



SBS RESPONSE TO

PRODUCTIVITY COMMISSION DRAFT REPORT - INTELLECTUAL PROPERTY ARRANGEMENTS

3 JUNE 2016

1. Introduction

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

SBS previously made a submission to the Commission's Inquiry into Intellectual Property Arrangements in 2015, and welcomes the opportunity to now respond to the Intellectual Property Arrangements – Draft Report. This submission is concerned with copyright, and expands on the points raised by SBS in its first submission to the Commission.

As noted in the previous submission, SBS's Charter requires it to make use of Australia's diverse creative resources. SBS creates unique content across a range of platforms, including broadcast television, radio, online, social media and SBS apps. SBS offerings include in-house productions, commissioned productions and stories, as well as acquired content. Consequently, SBS is both a copyright owner and a user of copyright material under licence and through various vital 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. SBS is concerned that some of the recommendations made by the Commission will decrease the economic incentives vital to a balanced copyright regime.

2. Executive Summary

SBS supports a flexible and fit for purpose copyright regime which enables it to deliver its Charter content.

SBS is happy to provide further information to the Commission, particularly in response to the request for further information under 5.1 - 'Contracting out of copyright'. In summary:

- SBS supports the retention of the fair dealing exceptions.
- SBS believes that any new exception should not affect the existing fair dealing exceptions.
- SBS supports a fair use exception which would replace technology specific exceptions in the Act, and provide access to orphan works.
- SBS believes the fair use exception recommended by the Commission could adversely affect its ability to derive economic benefit from the use of its copyright material.
- SBS cautions against adopting the American jurisprudence on fair use, particularly as it relates to transformative use.
- SBS opposes the recommendation to legalise circumvention of geoblocks.
- SBS supports amendments to prevent contracting out of fair dealing exceptions and is happy to provide the Commission with further evidence of the extent of this issue.

3. Fair Dealing v Fair Use

Draft Recommendation 5.3: The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

a. Fair Dealing

SBS does not support the repeal of the fair dealing regime. SBS believes that the fair dealing exceptions can work alongside other statutory exceptions such as fair use.

SBS strongly supports the retention of the fair dealing exceptions to copyright infringement set out in the Copyright Act. SBS's News and Current Affairs and Sports divisions rely extensively on these exceptions to deliver core Charter content to the SBS audience across a wide range of platforms. SBS considers that the Copyright Act fair dealing exceptions for reporting the news, criticism and review, and parody and satire are clear and well established public interest exceptions to copyright infringement. These public interest exceptions should be maintained under Australian law.

Although fair use offers an ostensibly broader exception to copyright infringement, it can in practice limit the ability of broadcasters to report on sports news. The Australian fair dealing regime allows media organisations that are non-rightsholders to publish limited footage from sporting events online when reporting the news. However in the United States, the fair use regime provides less certainty and clarity for non-rightsholders in the same circumstances. SBS, like other media organisations, relies increasingly on third party social media platforms to share its content and thereby reach a broader audience. The complex relationship between fair use, terms and conditions of social media platforms and contractual rights has proved difficult to manage in the United States¹.

Without the retention of the current fair dealing regime, SBS anticipates similar challenges may arise in Australia. We fully expect media, sporting and other bodies to push the limits of what may constitute a 'fair use' under a new regime. There will inevitably be a period of litigation as the boundaries of the law are tested. Compared to the United States, Australia has a low rate of copyright litigation. If this trend continues, the uncertainty of a proposed fair use exception may remain unclear for some time. This may curtail SBS's ability to deliver its Charter content on existing and new platforms. As outlined in our previous submission, SBS has had recurring issues in reporting sports news on social media services already. We expect this problem to grow in the event that fair dealing is replaced with fair use.

b. Fair use

SBS nevertheless acknowledges that an effective copyright system must be adaptable and responsive to changes in industry and public expectations. SBS believes that a limited fair use exception could improve access to important copyright material in Australia. However, SBS is concerned that the broad fair use recommendation made by the Commission could significantly undermine legitimate business models.

¹ <http://www.ibtimes.com/fair-use-or-infringement-nfl-sports-gif-fight-raises-legal-questions-deadspin-sb-2141415>

Additionally, SBS submits that copyright reform should focus not only on the economic impact of the law, but also on the public interest and cultural value of the use of copyright material. SBS outlines below some considerations for a balanced fair use regime in Australia.

c. *Orphan works*

SBS supports the recommendation by the Commission for a fair use regime which would provide an important new exception to infringement for orphan works.

SBS has a strong reputation for broadcasting documentaries of national and international significance, including *Go Back to Where You Came From*, *Struggle Street*, *The Surgery Ship* and *First Australians*. The national Indigenous broadcaster NITV has been part of SBS since 2012. NITV broadcasts a range of important Indigenous stories, such as *Songlines on Screen* and *Innocence Betrayed*, the story of the search for justice for the Bowraville murder victims.

Many SBS and NITV programs and stories use third party materials, including orphan works. A fair use exception for orphan works may assist us in creating more Charter content by facilitating access to old archival footage to share with Australian audiences.

SBS has had a best practice-setting orphan works policy for the past 5 years². Nevertheless, without a legal regime in place, SBS's policy on the use of orphan works is essentially no more than a risk management exercise, as the current copyright regime in Australia still limits SBS's use of orphan works. SBS has, in some instances, not proceeded with plans for documentaries due to the volume of orphan works required to make the project viable. The risk in using these works, and the resources required to comply with the policy, can be prohibitive. Because of these risk factors, orphan works often remain unexploited, and Australian audiences are denied the opportunity to engage with important national stories.

SBS welcomes reform in Australian copyright law which would provide a framework for the effective use of orphan works.

² <http://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-orphan-works-1.0-February-2011>

d. *Commercially unavailable content – ‘works not being supplied commercially by rights holders’*

SBS does not support the Commission’s recommendation to include commercial availability of copyright material as a fairness factor in determining fair use.

The Commission has recommended that the commercial availability of copyright material be included as a ‘fairness’ factor in determining fair use. SBS is concerned that this recommendation could undermine the legitimate business models and strategies of SBS and other media organisations.

A legislative change is not required when the market has responded to the issue of commercial availability. The Commission’s recommendation seeks to enforce market changes by undermining media organisations’ ability to commercialise valuable content.

As many initial submissions to the Commission noted, the media industry in Australia is currently undergoing a significant period of upheaval and change. In 2016, Australian users have access to more content on more platforms than ever before. New players such as Stan and Netflix have entered the market in the last 24 months. These streaming video on demand services have serviced a need for audiences to consume large quantities of content in ways that traditional linear programming did not allow. In order to continue to engage with our audiences, broadcasters such as SBS have been forced to adapt to these new market conditions.

SBS On Demand, SBS’s free streaming video on demand and catch up television service, has been operating for 5 years and SBS has worked to develop its on demand repertoire. SBS On Demand provides audiences with free, advertisement-supported feature films, television shows, documentaries and other content, including digital only content and webisodes such as *The Weekend Shift*, a satirical sitcom about the SBS news room. In 2015, SBS added over 600 movies and 300 documentaries to SBS On Demand.

SBS On Demand is now available on more platforms than ever before. Since 2015, it has been available on 22 platforms - more platforms than any other Australian broadcaster. New set top box technologies such as Apple TV and Fetch contribute to enabling SBS On Demand to be accessed by the audience on an increasingly wide array of devices. Between January and June 2015, SBS On Demand achieved an average monthly unique audience of 437,000, up 26% from the same period in 2014.

The existing 'windowing' or holdback strategies used by broadcasters to strategically release content have adapted to meet audience demand. Like many other broadcasters, SBS now screens its most in demand programming on the same date as its overseas premiere. For example, SBS screens new episodes of the television show *Orphan Black* on SBS On Demand on the same date as the show's release on BBC America in the United States. SBS has also responded to the growing trend towards social media video streaming, premiering its commissioned drama *The Family Law* on Facebook in December 2015.

While the television industry was initially slow to adapt to these changes, audience demands, new competition and increasing piracy have provided incentives for change. SBS has adapted to meet the market demand, and believes that the Commission's proposed introduction of 'commercial availability' as a fairness factor in determining fair use could jeopardise SBS's ability to strategically commercialise its content.

e. *Technology-specific exceptions*

SBS supports a more flexible and less technology specific model for copyright law.

SBS acknowledges that some exceptions to copyright infringement under the Copyright Act are too technology specific. SBS believes that Australia's copyright system should be adaptable and technology-agnostic. In particular, SBS notes that the private copyright exceptions in sections 109A, 110A and 111 are already outdated, or likely to become outdated in the near distant future. SBS supports a fair use exception which can respond to changing market conditions and technologies. Any such exception should mirror the spirit of the existing exceptions, permitting private use of content.

SBS cautions against adopting a fair use exception that could incentivize non-rightsholders to undermine the economic value inherent in rights. SBS believes the decision in the Optus TV Now case³ has created an incentive to rightsholders both to purchase valuable content (in the confidence that non-rightsholders cannot undermine the return on investment in those rights) and to adapt their platforms in response to user demands. This decision should provide guidance to the Commission in making recommendations in relation to private use.

³ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

f. Transformative use

SBS is concerned about the recommendations made by the Commission with respect to transformative use.

SBS acknowledges that a fair use exception can offer legitimacy to uses of content that do not interfere with the commercial interests of the rightsholder. SBS agrees with the Commission that copyright exceptions should be able to adapt to new circumstances and technologies. However, SBS is concerned about the way in which the Commission's proposed fairness factors may be interpreted in Australia. The Commission has itself acknowledged that there will be a period of uncertainty after any fair use regime is implemented, during which time Australia should draw guidance from American case law⁴. SBS is concerned about the transformative use aspect of fair use which has, in the opinion of SBS, been too liberally applied in the American jurisdiction, as exemplified in *Cariou v Prince*⁵. Precedents such as this clearly reduce the economic incentives of the original artist and others to create new works, in circumstances where their work can be so easily and legally copied with minimal transformation and without any financial reward to the original artist. In this context, a fair use exception would in fact interfere with the commercial interests of the rightsholder, and in so doing act as a disincentive against the creation of new works.

g. Educational use

SBS does not support the inclusion of educational use as an illustrative purpose of fair use where such use would be covered by the existing statutory licences.

SBS recognises the value of providing a list of illustrative purposes of fair use in order to reduce the inherent uncertainty of any fair use regime. However, SBS does not agree with the Commission's proposed broad inclusion of education on that list. Rather, it supports a statutory licensing scheme as the more appropriate means by which to regulate educational use of copyright material.

The educational statutory licensing scheme under Part VA and VB of the Copyright Act allows educational institutions to use copyright material without obtaining permission from individual rightsholders. It also

⁴ *Productivity Commission, Intellectual Property Arrangements, Draft Report* at page 18.

⁵ *Cariou v Prince* 714 F. 3d 694 (2013).

provides a means for rightsholders to earn valuable income from the educational use of their copyright material. The administration of these statutory licences by Screenrights and Copyright Agency Ltd, respectively, ensures that licence fees are collected and distributed to rightsholders in a reasonably efficient manner within the realm of what is practicable.

Approximately one of third of SBS's screen content is local Australian content. SBS owns a copyright share in most of its original commissioned productions. It relies on, and benefits significantly from, licence fees generated through the current educational statutory licences in respect of such content. SBS reinvests the revenue generated through education statutory licensing towards commissioning and acquiring further diverse screen content to share with Australians. Such revenue, and its flow-on benefits in relation to the creation of new copyright material, would cease to exist under a fair use regime that encompasses education in a broad-brush manner. In SBS's view, this outcome is detrimental to both SBS (in its endeavors to fulfill its Charter) and the broader Australian community.

SBS acknowledges that the administrative arrangements in the Copyright Act under which the educational statutory licensing regime operates, including the record-keeping scheme, could be further simplified and less prescriptive, as recommended by the ALRC⁶. SBS also agrees that certain unremunerated exceptions on which educational institutions wish to rely, such as technical copying, could be incorporated into a limited fair use exception, provided that the scope and function of that exception are clearly stated.

h. Public interest

SBS recommends that the Commission consider adding public interest as a factor to be considered in any recommended fair use exception.

SBS previously submitted that it would support the inclusion of a 'public interest' test under fair use in response to the Commission's Inquiry into Intellectual Property Arrangements in 2015. SBS is disappointed that the Commission has not considered public interest as factor in recommending a fair use exception for

⁶ Australian Law Reform Commission 'Copyright and the Digital Economy: Final Report', November 2013 at page 200, available at <http://www.alrc.gov.au/publications/copyright-report-122>.

copyright infringement. We note that the ALRC considered public interest a vital part of its reasoning when recommending the introduction of fair use⁷.

There are some instances where the fairness factors recommended by the Commission may not be met, but a public interest in using the material may nevertheless be desirable. SBS previously raised the example of CCTV footage of the 2015 Paris café terror attacks. SBS considers that the broadcast of important international news events like this are within the public interest. However, in that case, a purported rightsholder of the footage alleged copyright infringement on the part of multiple Australian television broadcasters that had used the footage. In other situations, SBS has been contacted by rightsholders requesting extraordinarily high sums of money to use their content. For stories of public interest, SBS may also want to use more of the material than is permitted by the current fair dealing regime. A fair use exception based on public interest would permit the use of such content in circumstances where the general public would benefit from the information contained in such content.

4. Moral Rights

SBS strongly supports the retention of the moral rights regime in the Copyright Act.

The Productivity Commission states that “moral rights... were introduced despite little evidence of a policy problem⁸ and that “the expansion in scope has no rationale.”⁹

Despite being a signatory to the Berne Convention for the Protection of Literary and Artistic Works since 14 April 1928, Australia did not introduce Article 6b, relating to moral rights, until 2000.

Article 6b states:

Independently of their copyright or economic rights authors should enjoy the rights of paternity and integrity to their works, and the right to object to any distortion, mutilation or other modification of their work that would be prejudicial to their honour or reputation.

⁷ ALRC Report at page 100.

⁸ Productivity Commission Draft Report at page 121.

⁹ ALRC Report at page 93.

Other major economies to have introduced moral rights regimes include Canada, the United Kingdom and China.

SBS previously submitted that moral rights underpin economic rights: recognition of the author of a work ensures respect for the integrity of the work and its ongoing attribution. Correct attribution enables efficient downstream licensing and ensures the author's remuneration.

SBS further submits that there are economic benefits that arise from moral rights, even if such benefits are not the primary measure of their value. For example, an artist or writer may rely on the strength of their name and reputation in growing an audience for their work. Attribution of that creator over time can often have a direct impact on economic revenue, independent of the quality of the work itself. For example, when Robert Galbraith published the novel *The Cuckoo's Calling* in 2013, only 1,500 books were sold in the first 3 months. After it was revealed that Robert Galbraith was actually a nom de plum of *Harry Potter* author JK Rowling, sales exponentially increased. It is now reported that over 1 million copies of *The Cuckoo's Calling* have now been sold.¹⁰

SBS provides opportunities for a wide range of creators to develop their craft and their reputations, by commissioning and developing scripts and cinematograph films, as well as musical works and other works. Moral rights enable these contributors to develop a reputation in Australia. In publishing or broadcasting the works of these creators, SBS can work with creators to develop and benefit from their reputation and their works by affording them a right of attribution in those works.

5. Duration of copyright protection and international framework for copyright protection

Draft finding 4.2: While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

SBS notes that the Commission has recommended Australia seek to negotiate a shorter duration for copyright protection in its international legal and trade discussions. SBS expects the likelihood of any

¹⁰ <http://www.independent.co.uk/arts-entertainment/books/features/how-jk-rowling-was-revealed-as-the-true-author-behind-the-robert-galbraith-novels-a6696576.html>

reduction in the duration of protection to be purely academic given the complex political and legal issues involved.

However, SBS strongly objects to any change in law which would put Australia at a competitive disadvantage, given that Australia already has a very small film and television industry. SBS also believes that if the term of copyright protection shortened to the recommended levels, access to content would become a point of contention. Rightsholders and archives would be hesitant to make their content available without a significant fee and security guarantees. Rather than making content more accessible, SBS believes this recommendation could undermine access to content, reducing the consequent public benefits.

6. Contracting Out

Information Request 5.1 *Other than for libraries and archives, to what extent are copyright licence conditions being used by rights holders to override the exceptions in the Copyright Act 1968 (Cth)? To what extent (if any) are these conditions being enforced and what are the resulting effects on users?*

SBS supports amendments to the Copyright Act to remove the ability to contract out of fair dealing exceptions.

As previously submitted by SBS, contracting out of fair dealing provisions is a significant issue for SBS and other media organisations. SBS is recognised as a leading provider of international news in Australia, contextualising global stories for a multi-cultural Australian audience. SBS runs an efficient and effective business by working with global and local media partners for the supply of news stories. These contracts are often subject to stringent conditions. Large international media organisations frequently require SBS to contractually limit its fair dealing rights, and impose strict conditions around how supplied stories may be used. For example, many news providers do not permit SBS to make news available on social media services or online. SBS is often required to pay for third party content included in these media supply agreements, where it might otherwise have been able to rely on the fair dealing exceptions. The process that SBS must go through to identify these third parties, and to separately negotiate fees to use their material, is onerous and often prohibitively expensive.

These contractual restrictions limit the ways SBS can share important news stories of public interest. They also reduce the size of the audience to which SBS can make the stories available, when use on certain platforms is restricted. Such restrictions impact both SBS and its audience.

The specific public interest factors that resulted in the development of the fair dealing exceptions should not be able to be overcome by commercial interests and media power, particularly from foreign jurisdictions.

SBS is happy to provide further examples and information to the Commission on the scale of this problem.

SBS supports the recommendation made by the ALRC that:

Proposal 20-1: The Copyright Act should not provide statutory limitations on contracting out of the fair use exception. However, if fair use is not exacted, limitations on contracting out should apply to the new fair dealing exception¹¹.

SBS also notes that a restriction on the ability to contract out of copyright exceptions may have other consequences, including making it slightly more difficult for SBS to rely on contractual provisions to protect Indigenous cultural property rights. However, in SBS's view, the better approach is to address Indigenous people's right to legal recognition of cultural property separately, rather than foregoing the opportunity to implement important reform to the Copyright Act.

There is a lack of recognition in Australian laws to recognise Indigenous peoples' rights in relation to their cultural property. Despite this, media organisations such as SBS have been enforcing cultural protocols through contractual relationships for many years. SBS was an industry leader when it commissioned cultural protocols for working with Indigenous people in 1990. SBS currently uses *The Greater Perspective: Protocols and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities* (last updated in 1997) (The Greater Perspective). The Greater Perspective sets out ethical principles and protocols for working with Aboriginal and Torres Strait Islander communities. The inclusion of NITV as part of SBS since 2012 reinforces SBS's commitment to work with Indigenous communities to

¹¹ ALRC Report at page 460.

create powerful and distinctive Indigenous content. SBS and NITV use legally enforceable agreements that adhere to cultural protocols.

Limiting the ability to contract out of fair dealing exceptions may impact on this growing practice, highlighting the need to separately address Indigenous peoples' rights to legal recognition of cultural property. SBS supports the rights of Indigenous people to own, control and maintain their cultural heritage as expressed in Article 31 of the United Nations Declaration on the Rights of Indigenous People.

7. Geoblocking

Draft Recommendation 5.1 (Geoblocking): *The Australian government should... amend the Copyright Act to make clear that it is not an infringement for consumers to circumvent geoblocking technology.*

SBS does not support the Commission's recommendation to legalise the circumvention of geoblocks and other technological protection measures.

SBS understands that Australian users frequently engage in the practice of circumventing geoblocks, even in the face of current legal uncertainty. SBS believes this amendment would further incentivise this practice, resulting in a decrease of economic revenue in Australia, and a lowering of investment in local Australian content.

a. Impact on local content

SBS is often required, as a condition of acquisition and commission, to impose geoblocks and other technological protection measures on its broadcasts and communications. Rightsholders rightly want to prevent piracy, and need to have confidence that SBS will use measures to minimise this risk. SBS has a limited budget for acquisitions. In many cases, it is able to acquire the rights for Australian free to air television broadcasting at a favourable rate because of the small size of the market. These acquisitions bring a broader audience to SBS, which in turn enables us to further invest in local content in pursuit of our Charter's objectives. Despite the size of the market, SBS's ability to attract advertising on its broadcasts and online platform helps to offset the costs of these acquisitions and supplement government income to invest in local content. The Commission's recommendation would result in SBS audiences accessing



overseas content that might otherwise be accessed via SBS. This practice is likely to result in decreased advertising revenue for SBS, leading to decreases in investment in locally commissioned content and a net detrimental effect on Australian audiences.

b. Tension between rights

SBS notes that the Commission's recommendation to allow circumvention of geoblocks could also result in a tension between the legal rights of users and the rights of rightsholders to control access to and use of their content. SBS is contractually bound to other rightsholders to implement digital rights management and other technological protection measures to prevent piracy, and to maintain territorial carve outs for rights. The Commission's recommendation could cause a tension between SBS and its contractual partners over the efficacy of these protections, which may undermine SBS's ability to obtain rights to broadcast acquired content.

Conclusion

SBS welcomes the opportunity to provide further information to the Commission as required.