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Copyright in the Digital Economy (IP 42)

SBS Submission

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A story still growing: We thought six billion was a lot of stories to tell... until the world population officially clocked seven billion, and we re-set our sights on a brand new number. Seven billion stories (and counting) might seem like a big ask, but if anyone's up to the task, it's SBS, the world's most multicultural broadcaster, attuned to the diverse needs of a growing nation.

Seven Billion Stories and counting...



SBS is pleased to make a submission to the Australian Law Reform Commission issues paper 42 “Copyright in the Digital Economy”.

Background to this submission

SBS is Australia’s national free to air multicultural public broadcaster. Under its Charter, provided in the *Special Broadcasting Service Act* (1991), the principle function of SBS is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians and, in doing so, reflect Australia’s multicultural society.

SBS has broadcast on radio since 1975 and on television since 1980. Since 1 July 2009 SBS has operated its digital multichannel SBS TWO focussing on news, documentaries, film and entertainment programs from around the world and in languages other than English. In July 2012 NITV joined SBS. NITV will launch as a terrestrial free-to-air national channel featuring Indigenous content on 12 December 2012.

SBS also operates two subscription television channels, World Movies and STUDIO, and distributes programs around the world through its Distribution division.

In addition to its television and radio services SBS extends its reach to all Australians on new platforms and via social media. This includes SBS’s popular SBS ON DEMAND video player “catchup” service (available on a number of platforms including game consoles, smart TVs and as a mobile app) and other digital services such as streaming of radio programs, numerous podcast and RSS services, a YouTube channel and popular apps such as SBS World News and SBS In-Language. SBS also hosts many websites, including sports sites Cycling Central and The World Game.

SBS’s Charter requires it to make use of Australia’s diverse creative resources, which it does with a combination of in-house, commissioned and acquired content. Consequently, SBS is both a copyright owner and a user of copyright material under licence and through various important copyright exceptions such as fair dealing.

SBS supports a balanced copyright regime which encourages innovation and investment while also maximising public access to informative, educational and entertaining content on fair terms.



Response to Principles of Issues Paper

SBS is generally supportive of the Principles expressed in relation to the Issues Paper and would welcome simplification and clarification of copyright principles where appropriate. In particular SBS supports Principle 4: Promoting fair access to and wide dissemination of content. A key guiding principle for SBS itself is to ensure fair and wide access to SBS programming in the public interest.

SBS response to questions

The Issues Paper covers a very wide range of issues in what is a fast changing digital environment. This submission focuses on several key areas of interest to SBS. SBS would welcome the opportunity to comment on the Discussion Paper and other submissions and may wish to amend or expand its position at these subsequent stages of the review. SBS would also be willing to engage in round table discussions or present orally as required.

Summary of key issues for SBS

1. s 111 Copying of broadcasts for personal use
2. Retransmission of free to air broadcasts
3. Orphan works
4. Fair dealing
5. Contracting out of copyright

Key Issues for SBS

1. s 111 Copying of broadcasts for personal use

Question 9 The time-shifting exception in s 111 of the Copyright Act 1968 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?

SBS supports the right of users to make personal copies of broadcasts for time shifting purposes. SBS also acknowledges overseas developments in relation to cloud storage services and the need for Australia to keep up with international innovations. However, SBS has concerns that commercial providers should not be allowed to build business models on the private copying exception without fair remuneration. Nor should services be permitted that substantially undermine licensing of rights in valuable television broadcast content such as to mobile operators.

SBS accepts that the interpretation of the existing provision in the Full Federal Court in the *Optus TV Now* case¹ has thrown doubt on the scope of the exception, particularly in relation

¹ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012).



to whether the streaming of a program made “by” a user to himself or herself via the internet or an IPTV service would be an infringement of copyright.

At a minimum SBS submits that if any extension of the exception is to be countenanced to allow commercial cloud providers to build subscription, cloud storage, IPTV delivery or other business models around the private copying exception, such commercial activities should be the subject of fair remuneration to copyright owners (eg along the lines of the retransmission scheme operated by Screenrights). SBS submits that a statutory licence would be appropriate to ensure the clearance of underlying rights on behalf of such third parties, on just terms.

SBS would also be prepared to consider an amendment which would make the exception technology neutral and permit private copying of SBS material other than broadcasts, such as online native video material. However, any such extension should not permit the user to break technological protection measures in order to access such material (such as hacking a website to download video intended to be offered only as a viewable stream).

As these issues have only recently been the subject of the High Court’s refusal of special leave to appeal in the *Optus TV Now* case², and given the rapidly changing nature of technology and recent legal decisions overseas in this area,³ SBS would welcome the opportunity to review other submissions, any proposals for redrafting of the section and the Discussion Paper before finally determining its view on this issue.

2. Retransmission of free to air broadcasts

Question 35 Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

SBS considers that this question involves complex communication and competition issues and should be dealt with in a more appropriate forum as indicated at Q 38. However, for the purposes of this review SBS considers that the *Copyright Act* should be amended so as to provide for direct remuneration of SBS’s broadcast signal, and to strengthen protections against uses of SBS’s broadcast signal by third parties which may affect the integrity of its presentation to viewers.

Question 36 Removal of exception to Part VC retransmission scheme excluding free-to-air broadcasts “over the internet”.

Subject to our other comments on retransmission, SBS supports the removal of the “over the internet” exception⁴ to the Screenrights Part VC retransmission scheme so as to ensure certainty and so as to allow a technologically neutral scheme to apply.

² *SingTel Optus Pty Ltd & Anor v Australian Rugby Football League Limited & Ors* [2012] HCATrans 214 (7 September 2012).

³ *American Broadcasting Companies, Inc et al v Aereo, Inc; WNet et al v Aereo, Inc* No.12 Civ. 1540 (AJN), 12 Civ. 1543, (SDNY, 11 July 2012); *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] SGCA 43.

⁴ *Copyright Act*, s135ZZJA.



SBS considers that a geo-blocking requirement would be implied by the jurisdictional limits of the scheme to the Australian territory.

Question 38 Is this Inquiry the appropriate forum for considering these questions?

SBS submits that a more appropriate forum for considering these questions is in a forum which focuses on communications and competition policy in the media sector.

3. Orphan Works

Questions 23-24

SBS has been recognised as a Key Cultural Institution⁵ for the purposes of the *Copyright Act* on the basis that it holds a valuable and unique collection of publically funded broadcast and other material created in accordance with its Charter.

SBS would like to maximise access to and reuse of these valuable archives in the public interest.

Current legal position

SBS notes that in other territories, such as the EU, a need has been recognised for orphan works reform to ensure public access to valuable cultural material.⁶

Under current Australian law, if SBS uses or licenses an “orphan work” from its archives SBS is exposed at any time within the statutory limitation period to a claim for copyright infringement and potentially to indemnities to third party distributors or other parties.

SBS submits that the current law does not sufficiently support the public interest in access to valuable cultural archives and other copyright material.

Current SBS policy regarding orphan works

Despite the inadequacies of the current law SBS has recognised a need to provide access to its cultural archives and has taken steps to do so as far as possible.

In February 2011 SBS launched its orphan works policy:

<http://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-Orphan-Works-1.0-February-2011>

⁵ *Copyright Amendment Regulations 2011 (No. 1)* made under *Copyright Act 1968* s 249(1).

⁶ See eg European Union Directive on Orphan Works: Directive 2012/28/EU.



Since its public launch in February 2011,⁷ SBS has received informal feedback supporting the policy from a range of copyright owner and user organisations. SBS has not received any negative feedback or any suggestions for changes to the policy.

In addition to its investment in stakeholder relations, SBS is obliged to comply with the law and employ risk management principles in accordance with Commonwealth government guidelines. In order to implement a policy which would maximise public access to SBS's archives within existing legal restrictions, SBS developed an internal risk assessment and management process for the use of orphan works, summarised in the Annexure to this submission.

However, due to the lack of any legal defence or remedial relief, SBS uses only material assessed as "low risk". SBS has used very little material under this policy to date.

Suggestions for orphan works reform

Limitations on remedial relief

At a minimum SBS supports remedial relief where an orphan work has been used in good faith after a reasonable search.

For example, the remedy of account of profits⁸ should not be available for the use of an underlying work or subject matter included in another work or subject matter (such as archival footage included in a new documentary program). An account of profits (eg, a share of profits in a program when distributed), would almost never form part of a licensing negotiation with a rights-holder in an underlying work in a program. Rather, a reasonable licence fee would be offered. An account of profits is therefore an inappropriate and punitive remedy in relation to use of an orphan work in good faith in a new creative work.

SBS also supports the removal of additional "flagrancy" damages⁹ as an available head of damages in relation to good faith use of orphan works. Flagrancy damages are rarely awarded by courts but are not infrequently cited in letters of demand relating to copyright infringements. However, they should not be arguable where a user has acted in good faith to use an orphan work. To remove flagrancy damages would be to recognise that a good faith use of an orphan work after a reasonable search is not a "flagrant" act.

SBS is of the view that such limitations would be likely to result in increased public access to archival material particularly that held by cultural institutions applying risk management.

The introduction of such reforms may also lead to private insurance becoming more available for such risks. Due perhaps in part to existing uncertainties around the lack of any defence, orphan works are generally uninsurable by third party "E&O" or errors and omissions insurers for the film and television industry.

⁷ "Orphan Works: Solutions for Australia?" Workshop, 8 February 2011, Cyberspace Law and Policy Centre, University of New South Wales: <http://www.cyberlawcentre.org/orphan/index.htm>

⁸ *Copyright Act*, s115(2).

⁹ *Copyright Act*, s 115(4).



Industry standards

SBS is of the view that it is important for such legal reforms to stimulate reference to, and therefore the considered development of, *industry specific* standards for what is reasonable search.

For example, what is a reasonable search in relation to one type of material will not necessarily be relevant or sufficient in relation to another. Certain industries or industry bodies may have or may develop minimum routine searches which should be done of particular databases or sources.

SBS notes that the moral rights provisions of the *Copyright Act* provide for reference to reasonableness in accordance with industry practice.¹⁰ These provisions have been the subject of very little litigation since their introduction many years ago.

SBS would also support provisions referencing industry standards in relation to “good faith” or “reasonable” use. These could include the taking of steps to avoid moral rights infringements, as the SBS policy provides, or to put in place industry standard measures to prevent the unauthorised use of the material by third parties.

SBS considers that the introduction of reference to industry standards may alleviate concerns that may be specific to particular creative industries.

Orphan works statutory scheme

SBS would also be prepared to consider the working of a statutory scheme for the use of orphan works, but notes that such a scheme would need to be efficient and tailored to particular industry needs, and should be in addition to the remedial relief suggested above.

4. Fair dealing

Questions 45-47

The review queries whether an open ended fair use defence should be introduced into Australia.

SBS relies strongly on fair dealing exceptions in its news reporting and other programming activities on all platforms. SBS considers that the current fair dealing exceptions for reporting the news, criticism and review and parody or satire are clear and well established and would not support any change to these provisions.

SBS would support additional fair dealing rights which could be framed within a fair use exception, and which may cover additional fair uses not covered within the existing exception. Such a use could include a use of copyright material in the public interest where an existing provision did not apply.

¹⁰ See eg *Copyright Act*, ss 195AR(2),(3), 195AS(2)(3).



5. Contracting out of copyright exceptions

Questions 54-55

SBS submits that copyright exceptions under the *Copyright Act* should not be overridden by contract. In many cases, it is difficult or impossible to renegotiate contractual terms to allow fair dealings as permitted under Australian law. This disturbs the balance of copyright law intended by Parliament.

This reform if introduced would mean for example that SBS is free to do fair dealings with licensed feeds of programs just as non-rightsholders do, or to make fair dealings with material which is otherwise the subject of restrictive online “click licences”.

In SBS’s view this is a long overdue reform to the *Copyright Act* which will create certainty and a level playing field in relation to use of copyright material in the public interest.

ANNEXURE

Key principles of SBS's risk management approach to use of orphan works

Definition of orphan work

In the absence of any definition in the *Copyright Act*, SBS applies the following definition of “orphan works”:

“copyright material for which the rightsholder cannot be identified, or is identifiable but cannot be found, after a reasonable good faith search by the user.”

Reasonable search

SBS considers that “reasonable good faith search” rather than “diligent search” is an appropriate concept reflecting the balance between the public and private interests in the use of orphan works.

Under SBS's policy, an “orphan work” cannot be used unless the reasonable good faith search has been carried out, and has been documented internally by SBS Rights Management. A copy of the search record must be given to the owner if the owner comes forward.

Await claim

If a fee would have been appropriate as part of a licence negotiation to use the material, the cost centre manager for the project must put aside an “await claim” representing a fair fee for the anticipated use. This recognises the concept of an orphan work as a reluctantly delayed negotiation – not a free for all in the absence of the owner.

Moral rights issues

As the owner is not present to consent to the use, SBS undertakes to take care to respect the moral rights of the author for example by making clear if any editing has occurred.

Risk assessment

Despite the above the orphan work cannot be used unless the use is assessed as “low risk”.

SBS applies a risk management matrix commonly used by Commonwealth agencies for the general assessment and management of risks.

SBS has determined that, due to the lack of an orphan works defence, the orphan work and its use must be assessed as “low risk”: that is, as **likelihood of occurring: unlikely and consequences: low**.



For the purposes of **likelihood: unlikely** it can generally be assumed that as a reasonable and good faith search has been carried out, this criteria has been fulfilled.

However, a significant amount of material is unable to be used under the risk policy because of the requirement for risk assessment to be: **consequences: low**

This risk assessment is undertaken by SBS Legal and depends on factors such as the type of material, its commercial value, the original fee if any which was paid for a former authorised use, whether SBS may be forced to edit a program or recall a DVD, whether SBS has warranted the clearance to any third parties under a contractual indemnity, and so on.

A low risk example of content might be a family photograph, originally provided by a documentary interviewee for free, which is probably out of copyright.

A high risk example of content may be music related footage, or news agency footage. However, in addition to risk assessment based on the type of material, the risk multiplies according to the number of third parties to whom SBS has had to warrant the material is not going to be subject to a copyright infringement claim.

Ambit claim risk of copyright infringement can often mean risk is not “low”

Where a negotiation takes place against the background of an unauthorised use without the normative influence of an arguable defence, SBS is also potentially vulnerable to claims which would go well beyond a reasonable licence fee. In providing advice, the “ambit claim” risk is sometimes the key factor which might deny a low risk assessment.

For example, in addition to differences of opinion as to what a reasonable licence fee is, exposure can be significantly boosted by claims for account of profits,¹¹ or “flagrancy damages”,¹² even though these claims may not ultimately succeed if the matter were to go to trial (as the vast majority of copyright disputes do not).

The uncertainty created by the “ambit claim” risk can be particularly acute in relation to DVD releases or third party distribution warranties, and can often be off-putting to SBS cost centre managers who face an uncapped liability of this kind. SBS may also expend substantial legal fees obtaining external advice in relation to dispute management where a claim arises without an arguable defence.

¹¹ Copyright Act s 115(2).

¹² Copyright Act s 115(4).