

Mr Hari Sundaresan
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By email: Hari.Sundaresan@communications.gov.au

Date: 24/05/2019

Dear Hari,

Australian-European Free Trade Agreement

Thank you for the opportunity for SBS to provide this additional submission to the Department on the Australian-European Free Trade Agreement. This submission concerns Article X.7 (Performers) and Article X.11 (Term of protection).

1. Article X.7 (Performers)

As currently drafted, the exclusive rights granted to performers under Article X.7 of EUFTA purport to grant performers copyright in respect of any "audiovisual fixation" or sound recording of those performances, without qualification or exception.

These rights extend beyond those granted to performers under the Australian *Copyright Act 1968* (**Act**), in which:

- (a) performers are only recognised as copyright owners in respect of sound recordings of their performances (under section 22), not in respect of audiovisual recordings such as cinematograph films, and there are robust fair dealing exceptions to copyright infringement including reporting the news and criticism or review; and
- (b) while performers are recognised as having limited neighbouring rights to authorise or prohibit the making (and flow-on communication) of a cinematograph film or sound recording of their performances (under Part XIA), there are robust exemptions to those rights for "exempt recordings." Among the categories of exempt recordings are cinematograph films of a performance *'made for the purpose of, or associated with, the reporting of news and current affairs; or for the purpose of criticism or review.'*

Performers' rights under the Act have not been a matter of significant review or recommendation for reform in recent inquiries into copyright law in Australia. Expanding performers' rights as suggested in the draft EUFTA text could potentially limit the amount of distinctive content that SBS may publish across its multi-platform services, or alternatively increase the risk profile for SBS in managing clearances.

- (a) **Example:** SBS does not obtain a performer's explicit consent to broadcast or communicate an authorised recording of a performer's political speech in an SBS news story, or in an SBS documentary that is critical of the performer.

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Currently, SBS would be able to rely on the fair dealing exceptions to copyright infringement to broadcast or communicate the sound recording in which the performer holds copyright, and SBS would not be required to obtain the performer's consent to broadcast or communicate the (previously authorised) audiovisual recording. If this legal position is amended by the EUFTA, SBS would be restricted in its ability to publish newsworthy, relevant political content as part of its news and current affairs offering.

- (b) **Example:** *SBS does not obtain a performer's explicit consent to broadcast or communicate an audiovisual recording of their performance within an SBS scripted program.*

Currently, SBS may be able to rely on implied consents from the performer without the additional practical and logistic challenges of also having to ensure copyright clearances from the performer from a chain of title perspective. If this legal position is amended by the EUFTA, then depending on the number of performances within a program, SBS would be required to seek time-consuming copyright clearances and may in certain instances be restricted from broadcasting or communicating the program if such clearances cannot be obtained.

For the above reasons, SBS does not support the extension of performers' rights in the manner proposed without further consultation with industry. At a minimum, if these rights were introduced, SBS would submit that exemptions relating to news reporting and criticism and review be extended and revisited.

2. Article X.11 - Term of protection

SBS notes that Article X.11 proposes to:

- (a) recalculate the duration of copyright for cinematograph films, from 70 years from the year of first publication (under the Act) to 70 years after the death of the last of the principal director, screenplay author, dialogue author and music composer; and
- (b) recalculate and extend the duration of copyright for performers' rights, by expanding to cover performers' rights in audiovisual recordings.

SBS opposes these changes to the duration of copyright for cinematograph films for two reasons:

- (c) recalculating the duration of copyright for cinematograph films would create confusion in identifying who are the co-creators of the film and when copyright has lapsed (leading to difficulties putting works into the public domain and potentially leading to more orphan works); and
- (d) there is no justification to increase the calculation when the existing period is already generous to creators. The Productivity Commission Inquiry into Intellectual Property Arrangements itself noted that the current lengthy duration of copyright protection is "excessive," having regard to the relatively short commercial life of most copyright material and the adverse impact of the current copyright duration on community access to works.¹

In relation to the expansion and recalculation of performers' rights, SBS does not support any changes to this regime without further industry consultation, as noted above.

¹ Productivity Commission, *Intellectual Property Arrangements - Productivity Commission Inquiry Report Overview and Recommendations*, No. 78, 23 September 2016, page 8.



Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'Nicole Choolun'. The signature is fluid and cursive, with a prominent initial 'N' and 'C'.

Nicole Choolun
Legal Counsel