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The Secretary  
 House of Representatives  
 Standing Committee on Legal and Constitutional Affairs  
 Parliament House  
 CANBERRA ACT 2600  
 By email: laca.reps@aph.gov.au

**SBS submission to Review on Technological Protection Measure Exceptions**

Dear Sir/Madam,

Thank you for the opportunity to make a submission on this review of the Australia-US Free Trade Agreement provisions on technological protection measures ("TPMs") to be implemented under Australian law by 1 January 2007 ("AUSFTA TPM Regime")<sup>1</sup>. We understand that the Committee is charged with recommending additional exceptions which may be implemented under Articles 17.4.7(e)(viii) and (f) of the AUSFTA TPM Regime using the following criteria:

- Must be confined to acts of circumvention of access control measures;
- Must be limited to activities where the prohibition on circumvention has a credibly demonstrated likely or actual adverse impact on non-infringing uses of copyright material;
- Must relate only to a particular class of copyright material; and
- Must not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective TPMs.

Thank you for providing us with an opportunity to participate in this review. We would be happy to expand on our submission or make an oral presentation on request.

Yours sincerely

**Shaun Brown**  
 Acting Managing Director

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<sup>1</sup> Chapter 17, Article 17.4.7, Australia-US Free Trade Agreement, 18 May 2004 [2004] ATNIA 5.

## 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's response to the review is informed and guided by the following principles:

- As a **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. SBS has therefore not to date implemented any TPMs on its own signal, such as are becoming available for digital television services under "broadcast flag" technology.<sup>2</sup>
- 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 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.<sup>3</sup>
- SBS' Corporate Plan requires it to use **new forms of digital platforms and make available new forms of digital content** for the benefit of the Australian public. To do so requires extensive licensing and use of third party digital material.
- As Australia's multicultural broadcaster **SBS extensively sources DVDs, CDs and other digital content from overseas for use on its broadcast and other platforms**. As set out at 2. below, SBS is already encountering problems with regional coding of DVDs which cannot be played on DVD players or computer DVD-rom drives coded for the Australian market.
- SBS is concerned about the **general effect** of the AUSFTA TPM Regime on SBS's rights as a user of copyright. In particular we refer to SBS's extensive reliance on fair dealing in program making and its archival practices as the custodian of important national television and film records. However, having regard to the Terms of Reference of this Review, we have not raised these more general concerns in this submission.

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<sup>2</sup> See for example, the US Federal Communication Commission's *Digital Broadcast Content Protection, Final Rule*, MB Docket No 02-230, 68 Fed.Reg. 67599 (released December 3, 2003) establishing an interim approval process for digital output protection technologies and recording methods on home digital recording devices. See generally <http://www.fcc/dtv/> for links. For certification of particular technologies under this approval process see [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-193A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-193A1.doc)

<sup>3</sup> 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.

## 2. Policy considerations

SBS, as both user and owner of copyright material, acknowledges the need to ensure copyright law maintains a balance between the interests of copyright owners and users. 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.

In light of the Australia-US Free Trade Agreement, it is important to ensure that access for copyright users continues to be developed appropriately in an Australian context, and that Australia maintains an ability to allow fair and appropriate exceptions to new technological protection measures and to ensure that any such exceptions are able to be exercised in practice. SBS acknowledges that the use of TPMs may become more commonplace and that they have the potential to hinder current use and practice.

*Exceptions should be available where TPMs could impede legitimate use eg. fair dealings or licences to use copyright material.*

SBS is concerned that TPMs may substantially alter the balance of copyright in favour of copyright owners and in doing so impede the ability of SBS to meet its Charter obligations. SBS is also concerned that TPMs may lessen the legitimate use of copyright material under the *Copyright Act*.

Fair dealing exceptions are commonly used by SBS in its broadcast activities, for example in the provision of news and current affairs services. SBS also relies on the use of licensed material in its activities. SBS notes that such material is available in a number of different formats and that TPMs may inhibit the access and use of such material in formats and on equipment commonly used by SBS. In such a case, circumvention of the TPM is necessary for legitimate copyright use.

*TPMs could invoke anticompetitive behaviour by copyright owners.*

Increased use of TPMs may extend beyond the mere protection of a copyright owner's material from legitimate threats of digital piracy and provide largely unrestrained monopoly control over access to copyright material. In this case, such anti-competitive behaviour could circumvent the intent of fair dealing exceptions. This would be also likely to increase the cost of copyright material to SBS and ultimately increase the cost of SBS's services to taxpayers.

*Ensure TPMs do not prevent use of material which SBS has legitimately licensed, particularly in regard to time and format shifting.*

SBS notes that time and format shifting of legitimately licensed copyright material may be impeded by TPMs. SBS has submitted in the recent Attorney-General's Fair Use enquiry<sup>4</sup> that it supports a time-shifting exception for the copying of television and radio broadcasts provided that it is for private and domestic use solely for the purpose of enabling the broadcast to be viewed or listened to by the person who copies the broadcast at a more convenient time. SBS considers such exceptions should not be impeded by the existence of TPMs.

SBS also acknowledges that content provided in digital form may be used on a number of different platforms and devices and that TPMs may impede the legitimate use of legally

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<sup>4</sup> Ibid footnote 3 above.

acquired content. TPMs can also have the effect of limiting technology choice and operability.

Support of a private format and time shifting exception is consistent with SBS's commitment to ensuring SBS's content can be delivered on all platforms which its audiences wish to access, facilitating wide access to SBS material by the Australian public. This reflects current use practices.

### **3. Examples of TPMs having adverse effects on SBS's practices**

In the short time frame available, internal consultations have identified the following examples of TPMs currently affecting the legitimate activities of SBS, or likely to have an effect as a result of the introduction of the AUSFTA TPM Regime by 1 January 2007:

- (a) **Access to DVDs sourced from different "regions"**. SBS needs to access DVDs sourced from different countries for purposes such as previewing overseas sourced television programs for broadcast licensing, and previewing DVDs to be marketed in Australia by SBS Program Sales.

*Example: SBS Program Purchasing and Program Sales can currently play most DVDs received for preview from overseas licensors on multi-region DVD players. However, SBS's PC DVD-Roms and some other broadcasting equipment are not multi-region coded and therefore we have experienced difficulty in playing overseas-sourced DVDs on these.*

- (b) **Access to and copying of DVDs for fair dealing**. SBS television news and current affairs sometimes needs access to commercially retailed DVDs for the purposes of making a fair dealing in association with the reporting of news (Copyright Act s103B) or for criticism and review (Copyright Act s103A). Increasingly, such DVDs are copy-protected or, if sourced from overseas, regionally coded and SBS editing equipment cannot read or copy them. As turnaround for news reporting is generally the same day and for current affairs programs generally within days, it is generally too time consuming to have to contact the copyright owner for a "clear" version that can be copied, and unsatisfactory to use analogue or off-screen copying, which does not guarantee broadcast quality vision. Producers are reluctant to use de-encryption software downloaded from the internet or to write their own to access DVDs for program making, as there are concerns that such activity may already be illegal or in breach of internal SBS computing guidelines.

*Example: SBS recently wanted to use an excerpt of a famous Australian film in a current affairs program. However, the film had not been released on DVD in Australia. While the distributors had given permission for SBS to use the clip, they were unable to provide a broadcast quality clip. SBS had to purchase a region 1 DVD of the film and dub it using an analogue bridge. The only other option was a twenty year old shop rented VHS copy of substandard quality.*

There is also the strong possibility that the copyright owner, seeing an opportunity to secure payment for material which would otherwise be accessible for free under fair dealing, may refuse access or seek to impose an unreasonable cost on the broadcaster. Furthermore, in some cases the copyright owner is hostile to the story or could threaten injunctive legal action if it becomes aware that the story is in

production. It is not in these circumstances practical or advisable to contact the copyright owner for permission to use their material.

***Example: In one case the copyright owner, a beverage manufacturer, had material on its website which SBS wanted to feature in a current affairs program on underage drinking. On becoming aware of the program prior to broadcast, the copyright owner removed the material. Had SBS not already downloaded printouts of the material, and had the material been protected by TPM, SBS could not have used the material for criticism and review in its program.***

TPMs therefore interfere with SBS's legitimate fair dealings for news and current affairs reportage, and are likely to do so increasingly in the near future.

- (c) **Copying of phonograms in digital format** may very soon be constrained if copyright owners replicate their recent US rollout of copy-protected music in the Australian market.<sup>5</sup> SBS regularly purchases CDs from shops (both here and overseas) for the purposes of using music in programs for various media platforms under our existing broadcast licences. To do so requires that a copy of the CD be made. If this otherwise legal copying was prevented by TPMs, this would seriously constrain our music repertoire and devalue our licences. While we are aware that another review opportunity will be available in four year's time, given the very recent US experience, we submit that this concern should be addressed now.

#### **4. Suggested constructive approach to be taken by the Committee**

As the Committee is aware, the AUSFTA TPM Regime essentially imports the provisions of the US Digital Millennium Copyright Act<sup>6</sup> ("DMCA") and its review process, which occurs every three years.

We note that similar exceptions to those we will propose below have been rejected by the US Copyright Office in the latest DMCA review.<sup>7</sup> However while we anticipate that the Committee is likely to consider what has happened under the DMCA, we submit that the Committee should not follow the US Copyright Office without detailed consideration of the appropriateness of its approach to the Australian environment.

The Australian Legislature has always reserved the right to implement international copyright treaties such as the Berne Convention in its own way, within the parameters of those Conventions. To make the current consultation and review process meaningful, the Committee should form its own, independent view of justified exceptions under the AUSFTA TPM Regime for Australian conditions.

We submit that the approach taken by the US Copyright Office has been overly narrow, technical and unsympathetic to the genuine practical concerns of users. In particular, the Copyright Office has required a very high standard of evidence of harm to *justify* an exception to be proven by users, while accepting largely hypothetical evidence of harm to

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<sup>5</sup> See for example the statistics cited in an article by the Electronic Frontiers Foundation: "Unintended Consequences: Five Years under the DMCA"; available at [http://www.eff.org/IP/DMCA/20030102\\_dmca\\_unintended\\_consequences.html](http://www.eff.org/IP/DMCA/20030102_dmca_unintended_consequences.html)

<sup>6</sup> Digital Millennium Copyright Act 1998, introducing anti-circumvention provisions codified in s 1201 of Title 17 of the US Copyright Act.

<sup>7</sup> US Copyright Office of the Library of Congress, Federal Register, December 16, 2003 (Vol 68, No 241) available at <http://www.copyright.gov/fedreg/2003/68fr2011.html>

oppose an exception from copyright owners.<sup>8</sup> At **Annexure A attached**, we set out reasons why, in our respectful submission, the Committee should take a more purposive and constructive approach than the US Copyright Office has in identifying justifiable exceptions to TPMs.

**Example: the US Copyright Office rejected an exception allowing consumers to circumvent TPMs on DVDs, partially on the grounds that the consumer could obtain a usable copy by filming the television screen.<sup>9</sup> However, such a justification does not answer the needs of broadcasters, who, as noted at 3(b) above, require access to broadcast quality copies. See our proposed exceptions (2) and (3) below.**

## 5. Proposed exceptions

SBS submits that the Committee should recommend exceptions for broadcasters on the basis of the adverse effects outlined at 2 above using circumvention devices as follows. Our exceptions are drafted on the basis that the AUSFTA TPM Regime will **not** result in prohibition of circumvention of TPM **copy-controls, including where a copy-control is part of a TPM access regime**. We note our request for clarification of “access” at 6 below to reflect this intended meaning.

### (1) Access to DVDs sourced from different “regions”

*...as necessary for broadcasters to access region-coded DVDs of television programs and films in order to make acquisition decisions.*

We note that there is already an existing exception under the AUSFTA TPM Regime protecting the right of libraries to circumvent TPMs for the purposes of their acquisition decisions. This exception would be analogous and is equally justifiable. The exception applies only to a limited class (region-encoded DVDs of television programs and films). It does not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective TPMs, as only a clearly defined and highly visible class of users (broadcasters) is permitted to purchase and use such devices.

### (2) Access to DVDs for fair dealing in news reporting under section 103B of the Copyright Act

*...as necessary for broadcasters to access DVDs of television programs and films, where it is not practicable to obtain a “clear” copy without paying a licence fee in respect of the copy or to make a broadcast quality copy at reasonable cost within a reasonable time.*

Again, SBS submits that this provision meets the test for acceptance as it applies only to a narrow class of copyright material, and is qualified so as to be available only to broadcasters and only where the exigencies of news reporting require fast access for fair dealing purposes. There is therefore no likely impact on TPM protections beyond this use.

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<sup>8</sup> See submission by IP Justice to the 2003 DCMA review by the US Copyright Office: Rulemaking Hearing: Exemptions from Prohibitions on Circumvention of Technological Measures that Control Access to Copyrighted Works, Thursday, May 15 2003: available at <http://copyright.gov/1201/2003/hearings/schedule.html>

<sup>9</sup> See discussion in the May 15 2003 Rulemaking Hearing, id note 8 at pp 71-72.

### **(3) Access to DVDs for fair dealing for criticism and review under section 103A of the Copyright Act**

*...as necessary for broadcasters to access DVDs of television programs and films, where it is not practicable to obtain a "clear" copy without paying a licence fee in respect of the copy, or to make a broadcast quality copy at reasonable cost within a reasonable time.*

Again, SBS submits that this provision meets the test for acceptance as it applies only to a narrow class of copyright material, and is qualified so as to be available only to broadcasters in limited circumstances. Often a weekly turnaround or less is required in SBS's programs using criticism and review, and in these cases it is difficult to obtain a clear copy in time for transmission. There is therefore no likely impact on TPM protections beyond this use.

### **(4) Copy controls on phonograms in digital formats**

*....new provisions should be inserted for broadcasters utilising the ephemeral copying provisions of the Copyright Act (ss 47 and 107) to access and copy CDs for the purpose of broadcast as permitted by those sections.*

As stated above we understand that use of a circumvention device to circumvent a **copy-control** TPM, as opposed to an access control TPM, will not be illegal under the AUSFTA TPM Regime. However, in any event we request that the Committee provide for a separate provision of the Copyright Act like that of sections 112(a) and (b) of the US Copyright Code, inserted by the DMCA. This section, which has no current equivalent under Australian law allows broadcasters to require copyright owners to supply a clear copy of a CD for use under their ephemeral copying rights, and to circumvent the TPM if the copyright owner does not do so within a reasonable time.

We submit that at a minimum that equivalent provisions should now be inserted into sections 47 and 107 of the Australian Copyright Act to preserve the value of SBS's broadcast music licences in the digital age. We note that our broadcast licences with the music collecting societies are well established and mutually beneficial. If copyright owners restrict the repertoire of music available for use by SBS through TPM copy controls, SBS will lose value under its broadcast licences unless the above provisions are inserted for our protection.

### **General comments**

We would be happy to discuss refining these exceptions further to satisfy the Committee, if necessary. For example, while we believe that the exceptions should be available to all broadcasters, we note that public broadcasters are a specially recognised class under the AUSFTA TPM Regime (see our request for clarification at 6. below) and would accept that the exceptions could if necessary be limited to this class of broadcaster on public policy grounds. We would also be prepared to consider a requirement to certify that we are purchasing and using a device only for the relevant purpose, similar to the certification procedure for qualified persons under existing section 132(5F) of the Copyright Act. In our view such a provision provides adequate protection for copyright owners to ensure that the provisions are not being abused.

## 6. Clarifications

SBS requests that the Committee recommend clarifications of any new laws implemented under the AUSFTA TPM Regime as follows:

- We note that the new restrictions will apply to circumvention of TPMs controlling **access** but not **copying** of protected material. We request that it is made clear in the legislation that the **use, manufacture and supply of devices for circumvention of a TPM copy-control is not illegal**. A TPM copy-control should be defined for these purposes as including **a copy-protection device which is part of an TPM access regime**. Not to do so may be to invite copyright owners to “bundle” copy control measures as part of TPM access regimes.<sup>10</sup>
- We note the AUSFTA TPM Regime exceptions under Article 17.4.7(e)(viii) do not extend to supply or manufacture of access-control circumvention devices. We request clarification that a circumvention device developed by an organisation itself for a legitimate use is not “manufacture” and therefore not per se illegal.
- We also request that it is made clear in the legislation that *manufacture and supply* of circumvention devices aimed at circumventing *copy control* TPMs is not illegal.
- We note that Article 17.4.7(a)(C) of the AUSFTA TPM Regime provides that “public non-commercial broadcasting entities” will not be subject to criminal sanctions for breach, and request that the Committee ensure that SBS is included within this definition.

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<sup>10</sup> In the US, litigation has been brought by copyright owners against copying technology for DVDs on the basis that such programs or devices also infringe TPM access regimes and therefore violate s 1201 of the DMCA: see cases cited in “Unintended Consequences: Five Years under the DMCA” *ibid* footnote 5 above.



## Annexure A

SBS submits that the Committee should take a more purposive and constructive approach to its task of identifying justifiable exceptions than has been taken by the US Copyright Office in the DMCA reviews for the following reasons:

- Local conditions are not the same in Australia as they are in the United States. In particular, Australia is a net importer of copyright material whereas the US is the largest exporter of copyright in the world. Any negative effects of the AUSFTA TPMs Regime on copyright users will therefore be magnified in local Australian conditions. If the AUSFTA TPM Regime as implemented does not deal fairly with copyright users, the net effect on Australia's copyright industries will also be negative.
- US copyright law is subject to the First Amendment. All US legislation is interpreted by the US courts through this prism and in the case of copyright law, has led to more generous copyright exceptions such as those for "fair use". There is no general equivalent to the First Amendment in the Australian constitution and therefore it is the responsibility of the legislature in the first instance to protect free speech values as part of the accepted balance of copyright law.
- While Australia has voluntarily signed up to the AUSFTA, the Committee should bear in mind that, outside of the wider aims of the AUSFTA negotiations, the TPM regime previously chosen by the Australian legislature after extensive consultations was very different to the approach chosen by the US legislature under the DMCA and now imported here via the AUSFTA. No such wide consultation process with the copyright industries occurred at the time Australia negotiated the AUSFTA.
- In the recent High Court case *Sony v Stevens*<sup>11</sup> concerning the current TPM regime under Australian copyright law, Justice Kirby stated that the property rights of consumers who have legitimately purchased copyright products should not be lightly taken away. Implicit in his Honour's statement is the view that the courts should not lightly interpret legislation to take away consumer's rights to play DVDs and other digital products on devices of their choice, particularly where such rights are taken away through TPMs which consist of "access regimes" and not copyright protection per se.<sup>12</sup> In obiter, his Honour queried whether such laws may even infringe the "just terms" property protection of the Australian Constitution.<sup>13</sup>
- The Australian legislature has already committed to increasing the powers of copyright owners under other amendments from the AUSFTA. However, user exceptions under Australian law are currently narrower than under the US Copyright Act. As a result, the Attorney-General has recognised the potential need to consider US style "fair use" exceptions, or other new exceptions tailored to the Australian context, to rebalance our copyright law. The Committee should take into account this background to its current task.
- The first two DMCA reviews in 2000 and 2003 occurred when use of TPMs was still emergent. Users found it difficult to meet the evidentiary standards of harm set by the US Copyright Office. It is already evident that, by 2007, TPMs will be far more widespread than at either of these times.
- It is not apparent that broadcasters had any significant role in making submissions in support of exceptions in the US, nor that their concerns were taken into account by the US Copyright Office.<sup>14</sup>

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<sup>11</sup> *Stevens v Kabushiki Sony Computer Entertainment* [2005] HCA 58 (6 October 2005),

<sup>12</sup> Ibid footnote 10, Kirby J at paragraph 215.

<sup>13</sup> Id at paragraph 216.

<sup>14</sup> See eg, text accompanying note 9 above.