

30 September 2024

SBS submission on the Orphan Works Scheme – Design Options

The Special Broadcasting Service Corporation (**SBS**) appreciates the opportunity to comment on the Orphan Works Scheme – Design Options proposed by the Attorney-General's Department.

SBS has been a leading voice for the responsible use of orphan works since its launch of the SBS Statement on Orphan Works in 2011. More information about the SBS Orphan Works Policy can be found here: <https://www.sbs.com.au/aboutus/orphan-works-policy>.

Since 2011, SBS has consistently supported the introduction of a legislated limited liability scheme for the use of orphan works where a reasonably diligent search has been undertaken. In our view, based on our nearly 15 years of experience with our Orphan Works Policy, a successful orphan works scheme should:

- legislate only the fundamental obligations and principles of an orphan works scheme, and otherwise avoid prescriptive legislative requirements;
- wherever possible, utilise industry guidelines to outline standards, expectations, and due diligence processes for the use of orphan works;
- not legislatively mandate the manner in which a search for an orphan works rightsholder should be done, nor for how long;
- not legislatively mandate any public notice time frames or formats prior to use of an orphan work; and
- where fees are to be paid for use of an orphan work, only allow for negotiable fees in accordance with industry practice, without the option of an injunction.

SBS notes that obligations that may be reasonably expected for a novelist, academic researcher, or a museum seeking to use an orphan work, will not be practical or reasonable for a film producer, journalist, or public broadcaster. Additionally, the same approaches that may work today may not work tomorrow. As such, it is the view of SBS that the approach outlined above would allow for bespoke and rapidly adaptive strategies for the use of orphan works in both commercial and non-commercial contexts, across highly disparate contexts and creative practices. Should such a scheme be established, it would assist SBS to make more content from its rich archive available to users, and to find other ways to tell its unique stories without incurring the risks associated with current infringement penalties whilst also providing appropriate mechanisms for copyright owners.

Our answers to the specific questions posed by the Orphan Works Scheme – Design Options paper are below.

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1. Which of the options relating to a limited liability scheme presented in this paper do you prefer?

SBS lists its preferences regarding the listed options as follows:

- **Unpublished materials:** *Option 1, yes* - uses of unpublished materials may be supported.
- **Materials including ICIP:** *neither option*. SBS is comfortable with legislation that sets an overarching positive obligation that, where potentially orphaned material appears to include ICIP, a reasonably diligent search for the copyright owner is expected to include attempts to identify and consult Aboriginal and Torres Strait Islander people or communities with an apparent connection to that ICIP. However, beyond that broad legislative expectation, actual standards and expectations for materials including ICIP are addressed in industry guidelines only. At the same time, we also note some caution given current consultations are also under way for *sui generis* ICIP legislation which may cover this topic and SBS does not have a view as to how the orphan works regime should interact with any new law proposed.
- **Interaction with statutory licences:** *Option 2, yes* - uses of copyright material covered by a statutory licence should be excluded.
- **Reasonably diligent search:** Category 1 (legislative requirements) and Category 3 (industry guidelines).
- **Standards for 'reasonable diligence':** Category 1 – Legislative requirements: Baseline requirements around efforts to identify, locate, and contact copyright owners.
- **High-risk use cases (including sensitive and vulnerable materials):** Category 3 – Industry guidelines: Guidance on expectations and best practice in search relating to materials that are particularly vulnerable to being orphaned (including photographs and images) provided in industry guidelines.
- **Record of a search, and how long a search can be relied on:** Category 1 – Legislative requirements: User must make and retain a reasonable record of search; search can be relied on for up to six years.
- **Who can rely on a search:** Category 1 – Legislative requirements: A user can rely on a reasonably diligent search conducted by another person where reasonable to do so.
- **Notice of use:** SBS does not support the single option listed requiring a user to give reasonable notice of use if the material is "made public".
- **Industry guidelines:** Category 2 – Discretionary factors: Relevant industry guidelines amongst discretionary factors that may be considered in determining whether a reasonably diligent search was conducted.
- **Remedies for past use:** Reasonable payment of a licence fee based on no more than a willing but not anxious user would have paid to a willing but not anxious copyright owner.
- **Ongoing use of materials after a copyright owner is found:** Monetary remedies permitted but injunctive relief restricted.
- **Legal forum for disputes:** Option 1 (Copyright Tribunal of Australia), and Option 2 (Federal Circuit and Family Court of Australia, or Federal Circuit and Family Court of Australia and Federal Court of Australia), with additional preference for the establishment of a small claims copyright tribunal.

2. Are there any other options not presented in this paper that you suggest should also be considered?

No



3. Would the potential approach outlined in Option 1 be an effective way to protect against misuse of ICIP under an Australian orphan works scheme ahead of the establishment of new ICIP rights under stand alone legislation?

No. SBS observes that the general public understanding of ICIP, as well as public awareness of the diversity, complexity of Indigenous voices and matters, tends to be low. As such, it is our view that it will be difficult for users to know, or ought reasonably to know, when and where a use of an orphaned work is inconsistent with the views of or might otherwise raise sensitivities for relevant Aboriginal and Torres Strait Islander people.

4. Are there any potential uses of material including ICIP under an orphan works scheme that do not involve making that material public, but still present risks or concerns that you would like to see addressed?

SBS is of the view that the presence of ICIP should not automatically disqualify material from being used under an orphan works scheme, including uses that make the material public. However, the presence of ICIP may change the consideration of and/or require a higher standard as to what is reasonable when using that orphan work.

5. Should there be a positive obligation on a user to take reasonable steps to identify and consult with Aboriginal or Torres Strait Islander people who may own ICIP in the material? If so, what reasonable steps might be taken?

Legislation should set a positive obligation on a user to take reasonable steps to identify and consult with Aboriginal and Torres Strait Islander people who may own ICIP. However, in the interests of flexibility and bespoke industry needs, any further definition or guidance as to specific reasonable steps should be addressed in industry guidelines and not legislated.

SBS would also note that, given current consultations are also under way for *sui generis* ICIP legislation which may cover this topic, this question should be approached with some caution. At this stage, SBS does not have a view as to how the orphan works regime should interact with any new law proposed regarding ICIP.

6. Do you have views on how should the department seek further advice on this potential aspect of a scheme from Aboriginal and Torres Strait Islander people before it provides its advice to the Government on design options?

We assume the department is already liaising with Patricia Adjei, Director of Standalone Legislation at the Office for the Arts under the Department of Infrastructure, which is establishing a First Nations expert working group on ICIP to guide the development of new laws on ICIP rights. We encourage the department to continue this consultation.

7. If the Government were to support Option 1, are there any additional arrangements that could be put in place to support effective interaction between the statutory licensing schemes and the orphan works scheme (either prescribed in legislation or in industry guidelines or other agreements)?

No



8. Are there aspects discussed in this paper under one category that you think would better be addressed under another?

SBS is of the view that a successful orphan works scheme should legislate only the fundamental obligations and principles of an orphan works scheme. Prescriptive legislative requirements should be avoided as these are likely to quickly become out of date, particularly in relation to technological developments, and also tend to be interpreted conservatively.

In the interests of maximum flexibility, an orphan works scheme should, wherever possible, utilise industry guidelines to set the standards of due diligence processes for those seeking to use orphan works, including guidelines as to what constitutes a "reasonable search".

9. Are there any further important aspects of a reasonably diligent search framework that should be addressed?

No

10. Are there any other aspects of a 'reasonably diligent search' that you consider so fundamental that they should be made mandatory requirements?

No – category 1 is all that's required.

11. Conversely, is there any risk that the department's suggested mandatory requirements could result in potential uses that should be covered by the scheme being unintentionally excluded?

Unlikely

12. Do you think the inclusion in legislation of discretionary factors, as discussed above, would help scheme users to understand what they need to do to as part of a reasonably diligent search, and support a court to reach a fair decision on this issue in an individual case, if needed?

No. Legislation should be as agnostic as possible, with industry guidelines setting the standards and expectations as to what may constitute a reasonably diligent search.

13. Are there any other factors (besides those raised as options below in relation to certain higher-risk uses) that you think should be included if this approach were taken in legislation?

No

14. If the Government implemented the option under Category 2 noted above:

(a) Are there other characteristics of a potential use under the scheme, or of the material to be used, that are significant enough to the degree of risk posed that they should be specifically mentioned among discretionary factors in the legislation?

No. Category 3 is preferred option.



(b) Are there other forms of sensitivity (besides those relating to ICIP and cultural sensitivity for Aboriginal and Torres Strait Islander people) on which specific guidance and examples should also be provided in the Explanatory Memorandum?

No

15. Alternatively, if you think there should be mandatory search requirements in the legislation applying particularly to higher-risk uses (Category 1 option), what should they be, and what high-risk uses should they apply to?

SBS does not support mandatory search requirements for higher risk categories.

16. If the legislation were to include a requirement that public notice be given of a search in some circumstances, what would generally be a reasonable period of notice before the use could progress (e.g. 3 months or 6 months)? Should a minimum period of notice be prescribed in the legislation?

No. SBS notes that while a lengthy prior notice may be feasible for some uses with a long production time (eg, adapting an orphaned short story or novel into a film or play), prior notice requirements are highly impractical for orphan works that may be used in contexts with very short time frames, such as news and current affairs-related material.

SBS strongly recommends that orphan works legislation does not mandate any minimum prior notice periods and should instead enable as much flexibility as possible, including recognition that it may be reasonable for an orphan works notice to be included at the point of use. This approach to orphan works notices has been part of SBS's long-standing and industry best practice Orphan Works policy since 2011 (<https://www.sbs.com.au/aboutus/orphan-works-policy>).

17. Do you agree the time periods for retaining records and being able to rely on a search should align?

Yes

18. Is six years from the date of completion of the search a reasonable time period?

Yes

19. Would it be useful to copyright owners and users to set out the general information that should be documented in a search record in the regulations (rather than simply the Explanatory Memorandum)?

No. Such general information should be included in the Explanatory Memorandum to allow for maximum flexibility, including the formulation of industry guidelines.



20. Do you have any concerns about how this option would interact with authorisation liability as provided for by ss. 36 and 101 of the Copyright Act?

No. Sections 36 and 101 already state that one of the matters to take into account when determining authorisation liability is whether the person complied with any industry codes of practice. SBS's preferred option for an orphan works scheme (ie, a scheme based on broad legislative principles but effected predominantly through industry guidelines), would create clear, nuanced, and bespoke industry codes of practice for the use of orphan works.

SBS is of the view that if a reasonably diligent search, which complies with the standards of an orphan works scheme, has been conducted, then a downstream user should be able to rely on that search and not be required to replicate work already done. However, for the purposes of authorisation liability, it would only be reasonable to rely on such a search if the original search had complied with the standards of the orphan works scheme.

21. How would this option align with current industry practices, for example in relation to publishing or screen industry assurance and contracting practices relating to chain of title?

SBS is of the view that this option would align well with current industry practice. As a media organisation and producer of film/television/digital content, SBS should be able to rely on orphan works searches done by parties (e.g., museums, galleries, archives and libraries) who have specialised research expertise and experience with orphan works, and not be required to replicate work already done.

It is SBS's experience that the film/television production industry is broadly risk averse when it comes to chain of title, in part due to errors and omissions (E&O) insurance policies which typically require full documented copyright licences to be acquired, or a solicitor's opinion letter detailing the clear application of any copyright exceptions. As such, use of orphan works is often avoided unless considered editorially vital, and a risk mitigation strategy can be established.

SBS anticipates that a well-functioning orphan works legislative framework will enable more orphan works to be used in screen productions by providing more chain of title clarity and processes that can be incorporated into E&O insurance policies. This in turn will enable film/television producers to explore more commercial opportunities including with overseas distributors who may otherwise have passed on programs containing orphan works, due to the producer being unable to warrant that all copyright material has been fully cleared for distribution.

22. Are there any particular circumstances in relation to which you think the legislation should explicitly provide that a user can (or cannot) rely on a search conducted by another person, rather than relying on a flexible test of 'reasonableness'?

No

23. If the Government implemented the option under Category 2, should a regulation-making power be included in the legislation to allow mandatory guidelines to possibly be prescribed in future (e.g. if early experiences with the scheme indicate that greater certainty is needed on particular matters)?

Yes



24. Would it be useful to include a definition of 'commercial' or 'commercial use' in the Copyright Act for the purposes of the orphan works scheme? If so, would you suggest this be defined in any particular way?

No. SBS is of the view that the terms "commercial" and "non-commercial" are difficult to define and legislating any definitions to these terms may have unintended consequences (eg, on fair dealing exceptions).

25. Alternatively, should these terms be left undefined and 'commercial' given its ordinary meaning (i.e. of the nature of commercial, trade or business) if used in the legislative provisions establishing the scheme, with guidance on the meaning of 'commercial use' provided in the Explanatory Memorandum to the bill?

SBS has a strong preference to not use the terms "commercial" or "non-commercial" at all in relation to the orphan works scheme, as any definition of these terms may give rise to complications given the unique nature of SBS's services being a public broadcaster with commercial activities. Instead, we would prefer an approach akin to the fair dealing exceptions under the Copyright Act, which refer only to a dealing being "fair", a term undefined in legislation, but interpreted in caselaw to take into account a number of factors, one of which is whether the use was for a commercial purpose.

26. Are there any other options for limiting remedies available in relation to past uses under the scheme that should be considered?

No

27. Which of these options would be less likely to result in disputes that could require courts and judicial processes, and/or forensic accounting, to resolve?

SBS is of the view that the option of reasonable payment of a licence fee, based on no more than what a willing user would have paid to a willing copyright owner in line with industry market rates, including for past use, is the least likely to result in disputes requiring judicial processes and/or forensic accounting.

In contrast, SBS is of the view that options that allow for an account of profits, or for a copyright owner of an orphan work to injunct a use, will be far more likely to result in litigation and/or forensic accounting.

28. If a schedule setting out a range of fixed fees were prescribed for standard uses of materials, who should have authority to set the fees, and who should be consulted in the process?

SBS does not agree with fixed fees.

29. Would there be value in the legislation setting out matters to which the court is to have regard when considering injunctive relief in respect of ongoing use of a former orphan work?

No. It is SBS's strong preference that parties should negotiate reasonable terms for ongoing use of an orphan work, without the option for injunctive relief. If injunctive relief is to be an option, the general law of injunction should apply, without specific orphan works legislation.



30. Do you think the Copyright Tribunal would be an appropriate forum for hearing monetary claims arising under the orphan works scheme?

The Copyright Tribunal would be the appropriate forum only in that it has the relevant expertise. However, SBS notes the high costs of the Copyright Tribunal are prohibitive for most copyright owners, and as such it would be far preferable to have a small claims copyright tribunal.

31. If the Copyright Tribunal were able to hear monetary claims, should these claims be required to be taken to the Copyright Tribunal in the first instance, or only upon agreement of both parties (i.e. the parties could elect to have the matter heard by either the Tribunal or a court)?

It is SBS's view that parties should have as much choice as possible with regards to forum, subject to mutual agreement. However, given the high costs of the Copyright Tribunal and superior courts which have copyright jurisdiction, we note that it would be far preferable to also have the option of a small claims copyright tribunal which may be used at first instance.

32. Alternatively (if you do not think the Copyright Tribunal would be an appropriate forum), do you think the FCFCOA (Division 2) should be given sole jurisdiction over monetary claims under the orphan works scheme, or have concurrent jurisdiction with the FCA (and State and Territory Supreme Courts) to hear such matters?

As it is SBS's view that parties should have as much choice as possible with regards to forum, our preference would be for concurrent jurisdiction with the FCA, as well as any options that give flexibility and access to lower tier courts.

33. Do you think the Copyright Tribunal would be an appropriate authority for setting prescribed fees for uses of copyright material under the orphan works scheme (if a schedule of fees were to be prescribed in the legislation)? If not, how else could prescribed fees appropriately be set?

No. SBS is of the view that industry should set fees in the first instance, and where there is disagreement that cannot be negotiated, then refer to the Copyright Tribunal.

Yours Sincerely,

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Legal Counsel