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## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Copyright Legislation Amendment Bill 2004**

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**SENATE**  
**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**  
**Monday, 6 December 2004**

**Members:** Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

**Substitute members:** Senator Brandis for Senator Payne

**Participating members:** Senators Abetz, Barnett, Bartlett, Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Kirk, Knowles, Lightfoot, Lundy, Mackay, McGauran, McLucas, Nettle, Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senators Bartlett, Bolkus, Brandis, Ludwig, Mason, Nettle, Ridgeway and Scullion

**Terms of reference for the inquiry:**

Copyright Legislation Amendment Bill 2004.

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**Committee met at 7.04 p.m.****HOUGH, Ms Carolyn Elisabeth, Public Policy Manager, Telstra Corp. Ltd; and Internet Industry Association of Australia****McCULLOCH, Mr David, General Manager Government Affairs, Optus Pty Ltd; and Internet Industry Association of Australia**

**ACTING CHAIR (Senator Scullion)**—This is the public hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the [Copyright Legislation Amendment Bill 2004](#). The inquiry was referred to the committee by the Senate today for report by tomorrow, 7 December 2004. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat.

Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

The committee is reminded that the Senate has given leave for this committee to hold a public hearing during the sitting of the Senate from 7 p.m. to 9 p.m. This hearing must therefore be completed by 9 p.m. I welcome representatives of the Internet Industry Association. Do you have any comments to make on the capacity which you appear today?

**Mr McCulloch**—I am General Manager of Government Affairs at Optus, but tonight I am representing the Internet Industry Association.

**Ms Hough**—I am the Public Policy Manager for Telstra Corporation, but tonight I also represent the Internet Industry Association.

**ACTING CHAIR**—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

**Mr McCulloch**—Both I and Ms Hough will participate in making the opening statement. As I indicated, we are both here tonight representing the Internet Industry Association of Australia. The association represents some 600 Australian ISPs, ranging from large players like Telstra and Optus to the vast majority which are very small. The IIA supports copyright law that appropriately balances the interests of copyright owners, users and service providers. Our key concerns are with items 11 and 13 that we introduced into the Senate last week. These were a surprise to the Internet industry, as they did not appear in the consultation draft bill given to the industry prior to the introduction of the bill. The provisions are confusing and complex. They add a condition to the safe harbour scheme that requires ISPs to remove material without any proactive step by a third party. We believe the new provisions go further than the provisions required by the FTA, or side letters to the FTA. In fact, the two provisions go even further than the provisions required by US copyright law, leaving Australian ISPs in a worse position than our colleagues in the US. There are three very serious problems with items 11 and 13.

The first problem is that they undermine the FTA safe harbour regime, allowing copyright owners to bypass the system set out in the proposed regulations and to spam ISPs with WebBot generated notices. This would undermine all the work that the government has done in the formal safe harbour scheme to prevent this problem from occurring in Australia. The second problem is that the items remove immunity from ISPs who act in good faith under the new schemes. We are essentially between a rock and a hard place. We will be either liable to copyright owners if we do not act or liable to our customers if we do. The third problem is that they remove important protections from our customers. Internet users will no longer be able to prevent their legitimate material from being taken down. Ms Hough will shortly show you an illustration of the practical problems with items 11 and 13. However, in summary, removal of the two provisions would in no way endanger the FTA. They are an FTA plus and are not required in the text of the agreement. In contrast, leaving these provisions in the bill would undermine the government's existing safe harbour scheme and enable the WebBots that that have been such a problem in the United States to be used to an even greater extent in Australia.

**Ms Hough**—We have a short slide pack that may illustrate some of the points we are making. If possible, we would like to share them.

**ACTING CHAIR**—I note that the document, headed 'ISP Liability and the Copyright Legislation Amendment Act 2004' of December 2004, consists of four pages.

**Ms Hough**—If I might speak to the document, slide 2 essentially makes the point that the free trade agreement and the implementation act that was passed in June this year contained a careful deal which we believe balances the rights of Internet service providers, copyright owners and users. Essentially if Internet service providers—or carriage service providers, as they are referred to in the bill—followed a three-step process, legal immunity would result in the form of safe harbours. Whilst the Internet Industry Association had some concerns about the implementation of that bill, we felt that the balance in the implementation act was right and that it was broadly workable. However, we believe that items 11 and 13, as Mr McCulloch has suggested, go beyond the FTA requirements and exchange of letters but, more importantly, compromise the implementation act.

Slides 3 and 4 are an attempt to graphically represent the way that that would work. On slide 3 the copyright symbol represents the copyright owner. There was a precondition that the copyright owner or their representative was the source of a take-down notice. The regulations will contain, as we understand it, significant protections and formal requirements as to the form that that take-down notice must take. On receipt of the take-down notice, an Internet service provider is obliged to notify the user that the claim has been made. The user then has the ability to object to the claim and to assert their rights to have the material not taken down. The dotted line on the slide represents an immunity, that if the ISP follows the process set out in the free trade agreement the ISP will be protected from damages claims from the user from acting in accordance with the safe harbour scheme. After that process has been completed, the ISP will then moved to take down the allegedly infringing material. We think that that balance between the three parties is an appropriate and indeed essential element of any safe harbour scheme.



Slide 4, in contrast, represents the scheme as it appears to work under items 11 and 13 in the bill that has been introduced into parliament this week. You can see that the line between the copyright and the ISP has been removed. There is no longer any need for the copyright owner to instigate the safe harbour process. We believe, more importantly, it allows copyright owners to bypass the formal process and that copyright owners will no longer be required to follow the strict format of notices as contained in the regulations. That is particularly problematic given the efforts that the government has gone to to ensure that the regulations process contains significant checks and balances to take the Australian scheme away from the problems that the US has experienced in terms of inaccurate automatic generated notices.

The other difference with new items 11 and 13, as you can see, is that the link between the user and the ISP has been removed. Users no longer have any rights to object if the ISP is going to take down material. Importantly for the Internet industry, the immunity from users has also been removed. This is the rock and hard place that Mr McCulloch referred to: if we choose to act we are liable to our customers; if we choose not to act we are potentially liable to the copyright owner. So under items 11 and 13 in the bill we no longer get the protection that previously existed from claims from our users if the industry gets it wrong. More importantly, and you can see the part that is marked in red on the document, ISPs will now have to act if they become aware of facts and circumstances that make it apparent that material is likely to be infringing. We believe that this terminology goes beyond the language required by chapter 17 of the free trade agreement and indeed goes further than the language contained in the US Copyright Act, significantly broadening the circumstances in which Australian ISPs will be required to act beyond that required of ISPs in the United States. That concludes our opening remarks.

**Senator LUDWIG**—As I understand your opening remarks, the consultation process did not include this provision.

**Ms Hough**—That is correct. The Internet Industry Association was given a copy of the draft bill and the draft regulations in October, but the version of the bill that we were given did not contain items 11 and 13.

**Senator LUDWIG**—Did you ask for a briefing on items 11 and 13?

**Ms Hough**—We had discussions this week following the introduction of the bill into parliament. We also discussed with the Attorney-General's Department, the Department of Foreign Affairs and Trade, and the adviser in Senator Coonan's office why these provisions have suddenly appeared in the bill.

**Senator LUDWIG**—What was your understanding of their answer to that?

**Ms Hough**—I note that representatives from the Attorney-General's Department and the Department of Foreign Affairs and Trade are here today, so hopefully I am not speaking on their behalf. Our understanding of the response was that the reason these provisions are in the bill is to avoid the circumstance of an Internet service provider that is aware of an alleged infringement, where that awareness is apparent, being able to rely on the safe harbour. Our view is that that is not necessary, as under the US Free Trade Agreement Implementation Act—and the bill as it was introduced into the parliament in June—the safe harbours do not start to run until the moment in time that an Internet service provider receives a take-down

notice in the format of the regulations. Our view is that, if that is the intended purpose of these provisions, they are unnecessary.

**Mr McCulloch**—Can I add that there are existing provisions in the Copyright Act that determine when an ISP, for instance, has potentially authorised a breach of copyright, and they would cover a situation where there is knowledge by an ISP of a breach.

**Senator LUDWIG**—So items 11 and 13 are effectively an awareness test as to when you have to actually make someone aware that there is an infringement occurring. Is that your understanding of its import?

**Ms Hough**—I think it is fair to say that we are slightly confused as to the effect of the provisions on existing copyright law. The current test for authorisation liability under Australian law is a three-step test. The three steps are set out in the pack that—

**Senator LUDWIG**—I think you went through that, anyway.

**Ms Hough**—It is contained in section 36(1A) of the Copyright Act. However, our understanding is that the words ‘likely to be infringing’ go beyond what would be required currently under Australian law.

**Senator LUDWIG**—Is it Australian law or is it in relation to the USFTA? My understanding is that, if you look at article 17.11(29)(v)(B), which I am sure you have, that is where you will find the language of this particular section. When you look at that language it is absent the word ‘likely’.

**Ms Hough**—Exactly.

**Senator LUDWIG**—What is your understanding of ‘likely’? Is it ‘more probable than not’ and is it an objective or subjective test? Although it may seem outside the scope of the actual agreement, in your view is it part of the process of explaining how the test is then to operate or is it an additional word that creates ambiguity or confusion?

**Ms Hough**—The latter.

**Senator LUDWIG**—Would you like to explain why you say that?

**Ms Hough**—I am trying to think of the simplest way to explain it.

**Senator LUDWIG**—You don’t have to be simple!

**Ms Hough**—Currently our view would be that, under Australian law, the first place a court would look would be to section 36(1A) of the Copyright Act, which requires a court to look at whether the ISP had power to prevent the alleged infringement, the relationship between the service provider and the alleged infringer, and whether the ISP took reasonable steps to prevent the alleged infringement. That has not been tested, to my knowledge, under Australian law as to exactly what those provisions mean and also what would be the reasonable steps that an ISP would have to take.

There is also a question under Australian law as to the extent to which knowledge of an infringement or some form of knowledge is less than an actual infringement—that is, a decision of an Australian court that material is infringing. It is unclear, in our view at least, in Australian law as to the extent to which knowledge is currently relevant. Our concern is that new items 11 and 13, by inserting a standard of knowledge, are effectively changing

Australian law as it currently stands. Given that the words ‘likely to be infringing’ go beyond what we can perceive in the FTA, as well as the US Digital Millennium Copyright Act, we are concerned that these provisions imply new, stricter conditions into Australian law.

**Senator LUDWIG**—What do you understand the word ‘likely’ to import? Is it a subjective or an objective test, or is it not a test at all? The dictionary would say it is an event that is ‘more probable than not’. Is that what you say qualifies the apparent—that is, the required—knowledge that the person would have? I do not want to put words in your mouth, but can you tell me how you read it. That is my poor reading of it. There are various versions that you could say it could possibly mean and I guess I will get an opportunity to talk to the Attorney-General’s Department about that. I was trying to understand what your problem was. I can understand the invidious position that an ISP or a CSP would be in vis-a-vis the copyright owner, who might say, ‘Once there is apparent knowledge that you have in relation to an infringer then you must act.’ That seems clear, but then it creates a liability to the ISP, who then says, ‘Having removed it, I now have a problem with the contact that I have with the person who has put the material up because there is no way to make a judgment as to whether it breaches the copyright legislation or whether there has been a breach of contract because, to be prudent, the material was taken off immediately.’ If a later court case proves that your prudence was ill-founded, your judgment was wrong, one or other are going to win, aren’t they? That is my understanding. So it puts you in the middle of that sort of argument where you really would not want to be. That seems to be the position that you are arguing. Is that right?

**Ms Hough**—That is correct. Perhaps I can give you a practical example of our confusion about what the legal standard of the term ‘likely to be’ means in practice. An actual infringement, we understand, is when a court, whether in Australia or elsewhere, has found that the material has infringed copyright. One of the examples that we have been thinking through is that of a current claim in the United States against the Google search engine—I am sure you are all familiar with the Google search engine. The claim is that Google is in fact infringing copyright. Our position under current law would be that we would not act in relation to, say, disabling access to the Google search engine until it had been made clear before a court of law that Google was actually involved in copyright infringements. The concern that we have about the term ‘likely to be’ when we know that there is currently a copyright claim against the Google search engine—and items 11 and 13 also refer to search engines and linking tools—is that it is a question that we do not know the answer to. Given that we are aware of facts and circumstances that make it apparent that the Google search engine may be infringing copyright in the United States, does that mean that we have to act now to disable access to Google from Australian web sites, or do we have to wait until the umpire and the court have made their decision? I think the point is that we do not have the answer and that the provisions are not clear about what ‘likely to be’ actually means in practice. Given that our sort of entry into the safe harbour may depend on those answers being clear, we are concerned by the appearance of those words in the bill before the parliament.

**Senator LUDWIG**—The way the system currently works is that if a take-down notice was delivered to you there does not seem to be any ability to have a counter take-down notice filed; therefore you would, more likely than not, have to act on the complaint by a

complainant who could be anonymous. Is that a potential outcome? And there is no way of verifying it, but you have then had to act, because it could be apparent that there has been a copyright infringement. Is that right?

**Ms Hough**—That is correct. One of our concerns about the new provisions is that there is no requirement that the source of the knowledge be the owner of the right. So, theoretically, if an anonymous person came forward and alleged copyright infringement, that could be facts and circumstances that make it apparent that that material is likely to be infringing. On a strict reading of these provisions, yes, I think we would have to act to take down if we wanted to avail ourselves of the safe harbour. The user would not have rights to object and, if we got it wrong, the corresponding immunity protection that exists under the formal notice and take-down scheme would not protect us from acting in good faith on the receipt of that awareness.

**Senator LUDWIG**—How will it impact upon the balance that currently exists between the ISP, the copyright owner, the web master and all of the actors in this situation? Where does the fairness lie?

**Ms Hough**—We think that items 11 and 13 fundamentally subvert the balance that was struck under the original implementation act. If I can refer senators back to slide 3 in the pack that we have presented, you will see that there is almost a triangle in the picture showing that all sides have rights and responsibilities under the arrangement. Our view is that the safe harbour scheme is supposed to be a form of quid pro quo arrangement, in that the copyright owners are granted a cheap and efficient way of enforcing their rights. In return for the Internet industry complying with the provisions, we get safe harbours that do not currently exist under Australian law.

The problem that we have with the situation under items 11 and 13, which is set out on slide 4, is that there is no longer any for the copyright owner to be involved in the process. But, more importantly, if you can imagine that there is the existing safe harbour scheme contained in the implementation act, and then there are new items 11 and 13 that sit beside the formal safe harbour scheme, the copyright owner can make a choice as to which of those procedures they choose to enforce their rights. So the copyright owner can choose to comply with a formal safe harbour scheme, which implies a notice in the form of regulations. There are penalties attached to that notice. There are steps taken to ensure that the copyright owner would have to sign the notice, and that signature is linked to Australian law under the Electronic Transactions Act.

In other words, there is a threshold that the copyright owner has to pass in order to issue a notice under the formal statute scheme. Under the new provisions, the copyright owner can decide to bypass the formal process and issue a notice in any form that the copyright owner chooses. All that the copyright owner has to do is make an Internet service provider aware of facts or circumstances that make it apparent that material is likely to be infringing. Our concern is that that allows copyright owners to bypass the formal scheme and to bypass the balance that has been carefully struck under the formal safe harbour scheme. As the bill stands at the moment, copyright owners can bypass the system. That will then have the effect that users cannot object to those claims as they can under the formal system, and carriage service providers will not get the immunity that the formal system allows.

**Senator LUDWIG**—What about the regulations? Do they help the system? Will they clarify it?

**Ms Hough**—We have seen a draft copy of the regulations, which was current as at 14 October. We have not seen a version of the regulations since then. So in one sense I cannot answer that question. If this side by side scenario is allowed to happen, as set up under this bill, where you have a formal system under the implementation act and then you have a new and informal system, if you like, under items 11 and 13, the copyright owner will be able to bypass the formal system that is governed by regulations. So in that sense, no, I do not think the regulations will help, even though we have not seen the latest version to be able to answer you questions.

**Senator LUDWIG**—I guess we can ask the Attorney-General, but there might be regulations that you have not seen. It would be strange that you were not consulted on it, though, wouldn't it? Did you raise these flaws with Attorney-General's when the matter was put before you?

**Ms Hough**—We have had discussions but, in fairness, they were late on Friday evening.

**Senator LUDWIG**—I will ask them as well, so we will all get around to the issue.

**Ms Hough**—In fairness, we did discuss these issues with Attorney-General's very late on Friday afternoon. I have no reason to suspect that these issues have not been actioned but I have no knowledge.

**Senator LUDWIG**—They have got your email, though. They could have got back to you with answers if they had them for you.

**Ms Hough**—I would ask that you refer that question to the Attorney-General's Department.

**Senator LUDWIG**—Is it possible that regulations could fix this and create balance? One of the problems that always crosses my mind is that you have legislation now, and then you have regulations, perhaps unseen, that might be developed to assist in the process. But then you have a check and no balance, so I guess the argument is whether you put the regulations in that hold the balance. But they can be changed.

**Ms Hough**—I should preface my answer by saying that I have not seen the latest version of the regulations.

**Senator LUDWIG**—No, neither have I.

**Ms Hough**—My view is that it will be very difficult to solve this problem in the regulations, simply because of the fact that if you have two schemes sitting side by side, one that imposes that requirements on the copyright owner and one that does not, so it will make it very easy for the copyright owner to bypass the formal scheme. Theoretically, I could imagine a situation where the regulations in relation to the user counter notification apply to the existing safe harbour statutory scheme and are extended to apply to the new items 11 and 13. Theoretically, I could also imagine a solution that would extend the immunity that exists under the safe harbour scheme as it currently stands across to the new regulations. But I cannot imagine a scenario whereby you could extend the regulations in a way that the copyright owner would have the same threshold tests applied, if you like, in meeting the form

of the notice under the new scheme, unless you basically replicated the existing implementation scheme and brought all of those protections across into new items 11 and 13. If that were to be the case you would have two identical schemes, and I think you would have to ask why 11 and 13 remain in the bill and why you would not just go back to the system as it existed in June, which we think got that triangulation between the balance of owners, users and the Internet industry just about right.

**Senator LUDWIG**—You talked about spybots a little earlier, which are effectively a self-generated information system which would send out a notice. I suspect that is the concept. So you would search for the words ‘Harry Potter’, perhaps, find them and then accuse someone with that information notice, and that is the way you could do it. How would you cope with that?

**Ms Hough**—Under the existing safe harbour scheme, or under this new one?

**Senator LUDWIG**—Under the proposed one.

**Ms Hough**—I think, unfortunately, a risk averse organisation would have to act on all of those web generated bots in order to enter a safe harbour. The question for the Internet service provider would be: do you act on the notices that are claimed by the copyright owner, in which case you open yourself up to liability from your users if those WebBot generated notices turn out to be inaccurate, or do you choose to ignore the WebBot generated notices, opening yourself up to claims from the copyright owner—and that comes back to the rock and the hard place.

**Senator LUDWIG**—Yes, back to that other issue—perhaps I used the term ‘invidious position’.

**Senator RIDGEWAY**—I want to follow up on some of the answers to Senator Ludwig’s questions. In relation to items 11 and 13 of the bill do you think it is possible to amend or reword what is currently there to arrive at the balance that you are seeking, or are you saying as a position that is being put forward that they need to be removed completely in order to bring it back to what you thought was going to be the case when you first dealt with these issues with the government earlier in the year?

**Ms Hough**—Our view is that the only way to avoid the problem of two systems sitting side by side—one which has a threshold for the copyright owner to meet and to cross before the safe harbours kick off, and one where there is no such threshold—is to remove items 11 and 13. As we just discussed, theoretically you could imagine a scenario where you could solve the user counter notification problem and you could solve the immunity problem by bringing the existing protections in the regulations across to apply to the new items. But it does not solve the arbitrage problem, in that a copyright owner has two systems which will give equal results as far as the copyright owner is concerned—one where the copyright owner has to comply with the regulations and to which penalties attach if the copyright owner does not take due care, and one situation where there is no threshold, there is no formal form of notice to avoid the WebBot problem and no penalties. For that reason, the only solution that we can see that really will work is to go back to remove items 11 and 13 and go back to the implementation act, which we think balanced the rights of the three interests adequately and more importantly is still in our view fully compliant with the free trade agreement. Given that

we do not believe items 11 and 13 are necessary under the FTA, we question why they are there.

**Senator RIDGEWAY**—So your basic position is one that establishes what has been agreed to in the free trade agreement as it currently stands. That is your answer in relation to what justification was being provided by the Attorney-General's Department on these new provisions, or extended provisions, if you want to call them that. Given that Australia is mostly a copyright importer of material, and given the nature of the business that you conduct, would you hold the view that most of this is driven by a need to look at questions of perhaps a downloading of music or DVDs online, as opposed to anything else? I know you have not had time to do any sort of quantitative research, but what are the scenarios that you think might be played out as a result of these provisions being put in place and how would that affect you directly, besides the fact that you have enormous onus being put back on you in terms of dealing with whether someone is legit or not?

**Ms Hough**—Given that items 11 and 13 apply to category C and category D material, which is essentially hosting and linking, I suppose the scenarios are if one of the Internet service provider's customers is hosting infringing material on the customer's web site but on the Internet service provider's server. Another scenario would be the linking example. If the Internet service provider's customer had a link to infringing material—or now to material that is likely to be infringing—our concern is that if we are put on awareness of facts and circumstances, not only of actual copyright infringements but also of claims about likely copyright infringements, then a risk-averse carriage service provider who wishes to act as a good corporate citizen will need to take down in accordance with these new schemes. The problem we have with the word 'likely' is that we do not have any clear understanding of what circumstances are envisaged by that term. For example, if we know that there is a court case in Australia involving a claim that a particular movie infringes copyright, would we have to disable access to all of those movies on our customer sites or sites with links to that movie prior to a court actually saying, 'Yes, that movie is infringing'? Our concern is really that the Internet industry is being placed in the position of judge and jury with no protection if we get it wrong.

**Senator RIDGEWAY**—And police as well, I imagine.

**Ms Hough**—And police.

**Mr McCulloch**—Under the existing provisions, prior to the introduction of items 11 and 13, although there are potential administrative problems, we know where we stand. If we get a notice we act on it; we have immunity and that is the end of it. Under these provisions we have to act as judge and jury.

**Ms Hough**—Importantly, under the previous provisions the owner of that material on the web could object and say: 'No, this is in fact legitimate material. Please do not take it down.' That important customer protection has been removed from items 11 and 13.

**Senator RIDGEWAY**—You mentioned the case of Google. Are you aware of any other cases happening in the United States or North America dealing with similar issues and perhaps things that may well be replicated in the Australian legal system as it relates to copyright?

**Ms Hough**—No, I am not.

**Senator RIDGEWAY**—One final thing: If you have not seen the draft regulations—the position you take at the moment is that there is a radical departure from what was initially agreed to—does that mean that, at the end of the day, you will or will not be supporting the passage of the bill, or are we just dealing with these particular provisions that deal with Internet service providers? I know that the bill itself has already gone through, but in the context of these particular issues does that mean that overall you do not necessarily agree with the outcome that has been put forward and that you have not been given an adequate explanation by the government as to why they have not extended, as you see it, these provisions?

**Mr McCulloch**—I think that is a fair comment.

**ACTING CHAIR**—I want to clarify whether you dislike the word ‘likely’ because it is too elastic for you. I would have thought that your decision about whether it was likely or not likely to occur would be reasonable in a court case, where there is a court and a legal system making a determination—as long as it was not one of the ISPs involved. Do you think the fact that the decision was out and was currently before a court would be defensible, or do you think that, in those circumstances, the global ISP system would take the fact that, if it was before a court, generally speaking you would have to take the precautionary principle and withdraw it until there was a court decision? What you think would be the opinion of the industry generally, not just of your association? Give me a global picture. If somebody goes before a court irrespective of the likelihood that it will proceed, given the fact that it is before a court they might be quite frivolous and the cautionary principle would immediately be applied by the industry. For example, it might be Harry Potter: somebody might say, ‘I spoke to someone in a restaurant and told her a bit of a story, and I think she is in breach of copyright.’ Do you think that the ISP industry would simply say all bets are off and we will hold until that court case is finished, or do you think there are stages of reasonability that you would have to make a decision on?

**Ms Hough**—I think it is appropriate to wait for the outcome of a court decision on the basis that, in the same way as a person under the criminal law is innocent until proven guilty, an allegation of copyright infringement is just that—an allegation—and it is not a proven copyright infringement until a court finds that it is. Copyright is actually quite a complicated thing to prove. There are a number of elements that involve very complicated legal judgments. Our position would be that it is not appropriate for Internet service providers to be exercising legal judgments over whether something is or is not infringement, and that is the role, appropriately, to be played by the judicial system.

Our view is that, under the scheme as it existed prior to the introduction of 11 and 13, if a copyright owner wanted to make a claim that something was an infringement or was possibly an infringement, they had a very clear process for making that claim. They could issue a notice in the form of the regulations and, if they did, we would advise the user that the allegation had been made. The user has the opportunity to come back to us and say yes or no. If they do not come back to us, we will take the material down. There is a really clear process to allow copyright owners that really cheap and simple way to have their rights enforced.



Our position would be to actually place the onus on an Internet service provider and absent any claim at all from the copyright owner to make a judgment about not when an infringement has occurred but when material is likely to be infringing, without any guidance as to how to apply the judgment to that term 'likely'. Given the complexities of the legal arguments, we just think that that is a completely inappropriate position for the Internet industry to be placed in. More importantly, it is a position that is not required under the strict terms of the free trade agreement.

**Mr McCulloch**—To be clear, Senator, it is absolutely the case that the Internet service provider has to make that judgment and, if that is later challenged in court proceedings, the court will look at the judgment made by the Internet service provider but look at it independently. It will apply the law to the facts and make an assessment. If the Internet service provider in good faith got it wrong, that is bad luck.

**Senator BOLKUS**—I was going through the existing legislation hoping to find some way through this, but I might have found another problem. Amendment 10 to section 116AH(1) omits financial benefit, and financial benefit appears in the legislation. It seems as if what we are talking about here are category C offences. With respect to the first part—they used to be called amendments and subclauses in the past—of item 4 category C there is a provision made in cases where:

The carriage service provider must not receive a financial benefit that is directly attributable to the infringing activity if the carriage service provider has the right and ability to control the activity.

The subclause then goes on to provide:

A financial benefit is to be regarded as directly attributable to the infringing activity only if the carriage service provider knew or ought reasonably to have known that an infringement of copyright was involved.

It seems as if amendment 10 is deleting the second part of that paragraph, which may then lead to a situation where a finding can be made that a financial benefit has been received, but you do not then have to have knowledge. You are deleting the subclause that, up until now, has required knowledge before a presumption or a finding can be made that a financial benefit is to be regarded. That is one provision. Have you looked at that? Am I on the right track?

**Ms Hough**—If that is the interpretation, you may have stumbled across something of which we are not aware. We may need to take that particular question on notice, if that is okay. In relation to financial benefit, we have looked at item 14 of the new bill, which, as we understand it, is in relation to comments that the Internet industry made with regard to a previous version of the bill and also the language of the FTA in relation to concerns that the industry had that financial benefit could extend to include circumstances where Internet service providers use what is called additional usage charging models—in other words, if you purchase a block of Internet time for, say, \$30 a month for 200 megabytes, after you have used that 200 megabyte allowance, there may be an additional megabyte charge per megabyte. We have confined our analysis in the short time we had available to us to that second part, but we will take that first question on notice.

**Senator BOLKUS**—The question running in the other direction is that we are talking here of category C offences. I presume the relief that a court can grant is found in 116AG

regarding limitation on remedies, which means that the relief that a court may grant against a carriage service provider is limited to what I can see as three or four specific light remedies. Is that the case?

**Ms Hough**—My understanding—I am sure that the Attorney-General's Department will be able to correct me if I am wrong—is that in the free trade agreement the financial benefit qualification applies to all of the safe harbours so, in a sense, it is a precondition to entry into the safe harbour that a carriage service provider has not received a financial benefit from any of the acts covered by the safe harbour scheme.

**Senator BOLKUS**—But we are still talking about category C activities. Subclause (4) of 116AG says that a court may order:

... the carriage service provider to remove or disable access to infringing ... material...

(b) an order requiring the carriage service provider to terminate a specified account;

(c) some other less burdensome but comparably effective non-monetary order if necessary.

Then there is a range of relevant matters in terms of harm caused and so on. Are they the penalties that a court has within its jurisdiction to order or are there more of these category C offences that we are talking about? Would you like to take that on notice?

**Ms Hough**—Yes.

**Senator BOLKUS**—We will ask A-G's as well.

**Senator NETTLE**—I am sorry I have not been here, so I have a couple of questions. If other people have asked them, let me know and I will read the answers in *Hansard* later. Presumably, you are aware of all the examples that have occurred in the US around take-down notices groups like the Church of Scientology using the provisions to stop criticism of themselves or groups like Wal-Mart, who were trying to compare prices. Do you see anything within this legislation that could prevent similar sorts of examples or abuses—I would term them as abuses—of the legislation occurring here in Australia?

**Ms Hough**—The short answer is no. Under the new items 11 and 13, we presume that it is open to anyone. It does not have to be the copyright owner to put an ISP on notice of facts and circumstances from which infringing activity may be apparent or likely to be apparent. One of our concerns is that the source of that knowledge may be through what you might call mischievous claims.

**Senator NETTLE**—The amendments that you would suggest to the legislation—I am presuming from what I heard before I had to go—would be the removal of clauses 11 and 13 of the legislation.

**Ms Hough**—Yes.

**Senator NETTLE**—I want to ask—again, it may be something you have to take on notice—about the financial costs to the industry if the legislation was to proceed as is. I know that is a hypothetical question, but have you had a chance to even think about that? You presumably have not done any analysis.

**Mr McCulloch**—It is a very difficult question to answer, because once the regime is in place we will then see how it operates and we will see the extent to which we get notices from copyright owners and others. But in anticipation of the scheme coming into place, which is scheduled to happen on 1 January, we have to look at very detailed procedural changes to handle the potential receipt of notices—the complex technical procedures that need to accompany the take-down of material and the like. So certainly, based on the experience in the US, if the experience in Australia is anything approaching that, the cost to the industry will be substantial indeed.

**Senator NETTLE**—Do you have a ballpark idea? Are we talking millions?

**Mr McCulloch**—I cannot give you a cost estimate but, to give you an example, in the case of the ISP Horizon in the US, I think they have had something like 300,000 electronic notices in the last year.

**Ms Hough**—I suppose, under the scheme as it was implemented in the original implementation act, the source of those notices had to be the copyright owner and the notices needed to comply with a formal process, and so we were mildly comforted that steps had been taken in Australia to avoid the worst of the US scheme. The real concern about items 11 and 13 is that, in a sense, the floodgates are back open and it is much more difficult to quantify the extent to which that may occur, particularly given that there are certain steps that copyright owners need to follow in the United States, in terms of the forms of notices. Even those steps will not be required in Australia under items 11 and 13, so one possibility is that the web-bots will be just transferred to Australia because the threshold may have been lowered.

**Senator NETTLE**—Mr McCulloch, you were talking before about the proposal to have the legislation implemented by 1 January next year. What is your assessment of the capacity of the industry to deal with the changes that they need to make in order to exist in the environment that is being proposed in the legislation?

**Mr McCulloch**—To take advantage of the safe harbours, it will not be possible for ISPs, or certainly for Optus, to put in place procedures to effect significant receipt of notices—this is under the procedures that we had understood would be in place prior to the further bill being introduced last week. So, for that period of time until we can put in place procedures, we will have to take a risk.

**Senator NETTLE**—Of either taking down the material automatically or not—is that the risk?

**Mr McCulloch**—If we are flooded with notices on 1 or 2 January, we will not, in the period before we see the regulations—presumably in a couple of weeks time—have anything like the time we need to put in place the systems we will need to put in place to take down material to assess the claims et cetera. That will take us months. So we are potentially in a situation where we cannot avail ourselves of the safe harbours and are possibly open to claims of infringement under the act.

**Senator NETTLE**—So your sense is that you may not be able to comply with the legislation, if it goes ahead as is, at the time of its implementation?

**Mr McCulloch**—That is true, although in fairness the safe harbours are an opt-in procedure. They do not derogate from the existing requirements under the Copyright Act, and therefore I guess we will be taking our chances under the existing provisions until we decide to opt in and to put in place procedures.

**Senator NETTLE**—If the legislation is to proceed as is, what would be your assessment of what a realistic time frame would be for the industry to be ready to engage with the legislation?

**Mr McCulloch**—Drawing on the example of the take-down notice procedures under the broadcasting legislation for content for X-rated material on web sites, I think the industry in that case was given in the order of three to four months to put in place procedures. We would think that is reasonable.

[8.00 p.m.]

**WALADAN, Miss Sarah Davina, Executive Officer, Australian Digital Alliance; Copyright Adviser, Australian Libraries Copyright Committee**

**ACTING CHAIR**—Welcome. I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

**Miss Waladan**—The Australian Digital Alliance is basically a coalition of interests, including universities, software companies, libraries, schools, museums and galleries. The Australian Libraries Copyright Committee basically comprises various libraries around Australia. Both organisations essentially exist to promote balanced copyright law. I will outline generally the main concerns that we have. I have had the benefit of listening to what the IIA has put forward this evening, and I concur with that. The main concern that we have generally is that the bill as is tips the copyright balance further in favour of the interests of rights holders, and in doing so it goes beyond what is required by the actual text of the free trade agreement—to the extent that it appears to be inconsistent with it.

More specifically, items 11 and 13 of the bill are of particular concern to the ADA and the ALCC. These appear to provide rights holders with an alternative to using the safe harbour scheme and thus largely defeat the purpose for having such a scheme by leaving ISPs open to litigation. The ADA and ALCC see this as inconsistent with the free trade agreement, which specifically provides that any safe harbour scheme cannot be conditioned upon ISPs monitoring their networks.

In addition to that, the test itself is problematic, as you have already heard this evening. It is extremely vague, and therefore potentially encompasses a very broad range of material which in fact may not be infringing at all. No provision is made for user groups to be notified of any removal of material pursuant to items 11 and 13, and users have no right of objection pursuant to those items. The provisions go further than the equivalent US provisions in the DMCA, which provide for a much firmer test in that respect.

During the free trade agreement negotiations, the government indicated that any ISP scheme would be fair and equitable and not overly burdensome on ISPs. The ADA and ALCC are basically of the view that for such a scheme to be fair and equitable, the legislation should ensure material is not required to be removed unless it has been found to be infringing by a court or, at the very least, unless legal proceedings have been initiated by the copyright owner. Our view of the effect of items 11 and 13 is that anyone could raise a claim or notify an ISP that they believe that the material is infringing and that could kick those provisions into effect. We see that as a huge problem.

**ACTING CHAIR**—Thank you for a very comprehensive opening statement. Hopefully there will not be too many questions for clarification.

**Senator LUDWIG**—With Australia vis-a-vis the US, does the US have a similar law to what is proposed here?

**Miss Waladan**—I have the legislation with me. There is something that is broadly similar, but it is actually quite different as well. The US wording is a lot firmer; our wording is quite

broad. The particular US provision provides that the Internet service provider is subject to the liability scheme if it does not have actual knowledge that the material or activity is infringing or, in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent.

**Senator LUDWIG**—So they do not have the word ‘likely’ either.

**Miss Waladan**—No.

**Senator LUDWIG**—And the free trade agreement does not use the word ‘likely’ either.

**Miss Waladan**—No.

**Senator LUDWIG**—Where did the word ‘likely’ come from? Have you asked A-G’s that question?

**Miss Waladan**—I have not as yet.

**Senator LUDWIG**—It is more probable than not that I will ask them that question shortly. Your interest in this matter concerns what happens to those who then breach or potentially breach copyright and receive these automatically generated notices? They will then have to take down the material, but what consequence will they be subject to?

**Miss Waladan**—I am sorry; could you repeat that?

**Senator LUDWIG**—Follow it to its conclusion. Once the language used in that text becomes law, as a carriage service provider you would then generate notices if someone told you there was copyright breaching or infringing material. What would be the consequence of the person who then did not take the material down? What would be the result? For people who flout the legislation as currently drafted, what penalties are involved? Are they significant or are they minor?

**Miss Waladan**—Essentially they would be in breach of the legislation, so the penalties provided under the act would then be open to be applied by the court system.

**Senator LUDWIG**—What are they?

**Miss Waladan**—I do not have them in front of me. I would not mind taking that question on notice.

**Senator LUDWIG**—We do not have a lot of time for you to take it on notice, unfortunately. But, if you want to look at it, I would be happy for you to email us back in the available time.

**Miss Waladan**—Yes.

**Senator LUDWIG**—I am trying to think through the impacts it would have on libraries and things like that; I was looking at consequences. You might want to turn your mind to the consequences there would be if this scheme were put in place. You have told me that you do not like it and you think it is a broad test.

**Miss Waladan**—Yes.

**Senator LUDWIG**—But let us go that next step in the available time we have and say what happens.

**Miss Waladan**—Our major concern would be that, before it even got to that stage, the legislation says that ISPs must take material down if they become aware or it becomes apparent that it is likely to be an infringement of copyright, and so a broad range of material would essentially end up being taken down. From the perspective of users, there is a great amount of knowledge there that is not accessible; but that is a separate issue.

**Senator LUDWIG**—One consequence is that, with computer generated notices, there could be a significant amount of material that is withdrawn and people would then make a decision that it is better to obey the notice and remove the material, even if it is challengeable—even if on balance it may not be a breach of copyright or an infringement of copyright.

**Miss Waladan**—That is right.

**Senator LUDWIG**—Being conservative, it is far easier to remove the material and not concern yourself with it. But that creates another problem with the people with whom there is a contractual relationship who have asked you to provide the material on the web. As a consequence, don't you then end up with a contractual dispute with those people?

**Miss Waladan**—That is a possibility.

**Senator LUDWIG**—But, if there are generated notices, you might then protect yourself by having contractual clauses which allow you to override them and err on the side of caution by removing the material, with no liability attaching as a consequence of that action.

**Miss Waladan**—Sure, and then that essentially becomes a resource issue also. Essentially, to be required to take down material on basically this likelihood provision is providing the remedy before infringement is actually proven. That is one big issue for us.

**Senator LUDWIG**—How much material could be lost out of this system? I am just trying to get a sense of the scale of it.

**Miss Waladan**—It is really hard to know. Looking at evidence in the US is one way of trying to guess what type of—

**Senator LUDWIG**—I am only after a guesstimate in your view, because the legislation is obviously not operating—but we have some experience with the US.

**Miss Waladan**—A vast amount of material, in my view. It has been my experience so far that libraries and cultural institutions go out of their way to ensure that they do not breach copyright legislation and so they would err on the side of caution, and a lot of material gets lost in that way. It is just taken down. The other problem with this particular legislation is that there is no ability for the user or the ISP to object pursuant to items 11 and 13, and so even if they would like to object to it, the legislation does not provide for that so they must take it down pursuant to that likelihood provision.

**Senator LUDWIG**—I understand that, thank you.

**Senator MASON**—Briefly, your argument is that item 11 of the Copyright Legislation Amendment Bill 2004 is broader than the requirements that Australia is asked to provide under the free trade agreement with the United States.

**Miss Waladan**—Yes.

**Senator MASON**—Looking at the language of item 11, maybe drafting has changed these days. I do not quite understand it, but they have used the active voice—‘becomes aware that the material is infringing’ or ‘becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing’. Isn’t that strange language, Mr Chairman? I would have thought it should be ‘likely to be infringed’—but I am not a draftsman.

**Senator LUDWIG**—Clearly not.

**Senator MASON**—It does not sound right to me.

**Senator LUDWIG**—No, but you would then be indicating that the Parliamentary Counsel got it wrong.

**Senator MASON**—I would not say that, but it just does not sound right. Why do you say that that, in essence, is broader than the requirements of the FTA?

**Miss Waladan**—The FTA specifically provides that ‘any safe harbour may not be conditioned on the service provider monitoring its service or affirmatively seeking facts indicating infringing activity’. This provision seems to require ISPs to do exactly that. So I see them as inconsistent in that respect.

**Senator MASON**—Can we go to 2A(b), where it says ‘ becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing’. What does that mean for a user? I understand part (a)—‘becomes aware that material is infringing’. What does part (b) mean for a user?

**Miss Waladan**—That is the large question. I guess potentially it could mean that Joe Blow comes up and says, ‘Look, I think this is infringing,’ but Joe Blow actually has no idea whether or not it does, so that could fall under subsection (b), and it may not be infringing at all. But that might make it likely or apparent to be likely to be infringing. What I am trying to say is that the problem with that test is that it is excessively broad and it could encompass a range of material that may or may not be infringing.

**Senator MASON**—Let us go straight to the point, as I can see that the chairman is restless. If the requirements under this bill are broader than the requirements under the United States free trade agreement, why don’t we adopt the wording of the free trade agreement?

**Miss Waladan**—Perhaps the Attorney-General’s Department could answer that.

**Senator MASON**—We will ask them exactly that question in a few minutes.

**Senator NETTLE**—What do you think may be the likely financial implications for libraries and institutions if the legislation were to proceed as is?

**Miss Waladan**—I think they would be reasonably extensive if they were to choose to opt into the scheme. Items 11 and 13 seem to provide for a system where copyright owners can choose not to go to a safe harbour scheme, but if institutions choose to implement a safe harbour scheme, it would potentially be reasonably costly because—it largely depends on the regulations, too—providers would be required to take down notices as soon as the copyright owner or anyone suggests that they might be infringing and then replace those notices as soon as they become aware that in fact they are not infringing. That would encompass someone



being there to deal with all the claims that exist or potential claims. Across the board quite an extensive increase in resources would be needed.

**Senator NETTLE**—What about any costs in relation to financial penalties that may result from not meeting the requirements of the act?

**Miss Waladan**—Items 11 and 13 leave scope for litigation and to that extent they may be liable to costs through litigation. That is certainly a large concern. Also, from the ISP's perspective, there is no protection from liability for actions against users and that is another aspect which, again, is in litigation.

**Senator NETTLE**—I understand there is an example from the United States where an astronomy institute had a lecturer whose surname was the same as a song and, therefore, copyright infringement notices that had automatically been generated on the basis of the surname—which was Usher, which coincided with the surname of the lecturer—led to a shutdown of the institute's web site during the exam period for people studying at that institution. Do you understand that under this legislation a similar situation could occur? What would be the provisions or remedies for an institutional library that was caught in a similar situation?

**Miss Waladan**—My understanding is that that could occur. Pursuant to the DMCA, there are remedies. The US legislation provides for remedies and it is a breach of the act to send out spurious claims. Under this legislation I have not seen a specific provision, but I do need to look at the legislation more carefully. I have not seen a specific provision which addresses that.

**Senator NETTLE**—So for that example and the other example of what I termed before as 'abuses of the legislation' you cannot see anything in the provisions that would either stop that occurring or allow for remedies for people caught in that situation?

**Miss Waladan**—It is certainly possible that those sorts of situations could occur.

**Senator RIDGEWAY**—Could I clarify something as a follow-on from Senator Nettle's questions. I presume you represent users more than carriage service providers.

**Miss Waladan**—Broadly, yes, but the Australian Libraries Copyright Committee represents libraries also and they may fall under the definition of carriage service provider. So to that extent we represent both.

**Senator RIDGEWAY**—How do they fall under the definition of carriage service provider?

**Miss Waladan**—My understanding is that some libraries may fall under the definition in the Telecommunications Act. I could clarify exactly how that is.

**Senator RIDGEWAY**—It would be good if you would not mind clarifying that, but there is not a lot of time for questions on notice. I am interested in finding out the effect of the introduction into law of items 11 and 13. Doesn't that really change the way in which information is accessed by users—that is, doesn't that change who gets to control the information and on what basis? For example, there was a case in the United States concerning Google. If it is found that as a carrier they have been breaching or infringing copyright, it is unclear to me what the impact in terms of liability would be on a service provider like Google or on telecommunication companies like Telstra and Optus.

**Miss Waladan**—Items 11 and 13 shift the onus of responsibility for regulating what is happening on their systems to the Internet service providers and the carriage service providers. To that extent it has a huge impact on their ability to determine complex copyright questions if they arise and to deal with those without having any input from the copyright owner. It does shift that responsibility, on my reading of the legislation.

**Senator RIDGEWAY**—I am thinking about this more in the context of historical arguments on the whole question of photocopying information, for example, and of whether or not that is a breach of copyright. It seems to me to be about much more than information—that is, about technology as well, whether software or hardware. That is my understanding of how this may affect users more particularly and the providers themselves. Is that your understanding of it?

**Miss Waladan**—Could you repeat that?

**Senator RIDGEWAY**—I used the photocopy example for when you have a company like Xerox that produces the machinery by which information is reproduced. Aren't we talking about that in a modern form in the Internet? Whether or not we are talking about creating information like music and DVDs et cetera, aren't we talking about how those things might be dealt with under these provisions?

**Miss Waladan**—So you are saying that, as a result of the technology, it shifts?

**Senator RIDGEWAY**—I am interested in what the end game is for users. How are they going to be affected directly in accessing information?

**Miss Waladan**—I think they will be affected to a significant extent because there will be less of it available. Pursuant to these items in the bill, such a broad range of material is required to be removed that potentially there will be less material accessible. That is the main way I think it will affect them.

**Senator RIDGEWAY**—I will leave it at that.

**ACTING CHAIR**—Thank you, Miss Waladan.

[8.24 p.m.]

**BRENNAN, Mr Geoffrey Michael, Adviser, Australian Film Industry Coalition; and Adviser, Interactive Entertainment Association of Australia**

**ACTING CHAIR**—Welcome, Mr Brennan. Is there anything you would like to add about the capacity in which you appear?

**Mr Brennan**—I am also the Managing Director of Gavin Anderson and Co. The coalition represents Australian film producers, distributors, exhibitors and retailers. It represents the range from a company like Village Roadshow through to independent producers and independent exhibitors like Reading down to small rental stores who distribute rental DVDs and videos.

**ACTING CHAIR**—Thank you, Mr Brennan. I invite you to make a short opening statement after which I will invite members of the committee to ask questions. In view of the time, if you do not have a short statement, that would be ideal. If the members of the committee could also keep their questions as brief as possible.

**Mr Brennan**—I appreciate that and I apologise for the tight time. I will make a very brief comment, not a statement. I am quite fascinated by the lengths that some people go to to avoid the issue of piracy or criminal activity on the Internet. The associations and companies I work with are significant Australian creators of art and film, and employers and investors in Australia. For them, piracy is a big issue and they are very keen to ensure that under Australian law we have the tools or the mechanisms to ensure that the damage from piracy is minimised and that we have appropriate legal mechanisms to take to court or to stop those who are trying to distribute pirated products on the Internet. In short, we want to have the same ability on the Internet as we currently have in relation to what we call ‘hard copy’, which is the ability to stop the distributor as well as the person providing the means to distribute pirated products.

To go one step further, the Australian companies also want the ability to be able to market products on the net to Australian consumers in terms of consumers being able to download products. They cannot make that investment commitment without proper laws to protect their products and their content.

**Senator BOLKUS**—I have two questions. I think we are all suffering from late notice and a very quick learning curve on the amendments, but the two amendments that are of major concern need to be looked at in context. It seems as though what the government is trying to do is amend category C and category D by the inclusion of two provisions—(2A)—in each section. The preceding subclause in the act refers to court orders, after which the provisions 2A under items 11 and 13 will be inserted. Is there anything that can be read from the placement of these clauses? Looking at them in context, should we read them to apply only to circumstances where a court has made an order?

**Mr Brennan**—I am not a lawyer. I think the colleagues behind me who are desperate to get up and talk to you in due course will give you a fuller answer than I can. I would like to

say that we believe the provisions in relation to items 11 and 13 are important for the industry. We have mechanisms in terms of the ability to issue a notification for a take-down—

**Senator BOLKUS**—I am sorry to stop you there, but that goes to my second question. What the amendments will do is amend the conditions in schedule 9. Subclause 2 at the bottom of page 173 of the US Free Trade Agreement Implementation Act states:

Nothing in the conditions is to be taken to require a carriage service provider to monitor its service or to seek facts to indicate infringing activity except to the extent required by a standard technical measure— which is provided for in item 1. Are we actually being asked to do anything more than that? Is the obligation on your clients going to be anything more than to implement those technical measures that are provided for in item 1, condition 2? Would you like to take that on notice?

**Mr Brennan**—I might take it on notice, but let me go back one step and argue that we believe the provisions in relation to these amendments and what we are talking about tonight complete the picture with respect to what is required by the FTA and what we believe matches what is available under US law, and that is the issue of knowledge. We have a mechanism in terms of take-down and notification, but we believe we also need a mechanism such that, where there is knowledge of behaviour or of the likely infringing, there is an obligation on the ISP to take action. This issue of knowledge goes well beyond the question of ISPs; it actually goes across a number of industries and sectors. I find it hard to believe that ISPs try to hide behind the issue of knowledge. For the industry, the damage that can be done within a very short time frame from a site being able to continue to operate beyond a certain time frame is quite substantial. The speed of downloads now is getting very fast. Whilst films do not yet face the problems of CDs because of the slowness of the Internet, in time that will change. We cannot afford to have a situation where there is adequate knowledge of the behaviour of a site and there is no obligation for the ISP to take action.

I think we have lost sight of two issues that are important here. One is the damage that can be done by delay. The other point worth noting is that if you look very closely at the conditions in relation to subscribers to an ISP, you will see that they are actually quite onerous, and even very much one-sided. An ISP can in fact shut down a service if they are deemed to be acting illegally or if there is improper conduct. So I think someone is crying poor a little too loudly.

**ACTING CHAIR**—Mr Brennan, just briefly, a number of the other sectors touched on the term ‘likely’, and you said this was hiding behind it. They think the term ‘likely’ is a bit broad, that they will have to go to a court and say, ‘We thought it was likely, but perhaps it isn’t now.’ From your perspective, and you obviously have a wide knowledge about these issues, do you think most people in the industry would be able to understand what ‘likely’ would mean? To me it means that you could ‘reasonably expect’, and whilst it is not definitive I understand what ‘likely’ would mean in that context. Can you give me an appreciation of how difficult it would be in these matters to deem that something would be ‘likely’ to infringe a copyright, or ‘likely’ to break rules?

**Mr Brennan**—We believe there is sufficient flexibility in the language of the bill to provide the ability for an ISP to make the judgment in terms of an examination of the behaviour of a site and their own knowledge, both in terms of a particular site and more

broadly in terms of traffic on the Web on their network. But in the end I think it will be an issue that will be decided in some way by the courts. We do not expect ISPs to be judge and jury; that is for the court to do. But we do expect the ISPs to act judicially and effectively in ensuring that we do not have a situation where a site that actually has alleged product is allowed to trade, with the consequent damage being done to Australian companies and their employees by that product staying on the Web. That is obviously a critical issue for us.

**ACTING CHAIR**—Thank you.

**Senator MASON**—Mr Brennan, your argument is that item 11 of the bill is not broader than the requirements under the US FTA—is that right?

**Mr Brennan**—That is the legal advice that I have.

**Senator MASON**—If it is not broader, why would we not use the words of the free trade agreement itself? I have it in front of me, and I think it is under chapter 17 of the FTA, which discusses intellectual property rights. Article 17.11, section 29(v)(B) states:

(v) With respect to functions referred to in clause (i)(C) and (D), the limitations shall be conditioned on the service provider:

... ..

(B) expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement—

actual ‘knowledge of the infringement’ is what the agreement says—

or becoming aware of facts or circumstances from which the infringement was apparent ...

That strikes me as being narrower than the bill before us. The bill before us states:

(a) becomes aware that the material is infringing;

In the FTA we have ‘obtains actual knowledge of the infringement’—that seems narrower. ‘Becomes aware’ strikes me as being broader than ‘obtaining actual knowledge’. Wouldn’t you agree?

**Mr Brennan**—I think it is also important to look at that provision in the context of the broader bill. There is also the fact that the FTA itself is a marriage between US and Australian laws, and obviously there needs to be some degree of freedom by Australian drafters to ensure that the way it is put into Australian law reflects Australian practice in terms of both the terminology of legislation and previous decisions by the courts. So in that regard I see ‘likely’ as being a reasonable use of the word. But, again, colleagues behind me would be better equipped to answer that question for you.

**Senator MASON**—In that same item, part (b) states:

(b) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing.

Whereas the agreement says ‘becomes aware of facts or circumstances from which the infringement was apparent’. That strikes me as being a narrower definition. Why don’t we use the words in the agreement?

**Mr Brennan**—I suggest that you ask the parliamentary draftsman. From our perspective, what is there reflects adequately the intent and meaning of what is in the FTA. We are happy with the words that are there.

**Senator MASON**—It may well suit your purposes, and I respect that, but that is a different argument from saying it is no broader than the requirements under the free trade agreement. It is a different question, isn't it? Your industry's interest is legitimate—I am not saying it is not—but that is a different question from saying that the bill is no broader than the prescriptions under the free trade agreement.

**Mr Brennan**—Let me rephrase it by saying that we believe the wording in the legislation adequately reflects the obligations within the FTA.

**Senator MASON**—But that is not my question; the question is whether it is broader. That is the issue.

**Mr Brennan**—I think we are getting into semantics.

**Senator MASON**—It is not semantic when you are a lawyer; it is bread and butter—believe me. And it is bread and butter when you are looking at the state of people's knowledge and the apparent circumstances. And that is the problem. The problem is that it seems broader. I have only studied this for half an hour, but to me the requirements under the bill seem to be much broader than the requirements under the free trade agreement. We will have to ask the Attorney-General's Department some questions about that.

**Senator RIDGEWAY**—Mr Brennan, I heard your opening comments about the question of piracy. How do you make a distinction between legitimate requests for take-down notices and spurious claims, given what is happening in the United States and what this proposes? It seems to me to be so open that you would capture both instead of having something that is reasonable and legitimate for Internet service providers. How do you make that distinction?

**Mr Brennan**—That is a valid question. There are a couple of points. Firstly, the search software that people have complained about in the United States has not been used in Australia for some time. If you look at the Kazaa case last week, evidence was brought forward in terms of the sort of information that came out of the use of the search software. It is worth noting that that has been around for some time yet there have been no complaints about someone's homework, or about someone's grandmother being approached by someone or being threatened with a suit. It has not happened here, so there is no evidence yet in Australia of the so-called problems that exist in the United States. In fact, what that software has found is significant evidence of pirated products on web sites across Australia. So that justifies the need for action and demonstrates that we have not had the same problems here.

The other point worth bearing in mind which has not come up is the fact that there is a mechanism whereby when action is taken which is malicious or spurious, action can be taken against the copyright holder for such action. So it is not a one-way street. If the copyright holder is found to be at fault it can be held to account. There is balance in the legislation, and people should mention the whole package and not just pick out the piece that suits their arguments or concerns about the provisions we are talking about tonight. I think it is worth noting in that regard the question that was put forward to the two previous witnesses about the cost of implementing the mechanisms in relation to take-down et cetera. We can talk about the

cost to Australian industry in terms of the loss of jobs, loss of investments and loss of products from continuing piracy. It is hundreds of millions of dollars, a substantial cost.

**Senator RIDGEWAY**—I accept the arguments about balance between copyright owners and copyright users, but are we talking about the creation of two schemes—that is, the one that was agreed to back in August and the one we are now contemplating in December. If you have a choice of two different schemes—one that is defined and another that is undefined—isn't it going to be in the interests of copyright owners to use the undefined one because it is much broader and it gives them the capacity to go into the area of spurious claims being made as well?

**Mr Brennan**—I would not agree. The conditions that apply to the provisions we are talking about tonight are clear. You have to demonstrate or give some reasonable basis for indicating knowledge. In relation to take-down and notification, the actual hurdle is softer, or lower, but of course the mechanism provides a greater degree of protection because it provides for the ISP to act within a certain process.

The mechanism we are talking about tonight is for a situation where there is knowledge and where there is a need for action to be taken quickly and effectively in relation to the alleged infringement. I think that effectively there are two mechanisms. They each have different tests and each serves a different purpose. I do not believe the tests that we are talking about tonight will in fact mean that everybody goes down that course of action, because it does require a degree of proof of knowledge or awareness, which at times can obviously be very difficult to put forward. But it means there is a mechanism whereby a copyright holder could, in certain circumstances, act quickly to protect their product and therefore to protect jobs and investment. I think it is important to bear that in mind.

**ACTING CHAIR**—Thank you, Mr Brennan.

[8.40 p.m.]

**DANIELS, Ms Helen Elizabeth, Assistant Secretary, Copyright Law Branch, Information Law and Human Rights Division, Attorney-General's Department**

**MACKEY, Ms Gabrielle Mary, Principal Legal Officer, Copyright Law Branch, Information Law and Human Rights Division, Attorney-General's Department**

**HOYLE, Mr Barton John, Senior Legal Officer, Copyright Law Branch, Attorney-General's Department**

**ACTING CHAIR**—Welcome. I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions. You are aware of the time constraints.

**Ms Daniels**—Given the time that is available, rather than refer to a full opening statement, I thought the committee might benefit from knowing who the government consulted with early on in the bill process. We consulted on an in-confidence basis with about 25 domestic copyright stakeholders. That was around 13 and 14 of October. That included a draft of the bill as it then was and the draft copyright regulations that have been discussed in committee today. The stakeholders and groups were chosen for a variety of reasons. Firstly, some copyright owner groups had provided feedback on the US free trade agreement implementation act. What I was going to tender was the list of who we consulted with, which might assist.

**ACTING CHAIR**—Certainly. If we could just move to that, that would be great.

**Ms Daniels**—It was really just so the committee knows that the submissions we received in response to both the bill and the regulations are something that are still before government, especially in relation to the regulations. That was the main point I wanted to make.

**Senator LUDWIG**—Perhaps we could cut to the chase. You have heard most of the people who have answered some of the questions that have been generated this evening. Is there anything you can add to allay our concerns about whether these particular items, 11 and 13, were consulted on specifically? They seem to say that they only just recently saw them, so it does not matter to me much on the consultative process on the previous issues, it matters to me about items 11 and 13. Do you say people have been consulted in relation to those, or do you agree that they have not been?

**Ms Daniels**—Those items were not in the bill that went out to consultation, but they are in the bill as a result of that consultation process. No-one has seen the bill since that consultation process and the version that went in on 30 November.

**Senator LUDWIG**—So who won the debate to have those provisions included?

**Ms Daniels**—I guess we had a look at all the submissions that came in, and the government had to deal with a possibility that the constructive knowledge requirement, for want of a better term, under the FTA was maybe not as clear as it should have been. That was why we chose the mechanism we did in items 11 and 13.



**Senator LUDWIG**—So the word ‘likely’ has now been included. When you look at the scheme that is currently provided for, you have now got 2 and 2A, and the difference between 2 and 2A seems to be the word ‘likely’. Is that right?

**Ms Daniels**—Yes. I think that is correct.

**Senator LUDWIG**—The word ‘likely’ is meant to add what?

**Ms Daniels**—There was no magic about it. I have heard the discussion earlier. I guess the process of instructing the Office of Parliamentary Counsel, as many of you would be aware, is that the relevant departments—in our case it was our department and Foreign Affairs principally—have a discussion about how we think we should best meet the test of the constructive knowledge requirement, OPC comes up with a possible form of words and we to and fro. That was really the process.

**Senator LUDWIG**—So where did constructive knowledge come from? Who proposed that there needed to be a test?

**Ms Daniels**—It was on the first legislation that went through implementing the free trade agreement, whether we had clearly met our requirements under chapter 17.11.2B, where it says, ‘or becoming aware of facts or circumstances from which the infringement was apparent’.

**Senator LUDWIG**—You could have used those words.

**Ms Daniels**—We did not use those words, but we have not in our other copyright obligations used the words in the agreement either. We use our own drafters, I suppose, to draft legislation in Australia and not the words of an international agreement.

**Senator LUDWIG**—So what is the effect of adding the word ‘likely’ into the scheme now, as to how that would operate?

**Ms Mackey**—The limb of the provision that we inserted was to ensure that we did deal with other means by which the carriage service provider might become aware, or that it was apparent, that the copyright material that was being hosted on their systems and networks was actually likely to be infringing. The fact that we had dealt with the issue of when they were given notice by the copyright owner—which was one way in which they might become aware of the facts and circumstances, but not the only way in which they would necessarily become aware that that was the case—meant we had to deal with the other possibilities.

**Senator LUDWIG**—So a person slips a note under my door that says there is someone infringing copyright on www.x. What do I do? Is that apparent knowledge likely to be something that I should act on?

**Ms Mackey**—I suppose you would have to look at what your source is.

**Senator LUDWIG**—I do not know—it is a note slipped under the door. Do I act on it or not?

**Ms Mackey**—I suppose you have to—

**Senator LUDWIG**—No, no, I am asking you: do I act on it or not? What judgment do I apply to that?

**Ms Mackey**—You would have to make a judgment. You would have to make a judgment now. Under section 326 of the Copyright Act, if you are aware that there is copyright infringement you are obliged to take reasonable steps to prevent or avoid the continuation of an infringement. So you actually have an obligation under the Copyright Act now.

**Senator LUDWIG**—Yes, but under this piece of legislation you would then have a take-down notice issued. I would say, ‘Okay, it looks likely that there has been an infringement,’ so I issue a take-down notice. What does the ISP do in response?

**Ms Mackey**—It would be up to the counter service provider to actually form the view that, whatever they had become aware of, it was apparent that the copyright material was likely to be infringing. That means that they cannot ignore the obvious infringement. They cannot be wilfully blind to it if something is brought to their attention. I will give you an example. We have just had the *Australian Idol*. There is going to be a CD produced and at some point that CD is going to be made public. If there was someone who managed to get hold of that CD before its public release and they had it available on their web site, it would be pretty obvious to everybody that that was not publicly available at that point.

**Senator LUDWIG**—It may not be obvious to me, but I accept that it could be for others.

**Ms Mackey**—It would depend on what the site said. It might say, ‘We have managed to get this available for your enjoyment before its public release’ and it might be obvious from the wording of the site that it was not an authorised copy. In that case it might be obvious that it is infringing. But it has to be apparent from the material. They are not required to go beyond what is on the face of it to see whether it is infringing. It would have to be fairly obvious.

**Senator LUDWIG**—What about the argument that it is only half of the process, that there is a check but no balance, because there is not an ability to issue a counter take-down notice?

**Ms Mackey**—That is a matter that is sort of under consideration in the regulations and those are still being—

**Senator LUDWIG**—What has been raised—I think I raised it right at the beginning—is that there seems to be only half the process. Who should I address that to? I do not know all your different roles and responsibilities here but, if I outline it, it seems to be half a system. Your answer seems to suggest that we will deal with it under 116AJ where we can then provide a regulation, but when will the regulation be made? When will I be able to look at that? You are asking parliament to pass the law with only half a system in place—one check but no balance. That is what you are telling me, isn’t it? I am happy for you to say yes or no.

**Ms Daniels**—Ms Mackey states the point correctly—that the regulations are still under consideration, including—

**Senator LUDWIG**—When will they be developed?

**Ms Daniels**—They are being developed now.

**Senator LUDWIG**—Will you do them before 1 July?

**Ms Daniels**—1 January?

**Senator LUDWIG**—So they will be available before 1 January?

**Ms Daniels**—That is the intention, yes, Senator.

**Senator LUDWIG**—What will they provide—the system similar to what is already in place or something different again, as to how it will shift?

**Ms Daniels**—The final form of them is not something that I am in a position to talk through because I am not sure what the final form of them may take.

**Senator LUDWIG**—Why would you not put it in the legislation? You put this bit in; why would you not put the other bit in? Why would you propose it by regulation? The whole system for the other system is already in place by legislation. Why would you not do it in respect of this one?

**Ms Mackey**—With respect, Senator, the actual process to put the prescribed procedure in relation to disabling access is all in the regulations. It was not in the legislation. The framework was in the legislation but the procedures are actually in the regulations.

**Senator LUDWIG**—Yes. So do you have the whole framework of this new system in the legislation?

**Ms Mackey**—No, that is just the framework.

**Senator LUDWIG**—So we have to wait for the regulation to see how the balance is going to work. Is that what you are telling us?

**Ms Mackey**—Yes.

**Ms Daniels**—Yes.

**Senator LUDWIG**—Was this matter raised with the United States? Did they request the provision be put in?

**Ms Daniels**—The United States saw a copy of the draft bill and the draft regulations at the same time as our domestic stakeholders.

**Senator LUDWIG**—Yes. Was the inclusion of 2(a) and the word ‘likely’ something that the US was consulted about? Did they suggest that addition?

**Ms Daniels**—They were part of the consultation process for all the amendments we made in relation to this bill, including those two items, yes.

**Senator LUDWIG**—So they saw that provision. Did they then tell you that they agreed with the inclusion? Did they suggest the inclusion?

**Ms Daniels**—No, they did not suggest the inclusion. That was a matter for us.

**Senator LUDWIG**—Was it something they were interested in?

**Ms Daniels**—Yes, they were interested in it because it was part of how the carriage service provider scheme operates.

**Senator LUDWIG**—Were they given an opportunity to say whether they agreed that that inclusion would fix the problem you have identified?

**Ms Daniels**—There were ongoing discussions with them as part of this exchange. So I guess they were aware of some of the issues that had been raised and we took their views into account as well in coming to the position that we did.

**Senator LUDWIG**—So they saw it before the ISPs?

**Ms Daniels**—I would have to take that on notice. I cannot answer that, Senator.

**Senator LUDWIG**—What is the provision supposed to do at the end of the day?

**Ms Mackey**—The constructive knowledge conditions were added so that ISPs could not take advantage of the scheme where they do not act expeditiously to remove or disable access to infringing material that they are aware is infringing. It is basically whether they have an obligation where they are aware of facts and circumstances that make it apparent that the material is likely to be infringing.

**Senator MASON**—Ms Daniels and Ms Mackey, is it your contention—from listening to the questioning from Senator Ludwig—that the bill seeks to be no broader in its operation than the obligations to Australia under the free trade agreement? Is that correct?

**Ms Daniels**—Yes, Senator.

**Senator MASON**—Therefore, would it be your contention that under part (b) ‘becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing’ means the same as ‘becoming aware of facts or circumstances from which the infringement is apparent’? Is that your view?

**Ms Daniels**—That is our intention and view, yes.

**Senator MASON**—Where did the word ‘likely’ come from, because I cannot see it in any relevant part of the free trade agreement?

**Ms Daniels**—It is not in the free trade agreement, as I think I mentioned earlier. In a lot of the drafting of the copyright provisions we used our own language to find a way to address a problem in law. Obviously, the Office of Parliamentary Counsel has the final say on the wording used, but there was no confusion about the intention.

**Senator MASON**—Why did we not simply say ‘become aware of facts or circumstances from which the infringement is apparent’? Yet here we have ‘likely’ and there is a change in the order of the words. Then there would be no argument at all.

**Ms Mackey**—We have not used the exact wording of the free trade agreement in all of the other implementations that we have made. Basically, we take the text and we implement it into domestic legislation in a way that is consistent with our own legislation.

**Senator MASON**—That is your evidence, but part (b) uses the word ‘likely’ and that surely is a broader test than ‘from which the infringement is apparent’. It stands to reason that it is. We would not be here if it were not for that word.

**Ms Mackey**—The wording of the bill has been approved by the government and it was put in—

**Senator MASON**—Just because it has been approved by the government or the executive does not mean it is correct.

**Senator BOLKUS**—I do not reckon they have read it.

**Senator LUDWIG**—The ISPs have to act then, do they not? They have got no choice.

**Ms Mackey**—They do have a choice.

**Senator LUDWIG**—How do they assess the validity of a claim? They cannot assess the note under the door that we talked about. They cannot assess it. It is anonymous, so they do not know who has made the allegation. It has come under the door. It has got it. It says, ‘Check out this web site www.x or whatever; it is a copyright infringement.’ I then say, ‘I should act’, because if I do not act it is constructive knowledge and I knew. So I have to act. I act by shutting the site down and removing it, notwithstanding that I may have contractual breaches. What do they do? Perhaps you can explain it better, Mr Hoyle. You have been quiet there.

**Mr Hoyle**—If I could just correct you slightly, the service provider will have to act, but they will not necessarily have to take that material down.

**Senator LUDWIG**—No, they would go out with the infringement notice first, but I do not know what happens next because there are no regs.

**Mr Hoyle**—It depends on which course you take. If it is an effective notification of claim—the infringement that comes from the copyright owner—then if the ISP wants to take advantage of the limitations on remedies they will have to take that material down or disable it. However, if it is through facts or circumstances that they have become aware of, that action does not necessarily mean that they have to take the material down; it just means that they have to make a decision or at least view the site and determine if it is obviously or clearly visible that that material is infringing. If so, they will have to take the next step; if not, the material stays up.

**Senator LUDWIG**—I was getting there via a shorthand way, but you are going to err on the side of caution, as I think was discussed earlier. You are going to go to the site and say, ‘I’m no expert on copyright. I’m no senior lawyer. Bang!’

**Mr Hoyle**—The intention is to cover situations where it is obvious to a—

**Senator LUDWIG**—Tell me what ‘obvious’ means. We cannot work out what ‘likely’ means. I do not know what ‘obvious’ means. My colleague tells me that it might be obvious that it is likely or likely that it is obvious!

**Senator BRANDIS**—If it was obvious it would be apparent.

**Senator LUDWIG**—Yes!

**ACTING CHAIR**—This is the last question, Ms Daniels, and we have only 15 seconds, so it must definitely be just a yes or a no answer. In terms of the concerns we have had from the remainder of the stakeholders, do you think the regulations that are being brought forward in January will ameliorate their concerns?

**Ms Daniels**—I am hopeful of that.

**ACTING CHAIR**—I thank the witnesses who have given evidence to the committee this evening.

**Committee adjourned at 9.00 p.m.**