



Submission to the Australian Competition & Consumer Commission (ACCC) Copyright Guidelines 2018 November 2018

SBS welcomes a framework with relevant examples to assist a range of licensors and licensees of copyright material in determining fair and equitable remuneration.

Background

As Australia's multicultural public broadcaster operating under a statutory Charter within the *Special Broadcasting Service Act 1991 (SBS Act)*, SBS is both a licensee¹ of and a member of copyright collecting societies². In both of these capacities, SBS seeks to fulfil its Charter purpose as set out in the SBS Act, which is to:

“provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.”

In order to do this, SBS seeks to make its content available across a broad array of platforms. In seeking to licence appropriate rights to copyright material SBS faces challenges both in direct and collective licensing. These challenges include difficulties seeking digital rights to reach audiences across all of SBS's platforms from either direct or collective licensing, appropriate and commensurate fees for all types of uses and unequal bargaining power in some licensing arrangements. Despite these challenges, SBS like many licensees would seek to rely primarily on Draft ACCC Guidelines in their finished form as a framework in negotiations rather than as a party to the Copyright Tribunal.

Application of Draft ACCC Guidelines

SBS submits that the Draft ACCC Guidelines would be relevant for only specific kinds of licensors and licensees and specific uses. As the ACCC noted, while the Guidelines serve the functions set out under section 157A and 157B of the *Copyright Act 1968*, their main purpose would be to facilitate licence negotiations without resort to the Copyright Tribunal. Despite this, it seems clear that the Draft ACCC Guidelines would be most applicable to parties who have previously been before, or who are before the Tribunal. For example, the Draft ACCC Guidelines include specific examples to highlight the framework being proposed by the ACCC drawn from previous Tribunal examples and which are not necessarily applicable to licensees like SBS.

¹ For example, SBS relies on blanket licences from the music copyright collecting societies APRA AMCOS and PCCA to broadcast and communicate its content to audiences.

² As a copyright owner of content, SBS is a member organisation of copyright collecting societies Screenrights and Copyright Agency Viscopy.

It would assist SBS as a public broadcaster and other licensees if additional examples were provided which gave wider context to the ACCC's proposed framework. For example, in chapter 6.3.2 – 'Whose WTP is relevant', the ACCC examines the question of how much a customer of a licensee is willing to pay for copyright material. As SBS does not charge customers a fee for access to its content, we anticipate the answer to the question of the willingness to pay (WTP) of its customers would be different than the example provided for a gym class customer (if the question is relevant at all).

While we acknowledge that the Draft ACCC Guidelines are intended only to respond to issues previously at issue before the Copyright Tribunal, it would be useful if the Guidelines contained practical examples of this nature throughout the Guidelines to assist licensees in different industries to interpret the Guidelines. For example, additional examples could be added to chapter 5 'Benchmarking', particularly in relation to existing rates. These industry guidelines are often used in practice to set rates for licensing and providing more examples to interpret the ACCC's framework would assist both licensors and licensees.

Substitute goods

SBS suggests that the Draft ACCC Guidelines consider the question of substitute goods in more detail, particularly in relation to the issue of imperfect substitute goods and copyright works. It is SBS's experience that no two copyright works can be substituted, and while a work may be replaced if the original is unavailable due to price, licence terms or the market power of collective licensing, substitution with a different work can impact the overall creative value of a work. For example, SBS has historically been unable to attain a licence to sync commercial sound recordings within its programming for particular uses on digital platforms from music collecting societies or via direct licence (because rights have been assigned). Rights in replacement copyright material like production music are available but are not considered to be a true substitute.

Loss of competition

Finally, on page 14 of the Draft ACCC Guidelines the ACCC states in relation to loss of competition and the overall benefits of collective licensing, "For example users of copyright material such as music will be more likely to use the collecting society which has the greatest repertoire of copyright material they desire." While this may be desirable, in SBS's experience as a broadcaster, other significant factors include the rights available and the quality of the repertoire. In other words, in considering the benefits of collective licensing against the associated costs, it is not only the volume of available music which would impact competition, but also the rights, the quality of the work and the price.