

28 October 2006

Senator Marise Payne
Chairman
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

SBS submission on Provisions of the Copyright Amendment Bill 2006

Dear Senator Payne,

Thank you for the opportunity to make a submission on the Provisions of the *Copyright Amendment Bill 2006*. We understand that the Senate Legal and Constitutional Affairs Committee is charged with reviewing the provisions of the *Copyright Amendment Bill 2006* for report by 10 November 2006.

In this submission to the Senate Committee SBS would like to focus on the key issues set out below. Each of these issues is of high priority to SBS:

- An exception for national public broadcasters to enable us to fulfil our Charter responsibilities in the digital media environment
- Digitisation issues that include: Format Shifting, making back-up copies, the proposed amendments to the Library and Archive exceptions; and also the new exception for 'Key Cultural Institutions'
- Parody and Satire
- Statutory Licences where SBS is a member of the relevant collecting society
- Technological Protection Measures ("**TPMs**")
- Copyright and Contract

We have also included Additional Background Material, drafting submissions and extracts from previous SBS Submissions in Annexures 1, 2 and 3.

NATIONAL PUBLIC BROADCASTERS

SBS supports the same position put forward by the ABC¹ that there should be a general statutory licence for public broadcasters to enable them to fulfil their Charter responsibilities by facilitating their activities. The ABC proposes that a public broadcaster

¹ ABC Submission to the Senate Committee, October 2006.

exception should be modelled on an extended version of the BBC exception under section 69 of the *Copyright, Designs and Patents Act 1988* (UK): that

Copyright is not infringed by the making or use by a national broadcaster, for the purpose of maintaining supervision and control over programmes broadcast or communicated to the public by them, of recordings or records of those programmes.

SBS' keen interest in having a broad exception for national broadcasters reflects our concern that even if some of the proposed new exceptions in the Bill were introduced, such as the provision for 'key cultural institution' to develop and maintain their collections (s 51B read together with for example, s 110BA) were introduced and SBS was deemed to be a key cultural institution, that the requirements of this amendment are still too narrow to significantly benefit SBS. For example, the provision for key cultural institutions that allows a single copy of a recording or film to be made as part of their function of developing and maintaining their collection would not accommodate SBS' actual technical requirements for making, communicating and archiving broadcast programming.

When he introduced the Digital Agenda Bill, the then Attorney-General² recognised that it would be challenging for government to keep pace with digital copyright reforms. This is just such an occasion where copyright users' rapid uptake of new technologies is occurring ahead of legislative reform, even while the Bill is in the Parliament.

It is the duty of the SBS Board under the SBS Act:

to ensure that it does not contravene this Act or any other Act;
(SBS Act, s10(d)(i)).

This provision in the SBS Act means that the SBS Board cannot necessarily make the same commercial and pragmatic decisions that may be available to other media organisations to assume that a circumscribed exception will be adequate to allow the copying and communication of copyright material and/or the circumvention of TPMs to gain access for the reproduction of copyright material for broadcasting purposes or archiving. This type of 'risk management' approach may not be available to the Board if there could be an infringement of rights, even if there is an unwritten code of practice in the industry about the way that copyright material is actually used. For this reason, SBS supports the ABC's³ position on this issue.

In the alternative, if the Committee is not prepared to recommend the introduction of a new statutory exception for national broadcasters, then SBS suggests that there should be a deeming provision that would enable SBS and the ABC to be deemed 'libraries' and/or 'archives' under the new exceptions and, hopefully, throughout the Act for the relevant purposes under the *Copyright Act 1968* and thereby also come within the new provisions for 'key cultural institutions'. See our discussion of Schedule 6: Parts 3 and 5 relating to the proposed operation of the Library and Archive Exceptions below.

² The Hon. Daryl Williams AM QC MP, *Second Reading Speech to the Copyright Amendment (Digital Agenda) Bill 1999, 2 September 1999, Parliament of Australia, House of Representatives Parliamentary Papers (Hansard) at 9751*, as quoted in "Digital Agenda Act five years on: more reform to come" by Carolyn Dalton in *Internet Law Bulletin, Volume 9 No.4*.

³ ABC Submission to Attorney General's Department, *Copyright Law Branch Confidential Proposal on Exceptions to Technological Protection Measures, 3 August 2006*

Schedule 6: Part 1 - Time Shifting

SBS supports this amendment for private use.

Schedule 6: Part 2 - Format Shifting

SBS supports this amendment for private use. As stated above, the national broadcasters also have urgent requirements for a matching exception to enable us to legally format shift copyright material so that our presentation playout systems can operate. Broadcast technology requires a number of copies to be made in the process of presenting programs via our new presentation playout system and the issue of enabling broadcasters to format shift for broadcast programming will be a continuing one given the rapid digital technological developments albeit for a single purpose.

SBS suggests that national broadcasters also require an exception for making back-up copies of copyright material, including making a back-up of software components of material other than literary works. Our requirement to be able to make back-up copies is based on a number of factors that were more fully explained in our Fair Use Submission (Annexure 3).

In summary, national public broadcasters require exceptions to format shift and make back-up copies of copyright material because of:

- Legal and compliance issues
- Risk management issues – we store irreplaceable programming
- To enable us to play music on digital playout systems that do not read ‘vinyl’
- To maintain our collections
- To provide public access to programming material on request, eg SBS supplied news footage from “The World News Australia” to the film producers of ‘Little Fish’ and ‘Candy’

Schedule 6: Parts 3 and 5 - Library and Archive Exceptions

SBS supports an exception that will allow the reproduction and communication of copyright materials by libraries, archives and “key cultural institutions” for certain purposes. In accordance with its Charter, SBS plays a very significant cultural role. In order to fulfil this national role, SBS maintains extensive library holdings reflecting decades of public investment of taxpayer funds in SBS’ Charter programming and related materials. Therefore, SBS would like to rely on the proposed new exceptions for libraries, archives and key cultural institutions.

Schedule 6: Part 3 - Use of works and other subject matter for certain purposes Section 200AB1

The proposed new s200AB(1) is envisaged to add a new exception to the Act that will enable use of copyright material by bodies administering libraries or archives. To avoid uncertainty, SBS suggests that the national broadcasters be deemed to be “libraries” and/or “archives” under this new exception.

Example of a deeming provision

“The national public broadcasters shall, for all purposes of this Act, be deemed to be “libraries”, “archives” and “key cultural institutions”.”

Further, for consistency throughout the Act in relation to the definition of “libraries” and “archives”, we suggest the following amendments to the Act:

Definitions

The definition of “archive” at s10(1) is qualified in s10(4). We suggest that the note to s10(4) be amended so that national public broadcasters are recognised as follows:

*“Museums and galleries **and national public broadcasters** are examples of bodies that could have collections covered by paragraph (6) of the definition of archives”.*

It follows that any subsequent definitions of “archives” and/or “libraries” would conform throughout the Act so that a national public broadcaster would also be covered.

In keeping within our previous Submission on the Exposure Draft of Copyright Amendments (TPMs) Bill 2006 (22 September 2006) to the Attorney-General on TPM exceptions relating to the limitations on remedies for public broadcasters (draft s116AP) that is not included in this Bill (Schedule 12), but that SBS argues should be retained, SBS recommends that another approach that is consistent with Australia’s obligations under the AUSFTA to defining national broadcasters that will enable them to clearly benefit from the exceptions for libraries, archives and key cultural institutions and the defences for infringement of TPMs available for certain public institutions would be to also adopt a definition of national public broadcasters: the proposed wording would be:

“a public broadcaster (being a body that provides a national broadcasting service, within the meaning of the Broadcasting Services Act 1991”.

This inclusive definition could then be applied consistently throughout the Act, including but not limited to the existing provisions s110A and s110B; and also to the proposed new exceptions at sections 51B, 110BA, 112AA, 200AB(2) and 132(5E) relating to TPMs for which (once section 116AP of the Draft Exposure Bill (TPMs) is restored) we propose the new amendment s132(5EA).

Schedule 6: Part 5 - Official copying of library or archive material

We support the same position put forward by the ABC that the drafting of the new amendments to limit the application of the exceptions in ss49 and 50 to libraries and archives - all or part of whose collections are directly accessible to members of the public and indirectly accessible through interlibrary loans - may have unintended negative consequences on the libraries and archives of the national public broadcasters that house specialised collections.

As we stated in our submission on the “Fair Use” Issues Paper, SBS is not equipped or funded to provide such open public access to our collections. Therefore we recommend that our proposed new definitions together with a deeming provision be adopted to include national public broadcasters in the definition of “libraries and “archive” which would overcome any unintended consequences.

PARODY AND SATIRE

Schedule 6: Part 3 - Parody and Satire

SBS commends in principle the inclusion of parody or satire as a new exception. After reviewing other submissions to the Attorney-General’s Issues Paper relating to Fair Use and other Copyright Exceptions, May 2005, SBS strongly supports the inclusion of satire

along with parody. Not only does satire overlap with parody, but in SBS' Submission satire is a longstanding Australian tradition and deserving of support for its social value.

Establishing parody or satire as an exception in Australian copyright law will foster more innovative and incisive local comedy and give Australian comedy writers and producers a level playing field in the global creative industry.

Drafting concerns

SBS submits that the current drafting of this exception is flawed because the parody or satire exception should not have been included in section 200AB, which is otherwise an open-ended provision concerned with ***new, unspecified exceptions to be determined by the courts according to strict criteria***. Parody or satire should be placed in the fair dealing exceptions alongside related exceptions such as criticism and review. This would align Australia with the European Union⁴ and the fair use provisions of the United States Copyright Act.⁵

If these drafting issues are not corrected, the parody or satire exception in the *Australian Copyright Act 1968* will be subject to ongoing uncertainty and a likely narrow and impractical interpretation. Ultimately the exception may fail to meet the Attorney-General's stated goals of honouring our comedic traditions and stimulating free speech⁶. We will also be isolated from the benefit of international precedent.

We explain our concerns briefly as follows:

(1) *Australia should be adhering to Berne and following its adoption into the digital environment along the lines of the European Directive, rather than adopting the narrower provisions of TRIPs that could change.*

SBS submits that the underlying thinking behind the proposed new 200AB is fundamentally flawed because it undercuts the breadth of the application of the Berne Convention to the narrower purpose of TRIPs, i.e. trade.

- (a) Since Australia is a signatory to the Berne Convention, all the exceptions in the Act are or will be limited by the "three-step test" of Berne. Notably, Berne does not make a distinction between trade related uses and non-trade related copyright uses (e.g. educational use).
- (b) By contrast the TRIPs Agreement is a trade agreement that imports the three-step test of Berne. Therefore, this new section just limits these proposed new exceptions to "trade exemptions" which implies a risk that exemptions that have nothing to do with trade or the market economy will not ultimately be subject to the "three-step test" of Berne.

(2) *The use of the "three step test" in section 200AB(1)(a) (c) and (d) to qualify the parody or satire exception is a wrong application of the international three step test.*

⁴ EU Copyright Directive 2001/29/EC, Article 5(3)(k), which allows member states to introduce new exceptions for the purpose of "criticism, review, caricature, parody and pastiche".

⁵ US Fair Use provisions: section 107, *Copyright Act 1976*

⁶ Attorney-General's second reading speech, 19 October 2006, available at http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2623753&TABLE=HANSARDR.

The “three step test” under copyright treaties such as Berne and TRIPS is appropriate to consider when deciding whether to introduce a ***new, previously unspecified exception***. It is not appropriate as an internal limitation in a national Copyright Act to an already specified exception. For example, the application of the first limb of the three step test to parody or satire (in subsection 200AB(1)(a)) effectively requires the court to find a “special case within a special case”.

To our knowledge no other jurisdiction applies the “special case” test internally within its legislation for the parody exception. Nor does the “special case” limitation apply to any other exception within our Copyright Act.

Advising SBS’ producers on what is likely to be a “special case” of parody or satire will be virtually impossible. Uncertainty will reign even if expensive test cases are run, as the notion that only “special cases” will succeed, discourages the development of broad precedential principles.

(3) *The exception is wrongly placed in section 200AB and should instead be a fair dealing exception.*

SBS previously submitted that this exception should be a fair dealing exception⁷. Placement of parody or satire within the fair dealing provisions would allow Australian courts to draw on persuasive precedent from other jurisdictions to guide development of the local exception. Retaining the exception within section 200AB means that overseas precedent would be virtually useless, as would analogy from Australian precedents on existing fair dealing exceptions.⁸

(4) *Subsection 200AB(6) is inappropriately applied*

The requirement that, before qualifying for protection under section 200AB(6), a work of parody or satire NOT be protected under any other exception, or statutory licence, is at best confusing.

(5) *Direct reference to TRIPS may require Australian courts to continually import WTO Panel decisions into Australian law*

SBS is concerned that direct reference to the meaning of terms in Article 13 of TRIPS in subsection 200AB(7) may require an Australian court to subordinate to World Trade Organisation Panel decisions on the meaning of Article 13 in the context of international trade disputes rather than developing the exception through Australian precedent.

In our view a parody or satire exception satisfies the three step test without further qualification. All limbs of the three step test are, arguably, naturally implicit in the concepts of parody and satire. They are therefore unnecessary as express limitations. The recently introduced *European Directive 29 of 2001* does not require member states to impose such limitations on its parody exception⁹. However, if the language of the three step test is to be

⁷ Note 12, below.

⁸ See for example the discussion of the “criticism and review” exception by reference to the natural, ordinary meaning of the words and their purpose in the “Panel” case: *TCN Nine v Network Ten*, (2001) 108 FCR 235; (2002) 118 FCR 417.

⁹ *Supra* note 4. For example, the Netherlands has, in reliance on the Directive, introduced a new parody exception without internal qualification by the three step test: see *Auteurswet 1912* (Dutch Copyright Act), Article 18b, discussed in the 2006 ALAI study days report by the Netherlands found at http://72.14.253.104/search?q=cache:SHaUxjuRF4MJ:www.ivir.nl/vva/publicaties/ALAI_2006_Report_NL.pdf+copyright+dutch+parody&hl=en&ct=clnk&cd=4&client=safari

retained in the Draft Bill, then at a minimum, direct references to TRIPS in subsection 200AB(7) should be removed. There is no other provision of the Copyright Act which directly imports TRIPS – nor is it clear why TRIPS, rather than any other copyright treaty, should be directly referenced.

Drafting suggestions

We agree with the ABC's position that the provision for new exceptions should also apply to performances under Part XIA of the Copyright Act.

Given the very short time period provided for the Senate reference, we have taken the liberty of attaching our suggested preferred drafting for a parody or satire exception (Annexure 2). Option A is our strongly preferred wording, and in our view complies with the three step test. However, we would, at a minimum, be prepared to consider Option B. We would be happy to discuss these Options with the Committee or make a further submission on any aspect.

ORPHANED WORKS

SBS notes that the relevant amendment on orphaned works has not been included in the Bill. SBS would seek to comment further if the government releases another Schedule. SBS often would like to use orphan works but is unable to do so.

STATUTORY LICENCES WHERE SBS IS A MEMBER OF THE RELEVANT COLLECTING SOCIETY

Schedule 8 - Communication of works or other subject matter in the course of educational instruction

In relation to the proposed sections 28A and 200AAA, SBS supports the joint position of Screenrights and the Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education Training and Youth Affairs ('CAG') in their letter to the Attorney-General dated 25 October 2006. They are recommending that proposed 28A be replaced by the addition of the Screenrights-CAG proposed 28(5)); and in relation to proposed 200AAA that it be replaced by the addition of the Screenrights-CAG proposed 200AAA and 200AAB. We understand that the Screenrights-CAG drafting is intended to target the actual needs of the educational users while preserving the continued clear operation of the statutory licences.

Schedule 8 - Extended operation of Part VA to the communication of the content by a free-to-air broadcaster

SBS supports the extension to the Part VA statutory licence reflected in the proposed 135C.

Schedules 10 & 11 - Copyright Tribunal

As a member of Screenrights (the declared collecting society under parts VA and VC of the Act), SBS supports their Submission on the expansion of the role and jurisdiction of the Copyright Tribunal. In particular, we note that the Tribunal will be able to refer the parties to an alternative dispute resolution process that would offer a more affordable and efficient dispute mechanism.

TECHNOLOGICAL PROTECTION MEASURES

Schedule 12 - *Technological Protection Measures* (“TPMs”)

SBS has made extensive submissions to government about the proposed exceptions to TPMs. In our view this draft Schedule falls short of meeting broadcasters’ exposure and the actual technical requirements of broadcasting in the digital media environment. We noted above that even the definition of “public broadcaster” that was included in the Exposure Draft was adopted from the AUSFTA, however has the potential to exclude Australia’s national public broadcasters from benefiting from the proposed new defences for certain public institutions.

Specifically, SBS requests the Committee to reincorporate the provision section 116AP of the Exposure Draft of the Copyright Amendment (TPMs) Bill 2006 that introduced a limitation on remedies for libraries, archives, educational institutions and public broadcasters under this Subdivision. See SBS’ Submission on the TPM Draft Exposure Bill dated 22 September 2006.

SBS supports the introduction of additional exceptions for the inclusion of:

An exception to allow circumvention of TPMs to gain access for the inclusion works and performances in broadcasts and the reproduction of works and performances for broadcasting purposes, and

An exception to allow circumvention of TPMs to gain access for Fair Dealing with copyright material (and other actions) for criticism, review, news reporting.

Our position is in keeping with the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs (“**LACA**”) in their *Review of TPM Exceptions* (Recommendation 27).

OVERLAP OF COPYRIGHT AND CONTRACT

SBS also wishes to highlight a crucial and overdue omission in the Bill: an essential provision to protect fundamental rights and exceptions provided for in the *Copyright Act* (1968) from being ousted by contract.

Despite seeking submissions on this issue in 2002, the Government has still failed to address this important issue in copyright law reform. Inclusion of such a provision is not only timely but of utmost relevance in the current suite of *Copyright Act* amendments.

SBS strongly submits that such a provision should be included to preserve the integrity of exceptions which are fundamental to maintaining the balance between the interests of copyright owners and users.

SBS also notes that such a provision is not without significant precedent. This principle has already been adopted in numerous pieces of Australian legislation: s47H *Copyright Act* (1968), s68 *Trade Practices Act* (1974), s199C *Corporations Act* (2001), and s80 *Occupational Health and Safety (Commonwealth Employment) Act* (1991) as well as international provisions in the United Kingdom¹⁰ and the United States.¹¹ SBS also supports the view of other stakeholders in the industry on this issue, including ABC.

¹⁰ Section 137, *Broadcasting Act* (1996) (UK).

¹¹ See: http://www.copyright.com.au/reports%20&%20papers/IssuesPaper_Lindsay.pdf, p 40 – 42.

Please refer to SBS submission on the *Fair Use Review* (Part A Section 10) in May 2005 (Annexure 32) and on incorporating our submission to DCITA on *Copyright & Contract* in July 2003, as well as our Submission on the Exposure Draft Copyright Amendment (TPM) Bill 2006 for more details on this issue.

SBS continues to encounter contracts that exclude the operation of the fair dealing exceptions. A practical example of this is the YouTube website, which sets terms and conditions of use which restrict end users from repurposing material on the site - even where the use could fall within a fair dealing exception for criticism and review, or reporting the news. Copyright owners justify this erosion of fair dealing by arguing for the primacy of contract law, asserting that they should retain the ability to be able to contract with individual users in whatever way they see fit.

It is SBS' experience as a broadcaster that allowing contract to exclude copyright law exceptions is overly prohibitive. In the case of YouTube, SBS recently advised a radio producer who wished to use audio of a clip from YouTube which portrayed cockfighting in the context of a story which reported on the rise of cockfighting. In SBS' opinion the use of the clip fell clearly within the fair dealing exception for reporting the news. However, our advice was that use of the audio would have been in breach of the YouTube terms and conditions, and that using it would leave us vulnerable to legal action from YouTube. In the circumstances there was no possibility of negotiating the terms of the contract direct with YouTube. This result undermines the policy reasons behind the copyright exceptions, which were intended to support the free flow of information, whilst also being limited enough to safeguard the interests of copyright owners.

Thank you for providing us with an opportunity to make a submission to the Committee. We would be happy to expand on our Submission or make an oral presentation on request.

Yours sincerely

Lesley Power
Corporate Counsel

Annexure 1

BACKGROUND

The Special Broadcasting Service Corporation is established under the *Special Broadcasting Service Act 1991*, with a Charter to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society.

SBS' submission to the Committee is informed and guided by the following principles:

- As a national public broadcaster SBS considers that its content should be available to all Australians wherever and however they choose to access it and, as such, makes its programs and services freely available to all Australians.
- Although SBS is both a user and owner of copyright material, SBS has limited budgets and production resources. This means that on balance, SBS is a net user of copyright material.
- SBS recognises the importance of balancing the rights of copyright owners with the need for free speech and the role of the media in disseminating news and content in the public interest. SBS notes the key role of fair dealing exceptions under copyright law in supporting these values.
- SBS has previously raised concerns with government about the advent of contractual and technological measures designed by copyright owners to create private legislation excluding copyright exceptions and upsetting the copyright balance set by the legislature.¹²
- SBS' Corporate Plan requires it to use new forms of digital platforms. The government is making and will continue to make a significant investment in digital infrastructure: digital transmission; digital playout facilities; digital recording; and they plan to make a significant investment in digital radio. SBS makes available new forms of digital content for the benefit of the Australian public. To do so requires extensive licensing and use of third party analogue and digital material.
- As Australia's multicultural broadcaster, SBS extensively sources analogue and digital copyright material, including DVDs, CDs and other digital content from national and international copyright owners for use on its broadcast and other platforms.
- While we welcome many of the draft new exceptions in the Bill, SBS is concerned about the residual effect of the AUSFTA amendments on SBS' rights as a user of copyright. In particular we refer to SBS' extensive reliance on fair dealing in program making and its archival practices as the custodian of important national radio and television and film records.

¹² SBS submission dated 4 July 2003 to DCITA discussion paper "Copyright and Contract" on the Copyright Law Review Committee Final Report on Copyright and Contract dated 1 October 2002; SBS submission dated 4 July 2005 to Attorney-General on May 2005 Issues Paper "Fair Use and Other Copyright Exceptions" – copies of these submissions may be made available to the Committee on request.

Previous Submissions

SBS has made a range of submissions on matters relating to the current provisions of the *Copyright Amendment Bill 2006*. They include:

- Digital Agenda Amendments Review¹³
- Fair Use¹⁴
- Technological Protection Measures Exceptions¹⁵ and our recent TPM Submissions¹⁶



¹³ Memo 8/10/03

¹⁴ Submission to the Attorney-General's Department, *Fair Use and Other Copyright Exceptions*, July 2005

¹⁵ Submission to House of Representative's Standing Committee on Legal & Constitutional Affairs, *Review on Technological Protection Measure Exceptions*, 21 October 2005

¹⁶ (1) Submission to Attorney-General's Department on the confidential *Outline Paper: Implementation of the Australia-United States Free Trade Agreement Technical Protection Measure Provisions*, 7 August 2006; (2) Submission to Attorney-General's Department, *Exposure Draft Copyright Amendment (Technological Protection Measures) Bill 2006*, 22 September 2006; (3) Submission to the Attorney-General's Department, *Further Review of Exceptions to the Technological Protection Measure (TPM) Scheme*, 25 September 2006; and (4) Submission to the Attorney-General's Department, *Exposure Draft Copyright Amendment Regulations 2006: Technological Protection Measures (TPMs)*, 6 October 2006.

Annexure 2

Drafting suggestions – parody or satire

Option A

Delete new subsection 200AB (5).

Insert a new section (eg as section 41A) as follows:

41A Fair dealing for purpose of parody or satire

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

Insert a new section (eg as section 103AA) as follows:

103AA Fair dealing for purpose of parody or satire

A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.

At the end of subsection 248A(1)(f)(ii) add the word “or;”

Insert a new subsection 248A(1)(f)(iii) as follows:

248A(1)

(f) a direct or indirect cinematograph film of a performance made:

....

(iii) for the purpose of parody or satire;

At the end of subsection 248A(1)(fa)(iii) add the word “or;”

Insert a new subsection 248A(1)(fa)(iv) as follows:

248A(1)

(fa) a direct or indirect sound recording of a performance, being a recording that is a fair dealing with the performance:

....

(iv) for the purpose of parody or satire;

Option B

Amend new section 200AB as follows:

200AB Use of works and other subject-matter for certain purposes

- (1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:
 - (a) **except in the case of subsection (5)**, the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
 - (b) the use is covered by subsection (2), (3), (4) or (5);
 - (c) the use does not conflict with a normal exploitation of the work or other subject-matter;
 - (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright or a person licensed by the owner of the copyright.

Use by body administering library or archives

- (2) This subsection covers a use that:
 - (a) is made by or on behalf of the body administering a library or archives; and
 - (b) is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and
 - (c) is not made partly for the purpose of the body obtaining a commercial advantage.

Use by body administering educational institution

- (3) This subsection covers a use that:
 - (a) is made by or on behalf of a body administering an educational institution; and
 - (b) is made for the purpose of giving educational instruction; and
 - (c) is not made partly for the purpose of the body obtaining a commercial advantage.

Use by or for person with a disability

- (4) This subsection covers a use that meets all the following conditions:
 - (a) the use is made by:
 - (i) a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject-matter in a particular form; or
 - (ii) someone else;
 - (b) the use is made for the purpose of the person obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces the difficulty;
 - (c) the use is not made partly for the purpose of obtaining a commercial advantage.

Use for parody or satire

- (5) This subsection covers a use for the purpose of parody or satire.

This section does not apply if under another provision the use does not, or might not, infringe copyright

- (6) **Except in the case of subsection (5),** Subsection (1) does not apply if, because of another provision of this Act:
- (a) the use is not an infringement of copyright; or
 - (b) the use would not be an infringement of copyright assuming the conditions or requirements of that other provision were met.

Example 1: Paragraph (a)—Without using an appliance adapted for producing multiple copies or an appliance that can produce copies by reprographic reproduction, a school teacher reproduces a literary work in the course of educational instruction. Under subsection 200(1), the reproduction is not an infringement of copyright in the work, so this section does not apply.

Example 2: Paragraph (b)—A body administering an institution assisting persons with a print disability makes a Braille version of a published literary work. Under subsection 135ZP(2), making such a version does not infringe copyright in the work if certain conditions (relating to remuneration etc.) are met, so this section does not apply to the making of the version.

Definitions

- (7) In this section:

~~**conflict with a normal exploitation** has the same meaning as in Article 13 of the TRIPS Agreement.~~

~~**special case** has the same meaning as in Article 13 of the TRIPS Agreement.~~

~~**unreasonably prejudice the legitimate interests** has the same meaning as in Article 13 of the TRIPS Agreement.~~

use includes any act that would infringe copyright apart from this section.