CHAPTER 3

KEY ISSUES

3.1 The committee received evidence covering a wide range of issues and which provided analysis of the Bill from the perspective of many key stakeholders.

3.2 Evidence was received from groups representing a variety of sectors and industries, including artists/authors representative groups, corporate rights holders and distribution industries, copyright-related industries, and consumers. These groups have generally raised issues and concerns in relation to aspects of the Bill which most significantly affect their interests. Some of the groups represented in submissions include: authors; publishers; visual artists; film industry; music industry; IT industry; television/pay television industries; libraries; educational institutions; and cultural institutions.

3.3 A number of the broad issues and concerns identified in the course of the committee's inquiry, including opposing arguments related to particular aspects of the Bill, are examined below. The vast majority of evidence received by the committee related to Schedules 6, 8 and 12 of the Bill.

Balancing of interests

3.4 Typically, divergent views emerged with respect to key elements of the Bill which accord with the interests of particular stakeholders. Generally speaking, for example, groups representing copyright owners or rights holders tended to support parts of the Bill which strengthen copyright protection, while often opposing, or offering only qualified support to, provisions which seek to create wider exceptions to copyright infringement.[1] Conversely, those advocating consumer rights and the importance of fostering creativity and innovation argued that the Bill is weighted towards copyright owners and rights holders to the ultimate detriment of individual consumers and the wider community.[2]

3.5 Such opposing views have been recognised by the Federal Government in its formulation of the Bill:

> It is inevitable in making amendments in this area that there will be areas of disagreement between stakeholders. Not all amendments are well received by copyright owners and not all are well received by users but, as ever, one has to balance rights in the public interest and we believe that this bill goes

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1 For example, see Copyright Agency Limited, *Submission 29*; Australian Recording Industry Association, *Submission 38*; Australian Publishers Association, *Submission 43*; Australian Federation Against Copyright Theft, *Submission 57*.

2 For example, see Electronic Frontiers Australia, *Submission 44*; Australian Digital Alliance, *Submission 50*; Ms Kimberlee Weatherall, *Submission 54*; Internet Industry Association, *Submission 66*.

> a long way to achieving that fair compromise and balance. We have drawn on direct consultations with a wide range of stakeholders including private individuals, peak groups representing people with disabilities, owners of copyright works, broadcasters, distributors, copyright collection societies, academics and those in industry.[3]

Consultation

3.6 In the Second Reading debate, the Attorney-General stated that 'the (B)ill is a result of extensive consultation and … delivers on a number of copyright reviews undertaken in the past few years'. In particular, he noted that the Bill includes the Federal Government's responses to:

> … the fair use and other exceptions review, the review of the Digital Agenda Act amendments, the review of protection of subscription broadcasts, the Intellectual Property and Competition Review Committee's review of copyright under the competition principles, the Copyright Review Committee's review of jurisdictional procedures of the Copyright Tribunal, the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on technological protection measures, and the technical review of all Australian legislation to ensure consistency with the Australian Criminal Code.[4]

3.7 The Attorney-General's Department (Department) provided the committee with a detailed chronology of consultation undertaken by the Federal Government in relation to various parts of the Bill. This chronology appears at Appendix 3.

3.8 The committee notes that the consultation processes were comprehensive and wide-ranging in relation to most aspects of the Bill. However, the committee is mindful of evidence raised during its inquiry which argued that public consultation has not been adequate in relation to certain specific parts of the Bill. In particular, submissions and witnesses expressed concern that the Bill proposes 'unexpected' changes in the following areas:

- introduction of the new tiered system of criminal offences relating to infringement of copyright, in particular the introduction of strict liability offences and an infringement notice scheme;[5]
- introduction of a 10 per cent 'cap' in Schedule 6 in relation to the current fair dealing exception for research and study purposes;[6]

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3 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech in reply, *House of Representatives Hansard*, 1 November 2006, p. 31.

4 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech in reply, *House of Representatives Hansard*, 1 November 2006, p. 31.

5 See Ms Kimberlee Weatherall, *Committee Hansard*, 7 November 2006, pp 29 & 33.

6 See Miss Sarah Waladan, Australian Digital Alliance, *Committee Hansard*, 7 November 2006, p. 10; Mr John Mullarvey, Australian Vice-Chancellors' Committee, *Committee Hansard*, 7 November 2006, p. 16.

- a new requirement under subsection 135ZMB(5) in Schedule 8 that 'insubstantial' copying of works in electronic form be 'continuous';[7]
- changes to the 'records notices' provisions relating to the Copyright Tribunal in Schedule 11;[8] and
- removal of a 'clear and direct link (contained in the Exposure Draft) in Schedule 12 between TPM protection and preventing or inhibiting the infringement of copyright.[9]

3.9 The committee also received evidence suggesting that the 'drivers' for some provisions of the Bill have not been adequately explained. For example, Ms Libby Baulch from the Australian Copyright Council (ACC) noted that:

> … we do not know what the origins of … amendments [relating to format-shifting for books, newspapers, magazines and photographs] are. We were not able to find those in the issues paper for the fair use inquiry or in the submissions to it. We have similar concerns about the application of proposed section 200AB to the activities of educational institutions and libraries where we have sought some information from government about what sorts of activities they regard as not being allowed at the moment which they think should be allowed … With some sort of explanation like that of the sorts of activities that they want to address, we may be able to look at better expressed purposes for this exception to apply … It is difficult to make alternative proposals if you do not know what the problem is that these amendments are intended to address.[10]

3.10 The committee also heard arguments that Parliament's consideration of the Bill is being rushed.

3.11 For example, Mr Dale Clapperton and Professor Stephen Corones argued that the only provisions of the Bill 'which have a deadline for implementation, or could otherwise be considered urgent, are the TPM provisions contained within Schedule 12'. In their view, the 'remainder of the … Bill introduces significant changes to Australia's copyright laws' and 'an unhurried committee review with sufficient time to conduct meaningful public consultation and hearings' is therefore warranted.[11]

3.12 Ms Kimberlee Weatherall made a similar argument:

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7 See Ms Delia Browne, Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs (CAG), *Committee Hansard*, 7 November 2006, p. 16.

8 Mr John Mullarvey, Australian Vice-Chancellors' Committee, *Committee Hansard*, 7 November 2006, p. 16.

9 Electronic Frontiers Australia, *Submission 44*, p. 4; Professor Brian Fitzgerald, *Committee Hansard*, 7 November 2006, p. 21.

10 *Committee Hansard*, 7 November 2006, p. 10.

11 *Submission 42*, p. 14.

> The only parts of this Bill which arguably must pass this year, in order to ensure compliance with the Free Trade Agreement with the United States, are Schedules 9 (encoded broadcasts) and 12 (technological protection measures). In my view, the remainder of this Bill should be deferred so that a proper analysis and discussion of the provisions can be undertaken.[12]

Department response

3.13 In response to arguments about perceived deficiencies in the consultation process and the apparent haste with which amendments not related to the AUSFTA are being considered, a representative from the Department explained that it is '(t)he government's preference … to do it as one major copyright reform bill and to get it all through this year'. She also noted that, apart from amendments relating to TPMs which are required to implement Australia's obligations under the AUSFTA:

> … there are also some other minor amendments in there that will allow us to accede to the World Intellectual Property Organisation Copyright [WIPO] Treaty, and that is a requirement under both the Australia-US Free Trade Agreement and the Singapore-Australia Free Trade Agreement.[13]

3.14 However, the representative acknowledged that accession to the WIPO Treaty is an 'indirect' issue; the WIPO Treaty requirements relate to the issue of 'reasonable portion' and how 'administrative purposes' are defined under the library provisions of the Bill.[14]

3.15 With respect to the criminal liability provisions (discussed in greater detail below), the Department informed the committee that 'a range of consultation' has occurred which 'has identified a number of issues that the Government is currently considering'. Further, '(t)here would be little value in delaying the passage of these amendments for any further consultation'.[15]

Schedules 1 and 2 – criminal liability

3.16 Several submissions argued that the Bill's introduction of strict liability offences for copyright infringement is unprecedented and troubling, to the extent that Schedule 1 of the Bill should not be passed in its current form. In other common law countries such as the United Kingdom, Canada and the United States, offences of strict liability do not exist in copyright law. Significantly, as Ms Weatherall noted, the AUSFTA does not require the creation of offences of strict liability for copyright, and offences of strict liability do not exist in patent or trade mark law in Australia.[16]

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12 *Submission 54*, pp 1-2.

13 *Committee Hansard*, 7 November 2006, p. 44.

14 *Committee Hansard*, 7 November 2006, p. 48.

15 *Submission 69A*, p. 10.

16 *Submission 54*, pp 11 & 15.

3.17 Many expressed the view that strict liability for copyright infringement should be rejected as a matter of principle. Ms Weatherall argued that ordinary Australian citizens, engaging in non-commercial activities, should not risk criminal liability, particularly where copyright infringement has taken place unknowingly.[17] Further, Ms Weatherall noted the inherently different nature of copyright property compared to other forms of property:

> Whichever way you look at it, the harm caused by copyright infringement, while serious in some cases, is commercial, not physical; no one is permanently deprived of property or the ability to use their property by copyright infringement, and it is highly questionable whether society fundamentally condemns unknowing, unthinking infringement of copyright.[18]

3.18 Ms Weatherall pointed to many deficiencies with the proposed criminal liability provisions, both from a policy level and in relation to their likely practical impact.[19] In her view, the reach of the provisions is overly broad and most problematic where they apply to:

- acts not done for a commercial purpose or in a commercial context;
- conduct that is a necessary part of conducting ordinary, legitimate business; and
- acts that might be done by ordinary Australians innocently.[20]

3.19 The Australian Digital Alliance (ADA) predicted that the effect of the Bill's criminal liability provisions will be that copyright 'crimes' will be the subject of substantially higher penalties than other property crimes, in circumstances where the public does not necessarily perceive these sorts of activities as crimes.[21] According to some, the result will be that many more people, probably including a disproportionate number of younger people, will at worst be facing jail time, and at best have their records and career prospects marked by criminal convictions.[22]

3.20 There was also concern that the strict liability provisions will make reasonable, good faith commercial activities illegal.[23]

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17 *Submission 54*, p. 11.

18 *Submission 54*, pp 14-15.

19 See *Committee Hansard*, 7 November 2006, pp 30-31; *Submission 54*; *Submission 54A*.

20 *Submission 54A*, p. 2.

21 Australian Digital Alliance, *Submission 50*, p. 15.

22 For example, see Electronic Frontiers Australia, *Submission 44*, p. 7.

23 Open Source Industry Australia Limited, *Submission 21*, p. 6; Mr Dale Clapperton and Professor Stephen Corones, *Submission 42*, p. 11.

3.21 In the context of educational institutions, the AVCC expressed concern that the criminal liability provisions may have an unintended impact, namely that educational institutions might be held strictly liable for inadvertent acts by their teachers and lecturers, and by students enrolled in educational institutions.[24]

3.22 On the other hand, the strengthened criminal liability provisions garnered ardent support from certain sectors. For example, the Screen Producers Association of Australia (SPAA) commended the Federal Government on the Bill's measures and argued that, if properly implemented, these changes will make it harder for commercial scale piracy to take place, and will give film and television producers greater protection against those who undermine their business.[25]

3.23 The Australian Recording Industry Association (ARIA), while broadly supportive of the proposed provisions relating to criminal liability, argued that in some cases they do not extend far enough. ARIA also expressed concern that:

> … police and prosecutors, given the option, may tend to favour charging offenders under the summary and strict liability offences, thereby avoiding the use of the indictable offences, which would amongst other things require a trial by jury. This is of particular concern to ARIA given the wide disparity between the penalties for the indictable offences ($60,500 and a maximum 5 years imprisonment), summary offences ($13,200 and a maximum 2 years imprisonment) and the on-the-spot fines ($1230). If police and prosecutors do tend to favor the charging of offenders under the summary and strict liability offences then the penalties that offenders will face in most instances will be significantly less than the current $60,500 and a maximum 5 years.[26]

3.24 The Australian Federation Against Copyright Theft (AFACT) expressed strong support for Schedule 1 of the Bill. It applauded the Bill's introduction of a new way of dealing with existing offences to recognise that criminal activity ranges from very serious to lower level matters. In its view, the particularly beneficial feature of the amendments is that copyright crimes in Australia are able to be prosecuted according to three tiers of liability which will enable law enforcement officers to address copyright crime at a level appropriate to the offence committed.[27]

3.25 At the hearing, Ms Adrianne Pecotic from AFACT provided the committee with cogent arguments for the inclusion of strict liability offences in the Bill. In her view, strict liability offences are necessary in the context of copyright law:

> Strict liability is a lower penalty aimed at low-range offences that equip police to make judgements about the nature of the activity that they are

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24 *Submission 58*, pp 5-6; see also Ms Delia Browne, CAG, *Committee Hansard*, 7 November 2006, p. 19.

25 *Submission 19*, p. 2.

26 *Submission 38*, p. 3.

27 *Submission 57*, p. 3.

> trying to deal with and make it easy to respond in a measured way to copyright crimes that are, in many instances, unfortunately out of control in the Australian environment. The sorts of activities that they are aimed at addressing are things like low-scale crimes that escalate into organised crime if they are not stopped at an early stage and the low-scale backyard operator type of crimes that are spreading out of control in a way that is adding up to a very significant amount of damage for copyright owners.[28]

3.26 Ms Pecotic did not believe that the strict liability offence would be used in the case of 'innocuous' purposes unrelated to commercial exploitation of copyright works.[29]

3.27 The Commonwealth Director of Public Prosecutions (DPP) submitted that the approach of providing for a range of offences with varying penalty levels provides 'considerable flexibility and enables charges to be selected based on the particular conduct that is being assessed'. The DPP noted that the choice of charge is a matter that is addressed in the Commonwealth's Prosecution Policy: if, after assessing the evidence, the DPP considers that there is sufficient evidence to lay charges, the DPP will choose the most appropriate charge or charges in accordance with that policy.[30]

3.28 At the hearing, the Senior Assistant Director expanded on the DPP's view of the criminal liability provisions:

> From our perspective, we see the amendments to the offence provisions very much in two ways. Firstly, they clarify the elements of the offences and the structuring of the offences and, in our submission, very helpfully set out the elements of the offences, clarify the elements and so on. We see that as useful.
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> …
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> Secondly, we think that structuring the offences in the way that they do—indictable summary and strict liability, and the addition of the strict liability and infringement regime—is a very useful adjunct to the criminal offences that are currently in the Act. We would certainly support that measure as part of the overall enforcement of copyright.[31]

3.29 The Senior Assistant Director also noted that the proposed strict liability offences do not alter dramatically the existing offence provisions in the Copyright Act:

> … our support for these is on the basis of ensuring effective enforcement of the policy objectives that are currently contained in the Copyright Act

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28 *Committee Hansard*, 7 November 2006, p. 32.

29 *Committee Hansard*, 7 November 2006, p. 32.

30 *Submission 53*, p. 7.

31 *Committee Hansard*, 7 November 2006, p. 29.

> rather than on the basis of an extension into new areas in terms of copyright policy.[32]

3.30 Several submissions and witnesses endorsed the introduction of guidelines with respect to the management of the strict liability offences and the infringement notice scheme.[33] Ms Weatherall suggested that, in developing such guidelines, consultation should take place with bodies representing those to be regulated under the proposed provisions, such as the Business Council of Australia, the Law Council of Australia, and user-interest groups (such as the ADA and the AVCC).[34]

3.31 The committee notes that the Australian Federal Police (AFP) consider that the amendments proposed in relation to Schedule 2 of the Bill will provide a more comprehensive range of tools for law enforcement to tackle copyright offending. The AFP informed the committee that the amendments will assist it in evaluating the seriousness of copyright matters that are referred, and in taking appropriate action against matters that are accepted for investigation.[35]

3.32 The AFP advised the committee that it is still developing an informed view on Schedule 1 of the Bill.[36]

Department response

3.33 The Department's response to concerns about the proposed strict liability offences was as follows:

> The introduction of new strict liability offences as part of a tiered offences system is intended to provide police and prosecutors with a wider range of penalty options to pursue against suspected offenders, depending on the seriousness of the conduct. By targeting lower level criminal offenders (eg market sellers), they will significantly enhance the effectiveness of the enforcement regime and result in stronger deterrence at the lower level. They will allow a more cost-effective administration of the existing enforcement provisions by enabling offences to be dealt with expeditiously.[37]

3.34 Further:

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32 *Committee Hansard*, 7 November 2006, p. 34.

33 For example, see Ms Adrianne Pecotic, AFACT, *Committee Hansard*, 7 November 2006, p. 32; ARIA, *Submission 38*, p. 3.

34 Ms Kimberlee Weatherall, *Submission 54A*, pp. 4-5.

35 *Submission 74*, p. 1.

36 *Submission 74*, p. 1.

37 *Submission 69A*, pp 10-11.

> The strict liability offences are not intended to target one particular group of the community and will be applied by law enforcement agencies in the normal way along with all other criminal offences.[38]

3.35 The Department is aware of other countries that have introduced administrative penalties which can be imposed for less serious activities, and noted that there is an increasing international trend for countries to create a wider range of penalty options to law enforcement and government agencies in addressing copyright offences.[39] The committee understands that administrative penalty systems for copyright are in place in countries such as Germany, Italy, China, Mexico and the Philippines.

3.36 The Department also informed the committee that it is not aware of international precedents of strict liability fines with respect to copyright, particularly in common law countries. However, it noted that the creation of strict liability offences in Australia underpinned by an infringement notice scheme for lower level criminal transgressions of certain regulatory offences is not an unusual feature of Australia's criminal law system. The Department also pointed out that, in addition, if a person refuses to pay an infringement notice penalty, they should be liable to face court only for a strict or absolute liability offence, which is consistent with recommendations of the Senate Standing Committee for the Scrutiny of Bills and the Australian Law Reform Commission.[40]

Schedule 6 – Exceptions to infringement of copyright

3.37 Some of the arguments for and against the exceptions contained in Schedule 6 are outlined below.

Time-shifting – Part 1

3.38 Submissions and witnesses who commented on the proposed time-shifting exception were generally divided between those who welcome the changes as long overdue, and those who opposed them as a matter of principle. Some, however, contended that the Bill provides a broadly balanced approach.[41]

3.39 The Australian Subscription Television & Radio Association (ASTRA) supported the provisions pertaining to time-shifting, given that they reflect the daily reality of millions of private households that engage in the copying of television programs for the purpose of viewing such programs at a more convenient time. However, it argued that the right to time-shift should be subject to the exercise of a

38 *Submission 69A*, p. 11.

39 *Submission 69A*, p. 11.

40 *Submission 69A*, p. 11.

41 See, for example, Apple Computers, *Submission 63*.

broadcaster's right to implement a technological protection measure on their broadcasts.[42]

3.40 SBS supported the time-shifting (and format-shifting) amendment for private use.[43]

3.41 The Australian Digital Alliance (ADA) argued that the time-shifting provisions do not go far enough:

> The provision does not allow time-shifting of new and emerging digital forms of technology, such as podcasts and webcats. Rather, the provision is limited to broadcasts only, and therefore is technologically specific rather than neutral. This will be confusing for consumers and[,] as technologies develop and use of podcasts and webcasts become more common[,] this will lead to disregard for copyright law.[44]

3.42 The Screen Producers Association of Australia (SPAA) expressed its opposition to the time-shifting provisions. However, it suggested that if they were to be implemented, a sunset clause on the number of days a copy can be kept (such as 14 days) should apply.[45]

3.43 ARIA submitted that the record industry considers that there is no demonstrated need for format-shifting and time-shifting exceptions and that any such exceptions should be limited so as not to undermine legitimate market activities.[46]

3.44 At the hearing, Ms Libby Baulch from the Australian Copyright Council argued that the time-shifting and format-shifting exceptions will interfere with current and future markets for copyright works and that 'insufficient regard has been paid to the way that technology and markets are going to develop'.[47] Further:

> All other developed countries that we are aware of which allow private copying, including the United States, have levy schemes that ensure compensation to copyright owners for private copying by consumers.[48]

3.45 According to Ms Baulch, the introduction of exceptions for time-shifting and format-shifting, without corresponding compensation for copyright owners, does not

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42 *Submission 28*, pp 2 & 3.

43 *Submission 33*, p. 3.

44 *Submission 50*, p. 5.

45 *Submission 19*, pp 1-2.

46 *Submission 38*, pp 2 & 9.

47 *Committee Hansard*, 7 November 2006, p. 2.

48 *Committee Hansard*, 7 November 2006, p. 2.

meet the three-step test contained in international treaties such as the Berne Convention.[49]

3.46 Such arguments were supported by others. Mr Michael Fraser from the Copyright Agency Limited (CAL) agreed that copyright owners should be compensated alongside any broadening of copyright exceptions, particularly in the context of the emerging digital download environment:

> If one institutes a free exception then copyright owners are going to be very concerned about whether it is one person or 14 days or their family or whether they are allowed to make a backup copy. But if one has a broad principle that these kinds of users should be permitted in return for a reasonable return, which can be subject to the Copyright Tribunal, say, then trying to shape up the exact framework of the market no longer becomes a question, because you leave it to the market to develop under a broadly based three-step test exception.
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> The problem now is trying to delineate a market which is in the process of forming. By doing that without compensation you prevent that market from developing at all—copyright owners will not invest in making these very services available. So compensation I think is the linchpin … [A]ll those countries that value their creative industries that make an exception for private use provide for payment to the copyright owner for what is a large part of their developing online markets.[50]

3.47 Mr Fraser argued further with respect to the digital environment that there are problems in trying to create exceptions to deal with a market that is still in a state of development:

> We are getting to the point of how many angles on the head of a pin in trying, very early in the digital revolution, to extend fair dealing exceptions to private use, library use, private copying—trying to shape up a market that is in a state of incredible creativity itself … [It is difficult] to say what exception should be allowed for free and what exception should be allowed but paid for and to say where the market now exists. Where the market will be in six months is going to be very different from where it is now. Our

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49 *Committee Hansard*, 7 November 2006, p. 3. However, the committee notes the strong divergence of views in relation to interpretation and implementation of the three-step test, including arguments that the three-step test allows for adequate exceptions to be introduced in order to enable effective operation of the digital environment and the Internet: see, for example, Miss Sarah Waladan, ADA, *Committee Hansard*, 7 November 2006, p. 8. The committee also notes evidence pointing out that the compensation or levy systems in other countries relate to a different kind of private copying to the exceptions proposed in the Bill, that is, a broader general right to copy. Conversely, the exceptions proposed in the Bill are very narrow and specific: see, for example, Ms Kimberlee Weatherall, *Committee Hansard*, 7 November 2006, p. 7; Miss Sarah Waladan, ADA, *Committee Hansard*, 7 November 2006, p. 8. The committee considers the three-test step in further detail below.

50 *Committee Hansard*, 7 November 2006, p. 4.

> members are very keen to provide the very services that these exceptions are designed to ensure.[51]

Department response

3.48 In response to questioning by the committee in relation to uncertainty about use of the term 'domestic premises' in proposed paragraph 111(1)(a), a representative from the Department informed the committee that, while there is an obligation to make a recording in domestic premises, there is no restriction on where a person watches or listens to the recording. The phrase 'private and domestic use' in proposed paragraph 111(1)(b) is not intended to restrict people to watch or listen to recordings in their own homes. The departmental representative noted that there is no definition of the term 'domestic premises', however he stated that:

> I would have thought the term 'domestic premises' was going to be fairly obvious in most circumstances. You may be able to find spots around the edges where you might have a bit of doubt, but for most people it will be fairly clear what their domestic premises are. I believe that term is used in the current UK provision which permits time-shifting and we are not aware that that has caused any great confusion in the UK.[52]

Format-shifting – Part 2

3.49 The Media Entertainment & Arts Alliance noted that Australia would be the only country in the developed world to introduce a format-shifting exception to the protections afforded copyright owners without simultaneously introducing a system of equitable remuneration to those copyright owners.[53]

3.50 The Australian Society of Authors submitted that the proposed 'format shifting' exception should not apply to books at this stage but instead be monitored and reviewed in two years time with respect to audiovisual material; its view was that some of the proposed exceptions to copyright infringement may impede or interfere with emerging markets in the digital environment.[54]

3.51 The Screen Producers Association of Australia expressed its opposition to the proposed format-shifting provisions, arguing that they inhibit the exploitation of markets which still exist for copyright owners.[55]

3.52 Viscopy (representing the copyright interests of visual artists) also opposed the introduction of the format-shifting exception. In its view, the justification for copying books, newspapers, periodicals and photographs, in particular, is not clear.[56]

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51 *Committee Hansard*, 7 November 2006, pp 4-5.

52 *Committee Hansard*, 7 November 2006, p. 40.

53 *Submission 60*, p. 1.

54 *Submission 4*, p. 2.

55 *Submission 19*, p. 2.

3.53 The Internet Industry Association noted the potentially limiting nature of the proposed exceptions in their application to the digital environment:

> … the supposed introduction of a more flexible regime for the use of new digital devices seems to have resulted in narrowly confined exceptions, which are not only likely to become dated (due to their technological specificity) but also may not deliver the legitimacy to common activities for which they are intended. The 'main copy' rule in relation to MP3 players has failed to take into account the actual method by which format shifting occurs, with the result that the use of iPods, for example, for most Australians will remain in breach of the [Copyright] Act.[57]

3.54 A number of submissions commented on the Bill's failure to cover the use of iPods, which require the making of more than one permanent copy of a sound recording to work.[58] The restriction in proposed paragraph 109A(1)(e), that an individual can only make one copy in any given format, means that if an individual makes an MP3 copy to put in their iPod, then they cannot also keep the MP3 copy on their laptop.

Department response

3.55 The Department is aware of concerns raised in relation to format-shifting, particularly in the context of the Bill's perceived failure to adequately deal with legitimate use of iPods. The Department justified the present drafting of the format-shifting provisions as follows:

> The present conditions for format-shifting of sound recordings allow the owner to make one copy in each different format. There are good reasons for this. The exception is not intended to be an open-ended licence that allows a person who buys one copy of a sound recording to make unlimited copies. The 'one copy in each format' condition is to protect copyright owners from this exception being abused, as well as to ensure that the exception complies with the three-step test. In effect, this condition will limit a person to making one copy for each playing device that uses a different audio format to that of the original sound recording.[59]

3.56 The Department clarified that the current drafting recognises that, in transferring music from a CD to a portable playing device, it is necessary to make an 'intermediate' copy in a personal computer. However, section 109A requires that this intermediate copy should be deleted after the transfer is completed.[60]

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56 *Submission 39*, p. 2.

57 *Submission 66*, p. 3.

58 For example, see Ms Kimberlee Weatherall, *Submission 54*, p. 3.

59 *Submission 69A*, p. 3.

60 *Submission 69A*, p. 3.

3.57 The Department pointed out that the Attorney-General noted in his Second Reading Speech that the Federal Government will listen to, and consider, relevant comments related to this issue, and make any necessary technical changes to ensure that the Bill achieves the Federal Government's objectives in this area.[61] The committee welcomes this undertaking.

Use of copyright material for certain purposes – Part 3

3.58 The committee notes that exceptions and limitations to the rights of copyright owners must comply with Australia's international treaty obligations. The provisions in these treaties provide for a 'three-step test' for permitted exceptions: limitations or exceptions to exclusive rights should only be in *certain special cases* which do not conflict with a *normal exploitation* of the work and do *not unreasonably prejudice* the legitimate interests of rights holders.[62]

3.59 The committee received evidence which highlighted opposing views on how the three-step test should be implemented in domestic legislation. Proposed section 200AB seeks to provide an open-ended exception in line with the US model, and to allow courts to determine if other uses should be permitted as exceptions to copyright. Some particular concerns were raised in relation to the Bill's approach to the three-step test.

3.60 The Australian Publishers Association (APA) noted several drafting issues with respect to proposed section 200AB. For example, the APA pointed to the likely uncertainty as to the scope of the new exceptions until case law is developed to interpret the open-ended exception. The APA commented that the move by the Federal Government towards 'a lawyer-based copyright regime – a litigious model – instead of staying with a regime based on clearer legislative exceptions' is 'odd'.[63]

3.61 The ADA and the Australian Libraries' Copyright Committee (ALCC), on the other hand, expressed the view that proposed section 200AB is unnecessarily limited by the 'commercial advantage' test which is unclear in meaning. Further, the requirement that the provision be limited to 'certain special cases' within the scope of the special cases of education, library and archive uses, parody and satire and uses for people with disabilities, confuses the meaning of the provision. According to the ADA and the ALCC, this additional limitation is not required by the three-step test or indeed the AUSFTA.[64]

3.62 Others disagreed with this approach. For example, the International Association of Scientific, Technical & Medical Publishers argued that the three-step

61 *Submission 69A*, p. 4.

62 See Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works.

63 *Submission 43*, p. 5.

64 *Submissions 50A and 51A*.

test demands that *all* exceptions be subject to the three-step test.[65] Similarly, CAL argued that 'there is inherent confusion in the approach of combining explicit recognition of the three step test in one exception with other exceptions in the [Copyright] Act'.[66]

Department response

3.63 A representative of the Department commented on the Bill's implementation of the three-step test as follows:

> … we are aware that there are a range of views … including [in relation to the inclusion of the 'commercial advantage'] condition in the new 200AB. We are aware that some user interests think that it is unduly restrictive. Given that the three-step test already has to be complied with, there is an argument that should be enough, that the government should go as far as the three-step test allows. But we note in passing that the three-step test is not an obligation; you only have to go as far as you can go under the treaty obligations. The government is also aware that some copyright owner interests think that the provision is too broad and that the commercial advantage test should be narrowed even further. In the present drafting the government has sought to find a balance between those interests, recognising that this is a new exception that is different in form to some of the specific exceptions already in the Copyright Act. Therefore, the government is minded to try to balance what are reasonable interests on both sides—the copyright owners and users.[67]

3.64 Further:

> The first part of the 'three-step' test requires that an exception must be limited to 'certain special cases'. Other types of exceptions (both in Australia and in other jurisdictions) set narrower conditions than simply that the use is for a particular purpose or by a particular person or organisation, for example, by a library. Those exceptions generally allow use of identified copyright material for a particular purpose, subject to various other conditions or limitations. In total, all the legislated conditions will define 'cases' which are more certain but are very restricted.[68]

3.65 In relation to concerns raised about the 'commercial advantage' test contained in elements of proposed section 200AB, the Department noted the differences in opinion between copyright user interests and copyright owners or rights holders:

> This condition is questioned by some copyright user interests as unnecessary because s 200AB already requires that a permitted use must comply with the three-step test. It is argued that the three-step test provides

65 *Submission 55*, p. 3.

66 *Submission 29*, p. 8.

67 *Committee Hansard*, 7 November 2006, p. 42.

68 *Submission 69A*, p. 2.

> all the protection for copyright owners required by international treaty obligations. User interests also contend that a 'commercial advantage' condition is too restrictive and uncertain given that institutions may charge instructional fees or engage in money rasing activities.
>
> The Government introduced the 'commercial advantage' test in recognition of concerns about the potential scope of the new exception. Indeed the Government notes arguments on behalf of some copyright owners that s 200AB is presently too wide in being potentially available to for profit schools and libraries in commercial companies and should be narrowed so that no commercial advantage, direct or indirect, can be obtained from reliance on this section.[69]

3.66 The Department acknowledged that the current form of proposed section 200AB was an attempt to balance these competing interests by indicating that the prohibition on gaining a commercial advantage should not necessarily prevent cost recovery by an eligible institution or person.[70]

Exception allowing use of copyright materials for parody or satire

3.67 Some submissions and witnesses commented specifically on the exception relating to use of copyright material for parody or satire.

3.68 ASTRA submitted that the elements of satire and parody are valid forms of expression that are recognised within the fair use doctrine established by US courts and (save for satire) in the European Union Information Society Directive (Article 5(3)). It supported the extension of the fair dealing rights to include these forms of expression, arguing that the Bill will create greater certainty for copyright users while not diminishing the rights of copyright owners.[71]

3.69 On the other hand, the Copyright Agency Limited (CAL) offered qualified support for the inclusion of an exception for parody – as long as it does not conflict with the ability of copyright owners to license such uses. CAL did not support the extension of the exception to cover satire.[72]

3.70 While commending the inclusion of satire and parody as exceptions, the ABC and SBS argued that the use of the three-step test to qualify the parody or satire exception is a wrong application of the test. As SBS explained:

> 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

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69 *Submission 69A*, p. 2.

70 *Submission 69A*, p. 2.

71 *Submission 28*, p. 3.

72 *Submission 29*, p. 9.

> 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. [73]

3.71 SBS argued that parody or satire should be placed in the fair dealing exceptions alongside related exceptions such as criticism and review.[74]

Department response

3.72 The Department informed the committee that it is considering the removal of the exception for parody and satire from proposed section 200AB and, instead, adding new exceptions to Parts III and IV of the Copyright Act to provide that a fair dealing with a work or other subject matter for the purpose of parody or satire is not an infringement of copyright.[75]

Limitation on 'fair dealing' exception for purposes of research or study – Part 4

3.73 Many submissions and witnesses expressed concern at the Bill's limitation on copying for the purposes of research and study to a 'reasonable portion' (10 per cent or one chapter) of a published literary, dramatic or musical work.

3.74 The Law Council of Australia submitted that there is no reason to change the current exceptions in the Copyright Act related to fair dealing as they already adequately cover the relevant subject matter.[76]

3.75 The Flexible Learning Advisory Group argued that the Bill proposes a radical and unwarranted departure from the existing fair dealing regime which will dramatically curtail the fair dealing rights of students and academics.[77]

3.76 Ms Weatherall noted the apparent disparity between the Bill, on the one hand, allowing format-shifting and time-shifting without a quantitative limit (to consume media, a person may copy the whole work) and, on the other, imposing a quantitative limit (10 per cent) on copying for research and study.[78]

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73 *Submission 33*, p. 6.

74 *Submission 33*, p. 5.

75 *Submission 69A*, p. 5.

76 *Submission 35*, p. 5.

77 *Submission 52*, p. 1.

78 *Submission 54*, p. 10.

3.77 Ms Sally Hawkins pointed to the inconsistency between copying for personal purposes and copying for research or study purposes:

> Changes to the law in relation to education include the restriction of fair dealing for research or study with a stricter adherence to the 10% copying rule, this means that a person can make a full copy of a book for personal purposes but can't make more than 10% of a copy for research purposes. This is ridiculous. There should be absolutely no limitation on the quantity of material that can be copied for research purposes. It is against the wider public interest that such a limitation exists in the first place and stupidity that it should be reinforced any further.[79]

3.78 The ADA and the ALCC submitted that the narrowing of fair dealing for research and study will seriously disadvantage libraries and cultural institutions and particularly their clients 'who will not be able to copy rare or out of print materials to take away with them for research or study purposes, despite the fact that those materials are not commercially available'.[80]

Department response

3.79 The Department indicated that it is considering a possible redraft of the amendments relating to fair dealing for the purposes of research or study:

> To overcome misunderstandings apparent from several submissions to the Department and to the Senate Legal and Constitutional Affairs Committee about the intended effect of the amendments, there may be redrafting of amendments to section 40 (fair dealing for research or study) to clarify the intended effect, which is that the reproductions *deemed* to be fair dealings will be slightly restricted but *without affecting* in any way the scope of the provision allowing any other amounts of reproduction if *considered* to be fair.[81]

3.80 The Department explained that the Federal Government's decision to limit the quantity of copying of a work that is, under section 40, *deemed* to be fair dealing is based on amendments necessary to enable accession to the WIPO internet treaties (WCT and WPPT). The Department also noted that Australia is required under the Singapore and AUSFTA to become party to those WIPO Treaties.

3.81 According to the Department, there must be appropriate limits to unremunerated copying automatically allowed under section 40 to ensure compliance with the three-step test in the Berne Convention and the WCT.

3.82 For the purposes of *deemed* fair dealings under the new section 40(5), it is intended that the quantification of reasonable portion in subsections 10(2) and 10(2A)

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79 *Submission 1*, p. 2.

80 *Submissions 50A and 51A.*

81 *Submission 69A*, p. 5.

should be exhaustive in relation to the works which they cover (that is, literary works, dramatic works and musical works in hard copy, and literary and dramatic works in electronic form, in both cases excluding computer programs and electronic databases.)

3.83 The Department advised that greater amounts of copying of any work for research or study will still be allowed under subsection 40(1) if a court judges the copying to be fair, having regard to the matters listed in subsection 40(2); both those provisions are unaffected by the amendments in the Bill.[82]

Official copying of library and archive material – Part 5

3.84 The Copyright and Cultural Institutions Group (CCIG) applauded the intent behind the exception applying to cultural institutions. However, it argued that there is a lack of certainty in terms and terminology used in the Bill which undermine the usefulness of the exception. In particular, the exception's limitation on one copy/reproduction does not accord with the technical processes of preservation.[83]

3.85 The National Library of Australia submitted that the Bill does not make adequate provision for the preservation of digital works and creates a significant impediment to the preservation of commercial works in digital form.[84]

3.86 The ADA and the ALCC noted that 'whatever the policy intentions of the Government may be, the result of the legislation will be that many practices which cultural institutions undertake in order to fulfil their mandates, will remain technically in breach of the law'.[85] The ADA and the ALCC also noted that best practice standards for preservation recommend that 'multiple copies' be made and stored in different locations. For example, the UNESCO *Guidelines for the preservation of digital heritage* recommend 'multiple copies'.[86]

3.87 The ABC and SBS both expressed concern that they, as national broadcasters and holders of valuable audio and audio-visual cultural material, may not be covered by the Bill's definition of 'cultural institution'. They argued that they should be specifically included in the concept of 'key cultural institution'.[87] The Australian Film Commission also argued that it should be deemed a 'key cultural institution' for the purposes of the exception.[88]

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82 *Submission 69A*, pp 7-8.

83 *Submission 68*, p. 2.

84 *Submission 26*, p. 1.

85 *Submissions 50A and 51A*.

86 *Submission 50*, p. 7; *Submission 51*, p. 6.

87 ABC, *Submission 32*, pp 9-10; SBS, *Submission 33*, pp 3-4.

88 *Submission 13*, p. 7.

Department response

3.88 The Department provided advice to the committee indicating that the term 'first copy' in proposed section 110BA of the Bill will be clarified in further drafting changes.[89] However, the committee is unsure of the extent of this clarification and remains concerned that the scope of the proposed provision may still not be wide enough to capture ordinary preservation processes undertaken by cultural institutions. While the committee understands that multiple copies for the purposes of preservation may be allowed under the specific exception for libraries and archives in proposed section 200AB, the committee considers that this should be made absolutely clear in the Bill.

Schedule 8 – Responses to Digital Agenda review

3.89 A number of concerns were raised in relation to proposed sections 28A (communication of works in the course of educational instruction) and 200AAA (caching on a server for educational purposes).

3.90 In relation to proposed section 28A, some argued that, as currently drafted, it might inadvertently operate to exempt from copyright obligations a variety of communications which are currently, and should clearly be, regarded as communications to the public, and which are therefore covered by the educational statutory licence in Part VA of the Copyright Act.[90]

3.91 On the contrary, CAG argued that the range of copyright material covered by section 28A does not correspond with the range of copyright material currently covered by section 28 of the Copyright Act. According to CAG, the practical effect of this will be that schools will be able to use new technologies for some kinds of copyright material but not others.[91]

3.92 Some also argued that proposed section 200AAA appears to provide a virtually blanket exemption to educational institutions to download and communicate material from the Internet, and then to keep that material for an unlimited period of time. This could have the effect of allowing the continuous caching of Internet content and may potentially undermine licensing arrangements.[92] Some also argued that this conflicts with the three-step test. As the Australian Publishers Association argued, '(i)t is difficult to see that there is a special case, the activity conflicts with a normal

89 *Submission 69A*, p. 4.

90 For example, Screenrights, *Submissions 8 and 15*; Australasian Performing Right Association Limited (APRA)/Australasian Mechanical Copyright Owners' Society Limited (AMCOS), *Submission 45*, p. 6.

91 *Submission 25*, p. 3.

92 For example, Screenrights, *Submissions 8 and 15*; Screen Producers Association of Australia, *Submission 19*, p. 6; Australian Publishers Association, *Submission 43*, p. 20.

exploitation of the work and would unreasonably prejudice the legitimate interests of the rights holder'.[93]

3.93 The Business Software Association of Australia (BSAA) argued that the words of proposed section 200AAA appear to extend far beyond active caching of websites. It expressed concern that the exception, as drafted, could be used to justify downloading a copy of a computer program onto a server and making it available to students for the purposes of an educational course. This would, in turn, have the effect of severely damaging the educational market for software companies and would jeopardise the heavily discounted pricing on products offered to educational institutions.[94]

3.94 The International Intellectual Property Alliance (IIPA) argued that the 'most troubling feature' of proposed section 200AAA is that:

> … it appears irrelevant whether a voluntary license – or for that matter a statutory license – is already available, or even already in force, under which the educational institution would be able to make the use but would have to pay for it.
>
> …
>
> … there is certainly a strong argument to be made that in its current form, Section 200AAA threatens to conflict with the normal exploitation of works which are already available to educational institutions under licenses that could cover the use labeled as "active caching." Indeed, one wonders why an educational institution would ever enter into such a license in the future if Section 200AAA were enacted.[95]

3.95 Conversely, educational institutions and other groups representing consumer interests have argued that the exemption in proposed section 200AAA does not go far enough. They argued that the proposed section, while clarifying the position of active caching for educational purposes, does not provide for the most common form of caching which occurs widely for Internet efficiency purposes in a broad range of organisations that provide Internet access – namely 'passive' or proxy caching.[96]

3.96 The Australian Vice-Chancellors' Committee (AVCC) noted that some copyright owner groups, such as the Copyright Agency Limited, have argued that caching for these purposes does not come within the temporary copy exception

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93 *Submission 43*, p. 20.

94 *Submission 41*, p. 2.

95 *Submission 7*, p. 10.

96 For example, Australian Digital Alliance, *Submission 50*, p. 14; Australian Vice-Chancellors' Committee, *Submission 58*, p. 3.

contained in section 43A of the Copyright Act.[97] However, the AVCC noted that no court appears to have determined that this is so. In any case, uncertainty regarding the legal status of such caching is a matter of great concern to educational institutions due to the risk of being sued for copyright infringement in respect of caching and having to engage in the expense of defending such a claim.[98]

3.97 The AVCC understands that the Federal Government intended that proxy caching does come within the exception contained in section 43A. It argued that, if this is the case, some words to this effect in the EM would put beyond doubt that caching of this kind does not infringe copyright. If the Federal Government is not minded to make such a statement, the AVCC urges that the proposed education sector caching exception be broadened to ensure that it can be relied on by educational institutions in respect of forward or proxy caching.[99]

3.98 As Ms Anne Flahvin from the AVCC explained at the hearing:

> What we are saying is that there needs to be some clarification to ensure that, when we cache for the purposes of efficiency, cost savings, technical efficiency or efficient use of bandwidth, we are not infringing copyright.
>
> …
>
> … the reasons we need to go out on a limb is that we are about the only place in the world that I know of where there has been a suggestion that caching for efficiency purposes exercises a right of copyright.[100]

3.99 Screenrights (the Audio Visual Copyright Society) and the Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs (CAG) provided the committee with a joint approach to overcome some of their perceived concerns in relation to proposed sections 28A and 200AAA. While their concerns differ – Screenrights is concerned that the proposed sections go beyond the specific policy intention, and CAG is concerned that they do not clearly cover some particular uses mentioned in the EM – they have identified possible solutions which they believe address each of their concerns.[101]

3.100 As Mr Simon Lake from Screenrights told the committee:

> Within the submission, ABC, SBS, APRA, the Screen Producers Association of Australia and other copyright interests have all had a look at

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97 However, note that there is a common view that passive caching does fall within the temporary copying exceptions contained in sections 43A and 43B of the Copyright Act: see further Australian Digital Alliance, *Submission 50*, p. 14.

98 *Submission 58*, p. 4.

99 *Submission 58*, p. 4.

100 *Committee Hansard*, 7 November 2006, p. 14.

101 See further, *Submissions 8, 15 and 25*.

> this. One of the things they have said is that, whilst, again, they do not love the policy behind it, they think that what we have proposed is a workable solution. They have also commented that they think it is a good thing that the schools and Screenrights, as the copyright representative, are working together to get those shared solutions. We have shown it, and the response has been positive.[102]

3.101 CAG and Screenrights' suggested solution to the problem is to delete proposed section 28A and to create a new subsection to section 28 to exempt communications made merely to facilitate a performance under section 28. They believe this approach meets their stated policy intention, and also addresses their concerns.[103]

Department response

3.102 The Department informed the committee that it is considering changes to address the concern expressed by copyright owners and educational bodies that, as drafted, section 28A goes further than current section 28 and extends to general exercise of the communication right. The Department acknowledged that this is unintended. It is proposed to amend the drafting of section 28A to deem a communication of a work or subject matter, other than a work in the circumstances of subsections 28(1) to (4) inclusive, not to be a communication to the public.[104]

3.103 With respect to the caching issue, the committee notes advice from the Department that it is considering drafting changes to proposed section 200AAA to clarify that caching for efficiency purposes does not infringe copyright; and to ensure that there is no doubt that the reproduction must be removed after the end of the particular educational course for which it was made. The Department also informed the committee that it is proposed that copies should be destroyed within 14 days of the end of a course. Such destruction could be by either direct human intervention or indirectly by an automated process.[105]

3.104 In order to address the fact that a copy of a cached or copied website resides in cache or storage after it is deleted, the Department noted that subsection 200AAA(3) could provide that subsection 200AAA(2) does not apply unless the reproduction is destroyed or access to the copy removed, rather than requiring the copy to be removed.[106]

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102 *Committee Hansard*, 7 November 2006, p. 17.

103 See *Submission 15*, p. 2 and Attachment B, p. 1.

104 *Submission 69A*, p. 4.

105 *Submission 69A*, p. 4.

106 *Submission 69A*, p. 4.

Schedule 12 - Technological protection measures

3.105 The committee notes the complex and technical nature of the Bill's provisions relating to TPMs.

3.106 Some submissions and witnesses expressed strong support for the provisions as a means of preventing copyright infringement and ensuring that copyright industries can continue to invest in the innovative delivery of copyright products to Australian consumers.[107]

3.107 However, the committee also received evidence that the proposed changes to copyright law in respect of TPMs would be significantly detrimental to some industries and to consumers.[108]

3.108 Others raised concerns with particular aspects of these provisions. For example, some submitted that the Bill's definition of 'technological protection measure' is undesirably broad, confusing, and is inconsistent with the AUSFTA, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and Australian case law.[109] The Business Software Association of Australia commented on the offences relating to TPMs, noting that, as drafted, they limit the capacity of law enforcement to respond in an appropriate way to the severity of an infringement of the Copyright Act because they do not enact the full range of offences – indictable, summary and strict liability – that have been developed for the non-TPM offences in the Copyright Act.[110]

3.109 In their submission, Mr Dale Clapperton and Professor Stephen Corones from the Queensland University of Technology argued broadly that the anti-circumvention provisions of the AUSFTA, as implemented by the Bill, will have a far broader effect in Australia than in the United States due to, in part, disparity in the protection for functional elements of computer software, and the lower standard of originality in Australia. Significant differences in the exceptions to copyright between the two countries exacerbate the problem.[111]

3.110 Electronic Frontiers Australia (EFA) pointed to Schedule 12 having undergone 'serious and fundamental changes' from what was contained in the Exposure Draft of the Bill. It argued that these changes 'were unannounced, unexplained, and only came to light after doing a side-by-side comparison' of the provisions of Schedule 12 and the Exposure Draft.

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107 For example, see Screen Producers Association of Australia, *Submission 19*, p. 1; Australian Federation Against Copyright Theft, *Submission 57*, p. 4.

108 For example, see Open Source Industry Australian, *Submission 21*.

109 For example, see Graham Greenleaf et al, *Submission 37*, p, 3; Apple Computers, *Submission 63*, p. 2.

110 *Submission 41*, p. 2.

111 *Submission 42*, p. 7.

3.111 EFA submitted that, in its view, the anti-circumvention provisions of the Exposure Draft contained a clear and direct link between TPM protection and preventing or inhibiting the infringement of copyright. Such a link was recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs report into TPM exceptions. Despite this recommendation, and the government accepting the recommendation in their response to that committee's report, this 'vital link' has been abandoned in the Bill.[112]

3.112 Similar arguments were raised by others in relation to the absence of the incorporation of a link to preventing or inhibiting copyright infringement. At the hearing, Professor Brian Fitzgerald and Mr Dale Clapperton contended that the correct interpretation of Article 17.4.7 of the AUSFTA requires a direct link between any effective TPM and the prevention of copyright infringement. They argued that this interpretation is consistent with the initial wording in the Exposure Draft which has been replaced with the words 'in connection with the exercise of copyright' contained in the current version of the Bill. In their view, this new wording could 'arguably be interpreted to allow almost any restriction imposed by the copyright owner' to be protected by anti-circumvention law.[113]

3.113 Professor Fitzgerald and Mr Clapperton also argued that this interpretation aligns with the interpretation of the AUSFTA put forward by the Attorney-General's Department before the House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs held in 2005, that committee's findings in that inquiry, the Federal Government's acceptance of relevant recommendations in that inquiry, and current US case law.[114]

3.114 Many also pointed to the *Stevens v Sony* case[115] which also emphasised the need to link any TPM protected by the Copyright Act to the prevention and inhibition of copyright infringement, and where the High Court cautioned against allowing copyright owners to use copyright law to further 'non-copyright' agendas'.[116]

3.115 In this vein, Professor Fitzgerald argued that copyright law is not appropriate to effectively provide legislative protection for business models and endorse a preference in the marketplace for certain business activities:

> Australian consumers, once they lawfully purchase a copyright item, have the right to use that item subject to controls that limit or prevent copyright infringement. Copyright infringement should be the touchstone of technological protection measures protected under the Copyright Act. If they are to be protected at all for other reasons, we should be looking at

112 *Submission 44*, p. 4.

113 *Committee Hansard*, 7 November 2006, p. 21; *Submission 42A*, p. 5.

114 See *Committee Hansard*, 7 November 2006; *Submission 42A* (supplementary), p. 2.

115 [2005] HCA 58.

116 For example, see Professor Brian Fitzgerald, *Committee Hansard*, 7 November 2006, p. 21.

> them under the other particular heads—whether it is consumer legislation or whether it is content legislation—but not under the Copyright Act.[117]

3.116 However, others expressed strong disagreement with this argument. For example, Mr Maurice Gonsalves from the Interactive Entertainment Association of Australia argued that 'there is no link to copyright infringement, and that link is not in the [AUS]FTA, in US law or in the law of most other jurisdictions'.[118] Mr Gonsalves was of the view that, in the online environment, where a copyright owner is exercising the copyright owner's right of communication to the public:

> … there is no other way of protecting the copyright work other than using the technological protection measure. So without protection like this, that potential distribution model is eliminated altogether potentially—which is detrimental to consumers because those models will not evolve.[119]

3.117 A number of submissions commented on the exceptions to circumvention of TPMs contained in the Bill. In particular, there was concern that the provisions of the Bill dealing with TPMs might be used to prevent the interoperability of data or the creation of software programs which can access other people's data.[120] There was also concern that the exceptions would not be wide enough to prevent anti-competition uses of TPMs.

3.118 As Mr Brendan Scott from the Open Source Industry Australia argued:

> We are very concerned that it does raise competition issues under the TPM provisions. We are concerned that they can be used to lock customers out of their own data or to require customers to be locked into a specific vendor. We were hoping to find an exception in the permission provision, which says that if you are the copyright owner you can give permission. But the issue for us there is just because I save a document it does not mean that I am the only person who owns copyright in the saved document. And that flows on to our main concern which is the interoperability exception.[121]

3.119 The Open Source Industry Australia contended further that the absence of a clear exception for interoperability to permit access to a customer's data would 'pose a substantial threat to our member's ability to compete in the software market' and would have 'a substantive adverse effect on competition and innovation'.[122]

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117 *Committee Hansard*, 7 November 2006, p. 28.

118 *Committee Hansard*, 7 November 2006, p. 23.

119 *Committee Hansard*, 7 November 2006, p. 26.

120 See, for example, Mr Graham Greenleaf et al, *Submission 37*; Open Source Industry of Australia, *Submission 21*.

121 *Committee Hansard*, 7 November 2006, p. 27.

122 *Submission 21A*, pp. 1 & 2.

3.120 There was also some concern with respect to the absence of a permission exception in Schedule 12. Ms Carolyn Dalton from CAG explained the potential problem as it applies to the education sector:

> In the TPM provisions in relation to the ban on the use of a circumvention device, there is an exception there that says you can circumvent if you have the permission of the copyright owner. In relation to the other set of bans or criminal and civil provisions in relation to dealings with circumvention devices—for example, sale, manufacture etcetera—there has not been that exception for permission translated across. So if, for example, in a school or a university you have been given the right to use a circumvention device, there is no equivalent exception to enable the sale or manufacture so that someone can sell you a device to use that exception. We understand that that is a requirement of the free trade agreement … but the absence of a permission exception means that the school or university cannot even contact the copyright owner. They cannot pick up the phone and say, 'Would you mind?' We think that is an interesting gap, because it can effectively mean that the provisions that have been given to educational institutions to use these devices might not be workable even in the context where specific permission has been sought from the copyright owner to undertake such acts.[123]

Department response

3.121 The Department responded to some of the issues raised by submissions and witnesses with respect to the TPMs provisions. In relation to arguments that the current version of Schedule 12 removes the link to copyright infringement that was contained in the Exposure Draft, a representative of the Department explained that Article 17.4.7 of the AUSFTA 'requires liability for TPMs to be independent of copyright infringement'.[124] She told the committee that the Federal Government's view is that the AUSFTA 'clearly states that the TPM liability that we provide should be independent of whether copyright infringement has occurred'.[125]

3.122 The representative also noted that there has not been a significant change between the Exposure Draft of the TPMs provisions and the current Bill. She explained that certain interpretations of the Exposure Draft did not reflect the Federal Government's intention:

> The intention of the exposure draft was to provide liability where there was a possibility that copyright infringement might occur, and it did not look at a particular situation as to whether an exception under the Copyright Act would have applied. It was an objective test. The government's intention in the exposure draft was not read by the public. In the submissions we saw that there was a lot of confusion about the government's intention. Both

123 *Committee Hansard*, 7 November 2006, p. 18.

124 *Committee Hansard*, 7 November 2006, p. 46.

125 *Committee Hansard*, 7 November 2006, p. 46.

> users and owners sought greater clarity and simplicity in the operation of the definitions. They also sought greater certainty in the issue of geographic market segmentation. The drafting approach in the bill is the government's response to those concerns.[126]

3.123 Further:

> It is my understanding that those interpretations would have resulted in Australia not complying with the free trade agreement. That understanding meant that you had to show infringement of copyright for TPM liability to exist. In moving from the government's intention in the exposure draft to where we are today in the bill, it is simply an attempt to provide clarity and simplicity in the operation of the definitions and to move away from the legislative notes that addressed the region coding issue to substantive provisions in the act that address market segmentation and anticompetitive use of aftermarket materials.[127]

3.124 With respect to a possible additional exception to TPMs liability for educational institutions to allow them to provide circumvention devices to other institutions, the Department informed the committee that this would not be possible under the AUSFTA:

> … the Australia-United States Free Trade Agreement (AUSFTA) places clear boundaries on the manufacture and supply of circumvention devices for other people. This is a necessary measure in order to discourage piracy.
>
> The effect of this limitation in the AUSFTA is that there is no scope for the Government to introduce an additional exception to liability for educational institutions to allow them to provide circumvention devices to other institutions.[128]

Committee view

3.125 The committee acknowledges the vast amount, and comprehensive nature, of evidence it has received in the course of its inquiry. This evidence has greatly assisted the committee in its deliberation of the issues raised by the Bill, particularly given the short timeframe within which the committee has been required to undertake its inquiry. The committee also notes the complexity of copyright law and the issues raised by the Bill which, in the context of the short timeframe, has made the committee's task challenging.

3.126 The committee notes the importance of balancing the interests of various stakeholders and recognises the difficulties in achieving such balance in the area of copyright law. The committee acknowledges that the Government has endeavoured to ensure that there continues to be strong economic incentives for the creation of new

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126 *Committee Hansard*, 7 November 2006, pp 46-47.

127 *Committee Hansard*, 7 November 2006, p. 47.

128 *Submission 69A*, p. 9.

material to protect copyright, while at the same time providing greater recognition to the interests of consumers to reasonably use copyright material that they purchase or legitimately access. The committee considers that, on the whole, the Bill represents a balanced approach between all competing interests.

3.127 Nevertheless, the committee is inclined to make suggestions which it considers may help clarify some of the remaining areas of contention, as well as address uncertainty with respect to certain aspects of the Bill and their likely impact. In doing so, the committee notes that many of these suggestions are already in the process of being considered by the Department, and by the Attorney-General.

Strict liability provisions

3.128 In particular, the committee agrees with arguments raised in relation to the proposed strict liability provisions that there is merit in attempting to limit the scope of these provisions to the actual activities that the committee understands they are intended to target. The committee is of the view that the strict liability provisions could be narrowed in a way that would significantly reduce the risk of their application to ordinary Australians and legitimate businesses. The committee therefore recommends that the Federal Government examine the possibility of narrowing the strict liability offences in such a way. The committee considers that one possible approach to concerns raised in relation to innocent and misguided infringements of copyright might be to introduce a 'first infringement' or 'warning' scheme where only a subsequent infringement of the same kind might carry the current proposed levels of penalty.[129]

3.129 The committee also supports the introduction of guidelines relating to management of the strict liability offences and the infringement notice scheme, and agrees with suggestions that consultation should take place with appropriate bodies in the development of those guidelines. The committee considers that this should occur prior to Schedule 1 being implemented.

3.130 Further, the response from the AFP indicated that it is yet to develop an informed view on Schedule 1. In any case, in accordance with the AFP's Case Categorisation and Prioritisation Model, these types of offences may be categorised as 'low' impact.

Time-shifting

3.131 The committee considers that the meaning and scope of the terms 'domestic premises' and 'private and domestic use' in proposed subsection 111(1) is unclear. The committee recommends that proposed subsection 111(1) be re-drafted to make absolutely clear that individual consumers are not restricted to watching and listening to recordings in their own homes.

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129 See further Australian Federation Against Copyright Theft, *Submission 57B.*

Format-shifting – use of iPods and similar devices

3.132 The committee also notes concerns raised by submissions and witnesses in relation to the proposed exception for format-shifting, particularly as it is likely to impact upon legitimate iPod use. The committee considers that all aspects of the use of iPods and similar devices, which includes storage of music collection libraries on personal computers, should be included in the Bill. The committee suggests that the Federal Government amend the Bill to recognise the ordinary use of iPods and similar devices by consumers.

Fair dealing for research and study

3.133 The committee expresses concern at the Bill's limitation on copying for the purposes of research and study to a 'reasonable portion' (10 per cent). The committee does not consider this to be appropriate, or consistent with the quantitative scope of other exceptions, such as time-shifting and format-shifting. However, the committee's concerns are allayed by advice from the Department that the Federal Government may redraft these provisions to clarify their intended effect. The committee understands that the intended effect is that only reproductions deemed to be fair dealings will be slightly restricted and that the scope of the provision allowing any other amounts of reproduction will not be affected, if they are considered to be fair.

Official copying of library and archive material

3.134 The committee also notes arguments made by and on behalf of cultural institutions that the Bill does not make adequate provision for technical processes related to preservation. In this regard, the committee notes that best practice standards for preservation, including the UNESCO *Guidelines for the preservation of digital heritage*, recommend that 'multiple copies' be made and stored in different locations.

3.135 The committee is encouraged by advice from the Department that the term 'first copy' in proposed section 110BA will be clarified. The committee understands that it may be possible for libraries and archives to make additional copies for the purposes of preservation under the specific exception in proposed section 200AB (unless determined otherwise by a court). If this is the case, the Bill should be clarified to put it beyond doubt.

3.136 The committee also expresses the view that the scope of the exception might be usefully clarified by specifically including such bodies as the ABC, SBS, the AFC and other similar institutions which hold significant historical and cultural material.

Educational instruction and caching

3.137 The committee notes concerns raised in relation to proposed sections 28A and 200AAA. It also applauds the collaborative approach taken by CAG and Screenrights in relation to a possible solution to address some of the perceived problems with these sections. The committee acknowledges advice from the Department that it is considering changes to these provisions.

3.138 The committee also expresses concern at the new requirement under subsection 135ZMB(5) in Schedule 8 that 'insubstantial' copying of works in electronic works be 'continuous'. The committee suggests that the Federal Government consider further the possibility of amending this proposed subsection to limit the potential budgetary impact on educational institutions.

Technological protection measures

3.139 The committee notes the conflicting evidence between some submissions and witnesses, on the one hand, and the Department, on the other, in relation to the necessity to link any TPM protected by the Copyright Act to the prevention of infringement of copyright. The committee accepts the Department's explanation of the need to ensure compliance with the AUSFTA. However, the committee notes the apparent divergence between the view expressed by the Department in the course of the inquiry, and other previous interpretations of the AUSFTA put forward by the Department and the Federal Government.

3.140 The committee suggests that, at the very least, the language used in the definition of 'technological protection measure' be harmonised with the language used in the definition of 'access control technological measure'. That is, that the phrase 'in connection with the exercise of copyright' in the definition of 'access control technological measure' be replaced with the more restrictive phrase, 'prevents, inhibits or restricts the doing of an act comprised in copyright', which is used in the definition of 'technological protection measure'. As the language used in the definition of 'technological protection measure' is presumably compliant with the AUSFTA, the committee considers that the same language could overcome some of the perceived problems related to the absence of a direct link to copyright infringement in the Bill.

3.141 The committee also considers that a clear exception for interoperability should be included in the Bill. In this vein, the committee notes Recommendation 15 of the House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs which suggested that there be an exception for interoperability between computer programs and data. The committee notes that the Federal Government has accepted this recommendation.[130]

3.142 Further, the committee notes evidence suggesting that there should be a prohibition on contracting out of TPMs exceptions to protect consumers from contracting away their rights.[131] The House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs specifically recommended that legislation implementing Article 17.4.7 of the AUSFTA should nullify any agreements purporting to exclude or limit the application of permitted exceptions

130 Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions", p. 10.

131 See, for example, Mr Dale Clapperton, *Committee Hansard*, 7 November 2006, p. 25.

under the TPMs liability scheme (Recommendation 33). The committee understands that the Federal Government has accepted this recommendation in principle.[132] The committee also notes that section 47H of the Copyright Act contains a specific prohibition on contracting out in the context of literary, dramatic, musical and artistic works; the committee therefore considers that an explicit prohibition on contracting out in the context of TPMs should be included in the Bill.

Review of impact of changes

3.143 The committee recognises that the changes proposed by the Bill are wide-ranging and will have a significant impact on copyright law in Australia. In light of this, the committee considers that the changes made to the Copyright Act by the Bill should be reviewed, and publicly reported on, after a period of two years.

Recommendation 1

3.144 The committee recommends that the Federal Government conduct a public awareness campaign and develop a 'plain English' consumer guide on the meaning and effect of the amendments contained in the Bill in order to assist people to understand their copyright rights and obligations under the *Copyright Act 1968*.

Recommendation 2

3.145 The committee recommends that the Federal Government re-examine with a view to amending the strict liability provisions in Schedule 1 of the Bill to reduce the possible widespread impact of their application on the activities of ordinary Australians and legitimate businesses.

Recommendation 3

3.146 The committee recommends that, in developing guidelines for management of the Bill's strict liability offences and infringement notice scheme, consultation should take place with appropriate bodies representing those to be regulated under the proposed regime, and relevant user-interest groups.

Recommendation 4

3.147 The committee recommends that proposed subsection 111(1) be re-drafted to make absolutely clear that individual consumers are not restricted to watching and listening to broadcast recordings in their own homes.

Recommendation 5

3.148 **The committee recommends that Schedule 6 of the Bill be amended with respect to format-shifting to specifically recognise and render legitimate the**

132 Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions", p. 17.

ordinary use by consumers of digital music players (such as iPods and MP3 players), and other similar devices.

Recommendation 6

3.149 The committee recommends that the proposed amendments to the fair dealing exception for research and study in Schedule 6 of the Bill be clarified to make clear that only reproductions deemed to be fair dealings will be restricted and that the scope of the provision allowing any other amounts of reproduction will not be affected, if they are considered to be fair.

Recommendation 7

3.150 The committee recommends that Schedule 6 of the Bill be clarified to make it absolutely clear that libraries, archives and cultural institutions are able to make sufficient copies for the purposes of preservation.

Recommendation 8

3.151 The committee recommends that the scope of the exception for 'key cultural institutions' in Schedule 6 of the Bill be clarified to specifically include the ABC, SBS, the Australian Film Commission, universities, research institutions, and other like institutions which hold significant historical and cultural material.

Recommendation 9

3.152 The committee recommends that proposed section 28A in Schedule 8 of the Bill should be amended to clarify that the same range of copyright material currently covered by section 28 of the Copyright Act is included; that is, that section 28A should apply to communication of a work or subject matter as encompassed in section 28, and not only to a sound recording or cinematograph film.

Recommendation 10

3.153 The committee recommends that proposed section 200AAA in Schedule 8 of the Bill be clarified to ensure that caching for efficiency purposes (proxy caching) does not infringe copyright; and to ensure that there is no doubt that the reproduction must be removed after the end of the particular educational course for which it was made.

Recommendation 11

3.154 The committee recommends that the Federal Government consider the possibility of amending proposed subsection 135ZMB(5) in Schedule 8 of the Bill so that 'insubstantial' copying of works in electronic works need not be 'continuous'.

Recommendation 12

3.155 The committee recommends that the Federal Government consider harmonising the language used in the definition of 'technological protection measure' in Schedule 12 of the Bill with the language used in the definition of 'access control technological measure', by replacing the phrase 'in connection with the exercise of copyright' in the definition of 'access control technological measure' with the phrase, 'prevents, inhibits or restricts the doing of an act comprised in copyright'.

Recommendation 13

3.156 The committee recommends that the specific exception to liability for TPM circumvention to allow for interoperability in Schedule 12 of the Bill be amended to ensure it allows interoperability between computer programs and data to permit interoperable products to be developed.

Recommendation 14

3.157 The committee recommends that Schedule 12 of the Bill be amended to include a prohibition on any agreements purporting to exclude or limit the application of permitted exceptions under the TPMs liability scheme.

Recommendation 15

3.158 The committee recommends that the Federal Government undertake a public review of the impact of the changes made to the *Copyright Act 1968* by the Bill, after a period of two years of operation of the provisions.

Recommendation 16

3.159 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair