1969 in Australia, it was regarded as a guiding principle of copyright law (in so far as it related to music) that striking the right balance between those who create music and those who seek to communicate it to listeners required the introduction of compulsory licences for public performance and broadcast. These licences permit those wishing to exercise those rights to do so without the risk of infringement provided that they pay creators/rights owners a fair return in respect of such use.

As such, we do not consider that a new or different set of guiding principles needs to be developed. Rather, the existing principles need to be viewed together – in such circumstances, one is inevitably lead to the conclusion that the concept of statutory licences needs to be extended to online services. This is particularly so where such services are often global in nature and for which there is a strong demand from users all around the world. Copyright law needs to facilitate the rollout of such services, not create a barrier to their launch (which does not serve the interests of anyone).

In our view, all parties' interests are best served by a system that ensures:

- that users have ready access to new digital services as soon as possible;
- that artists/creators properly and appropriately benefit from them; and
- that licensees are in a position to launch such services without the unnecessary impediments that emerge from voluntary licensing schemes developed by rights holders which:
 - are not comprehensive;
 - contain inconsistent rights grants from individual rights owners; and
 - are often developed reactively and often fail to match the scope and features of new digital services (and the demands of users for access to such services).

QUESTION 3

What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

Sections 43A and 43B (works) and s111B (recordings) currently provide an exemption from the obligation to secure a licence in respect of temporary copies "made as a necessary part of a technical process of using a copy of the subject matter" (s111B). Of course, ss47 and 107 provide similar long standing exemptions for broadcasters, recognising that the reproduction is made for the purpose of exercising the key licensed right and that the licensee is not undertaking a separate act of commercial exploitation.

For the purposes of providing Pandora's service, it is necessary to make temporary copies in the process of making the communication of a recording to a user. However, in order to provide a viable service to users in Australia, it is also necessary to make permanent copies of the recordings available on servers located in New Zealand (and, eventually, Australia we expect). Such servers were initially intended to be located in Australia from the outset had an agreement been concluded with PPCA.

Pandora considers that it shouldn't be required to separately negotiate licences to make copies of recordings where it secures a licence to communicate the recordings and the copies are made purely for the purposes of exercising that licence. In particular, the statutory licence scheme under which Pandora operates in the U.S. expressly covers such server copies.

Pandora accordingly submits that, consistent with section 112 of the U.S. Copyright Act (17 U.S.C. 112, attached as **Appendix B**), the above provisions ought to be amended or augmented to cover all server copies necessarily made for the purpose of exercising a licensed communication right in respect of the relevant works and recordings ie not just limited to copies that are regarded as being temporary (eg contained in a user's cache).

QUESTION 9

The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

- (a) should it matter who makes the recording, if the recording is only for private or domestic use; and
- (b) should the exception apply to content made available using the internet or internet protocol television?

Time shifting (in this case, the ability to make a copy of a stream of recordings from Pandora's service for playing later, including offline) is not currently a part of the feature set offered by Pandora to its users.

However, Pandora submits that there is no rationale for drawing a distinction between traditional broadcast activities (where such copies made by users are permitted) and newer, more fully featured online services (in respect of which many users seek to exercise the same rights). Users have demonstrated a strong desire to make copies in such circumstances so that they can play (and replay) the copies at a later, more convenient time.

At present, Pandora's licence obligations require it to employ technological protection measures designed to prevent users making such copies. However, in our experience, this restriction is designed simply to allow rights owners to impose additional licence fees on licensees who wish to facilitate such copying by users. Of course, the provisions of s111 already apply to broadcast based services which means that broadcasters are able to facilitate and meet legitimate user demand for such functionality without having to seek a licence (and, no doubt, pay additional licence fees) to do so. If Pandora's submissions on the guiding principles are accepted, then we would strongly submit that the time shifting exemptions ought to be extended to licensed online services.

QUESTIONS 40-43

Question 40: What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Question 41: How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Question 42: Should the Copyright Act 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43: Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Rather than respond to each question individually in this section, and risk repetition and possible confusion, Pandora considers that an overarching response to these questions is more appropriate. In short, given the various matters raised above, Pandora strongly submits that either the existing statutory licence scheme for broadcasters be extended to online services or, alternatively, that a new scheme be created for such services. In addition, such a scheme should also create a streamlined process for determining disputes over licence fees.

Rationale

In our view, and consistent with the guiding principle of technological neutrality, no distinction can be usefully drawn between different modes of content delivery eg:

- Traditional terrestrial broadcasters;
- Internet delivery (which are increasingly extending to IPTV services and radio services that, for many users, are indistinguishable from traditional broadcast activities); and
- Mobile networks (with many internet services accessed via mobile devices, often through a combination of wifi and telecommunications networks).

Features of Proposed Statutory Scheme

In Pandora's submission, either the existing statutory licence schemes for broadcasters need to be extended to include online services or, alternatively, a new statutory licence scheme needs to be introduced to address the issues raised earlier in this submission. In our view, the statutory scheme should contain the following key features:

- It would cover all works and recordings the subject of copyright protection, regardless of whether or not the owner can be identified;
- Similar to the right afforded to broadcasters under existing legislation, licensees should have the right to the benefit of a licence without the need to secure approval

- of rights owners or their agents – rights owners should be limited to securing appropriate economic return;
- A collecting society should be designated/gazetted to collect licence fees and distribute to rights owners (and to hold unallocated earnings on behalf of owners to be identified in the future) similar to those that operate under Part V of the Act currently;
- The scheme needs to also include a significant reform of the Copyright Tribunal's current processes so that a more efficient and cost effective approach to the setting of licence fees can be achieved.

In relation to the last point, our primary concern is that there is no fixed process that ensures that a decision is delivered within a known time frame. We are aware that some matters before the Tribunal can take years before there is a hearing and the subsequent delivery of a determination can also take a considerable time to occur (on occasions more than a year after the conclusion of a hearing). In our view, this process compares unfavourably with that which applies in the U.S. for example where the Copyright Board is required to complete the hearing process and deliver its determination within 2 years of the commencement of proceedings. Such a scheme allows the parties to plan with certainty at least around the timing of the determination. This is particularly important for licensees (including Pandora) that need to make significant commercial decisions and forward plans concerning the development of their business.

Specifically, we submit that the Copyright Tribunal ought to be required under statute to ensure that determinations are completed within 2 years of the commencement of proceedings. This could be achieved by amending the Tribunal processes to include the following features:

- Introducing a clearly defined timetable for parties to complete all steps prior to hearing (eg for filing pleadings, witness statements etc);
- Requiring the Tribunal to enforce that timetable in a way that ensures that a hearing is held within, say, 18 months of initial filing (thereby allowing the Tribunal up to 6 months to consider the evidence and finalise its determination);
- Requiring the Tribunal, at the application of a licensee, to make an interim order on rates and terms that will enable the licensee (should it chose to do so) to commence operations with commercial certainty whilst the Tribunal process is conducted;
- Encouraging the parties to deliver comprehensive written submissions in advance of the hearing; and
- Potentially limiting the time available for the hearing (effectively forcing the parties to focus on concise submissions on the issues they consider most relevant).

CONCLUSION

Pandora commends the Commission on undertaking this inquiry. The Issues Paper raises very significant questions, the answers to which will directly impact upon the development of viable online services in Australia. From our perspective, it is vitally important that the copyright framework in this country be simplified so that it ceases to be a significant barrier to entry for new online services. Given Australia's relatively small market size, the Australian copyright

system needs to operate in a manner that encourages the rapid development and/or implementation of new online services in this country, something which we consider it does not presently do.

We would, of course, be delighted to provide any further information that the Commission may require in considering these important issues.



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Appendix A

Excerpts from the Copyright Law of the United States of America and related laws contained in Title 17 of the United States Code

(Please see <http://www.copyright.gov/title17/92chap1.html> for complete copy of Title 17)

§ 114 . Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) Limitations on Exclusive Right.—Notwithstanding the provisions of section 106(6)—

(1) Exempt transmissions and retransmissions.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission—

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are—

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories—

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522 (12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

(2) Statutory licensing of certain transmissions.—

The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—

(A)(i) the transmission is not part of an interactive service;

(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

(i) the transmission does not exceed the sound recording performance complement; and

(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998—

(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless—

(I) the broadcast station makes broadcast transmissions—

(aa) in digital format that regularly exceed the sound recording performance complement; or

(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement as provided in this clause;

(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

(iii) the transmission—

(I) is not part of an archived program of less than 5 hours duration;

(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

(III) is not part of a continuous program which is of less than 3 hours duration; or

(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration, except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.

(3) Licenses for transmissions by interactive services.—

(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided, however,* That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services; *Provided, however,* That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided,* That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if—

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph—

(i) a “licensor” shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

(ii) a “performing rights society” is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

(4) Rights not otherwise limited.—

(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

(B) Nothing in this section annuls or limits in any way—

(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

(iii) any other rights under any other clause of section 106, or remedies available under this title as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(e) Authority for Negotiations.—

(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided*, That each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: *Provided*, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

(f) Licenses for Certain Nonexempt Transmissions.

(1)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, except in the case of a different transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

(C) The procedures under subparagraphs (A) and (B) also shall be initiated pursuant to a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of transmission service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for subscription digital audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(2)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmission services and new subscription services specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, except in the case of a different transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the

different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Copyright Royalty Judges licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their⁴⁹ decision on economic, competitive and programming information presented by the parties, including—

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for eligible nonsubscription services and new subscription services, as the case may be, most

recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.

(4)(A) The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings. The notice and recordkeeping rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 shall remain in effect unless and until new regulations are promulgated by the Copyright Royalty Judges. If new regulations are promulgated under this subparagraph, the Copyright Royalty Judges shall take into account the substance and effect of the rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 and shall, to the extent practicable, avoid significant disruption of the functions of any designated agent authorized to collect and distribute royalty fees.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

(5)(A) Notwithstanding section 112(e) and the other provisions of this subsection, the receiving agent may enter into agreements for the reproduction and performance of sound recordings under section 112(e) and this section by any 1 or more commercial webcasters or noncommercial webcasters for a period of not more than 11 years beginning on January 1, 2005, that, once published in the Federal Register pursuant to subparagraph (B), shall be binding on all copyright owners of sound recordings and other persons entitled to payment under this section, in lieu of any determination by the Copyright Royalty Judges. Any such agreement for commercial webcasters may include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of

such use shall be kept and made available by commercial webcasters or noncommercial webcasters. The receiving agent shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement.

(B) The Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A). Such publication shall include a statement containing the substance of subparagraph (C). Such agreements shall not be included in the Code of Federal Regulations. Thereafter, the terms of such agreement shall be available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.

(C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.

(D) Nothing in the Webcaster Settlement Act of 2008, the Webcaster Settlement Act of 2009, or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Copyright Royalty Judges of May 1, 2007, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—

(i) the term “noncommercial webcaster” means a webcaster that—

(I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes;

(ii) the term "receiving agent" shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002; and

(iii) the term "webcaster" means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor.

(F) The authority to make settlements pursuant to subparagraph (A) shall expire at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009.

(g) Proceeds from Licensing of Transmissions.—

(1) Except in the case of a transmission licensed under a statutory license in accordance with subsection (f) of this section—

(A) a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

(2) An agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2 ½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

(C) 2 ½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

(3) A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than copyright owners and performers who have elected to receive royalties from another designated agent and have notified such nonprofit agent in writing of such election, the reasonable costs of such agent incurred after November 1, 1995, in—

(A) the administration of the collection, distribution, and calculation of the royalties;

(B) the settlement of disputes relating to the collection and calculation of the royalties; and

(C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(4) Notwithstanding paragraph (3), any designated agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such agent incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such agent a contractual relationship that specifies that such costs may be deducted from such royalty receipts.

(h) Licensing to Affiliates.—

(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

(A) an interactive service; or

(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(i) No Effect on Royalties for Underlying Works.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

(j) Definitions.—As used in this section, the following terms have the following meanings:

(1) An “affiliated entity” is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or nonvoting stock.

(2) An “archived program” is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.

(3) A “broadcast” transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

(4) A “continuous program” is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.

(5) A “digital audio transmission” is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

(6) An “eligible nonsubscription transmission” is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings,

including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(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 ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

(8) A “new subscription service” is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(9) A “nonsubscription” transmission is any transmission that is not a subscription transmission.

(10) A “preexisting satellite digital audio radio service” is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(11) A “preexisting subscription service” is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(12) A “retransmission” is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as provided in this section, a transmission qualifies as a “retransmission” only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

(13) The “sound recording performance complement” is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

(14) A “subscription” transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

(15) A “transmission” is either an initial transmission or a retransmission.

Appendix B

Excerpts from the Copyright Law of the United States of America and related laws contained in Title 17 of the United States Code

(Please see <http://www.copyright.gov/title17/92chap1.html> for complete copy of Title 17)

§ 112 . Limitations on exclusive rights: Ephemeral recordings

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114 (a) or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if—

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) Statutory License.—(1) A transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f) is entitled to a statutory license, under the conditions specified by this subsection, to make no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more), if the following conditions are satisfied:

(A) The phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it.

(B) The phonorecord is used solely for the transmitting organization's own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

(C) Unless preserved exclusively for purposes of archival preservation, the phonorecord is destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord.

(D) Phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the phonorecord under this subsection from a phonorecord lawfully made and acquired under the authority of the copyright owner.

(2) Notwithstanding any provision of the antitrust laws, any copyright owners of sound recordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(3) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for the activities specified by paragraph (1) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Copyright Royalty Judges licenses covering such activities with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(4) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (5), be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms under voluntary license agreements described in paragraphs (2) and (3). The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

(5) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.

(6)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

(7) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

(8) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under section 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if—

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(g) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.