

**SBS SUBMISSION TO THE DEPARTMENT OF INFRASTRUCTURE, TRANSPORT,  
REGIONAL DEVELOPMENT AND COMMUNICATIONS  
EXPOSURE DRAFT AMENDMENT (ACCESS REFORM) BILL 2021  
FEBRUARY 2022**

### **Key Points**

- SBS supports amendments to the *Copyright Act 1968 (Cth)* (**Copyright Act**) which balance entities' legitimate interests in carrying out their functions or activities with the purpose being targeted by the area of reform.
- SBS's principal function is to provide multilingual and multicultural broadcast and digital media services to inform, educate and entertain all Australians. However, it also has an interest in reform in areas which affect other parts of its operation, such as the management of its archive, revenue under statutory licenses and commercial licensing of its own original content and archive material.
- This submission addresses the *Draft Copyright Amendment (Access Reform) Bill (Draft Bill)* and related Discussion Paper to the extent they are relevant to SBS's functions and operations.
- In relation to the key areas covered by the Draft Bill:
  - **Orphan Works:** SBS strongly supports the Orphan Works proposal and has a minor suggested amendment to encourage more use of orphan works by changing the notification process for when a rightsholder comes forward.
  - **Fair Dealing for quotation:** SBS broadly supports any new exception which enables it to fulfil its functions. However, while case studies in the Discussion Paper suggest this exception may apply to commercial broadcasters and documentary programs, it is unclear whether it would apply to SBS. It should be clarified that this exception will apply to SBS. SBS also anticipates an impact to its direct licensing revenue because of the introduction of this exception given the third case study provided by the Discussion Paper on page 15 which provides a free exception for quotation where a paid market for licensing documentary filmmakers exists. Guidance and examples like this are likely to undermine existing markets, particularly, as that case study notes, it is at the discretion of the documentary maker as to whether the fee being asked by the rightsholder is cost prohibitive.
  - **Educational exception:** SBS supports the policy intent in the Discussion Paper with respect to the education exemption. However, the effect of the Draft Bill may be broader than this intent. This is likely to lead to uncertainty and dispute around the

educational statutory licence in a highly divided sector. The exception should be clarified, for example, by reverting to section 28 with additional exceptions to adapt to the requirements of the educational sector.

- **Archives and library provisions:** SBS broadly supports the archive and library proposals which will enable it to manage its archive as a Key Cultural Institution. In particular, SBS supports the proposal to include Key Cultural Institutions as archives.
- **Contracting out:** in principle, SBS supports the introduction of amendments to resolve the issues faced by many sectors and organisations who are asked to contract out of exceptions provided for under the Copyright Act. However, the proposed amendments to section 47H only clarify the operation of section 47H (which only covers exceptions in relation to reproducing computer programs), and do not explicitly preclude the operation of contractual agreements that seek to exclude or limit of other exceptions under the Copyright Act.

## **Introduction**

The Special Broadcasting Service Corporation (**SBS**) welcomes the opportunity to review the Bill and make a submission in response to the associated Discussion Paper.

SBS provides important public services pursuant to its Charter and serves in its roles as a creator and broadcaster of film, television and radio programs and services, as well as a digital media content provider. Moreover, SBS is also an archive, and Key Cultural Institution preserving records of Australia's multicultural, multilingual, and Indigenous heritage, and is a user of third-party material in the course of providing its public services.

### ***SBS informs, educates and entertains all Australians***

For over 45 years, SBS has developed compelling and thought-provoking content that tells the stories of a truly diverse Australia. SBS content is delivered free across broadcast and online platforms to audiences across Australia in more than 60 languages. In recent years SBS has responded to technological advances and associated changes to the way in which Australian audiences consume content by establishing industry-recognised innovations to ensure that its services remain relevant and continue to inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society; consistent with its Charter.

SBS reaches almost 100 per cent of the population through its six television channels (SBS SD, SBS HD, SBS VICELAND, SBS World Movies, SBS Food and National Indigenous Television (NITV)) and seven radio stations (SBS Radio 1, 2 and 3, SBS Arabic24, SBS

PopDesi, SBS Chill and SBS PopAsia). In 2022, SBS will launch an additional television channel, SBS WorldWatch, our new home of fifty news bulletins from around the world to Australian audiences.

Servicing 63 languages, SBS Radio is dedicated to the approximately five million Australians who speak a language other than English at home, while SBS's three music channels (SBS PopAsia, SBS PopDesi, and SBS Chill) engage all Australians through global music and pop culture.

SBS's reach is being significantly extended through SBS's digital services, including SBS On Demand (with more than 10 million registered users) and the SBS Radio App and portals, which make online audio programming and information available to audiences at a time and place of their choosing.

SBS services are expressly provided for by SBS's enabling legislation. The SBS Charter, set out in the *Special Broadcasting Service Act 1991 (Cth)* (**SBS Act**), provides that it is the principal function of the SBS to provide, via both broadcasting and digital media services, multilingual and multicultural services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.<sup>1</sup>

This principal function must always be the guiding force for SBS when considering any matters raised in the Discussion Paper or the Draft Bill.

### **Schedule 1 – Orphan Works**

SBS continues to support the introduction of an effective scheme for orphan works which will add to the cultural diversity and enrichment of all Australians, whilst simultaneously managing the copyright risk for users of those works. SBS has an extensive collection of archival media assets which are valuable to all Australians. This archive includes works and other subject matter which would be classified as 'orphan works'.

As an organisation that commissions, produces and provides to audiences film, television, radio and digital content, SBS is also often in a position to require the use of 'orphan works'.

SBS strongly supports the principle of the proposed approach to orphan works – to implement a limitation of liability scheme which allows wider use of all orphaned copyright material to open up access to a larger collection of cultural, historic and educational works held by our cultural and educational institutions, SBS supports the drafting of the Bill to achieve this intent. However, the functionality of the scheme should be further improved, as follows.

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<sup>1</sup> SBS Charter, section 6, SBS Act.

### **Clause 116AJB(2)**

As proposed by the Draft Bill in clause 116AJB, if after the initial use, the copyright owner of an orphan work is identified or comes forward, the copyright material will stop being an orphan work.

SBS supports a mechanism where an orphan work owner should be able to reclaim their work and negotiate terms, including for ongoing use of an orphan work. However, there should also be a positive notification obligation (similar to the one as set out in section 8 of SBS's Orphan Works Policy<sup>2</sup> which requires the copyright owner of the orphan work to notify the user of an ongoing work that they are contactable. The following example will set out why this works in practice.

In its submission to the 2018 Copyright Modernisation consultations<sup>3</sup>, SBS provided the case study of 'I'm Your Man' to demonstrate why having an Orphan Works Policy had assisted SBS in producing new Australian stories, whilst also managing risk. Please see the case study reattached for reference at **Annexure A**.

In that case study, SBS undertook diligent searches at the commencement of the project for the orphan work owners before publishing the works in reliance on its Orphan Works Policy. That online documentary continues to be published on SBS's website.

As proposed in the Draft Bill, if any of the copyright owners of the orphan works were to come forward after the initial publication, the work would no longer be an orphan work. However, under the Draft Bill, that process would happen automatically.

The only way the proposed scheme could work in practice is by regular, proactive monitoring by the users of all orphan works used, potentially for many years or even decades after their initial use, which (depending on volume) would be very time and cost prohibitive and again provide a disincentive for use of orphan works.

**SBS Recommendation 1:** The Department should consider a notification trigger mechanism through which the users are directly notified by the copyright owner of the orphan work, or becomes indirectly aware that the copyright owner of the orphan work has been identified.

### **Schedule 2 – Fair Dealing for Quotation**

In considering any exception SBS must weigh the proposed benefit it would receive under the use, while taking account of the impact the exception would have on its activities as a rightsholder and licensor. The fair dealing exception as it has been

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<sup>2</sup> <https://www.sbs.com.au/aboutus/orphan-works-policy>

<sup>3</sup> Conducted by the Department of Communications and the Arts.

proposed in the Draft Bill is limited to particular kinds of users or particular kinds of uses. As proposed, bodies which administer an archive may rely on the exception subject to qualifying criteria (for example, that the use be non-commercial).

It is uncertain as to how the exception would apply to other activities relevant to SBS as a broadcaster or user of copyright material. There are examples provided in the Discussion Paper which appear to apply to SBS and its activities, but which are not clearly reflected in the Draft Bill. Under the Bill, and as set out in the Discussion Paper, there appear to be three ways that the exception could apply to SBS in its capacity as a user:

- 1. As a body administering an Archive** (paragraphs 113FA(i) and (ii) of the Draft Bill) – This exception most likely applies to SBS in its capacity as a body administering an archive. However, the exception is not limited to archive activities, and SBS's archive is only one part of its operations. There is therefore uncertainty over the operation of this clause and its application to all uses made by SBS. SBS seeks guidance from the Department as to whether 113FA(i) and (ii) are intended to cover only archive activities or may relate to activities beyond SBS's role as an administrator of an archive.
- 2. Commercial broadcaster example** (page 17 of the Discussion Paper) – This example in the Discussion Paper is given to clarify an understanding of commercial use and suggests that excerpts of background music or images captured in a documentary aired by a commercial broadcaster may be considered a non-commercial fair dealing for a quotation purpose. This example is not reflected in the Draft Bill directly. Can the Department clarify whether section 113FA(a)(vii), an exception targeted towards a person or organisation for the purpose of research is intended for this purpose?
- **3. Documentary filmmaker example** (page 17 of the Discussion Paper) – This case study relates to documentary makers struggling to complete their film projects where those projects require reference to third party content. The Discussion Paper suggests a quotation exception will help these creators use excerpts of copyright material without significant cost or legal risk where that content is cost prohibitive. This is directly relevant to SBS in its operations of producing film and television content for its documentary programming and news coverage, and in its role in both commissioning and acquiring programs from film makers and distributors. Again, no specific exception exists for this activity in the Draft Bill but clarification on whether section 113FA(1)(vii) would apply would assist.

In assessing this quotation exception, SBS must also consider the impact on any potential loss of revenue, and/or moral rights provisions due to use of the exception

where a licence may otherwise have been paid and reinvested in new broadcast content for Australian audiences.

SBS directly licenses its archival content (primarily video and audio) to a wide range of producers including researchers and documentary filmmakers, who seek to include its archive material in their programs. SBS charges for use of the material in accordance with its standard rates and reinvests this stream of revenue in its content. Under the proposed fair dealing exception for quotation, these kinds of uses, if deemed by the user in their sole opinion as being cost prohibitive, could be accessed by the user without a licence fee, regardless of whether the material was sourced from the SBS archive, or from a third party source (infringing or otherwise). We are uncertain if the Department has given sufficient consideration to the existing markets which may be impacted by the exception if users are guided by the case studies in their application of this exception.

**SBS Recommendation 2:** The uncertainty in relation to the above examples or clauses means that it is unclear how the legislation will apply to SBS's activities as a user. Therefore, drafting notes, or amendments to the Draft Bill should be provided, to acknowledge that:

- 113FA(1)(vii) extends to cover the examples which apply to documentary filmmakers and commercial broadcasters, particularly given the considerations listed below,
- 113FA(1)(vii) covers organisations who have not conducted the research themselves (for example, because they are a broadcaster who has acquired or purchased a program which contains research)
- 113FA(1)(vii) covers dealings where research does not have to be the primary or sole focus (for example, it is a component part of a program broadcast)

**SBS Recommendation 3:** Unpublished material should be included in the quotation exception. The other fair dealing exceptions do not distinguish between published and unpublished material.

We note that unpublished materials held in archives can be personally and culturally sensitive and many archives (including SBS) follow protocols (including Indigenous Cultural protocols) in relation to the approval of those materials. SBS and other archives may still decline access to footage due to these concerns, even if the exception is introduced into law.

### **Schedule 3 – Archives and Library Provisions**

The Draft Bill proposes to simplify, consolidate and update the exceptions in the Act relating to Archives and Libraries, including Key Cultural Institutions. As a Key Cultural Institution<sup>4</sup> and public broadcaster, SBS supports amendments to the Act based on these principles.

In particular, SBS supports including Key Cultural Institutions as Archives in the Draft Bill. This will provide certainty to SBS and other Key Cultural Institutions for activities that relate to their archives, giving them the same benefits as those proposed to be provided to other archives.

Flexibility in relation to the preservation activities and ongoing management and use of SBS's archive will enable it to manage its collection of critical Australian heritage into the future.

### **Schedule 4 – Education Exceptions**

SBS supports the intention to update and streamline the exceptions in the Act relating to educational institutions so that they are material and technology neutral. In the period since the COVID-19 pandemic has emerged, SBS understands the shift to classroom learning has required teachers, schools and universities to adjust their teaching methodologies to different environments at a pace and in a way not previously envisaged.

As a rightsholder and provider of educational content, SBS supports in-principle changes to the Copyright Act which create certainty for teachers. However, the scope of the statutory licence should be clarified.

As described in the Discussion Paper, this would involve an update to the existing the Copyright Act to enable schools to continue hybrid or online classes without any concerns that they are breaching the provisions of the existing restrictions of the Act, in particular, in section 28. However, what is being proposed in the Draft Bill is the removal of section 28, and an entirely new exception, s113MA which goes significantly beyond section 28 and, in SBS's view, the stated objective of the Discussion Paper. This is likely to create further uncertainty about the scope of the educational statutory licence, which has also been identified by the Department in the Discussion Paper.

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<sup>4</sup> SBS was declared as a Key Cultural Institution in 2011.

The section 28 performance exception has, up until the COVID-19 mass shift to remote learning, worked well to facilitate the performance of copyright material in the classroom setting. SBS, as a copyright owner, has not considered challenging an educational institution's performance of its copyright material in a classroom simply because a parent or visiting member of the public has joined that classroom.

On this basis, rather than removing and replacing section 28 with the entirely new proposed clause 113MA (which, as stated earlier and detailed further by Screenrights in its submission, is drafted broadly enough to undermine the educational statutory licence), it is more appropriate to clarify section 28 to cover remote learning situations.

For example, subsections (5), (6), and (7) of section 28 already state that a communication of copyright material that is made merely to facilitate certain performances, including performances in the course of educational instruction, are not considered to be performances to the public infringing copyright.

Further, the Draft Bill currently extends the educational exception beyond the existing section 28 in a way which is likely to undermine the statutory licence, and create uncertainty for teachers and rightsholders which may lead to an increase in disputes. A clear solution should be created which can work well for both the educational sector and for rightsholders who have no interest in pursuing legal action for the issues that have arisen for schools during the COVID19 pandemic.

**SBS Recommendation 4:** Section 113MA be removed and section 28 be reinstated and amended to clarify that it will apply to online and remote learning. For example, subsections (5), (6) and (7) be amended to include temporary reproduction as well as communication.

## Annexure A

### **Orphan Works case study**

In 2017 SBS published *I'm Your Man*, an online documentary about Australia's boxing legends (<http://www.sbs.com.au/imyourman/>). SBS licensed about 160 third party works and other subject matter to create a rich and interactive story. One of those figures was boxing legend Johnny Famechon, Hall of Fame inductee and featherweight champion from the 1960s. Five of the 16 third party works in Famechon's story were included in reliance on the Statement. In relation to one orphan work, which was a 1969 magazine cover featuring Famechon, SBS:

- undertook extensive searches for the rightsholder, including chain of title investigations using the National Library database, other key databases, social media platforms and search engines;
- spoke to key industry contacts who had licensed similar images; and
- searched phone books in the two last known locations of the rightsholders.

Despite this due diligence, the rightsholder was not found. Because SBS had licensed similar magazine covers from the same source, and in those cases the rights holders had given permission and charged no fee, SBS used the image in reliance on the Statement. The image was accompanied by an orphan works notice and SBS's contact details in case the rightsholder surfaced. No advertisements were placed against this content.

Had SBS not had an Orphan Works Policy, the Famechon component of the story may not have made it to publication due to the large volume of orphan works comprised in the materials.