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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 7 November 2006

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Brandis, Kirk, Ludwig, Scullion and Trood

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Bartlett, Crossin, Ludwig, Lundy, Payne and Trood

Terms of reference for the inquiry:

Copyright Amendment Bill 2006

WITNESSES

Committee met at 9.02 am

CHAIR (Senator Payne)—Good morning, ladies and gentlemen. This is the hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Copyright Amendment Bill 2006. The inquiry was referred to the committee by the Senate on 19 October 2006 for report by 10 November 2006. The bill makes a range of major amendments to the Copyright Act 1968. Amongst other things the bill implements the outcomes of several copyright reviews conducted by the federal government in 2005-06 in relation to fair use exceptions and encoded broadcasts. It also gives effect to Australia's remaining intellectual property obligations under the Australia-United States Free Trade Agreement by implementing a liability scheme for certain activities relating to the circumvention of technological protection measures and by setting out a number of permissible exceptions to that liabilities scheme.

The submission from the Attorney-General's Department outlines the consultation which has occurred in relation to the bill, including discussions with stakeholders and the development of exposure drafts of certain schedules of the bill. The committee has received 71 submissions for this inquiry. All of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. 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. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

I note for the record that the committee is meeting this morning while the Senate is in session and so as a committee we are subject to the vagaries of that process. It is not expected that there will be divisions or quorums during this time, given the nature of today's debate, but I have learned over the years that it is always best to expect the unexpected in that regard. Hopefully, our proceedings will go smoothly; if we do have to break for quorums or divisions, I am sure you will understand.

[9.06 am]

WEATHERALL, Ms Kimberlee Gai, Private capacity

BAULCH, Ms Libby, Executive Officer, Australian Copyright Council

WALADAN, Miss Sarah Davina, Executive Officer, Australian Digital Alliance

FRASER, Mr Michael, Chief Executive, Copyright Agency Ltd

MORGAN, Ms Caroline, General Manager, Corporate Services, Copyright Agency Ltd

CHAIR—Welcome. Ms Weatherall has lodged a submission, which we have numbered 54. The Australian Copyright Council has lodged a submission, which we have numbered 22. The Copyright Agency Ltd has lodged a submission, numbered 29, and the Australian Digital Alliance has lodged a submission, numbered 50. All of those submissions have been lodged with the committee. Does anyone need to make any amendments or alterations to their submissions? There being no alterations or amendments, we will continue.

In this section of this morning's hearing the committee intends to focus on the fair use exceptions in schedule 6 of the bill. Schedule 6 contains amendments that concern new copyright exceptions, in response to the federal government's recent Fair Use and Other Copyright Exceptions Review. The bill includes exceptions for two kinds of copying—that is, for private and domestic use, known as time-shifting and format-shifting. Schedule 6 also provides for four new specific exceptions and includes amendments that clarify the existing exception related to fair dealing for the purposes of research or study.

Given the way that we have structured today's hearing, I did not intend to ask witnesses to make opening statements. Unless anyone is dying in the breach to do so this morning, I thought we would go directly to questions from members of the committee. As no-one is particularly keen to leap across that barrier, we will go to discussions with senators.

Senator LUDWIG—This is a broad question that I am happy for anyone to answer, depending on your interest. When you look at schedule 6 and the two parts that deal with time-shifting and format-shifting, in your view does it achieve the purpose it is designed to provide—that is, fair use? I would not mind hearing from each one of you because I suspect there is a different policy position adopted here from what the submitters might be interested in. You may want to say that you do not accept the position to begin with, as a preface. If this part of the schedule is designed to achieve fair use, which is clearly the government's intention, does it in fact achieve that? How would the government go about explaining to people in a community information session that the legislation provides for time-shifting and format-shifting, to use the language of the bill?

Ms Baulch—When the government is looking at new exceptions to copyright infringement in the Copyright Act, it needs to have regard to its obligations under international treaties, including the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Those treaties require that any exceptions to copyright infringement meet what is referred to as the three-step test. You will be familiar with the three-step test because it has been incorporated into this bill.

More importantly, the three-step test imposes obligations on countries which are parties to those treaties to ensure that any exceptions meet those requirements. One of those is that any exception not interfere with a normal exploitation of the work, which means that if an exception interferes with a market for copyright works then it is not allowed under the international treaties. So our position in relation to the time-shifting and format-shifting proposed exceptions is that they will in fact have the effect of interfering with current and future markets for copyright works, and that insufficient regard has been paid to the way that technology and markets are going to develop. All other developed countries that we are aware of which allow private copying, including the United States, have levy schemes that ensure compensation to copyright owners for private copying by consumers.

In relation to proposed section 200AB, the difficulty there is that including the three-step test from the international treaties in domestic legislation does not necessarily satisfy Australia's obligations to meet that test in terms of the way that the exception may apply in practice, and there are too many uncertainties in the way that that proposed exception will apply in practice to enable it to be relied on effectively by its intended users.

Senator LUDWIG—So is it the case that you do not accept the legislation as drafted in schedule 6 or is it that you reject both principles of time-shifting and format-shifting as not meeting the three-step test, but you do accept that there should be fair use?

Ms Baulch—We say that introducing exceptions for time-shifting and format-shifting without compensation to copyright owners does not meet the three-step test in the international treaties.

Senator LUDWIG—How do you see the compensation being structured?

Ms Baulch—As I referred to earlier, other countries which have an exception for private copying have levy systems whereby a levy is payable on recording equipment and blank recording media which is paid back to copyright owners.

Senator LUDWIG—I heard your earlier evidence. But, in that sense, are you saying that should be applicable here—

Ms Baulch—Yes.

Senator LUDWIG—and which items should it be attached to? Should it be attached to blank CDs? That is what I am trying to understand from you. I need a bit more detail about what you are proposing here.

Ms Baulch—There have been a number of proposals made to the government in the past about the way that such a scheme would work.

Senator LUDWIG—Yes, I know that. I was wondering which one—

Ms Baulch—It could be both the recording equipment and the media or one or the other, and different countries adopt different systems. I am not sure that it matters which, provided that compensation is returned to the copyright owners.

Senator LUDWIG—That is what I am trying to understand: have you looked at how much would be returned and whether that would be fair? Otherwise, we would end up in the same position, wouldn't we, where you would say the particular scheme adopted is not sufficient

and therefore is not fair? That is why I was looking for a bit more detail. I prefaced my remarks with the comment that the difficulty we face is schedule 6 as drafted by the government. You choose not to agree with it. I understand that. What you are now proposing seems to be less difficult to conceptualise and put into legislation, but I was looking for a bit more detail on it.

Ms Baulch—That detail has been provided and we can provide those submissions again to the committee—

Senator LUDWIG—I have not seen them in your submission to this inquiry.

Ms Baulch—No, because the government has given a clear indication for some time now that it is not prepared to go down that path, and so we have been looking at this proposal to try and limit the deleterious effect on copyright owners, in particular looking at how it might be drafted so that it does not interfere with current and emerging markets, particularly in the digital download area.

Senator LUDWIG—So in your submission, whilst not accepting schedule 6, you do recognise the government's policy position and have put forward amendments to remedy the more deleterious effects of that schedule.

Ms Baulch—Yes. We have put forward proposed changes to the provisions in the bill which we regard as lessening the prejudicial effects on copyright owners.

Senator LUDWIG—But in your view it will still not meet the three-step test, even with those amendments?

Ms Baulch—No, I think that there have to be compensation provisions for copyright owners to fully meet the test.

Senator LUDWIG—In dealing with those amendments that you have put forward—and I am looking at schedule 6—can you just take me through the main amendments that you seek?

Ms Baulch—In relation to time-shifting or format-shifting first?

Senator LUDWIG—We can deal with time-shifting first, if you prefer.

Ms Baulch—There are difficulties in the drafting of the time-shifting provisions, which go further than the government's stated intention of enabling recording of a television program to watch at a more convenient time. One of those is that the recording may be retained and watched any number of times. There is no limit on how long the person may keep it before watching it.

Senator LUDWIG—If there was a provision that it be deleted after 14 days, how would that be policed?

Ms Baulch—There are a lot of provisions in the Copyright Act to do with activities which are not policed, but there is nevertheless a policy position adopted by the government as to what people are entitled to do with copyright content.

Senator LUNDY—What if different members in the family watch it at different times?

Ms Baulch—If the recording can be kept for 14 days, then I guess you could have more than one person watching it in that time.

Senator LUNDY—Would that put them in breach of what you are proposing?

Ms Baulch—No.

Senator LUNDY—What if one person watched it, and then that person and another person watched it again later the following week? Would that put them in breach?

Ms Baulch—I should say that there are two prongs to the proposal that we have put forward. One is that if a time-shift copy is available to you then the exception is not available to you. We referred in the submission to the availability of digital downloads of time-shift copies of television programs—in one case advertised prominently in each of the commercial breaks while the program was showing on television to let people know that the time-shift copy was available from midnight that night.

Senator LUDWIG—What concerns me about that is the issue of knowledge. How would you know that a time-shift copy was available digitally for download if you were in some parts of Australia, if we take the extreme, which do not provide sufficient digital download—broadband—facilities—

Senator LUNDY—Most places, you mean?

Senator LUDWIG—Yes.

Senator LUNDY—Most of Australia.

Senator LUDWIG—or you do not have the internet, for argument's sake; you use the local paper as your main source of information? Would you then structure it as a strict liability offence or do you then say that you have to have knowledge or be negligently reckless to the fact? That is what I find difficult with that proposal. Would you—or anyone else—like to comment on that?

Mr Fraser—I would like to make a broad comment. I think that the copyright owners whom we represent have the same broad aim as the consumer groups also represented here. They want people to use their works—they want people to read and view their works—to the maximum. They do not want to hold back the consumption of their works—that is why they are writing, publishing or producing their works. The problem of these very fine questions arises when the government tries to regulate a market with very specific copyright exceptions when the market is still in formation. The copyright owners are investing heavily in producing new services to make content available to people in their homes, in schools or in corporations.

If one institutes a free exception then copyright owners are going to be very concerned about whether it is one person or 14 days or their family or whether they are allowed to make a backup copy. But if one has a broad principle that these kinds of users should be permitted in return for a reasonable return, which can be subject to the Copyright Tribunal, say, then trying to shape up the exact framework of the market no longer becomes a question, because you leave it to the market to develop under a broadly based three-step test exception.

The problem now is trying to delineate a market which is in the process of forming. By doing that without compensation you prevent that market from developing at all—copyright owners will not invest in making these very services available. So compensation I think is the linchpin. As my colleague here, Libby Baulch, has said, all those countries that value their

creative industries that make an exception for private use provide for payment to the copyright owner for what is a large part of their developing online markets.

Senator LUNDY—You seem to have presented a pretty cogent argument for the retention of the flexibility in the law and how the courts interpret what is fair use and what is reckless. Can you tell the committee what your views would be of just deleting schedule 6 and its restrictions particularly—its further restrictions on the creation of exceptions in the area of education and research?

Mr Fraser—I think it would be a good thing. I think we are getting everybody concerned with good intentions. That is my starting point. We are getting to the point of how many angels on the head of a pin in trying, very early in the digital revolution, to extend fair dealing exceptions to private use, library use, private copying—trying to shape up a market that is in a state of incredible creativity itself. It is a very basic exception which incorporated the three-step test and which allowed, say, the Copyright Tribunal—as these new markets for bits and pieces and aggregation of pieces to developed—in that context to say what exception should be allowed for free and what exception should be allowed but paid for and to say where the market now exists. Where the market will be in six months is going to be very different from where it is now. Our members are very keen to provide the very services that these exceptions are designed to ensure.

Ms Morgan—I think Michael's point about schedule 6 is around the fact that we have all these provisions in the Copyright Act at the moment that are sort of carve-outs from copyright owners rights that have all of these different provisions relating to them and they all create controversy. Reading through the other submissions this morning—the issues around the reasonable portion test in fair dealing and around the insubstantial copying in educational institutions—the issues are based on the fact that there is not the flexibility in those provisions that the extended fair dealing provisions for educational institutions and libraries offer. So we welcome that flexibility. We also think there is this opportunity to put those provisions in the act which will remove a lot of these other ones that there is controversy around. Our position is that you cannot have both, really, because of the uncertainty that the parallel systems together in the Copyright Act will create. I hope that expands a little on what Michael was saying.

Senator LUNDY—Can I ask you specifically if you support the removal of specificity surrounding the copying of material for education and research purposes and the additional requirements that have been inserted in this bill? Notwithstanding your broader view, would you support the removal of that specificity?

Mr Fraser—Yes, because it responds to the reality of the dynamic market, as opposed to this committee trying to set it in stone when it is so rapidly changing. But the principles that apply in the extended fair dealing sections would embrace and allow for that development and investment and allow creativity in online services to develop, and we think that would be in the public interest.

Ms Morgan—Our big issue is the existence of the 10 per cent cap at all, because it treats a student in a remote location in exactly the same way as a researcher in a pharmaceutical company. It is too much of a blunt instrument. So, if you talk specifically about students, of

course we have no objection to that, but if you ask, 'Can corporations have the same rights,' which, if you removed that cap, they would, we would not be able to agree with that.

Senator LUNDY—Ms Weatherall, you state in your submission that you have some serious problems with what you describe as 'strange drafting' in this area. You say:

The effect of Schedule 6, part 4 is not entirely clear, due to very strange drafting. On one interpretation, the effect of these amendments to s 40 of the Copyright Act is:

- Copying a work contained in an article from a periodical is taken to be a fair dealing;
- Where a literary, dramatic or musical work is not contained in an article in a periodical, but is in a published edition or in electronic form, copying that work for research or study can be fair dealing only if 10% or less, or one chapter, is copied.

Can you extrapolate on the problems you have with the drafting of that section of the bill and what you think the implications are?

Ms Weatherall—Certainly. Section 40 covers fair dealing for the purposes of research and study. A general exception for copying for the purposes of research and study has existed for a long time. There are some other provisions in that section which allow certain kinds of copying to be deemed fair dealing, but with others you have to go through a process of working out if it is going to have too deleterious an effect on the copyright owner's market, it is too great et cetera—the section 40(2) factors. It does appear from the current drafting of section 40 that those deeming provisions that allow you to copy less than 10 per cent and be safe and not have to think about whether it is fair in the circumstances would be taken out and replaced with an absolute 10 per cent cap. That is because of words in the section that say something is a fair dealing 'if and only if' it fits within the definition of 'reasonable portion', which is 10 per cent.

A number of people have had communications with the department since these submissions went in. It is my understanding that a 10 per cent cap is not intended by the Attorney-General's Department and that the current draft of the bill is going to be amended in order to avoid the 10 per cent cap feature—which would have made it impossible to copy 11 pages of a 100-page book, even if it happened to be out of print. It would have had some quite ridiculous results. So that particular aspect of the drafting of this bill seems to have been fixed. It is generally indicative of a problem that has already been mentioned this morning, which is the highly specific nature of the exceptions, not just that particular one and that particular change but also the format-shifting and the time-shifting exceptions that we have already talked about. Could I make a comment about the format shifting and the time shifting?

Senator LUNDY—I was going to ask you if you could make a comment about them as well.

Ms Weatherall—To turn to format shifting, the government could take two approaches here. They could try to create a general fair use type exception, as they have in the States. That would create flexibility and would mean that in each case you would have to assess whether or not this was in fact a use that interfered too much with the market et cetera. So you could have a general exception. Or the government could try to set out situations where they say the copying does not interfere too much or illegitimately with the copyright owner's

market. What they have done is the latter. They have tried to create a small, free exception for certain generally accepted uses. One of the problems with the particular drafting that they have adopted is that in fact it does not excuse a lot of uses of fairly ordinary consumer electronics. For example, the current drafting does not allow you to use an iPod in the way that most people would use an iPod.

Senator LUNDY—The current drafting does not?

Ms Weatherall—That is correct. Ordinary use of an iPod at the moment involves copying your CDs onto your laptop or your PC and then copying some or all of those songs onto your iPod. Most people would in fact keep the copies on their hard drive for a couple of reasons. One is that iPods crash and, when they do, you have to replace the songs on them. Your iPod's battery might die and your whole iPod might be replaced, and then you would need to replace your music on it. You might want to use the synching function—the synchronisation function—in the iPod, which means the same songs that are on your hard drive go onto the iPod. If you use that and there are no songs on your hard drive, the whole thing gets wiped.

So all these ordinary uses of this technology are not in fact covered by an exception that allows you only ever to make one copy in a given format—you cannot make a new copy if your copy on the iPod gets wiped et cetera. It is one copy in any given format for all time at the moment.

Senator LUNDY—To get this very clear, can you describe what would happen if I saved one of my CDs to my computer in an MP3 file format and then saved it in a different format to—I do not have an iPod—my iPod-type thing. Would that be allowed, or is it unclear?

Ms Weatherall—It is unclear. The word 'format' is used in a number of different ways in the legislation at the moment.

Senator LUNDY—So it could mean a different file type, even though it is the same sound?

Ms Weatherall—It might mean a different file type, which would mean that if your particular kind of MP3 player used a different file format then you would be okay. You could have your MP3s on your computer and your other format on your player, because that would be one copy in each format.

Senator LUNDY—Does the legislation specify MP3 player or iPod?

Ms Weatherall—No, it does not.

Senator LUNDY—What term does it use?

Ms Weatherall—That is a very good question. I am trying to find it in the copy I have here.

Senator CROSSIN—Does it use the word 'broadcast'?

Senator LUNDY—No, it is not a broadcast device.

Ms Baulch—'Format' is the term.

Senator LUDWIG—Yes, they just use 'format'.

Ms Baulch—For music copying it is 'format'.

Senator LUNDY—But is that talking about the file type or the device?

Ms Baulch—That is not clear. It looks as if it means file format—

Senator LUNDY—Do you think that needs to be fixed?

Ms Baulch—partly because the format-shifting provisions for newspapers, books and magazines refer to a different 'form' and for photographs they talk about hard copy to electronic copy, so we assume that 'format' means something different to 'form'. It appears to mean file format but it is not clear.

Ms Weatherall—Of course there are two conflicting tendencies here. One is that if you try to say 'file format' and make it that specific in the legislation then maybe your MP3 player would be okay but maybe mine would not because it plays MP3s. So you start to get very technologically—

Senator LUNDY—Mine can play anything.

Ms Weatherall—You are very lucky. You made a good consumer choice there.

Senator LUNDY—If I saved a CD to my computer and then put it onto my digital music player, would my daughter also be able to put it onto her digital music player?

Ms Weatherall—No, I do not think so, because that would involve making more than one main copy in the same format from the one record—and it can only be made by the owner of the physical CD.

Senator LUNDY—This is really the heart of the issue: when the CD is in family ownership. I am not particularly possessive about my CDs, and I suspect most families are not. But one would expect, if the CD were in the house and you had a lot of kids, that everyone would be able to listen to the music. It concerns me greatly that this legislation might be impinging on that right.

Senator LUDWIG—One of the difficulties is whether a nine-year-old can own copyright. If it was purchased by the parent, who owns the copyright? The copyright is owned by the copyright holder but—

Ms Weatherall—The copyright owner will own the copyright.

Senator LUDWIG—the use has been authorised for the distribution of the CD. For argument's sake, it is a nine-year-old. I buy it for my daughter who is not now nine.

Ms Weatherall—The legislation refers to the owner of the CD.

Senator LUNDY—So that means your daughter.

Senator LUDWIG—So who do you think the owner of the CD is if either a nine-year-old purchases it at the store, because I give her the money, or I purchase it on her behalf?

Senator LUNDY—Can nine-year-olds own copyright?

Senator LUDWIG—Not own the copyright, but in terms of its use.

Ms Weatherall—A nine-year-old can own a CD. You can give it as a gift to the daughter, and I think the daughter would be seen as owning the CD. To be honest I do not think that part of it is the main problem. I think the particular problem we face in this proposed legislation is:

one single copy for all time in any given format. That makes it very difficult to use most modern technologies.

Senator LUNDY—That makes all of the scenarios we have been describing effectively illegal under this proposed law.

Senator LUDWIG—No. There is a narrow band you can fit within. If you use an MP3 player with an SD card, you save it to the SD card and then transfer the SD card from the computer to the MP3 player. You are probably still within the tight band of the law if you have format-shifted it from the CD to the MP3 format or WMA format, depending on what you want to do.

Ms Weatherall—To go back to the very first question you asked, Senator Ludwig: how are you going to explain to consumers exactly what they can do in this situation?

Senator LUDWIG—That is exactly what I was hoping to ask you, eventually.

Ms Weatherall—I should say one thing to qualify this discussion: the Attorney-General did note that he was planning to change the legislation in order to achieve the government's ends in this respect. The concern I have expressed in writing about that is, firstly, that we may not see the drafting and have a chance to discuss it and work through these problems again. Secondly, it is not clear that, if you fix it for the iPod, you will fix it for Senator Lundy's player or someone else's player, and so on. If we try to fit it to the scenario that we know now, you will end up with a situation where it is not clear whether it fits the next form of technology—Microsoft Zoon or the next form.

The levies we have been discussing are one solution to this; you can draft it more broadly. It should be said that the many countries that have levy systems have a different kind of private copying exception. It would be a private copying that allows more general private copying—more copies, free of form. The government has chosen to make a free exception, and therefore it has narrowed it. Once you start broadening it extensively you might start to run up against the three-step test. I think there might be ways to amend the legislation and to keep it to a free exception, but that is the sort of tension you will experience.

Senator LUNDY—You said in your submission that you think schedule 6, part 4 should be removed. You said:

No changes to the fair dealing exception are required or desirable. In the alternative, this part of the Bill should be deferred, in order to give interested stakeholders time to address the argument that these changes are required.

Ms Weatherall—I may have used the numbers ill-advisedly there. In my view, the proposed amendment to section 40 should be removed. No change to that part is required. I am not of the view that we do not need to do anything about the exceptions. We are in a situation currently, as the Attorney-General has repeatedly recognised, where multiple acts, ordinary consumer things, are infringements. That is something we are trying to solve. We are also in the situation where libraries and educational institutions cannot do many of the kinds of copies they want to do. So the exceptions do need to be amended, but it is the proposed amendment to section 40 that I was particularly troubled by.

Miss Waladan—In the ADA's view, this certainly does not implement fees-style provisions such as those in place in the US. I think that was the initial question. Instead, it implements very narrow and specific exceptions, which is why there are problems with the workability of the provisions and working out how best to draft such specific and narrow exceptions.

In response to some of the comments that were made: we would have real problems with additional limits—for example, a 14-day restriction—which would complicate the legislation even further and make it even more difficult for consumers to understand. I also alert the committee to the fact that, in the drafting of the WIPO Copyright Treaty, there is an agreed statement to the treaty which suggests that the three-step test should not only be read in light of the whole treaty but should also be read broadly and that it clearly allows for adequate exceptions to be introduced to allow the effective operation of the digital environment and the internet. So that is certainly something to be taken into account.

We completely disagree that a US flexible fair use style provision is not compliant with the three-step test, because clearly the US does have a flexible provision for consumers, which we do not have in section 200AB. So we completely disagree with that interpretation of the three-step test. We would also disagree that, if there is a potential market in an area at some time in the future, that means something is not compliant with the three-step test—because that would clearly leave a gap where consumers can neither purchase a particular product or service, nor make any other use of it, because there is simply a gap in the market. That is what exceptions should ultimately address. For that reason, I think it is important not to take a very narrow interpretation of the three-step test.

Senator CROSSIN—Does domestic use under time-shifting have a geographical limit, or should it?

Miss Waladan—This is something we were confused about. We understand from the Attorney-General's Department that that is not in fact the case. We understand it does not have a geographical limitation, but we would perhaps seek clarification of the meaning of that term in the explanatory memorandum.

Senator CROSSIN—Ms Weatherall, in relation to your discussion with Senator Lundy, could you explain this to me. As a consumer, I might go out and purchase a CD—30 years ago I would have purchased a record and I might have wanted to put it on a tape and listen to it in my car. That was just a means by which I could hear that music over and over again. I might have copied it, but it was not for any purpose other than to use a different format to listen to it. So aren't records and tapes simply becoming computers and iPods? I might buy a CD and put it on my computer at home, but my computer would also allow me to listen to it through the computer, and, if I want to travel on an aeroplane, I will stick it on my iPod so I can listen to it. Isn't it just a matter of me as a consumer choosing how I listen to the one piece of music I have bought over and over again through a different device? Or is it more complicated than that? Am I missing something?

Ms Weatherall—The way copyright works is that the copyright owner controls the right to make copies. When you were buying vinyl records and putting them onto personal tapes so that you could listen to them in your car, that was an infringement. We have no exception that

currently covers that activity. It has been tolerated for a very long time, and it is within the rights of copyright owners to tolerate uses of that kind. They have not sought to enforce this against any consumers. Similarly, people expect that they will be able to do the same kinds of things: make a copy for their own personal use to use in a different format. The position the government has taken is that a copyright owner's rights should not interfere with or extend to that, and therefore they will create an exception that will allow that kind of activity. The government has taken the view that using different kinds of technologies—something which consumers have been doing for a very long time—is not an interference with normal exploitation of the work and is not interfering with the legitimate interests of the copyright owner.

Senator CROSSIN—Does the infringement come if I copy it from a CD to a CD? Is like to like the infringement?

Ms Weatherall—Under current law, any copy is an infringement because there is no personal copying exception. Under the proposed law, you will be allowed to make one copy into any given format—one MP3 version of the song. If format means file format, maybe one copy into a different format.

Senator CROSSIN—We need to clarify the use of that.

Ms Weatherall—The approach is designed to protect the copyright owner's interests. We do not want people making lots and lots of copies unremunerated. The difficulty is that it will not actually allow common uses of technology. For that reason, the legislation does need to be amended.

Senator CROSSIN—And broadened?

Ms Weatherall—Broadened somewhat, yes.

Senator CROSSIN—Otherwise how is it policed or monitored in a household with eight kids?

Ms Weatherall—There are a lot of activities in copyright that are not monitored. One of the difficulties, of course, is that under this law you cannot go out and say, 'Consumers, you can use the technology that you are buying.' We just cannot do that.

Senator CROSSIN—Thanks.

Ms Baulch—Can I just add something there?

Senator CROSSIN—Yes.

Ms Baulch—The format-shift provision for music, as I understand it, is intended to address a view by some that if a consumer pays $30 for a CD at retail outlet then the consumer should be entitled to make a copy of the songs from that CD onto their iPod. The legislation, however, would also apply to digital downloads that you pay $1.67 for, for example. Digital downloads are nearly always governed by a contract with the consumer that would allow the consumer to make a certain number of copies. So the making of copies is governed by that contract between the consumer and the digital download outlet. Our concern is that this exception has no place in relation to digital downloads. That is governed acceptably by contract already.

This exception may set up false expectations and misinformation for consumers about what they are entitled to do. If the exception is to remain then it should only address the main concern that has given rise to it. On that issue, we still have no idea where the format-shifting provisions for books, magazines, newspapers and photographs have come from. We do not know what has generated those and what the government is trying to address and that makes it very difficult for us to respond to those provisions in the bill. We have an understanding about the political issues for copying music from CDs onto iPods but in relation to the rest we do not. That has made it very difficult, particularly with this truncated process, to be able to respond adequately to the provisions in the bill.

Senator LUDWIG—Just on digital downloads, is it your view that this legislation would oust the contract? In other words, it would override the contract and a person could effectively download it in a WAV format depending on which digital download subscription service you signed up to as to the format. Assuming it was not in MP3 format then you could use that as the main copy to be kept on your iTunes—I do not want to promote any particular brand—but then you could keep a copy on your MP3 player. This system would seem to fit better for that than it would for the objective of fitting it under CD copying.

Ms Baulch—No, we do not think that this exception would oust the contractual obligations. The consumer would have parallel legal obligations under the Copyright Act and under the contract. Our concern is that by putting this exception in we will give a mixed message to consumers about what they are entitled to do when what they can do in relation to the digital download is set out already in their contract. We are not aware of any concerns being raised about what consumers can do with music they have acquired via legitimate music downloads.

Senator LUNDY—During the US free trade agreement debate there was a lot of discussion at the inquiry about an option for the government being to legislate for a general fair use requirement reflecting the United States situation. They obviously have not taken up the opportunity to do that with these amendments. Would any of you care to comment on what your understanding of the policy approach of this government is in relation to not taking up the opportunity to legislate for a general fair use provision to give Australian consumers at least a base from which to establish their rights as consumers.

Miss Waladan—We do not understand exactly why the government has chosen not to take up that opportunity, but we certainly feel that it is to the detriment of Australian consumers and the Australian public. Certainly many uses that the US consumers are able to undertake in that jurisdiction are not able to be undertaken in this jurisdiction, and that will be at the cost of innovation in this country. That is our view of it.

Ms Weatherall—I think the position of the government is that they did not see a great deal of support for removing the specific exceptions that we do have and replacing them with a fair use exception that would be general and would cover the field. What there was support for, from a number of interests, was keeping the set of exceptions that we do have—which are well understood and have been used for some time—and then adding a flexible exception to allow some of the more interesting and innovative things to happen and to be addressed on a case-by-case basis.

What the government have chosen to do instead is to look at the sorts of things that they thought were allowed under the fair use provisions under existing case law—and I am extrapolating here—and find ways of drafting more specific exceptions to cover those activities. That has the benefit of certainty, but it has the cost of not allowing any flexibility. It is a particular issue for companies that want to do interesting things with technology that goes anywhere near copyright content, because you cannot be sure of the uses you are going to allow for consumers. For example, if you want to make a personal video recorder that will beam to a TV in another room within a very small area, you may not be sure whether you can do that. In fact, you cannot do that; that would be an illegitimate activity under this legislation. It means that you cannot create that technology. The next exciting PVR, or personal video recorder, doing interesting things like that within bounds will not come from Australia because it would not be facilitating the legitimate use of copyright content. That is the choice the government has made.

Senator BARTLETT—As I understand it, this area has been subject to a reasonably long consultation process with a discussion procedure, draft legislation et cetera. Given where we are now, I would like to hear your views about whether or not you like the final outcome. You have had a fair enough shot at this area, but is there any part in this component of the legislation where something snuck in at the last second that nobody is aware of?

Miss Waladan—Certainly the narrowing of fair dealing is something that snuck in that we were not aware of that we have serious issues with. In terms of the overall outcome, we think that there are some positive things; but certainly in terms of workability the issues that have been discussed today really need to be addressed. Similarly for the key cultural institution exceptions that are also in schedule 6 we think that there are issues with the workability there that need to be addressed in order for some of the positive policy decisions that have been made by the government to actually come to fruition in practice.

Ms Baulch—From our point of view, there has been inadequate explanation of the drivers for certain provisions in the bill. One of those is in the area of format-shifting for newspapers, magazines and photographs. As I said, we do not know what the origins of those amendments are. We were not able to find those in the issues paper for the fair use inquiry or in the submissions to it. We have similar concerns about the application of proposed section 200AB to the activities of educational institutions and libraries where we have sought some information from government about what sorts of activities they regard as not being allowed at the moment which they think should be allowed. That is partly because our experience has been that sometimes institutions think they cannot do something when in fact they can, and we might be trying to address something here which is already allowed. With some sort of explanation like that of the sorts of activities that they want to address, we may be able to look at better expressed purposes for this exception to apply. One of our concerns about this provision is that the purposes are not specifically defined. It is difficult to make alternative proposals if you do not know what the problem is that these amendments are intended to address. The consultation has been remiss, from our point of view, in relation to the format-shifting provisions and in relation to proposed section 200AB.

Senator BARTLETT—Is it reasonable to suggest that these changes in this area are likely to lead to a loss of income for artists, performers and such people?

Ms Baulch—Certainly the format-shifting and time-shifting provisions will because they will interfere with markets for copyright content. That will have an effect on the income of copyright creators. There may also be those implications from other provisions as well, but certainly there are those for the format-shifting and time-shifting provisions which are not subject to the test of whether or not the material is available.

Senator BARTLETT—There are often lots of examples given that this type of thing might be outside the law and that this type of thing might be in. I think you mentioned, Ms Weatherall, that iPods might be okay but some other similar things might not be. I saw on your website that you mention the example of a woman recording a concert on her mobile phone, taking it back to play at a party and being outside the law. Whilst interesting intellectual things to point out, are these really not ever going to be acted on in a legal sense?

Ms Weatherall—At a very general level, one of the problems is that we have been telling consumers that they will be able to legitimately do certain things that they have not been able to do before. That message has been coming out for the last 18 months. The legislation that we see at the moment does not do that. It is true that consumers have not had these laws enforced against them. One of the points that I was making earlier on is that if you are a company that is proposing to come up with interesting technology or to add a feature to your technology that would lead to a copyright-infringing act then you are in an area of legal risk. It is not a purely intellectual exercise; it actually has a real impact on a number of companies—software developers and consumer electronics companies.

Mr Fraser—My concern is similar, that the combination of having very broadly based exceptions and now all these specific exceptions that have been lobbied for by particular groups leads to very strict exceptions and free exceptions, therefore people try to narrow them further and so copyright owners in Australia will not invest in creative new products and services. The result will be that our consumers will go to services in those countries where there is more certain copyright protection and security, such as the United States and Europe, in my view. They are only a click away. So we will prevent the development of online markets in Australia by these non-remunerable exceptions.

I make the very basic point that there seems to be a kind of semantic confusion. An exception does not have to be a free exception; it can be a paid exception, so that the creators of the new services—the Groxter, the Napster, the Kazaa, the iPod of next month—have some security that, even if consumers are allowed to do what they want, they should be able to get a reasonable return; otherwise there will be no investment.

If I could just turn to the fair dealing provision, it seems remarkable to us that the change in the market has not been recognised. A little while ago you bought a book or you subscribed to a journal; now you can download articles. This exception allows free copying by corporations of articles or chapters—the very thing that is now for sale online from publishers in the States and Europe, not much in Australia, because the fair dealing exception allows corporations to copy scientific, technical and medical material for free. So we are getting stuck in regulating markets that are just in the process of shaping themselves, and our market will not respond in Australia if we have this very rigid kind of approach.

Senator TROOD—I wanted to pick up this question of fair dealing for research and study. I am obliged to say I have a relationship of some kind or another with your organisation—or at least I used to—just for the purposes of public declaration. Is that remark you have just made the thrust of the point at 4.30 on page 10 of your submission, Mr Fraser? I am very familiar with this practice of organisations' articles, particularly in various scholarly fields, being available online and being able to download those articles—sometimes for a price; sometimes not. You seem to be saying that that is an evolving technology and that this bill does not address the matter adequately. Is that the nature of your concern?

Mr Fraser—The bill addresses it in a negative way—in a way, against the legitimate interests of the copyright owners—by allowing libraries in corporations to copy articles and chapters without payment to the copyright owner. So, if the copyright owner, for example, has a book available online, the library, if it wants to get just one chapter from that book, can do so without payment to the copyright owner. Just in the same way as an educational institution can copy, why should the corporation be able to copy for free without payment to the copyright owner? Why should the copyright owner subsidise their commercial research and study?

Libraries can also supply documents to corporations for charge but copyright free, so they can recover their costs but not pay the copyright owner if they want to copy a chapter from a book that is available online. They could even use a copyright circumvention device to defeat the commercial site and download the chapter from the book that has been made available. That is an egregious example of how the fair dealing is not really fair at all, because it is done without compensation to the copyright owner.

Senator TROOD—What about journals online? Increasingly journals are online—thousands of them, it seems—where you can download articles or pieces from a volume or issue of a journal. Are we talking about the same situation there?

Mr Fraser—The libraries can copy if the article is not available separately. So, if the journal is available online but the library just wants an article to copy and transmit for its own corporation or to sell as a cost recovery document delivery service, it can do that without payment to the copyright owner. Again, it means that in Australia we are not seeing investment, and this is already appearing in our figures—that there is very little digital publishing going on in Australia and that our schools, universities and other consumers are going to overseas sites. It cannot be fair for a corporation to do this kind of copying. When we say to a corporation, 'We would like to offer you a licence, just like we do to a university or school,' they say: 'No, thank you. We don't need a licence for all our copying, intranet copying and copying to our customers. We use the library provisions.' There are only about 20 or 30 corporations in Australia that have not taken that approach, whereas corporations throughout the United States are licensed for their copying. The result is that you will not get the innovative, new, online services in Australia.

Senator TROOD—Mr Fraser, do you agree with Ms Weatherall's proposition? As I understand it, you are saying that the existing group provisions are better than these proposed ones. Is that right?

Ms Weatherall—In section 40.

Senator TROOD—Yes. So you prefer the existing arrangements rather than those that are being proposed.

Ms Weatherall—In relation to section 40 in particular, which is the research and study exception, the changes are said to be designed to clarify certain aspects of the exception. No expert that I am aware of has been able to work out what the clarification is, and there has been a great deal of misunderstanding of what that particular provision does. They should leave it alone if it is not going to be clearer. That is my view. But that is actually a separate question from the libraries provision which Mr Fraser is referring to. The libraries provision is actually outside my area of expertise, but Sarah Waladan works for the Libraries Copyright Committee, so she might be able to assist.

Mr Fraser—We think that the whole section ought to be removed, and the copying ought to be subject—

Senator TROOD—Section 40?

Mr Fraser—Section 40(3), so that a test of fairness can be made to apply in all circumstances, and that will vary according to all these new services that are coming online. If copyright owners are investing in providing articles online for free with licences for intranetting through the corporations, then it is not fair to allow competition for exactly the same digital product to be provided without copyright payments through an exception.

Senator TROOD—So you are at odds with Ms Weatherall's position—that the existing arrangements are satisfactory or, at least, better than the new ones?

Mr Fraser—We do not say that there should be no fair dealing but, as I said at the very outset, to the extent that we in this committee room are, with the best intentions, trying to determine the market and all the problems that are going to arise before letting people provide services and licences and download intranet services, if we deem something to be fair in this room, it cannot possibly encourage creativity and communication to develop in the marketplace in this country. If there is broad test of fairness, it can respond accordingly, and where there is a gap and consumers are not being given a fair go then it can address that circumstance as it arises. None of us can yet conceive what the next Groxter is going to be.

Ms Weatherall—The change that Mr Fraser is proposing would mean that school students, university researchers and university students would no longer know that they were safe when they copied an article for their personal research purposes.

Ms Morgan—I know we are talking about schedule 6 here, but I have some materials with me that would assist you in looking at schedule 8 that I would like to table.

CHAIR—Thank you very much. Thank you very much for your submissions, your attendance here this morning and your assistance to the committee.

[10.10 am]

FLAHVIN, Ms Anne, Legal Adviser, Australian Vice Chancellors Committee

MULLARVEY, Mr John, Chief Executive Officer, Australian Vice Chancellors Committee

BROWNE, Ms Delia, National Copyright Director, Copyright Advisory Group, Ministerial Council on Education, Employment, Training and Youth Affairs

DALTON, Ms Carolyn Elisabeth, Legal Adviser, Copyright Advisory Group, Ministerial Council on Education, Employment, Training and Youth Affairs

BRENNAN, Dr David John, Copyright Consultant, Screenrights

LAKE, Mr Simon Thomas, Chief Executive Officer, Screenrights

CHAIR—Welcome. Screenrights has lodged submissions with the committee which we have numbered 8 and 15. The Copyright Advisory Group has lodged submissions which have been numbered 8 and 25. The Australian Vice Chancellors Committee has lodged a submission with the committee which has been numbered 58. Do any of you need to make any amendments or alterations to those submissions?

Ms Browne—No.

CHAIR—As in the previous section, in this section of the hearing the committee wishes to examine a specific schedule of the bill—that is, schedule 8, the digital agenda reforms. These amendments relate to the use of copyright material for educational purposes and the educational statutory licences. As no-one has a burning desire to make an opening statement, we will continue with the question and answer format.

Senator LUDWIG—Those who were talking about schedule 6 might also want to consider this: is schedule 8 required by the US FTA?

Ms Dalton—No.

Senator LUDWIG—You can all respond separately or you can choose to agree with Ms Dalton.

Senator LUNDY—Can I clarify: was schedule 6 required by the US free trade agreement obligations?

CHAIR—We can ask those questions when we come to the department.

Senator LUDWIG—That is your view that it is not required. Does schedule 8 achieve the policy purpose to which it appears to be intended—that is, a response to the digital agenda review and its communication in the course of educational instruction? I do have some specific questions about some of the terminology in there, but I thought I would give you an opportunity of at least responding to whether it meets the broad policy objective. If there is an difference in policy objectives between the government and you, you are quite welcome to state that too, if you disagree.

Ms Browne—We understand that there are a number of policy objectives in relation to schedule 6. One was in relation to dealing with the caching issues that were raised in the

digital agenda review and the submissions to the fair use review conducted over the last 18 months. We understand that part of the intention of government was to clarify that caching, particularly proxy caching, should be a non-remunerable exception to the act, because it is not actually an infringing activity. There were other concerns in relation to reading from the internet, which is section 22(6A), which the government also said it intended to clarify. We also support the government's policy intention. I might pass over to my legal adviser, Carolyn Dalton, to go through the caching issue in relation to how it has not quite been achieved in the current proposed legislation.

Ms Dalton—Certainly. Just at a high level, to start with—

Senator LUDWIG—Yes, thank you.

Ms Dalton—As Ms Browne mentioned, we understood the government's policy intention to be to capture something called active caching, which we understood, at least in the schools context, to be a limited, child protection type of temporary storage—for example, in a primary school you might put some internet content onto an intranet to enable very young children to have a safe learning experience—but also the broader concept of proxy caching. The policy concern at a high level is that we think that the active caching or child protection copying has been captured, and I think our friends at Screenrights would say 'perhaps even more than what was asked for', but we were concerned that the proxy caching problem had not been properly addressed. So, from that perspective, I think it is a drafting issue, but maybe the policy intention has not quite been captured.

Senator LUDWIG—And you say your drafting suggestions overcome that?

Ms Dalton—We think so, yes. We have worked with Screenrights to put a proposal to the committee and to the Attorney-General's Department, and that proposal is to specifically deal with the issue of proxy caching and then to specifically deal with the issue of child protection caching—well, it is not really a form of caching; it is child protection temporary storage. But it is about having those concepts separated out so that we can actually address the policy objective, as we understand it, in a way that, certainly from Screenrights's perspective, minimises the perceived harm to the interests of copyright owners.

Senator LUDWIG—Have you had a response from the Attorney-General's Department on that? They will be appearing later, so I will have the opportunity to ask them. In the meantime, have you had a favourable response from them?

Ms Dalton—The department have indicated that they are looking at the proposal, and we understand that they are looking at the issue of proxy caching and whether it has been properly addressed in the active caching exception that is currently in the bill. Our understanding is that perhaps there was a bit of a communication issue as to the extent to which proxy caching needed to be captured or was captured in section 200AAA.

Ms Flahvin—Can I just make a point there about proxy caching in universities. I think sometimes there is some confusion about what it is that educational institutions—schools and universities—are asking for. What we are saying is that there needs to be some clarification to ensure that, when we cache for the purposes of efficiency, cost savings, technical efficiency or efficient use of bandwidth, we are not infringing copyright. Now, when we had a discussion with the Attorney-General's Department, they expressed some surprise that we had not just

assumed that that activity would be exempted by the temporary copying and communication exceptions that are already included in the act, in sections 43A and 43B.

The reason why we are concerned that we are potentially exposed to an infringement is that CAL, the Copyright Agency Ltd, commenced proceedings against schools in the Copyright Tribunal recently. They made the argument that every time a student is directed to something online by a teacher, told to go and have a look at something online, when the student clicks onto a link they are exercising a right of copyright and the school has to pay for that; and, every time they click on a link and there is a copy cached, that is a reproduction for which the school potentially has to pay. Now, nowhere else in the world is anybody paying for that kind of copying—caching for efficiency purposes. I think CAL say in their submission that, if Australia were to get the exceptions that we are asking for in the act, if we went down that path, we would be out on a limb. I think the point to make is that the reason we need to go out on a limb is that we are about the only place in the world that I know of where there has been a suggestion that caching for efficiency purposes exercises a right of copyright. So that is why we are saying—

Senator LUDWIG—That is proxy caching—

Ms Flahvin—Proxy caching, but for the purposes of efficiency.

Senator LUDWIG—in a technical sense.

Ms Flahvin—The reason that there is some uncertainty about whether or not sections 43A and 43B cover us is that those sections talk about copying purely for technical purposes. The argument has been raised that, if you are doing it for some other purpose—cost savings, for example—that is perhaps not covered.

Senator LUDWIG—Or time saving.

Ms Flahvin—Whatever—just efficiency.

Senator LUDWIG—It is more efficient. Most computers will have proxy caching for large networks, I suspect, because of the ability to efficiently and quickly process documents that would otherwise be online.

Ms Flahvin—They do. And most organisations, ISPs and what have you who are engaged in that activity, have the protection of the copyright safe harbours that were introduced into the act following the FTA amendments. Universities do not have the benefit of the safe harbour, notwithstanding that we have made various submissions to government about that. We are not carriage service providers within the meaning of the telco act, and we cannot claim the benefit of the copyright safe harbour.

On one side we have CAL saying, 'We think that when you cache that might be exercising a right of copyright and you might have to pay for that'—we are asking for that to be brought within the statutory licence and for some way to be found to make you pay for that—and on the other side of the fence we have no protection, the protection that ISPs would have, under the safe harbour, so we are quite exposed.

Senator LUDWIG—And that is different from when you throw up material on the intranet in terms of providing lecture notes or sections of books and the like?

Ms Flahvin—Absolutely. We would not classify that as caching at all.

Senator LUDWIG—That comes under a different section.

Ms Flahvin—The educational statutory licence, and we pay something like $20 million a year for that.

Senator LUDWIG—Do you think this has confused the two issues?

Ms Flahvin—I do. I think that the government have gone some way towards addressing our concerns, but I think they have misunderstood exactly what we need.

Senator LUDWIG—Section 28A(1) states, 'Not to be a communication to the public if,' and then it has, '(a) the communication is made,' and then (i) and (ii). I will come back to the 'communication' definition and 'use' in section 200AB. But I was curious as to whether communication that is 'not given for profit', in section 28A(i), excludes private educational providers—Bond Uni comes to mind—those types of educational institutions? Bond Uni might be an exception, but in particular I was thinking of where they use private educational providers in the immigration area, where they provide English language courses, which appear to me, anyway, to be profit orientated.

Ms Flahvin—I think there is potentially some uncertainty and concern about that. This is section 200AB?

Senator LUDWIG—No, this is the way section 28A(i) would work. Educational institutions have not had a qualification 'not given for profit' before, as I accept, in the copyright legislation. I have not found it. It might be there but—

Ms Flahvin—There are those words in the educational statutory licence.

Senator LUDWIG—I know it is there, but I am interested in whether it is in the copyright legislation. This is the first time 'not given for profit' has been introduced in the Copyright Act.

Ms Flahvin—In section 28, yes.

Senator LUDWIG—At least in section 28A.

Ms Dalton—I am just looking at section 28 in the act. Section 28 is essentially the exception that allows teachers to use copyright material in class, so you can read out a poem or show a video in class. There is an existing requirement in section 28 that the educational institution is an educational institution where instruction is not being given for profit. As I understand it, section 28A is, at least, intending to replicate the circumstances that are in the existing section 28 in the proposed section 28A.

Senator LUDWIG—Yes, but that is in a classroom. Section 28A is much broader. It has now moved it to outside the classroom—

Ms Dalton—That was one of the problems that we have tried to address with Screenrights.

Senator LUDWIG—because online educational institutions have been providing services. There is now a range of things which are broader than that. In keeping that 'not given for profit' online, does that change the colour of that, or does it exclude or limit it?

Dr Brennan—Proposed section 28A is not the provision which is directed at the caching issue. This is a separate issue related to essentially incidental communications made by educational institutions in the course of giving classroom instruction.

Senator LUDWIG—Yes, I understand it is not about caching, but let us deal with a couple of examples. Say, you are a university, a public institution, and you provide courses online or you provide course material online for your students as part of a lecture or, alternatively, you are a private institution for profit, providing educational instruction in English, and you then also provide it online.

Dr Brennan—I think the way in which these provisions in the act have traditionally been read is that, even if you have a private education provider, the particular instruction referred to in the provision is 'not-for-profit', so as long as there is not, say, a separate admission fee for that classroom activity.

Senator LUDWIG—So it is construed more narrowly.

Ms Flahvin—I think those words have also been construed in some litigation between CAL and Victoria University some years ago now. The university was selling course packs on a cost-recovery basis and CAL's argument was that that took them outside the statutory licence because they were selling the course packs for a profit. The court said, 'If there is no intention to make a profit on the sale of that material, that's okay. It is not for a profit.'

Senator BARTLETT—I want to ask a similar question to one that I asked the previous witnesses. This section has been through a fairly long process of consultation, which was a little more tortuous than the 'fair use' consultations, and we have ended up with exposure draft legislation and now the legislation before us. Do you people feel that you have had the chance to put your case and have not got what you wanted? Or do you think there are bits that have been completely misunderstood by the government in its drafting of this legislation and that it does not achieve what it says? Perhaps of equal concern, are there parts that have appeared right at the end of the process, out of left field, that you have not had a chance to put your case about until this rather late stage?

Mr Mullarvey—I think from the universities' point of view there are two areas that are from left field. One is the fair-dealing provisions; the change is late. The other is the changes to the Copyright Tribunal provisions. There has not been any consultation with the education sector. The bill was out for only 10 days, I think, even in its final form, for any input. So it was a very shortened period in which to have an opportunity to have input on these issues. Certainly that is the case for the fair-dealing provisions and the Copyright Tribunal provisions. With respect to caching, as Anne Flahvin has said, we agreed with the policy intent of the government; it just has not been captured in the legislation.

Ms Browne—From the schools' perspective, we also don't agree with the recent changes to section 40, with the addition of subsection (5), and also with some of the issues on the Copyright Tribunal in relation to record notices. The one area that we are probably the most concerned about is proposed section 135ZMB(5), which really came out of the blue. We were not expecting to see this section in the current draft. It was not part of the fair use review, and I do not recall it being a part of the recommendations made by previous inquiries and reviews

of the government. This is something that the schools, and I think the universities and TAFEs also, are very concerned with.

I just remind the committee that it is a fundamental principle of copyright law in Australia, and around the world, that a copy of a work that does not represent a substantial part of that work is not a copyright infringement. The copyright principle is about the substantial reproduction of works which will infringe copyright, and if you want to make a substantial reproduction of a work you require a licence. This principle of insubstantiality not being an infringement is reflected in our statutory licence schemes under part VB. Under that licence scheme, for instance, if it is in a hard copy environment, which is photocopying, there is a deeming provision that says one to two pages is deemed to be insubstantial provided the work is over 200 pages. What we have now is a new subsection in relation to electronic works which seeks to impose a requirement, and in the case of the electronic environment one per cent of the words is deemed to be insubstantial in the current state, or if it is an online work that has been paginated it will be one to two pages. But this extra requirement that has been placed under subsection 5 is that it will only be insubstantial for the one per cent of words of the online work or if it is paginated one to two pages, if the two pages or the one per cent is consecutive.

This overturns a fundamental and longstanding principle of copyright law. Basically you have a situation where a teacher may copy paragraph 1 and paragraph 2 from a webpage to use for a lesson if the sum of what has been copied is less than one per cent of the words on the webpage. Say, for argument's sake, the website has 30,000 words on it. One per cent of 30,000 words is 300 words—that is, approximately one A4 page.

If you do that now, there is no payment as required under the educational statutory licence. With the new proposed subsection 5, if the same teacher copies paragraph 1 from the same website and then copies paragraph 4, they will be required to pay for paragraph 4, even if paragraph 1 and paragraph 4 comprise less than one per cent of the insubstantial part. We are very concerned that this has come in at a very late stage. It totally changes the basis on which we have been operating for quite some time. But, apart from being completely contrary to the fundamental principles of copyright law, it would also have a serious impact on our budgetary implications under part VB, which we are currently in the process of trying to get determined in the Copyright Tribunal or negotiate.

Mr Lake—From the Screenrights perspective, there is much we would like to comment on in this bill. Certainly the thing we would most like to focus on is that Screenrights and schools have worked cooperatively together to get a workable solution for section 200AAA. Whilst we do not love the policy intent behind it, we certainly think that what we have proposed is something we can live with and which certainly defines more clearly what the government was hoping to achieve.

Senator BARTLETT—You mentioned before that you have done a modified wording and put a redrafted alternative version to the Attorney-General's department. I think your words, or Ms Browne's, maybe, were that this was in a way that would meet the needs of copyright owners. Have you shown that draft to copyright agency people or whoever the relevant people are? Do they agree with your assessment?

Mr Lake—Certainly we have shown it to many of our members. Within the submissions, the ABC, SBS, APRA, the Screen Producers Association of Australia and other copyright interests have all had a look at this drafting. One of the things they have said is that, whilst, again, they do not love the policy behind it, they think that what we have proposed is a workable solution. They have also commented that they think it is a good thing that the schools and Screenrights, as the copyright representative, are working together to get those shared solutions. We have shown it to them, and the response has been positive.

Senator BARTLETT—It is nice to see some togetherness.

Senator CROSSIN—What relationship will the proposed changes before us have vis-a-vis the action that I think CAL is taking against the school section?

Ms Dalton—To clarify something that I think is in one of the submissions to the senators, this action at the moment has come into the Copyright Tribunal. One of the claims in the tribunal action was that teachers, when they ask students to read from the internet, are causing what in general would be a copyright infringement but which, in the context of the educational statutory licence, is something that needs to be paid for. One of the two legal points that made up part of that claim were, as Anne Flahvin mentioned, for example, if a teacher says, 'Go and have a look at the *Sydney Morning Herald* website,' when the students actually go onto that website, there will be copies of the *Sydney Morning Herald* placed in a proxy cache. That was one part of the claim.

The other point was that students, in moving around with the mouse and determining what they wanted to look at, had determined the content of whatever they were viewing. There is a deeming provision in the Copyright Act which says that the maker of communication is the person who determines the content of communication. So, as I understand it, the argument effectively ran that, because the students had selected what they wanted to view by using the mouse, and that there was some sort of transmission or beaming of that material to them, they had in fact determined the content and therefore they were making the communication. Therefore, the students were effectively infringing, but for the operation of the statutory licence it was something that needed to be paid for.

In the context of the claim that moving the mouse determines the content and, therefore, reading from the internet can be an infringement, the education sector takes the view that this is completely contrary to the government's intention in introducing the digital agenda reforms. In fact, it says in the explanatory memorandum to the bill—in the explanatory material to the temporary copies exception in the act—that browsing or simply viewing the internet is not a copyright infringement. So the view was taken that, if there is some sort of legal argument that using your mouse to browse the internet could result in a copyright infringement, that is contrary to the government's intention and it would have placed Australia completely out of step with the rest of the world. We would have been the only jurisdiction in the world in which reading from the internet is a copyright infringement. So a request was made of the government to clarify that intention in relation to the communication right, and that clarification of intention is now in schedule 7 of this bill. So, in response to the effect of the action, there is no Federal Court action on foot yet. There may be if schedule 7 of this bill does not go through because of that clarification of intention.

In relation to proxy caching, I cannot really comment on the arguments the Copyright Agency Ltd might make in relation to that, but the schools' position is that proxy caching is something that is mandated by the internet protocols. If you look at W3, the organisation that runs the internet, you will see that proxy caching is built into the protocols. So everywhere in the world that runs the internet uses proxy caching. You can go to websites that explain the W3 protocols and ask, for example, how to set up your website if you do not want caching to occur. It is something that is so common and so fundamental to the operation of the internet that one of the arguments we put to the government was that this again is something that would place Australia completely out of step with its international obligations. The use of a proxy server to enhance efficiency and the way in which people read from the internet would be an infringement in Australia in a way it is not anywhere else in the world. We are very pleased that the government seems to have accepted those comments, which we see as effectively just clarifying the intention of the digital agenda reforms in 2000.

CHAIR—And that is quite clear from your submission.

Senator CROSSIN—We have talked about insubstantial copying, and I understand that comments have been made this morning about the 10 per cent limitation on research. There was a suggestion that this perhaps might be amended. Has there been any discussion with any of the groups here that that is the case?

Mr Mullarvey—We have had discussions with the Attorney-General's Department, and we understand that they are looking to resolve our issues. As far as I am aware, we have not seen any amendments to it yet.

Ms Flahvin—I have had no direct confirmation. I have just heard from people who have spoken to people that the word we are hearing now is that there was not an intention to do what it appears that they have done in this bill, and that is to impose a statutory cap of 10 per cent on fair dealing for research and study. We are quite pleased to hear that that is not the legislative intention and that there are now going to be some moves to amend that. But we would still like to stress how important that is for the sector.

Senator CROSSIN—Ms Browne, you have heard the areas we have discussed this morning. Do you want to draw the committee's attention to any other issues you have raised in your submission?

Ms Browne—Record keeping is an issue that was raised in our submission and also in the AVCC submission. That is one issue I would like to bring up. Carolyn, do you want to speak about the TPMs?

Ms Dalton—Yes.

Ms Browne—I will pass over to Carolyn soon, but the record-keeping provisions were also raised in the AVCC submission. Currently under the act, under the part VB licence, schools, universities and TAFEs can undergo a sampling regime, where a number of institutions are selected around different times of the year and they undertake full record keeping for a period of time and from that data CAL is able to identify what remuneration should be paid by the respective institutions depending on what the licence fee is that has been determined. That also allows CAL to distribute appropriately to its copyright members.

In some institutions—particularly in the TAFE sector, and sometimes in the university sector—it may be that they do not do a lot of certain types of copying. They may then choose to go on a record-keeping type system. The act actually has regulations that set out what you have to do for record keeping. Basically institutions just record every copy they make under either part VA or part VB if they are in a record-keeping type of situation. As I understand it, what is happening with the record-keeping changes to the Copyright Tribunal part of the bill is that it is saying that, instead of relying on those regulations, the record-keeping system now has to be determined by the Copyright Tribunal.

Ms Flahvin—Or agreement reached with—

Ms Browne—Yes, or agreement reached with the agency or the other collecting society. We had no idea that there was any evidence that there was anything wrong with the system as it currently stands, which is about complying with the regulations. We do not see the need to actually add another step and the potential for further litigation in the Copyright Tribunal, which is incredibly expensive for the education sector. It is not a cheap and quick process; it can take quite some time for these issues to be resolved. If the system ain't broke, we do not see why we need to put an extra step in. That is one issue that we have also raised in our submission. The other issue raised was in relation to the TPM provisions. Carolyn Dalton will be better at explaining that in a simple way. I will pass over to her now.

Ms Dalton—Very simply, it is a general proposition all the way through the Copyright Act that you can engage in an act that otherwise would be an infringement of copyright if you get the permission of the copyright owner to do so. In the TPM provisions in relation to the ban on the use of a circumvention device, there is an exception there that says you can circumvent if you have the permission of the copyright owner. In relation to the other set of bans or criminal and civil provisions in relation to dealings with circumvention devices—for example, sale, manufacture et cetera—there has not been that exception for permission translated across. So if, for example, in a school or a university you have been given the right to use a circumvention device, there is no equivalent exception to enable the sale or manufacture so that someone can sell you a device to use that exception. We understand that that is a requirement of the free trade agreement, so we do not make comments on that, but the absence of a permission exception means that the school or university cannot even contact the copyright owner. They cannot pick up the phone and say, 'Would you mind?' We think that is an interesting gap, because it can effectively mean that the provisions that have been given to educational institutions to use these devices might not be workable even in the context where specific permission has been sought from the copyright owner to undertake such acts.

Senator CROSSIN—I would like to get that clear in my mind. So a school can actually have an exception to copy the material but will not have an exception to purchase the device to copy it onto—is that correct?

Ms Dalton—Yes, that is correct. That is mandated by the free trade agreement, so there is not much we can do about that. But, in terms of how we might make this work a bit more practically, if a school or university wanted to be a good corporate citizens and say, 'I've been given this exception to use a TPM for the purposes of part VB,' then they could contact the copyright owner to ask, 'Could I please have a device or your permission to use one?'

Senator CROSSIN—So you think there is a way around it?

Ms Dalton—I would need to, I suppose, be guided by the Attorney-General.

Senator CROSSIN—Perhaps the phrase 'a way around it' is not appropriate when we are talking about copyright laws here. Perhaps a better choice of words would be to say that there is a way to get over the anomaly.

Ms Dalton—Yes, I suspect the question needs to be put to the Attorney-General's Department about whether the absence of a permission exception is a requirement of the free trade agreement or whether it is a domestic implementation issue.

Ms Flahvin—It is not so much that we need permission to use it so much as permission—

Ms Dalton—No, it is permission to obtain it—

Ms Flahvin—And to share it. That is our big point. One concern that we have with these amendments is that we have been given the benefit of this exception—which is fabulous; we appreciate that—but, as Carolyn said, the FTA mandates that we are not able to go and purchase the things; we have to make them ourselves. We have to have somebody in the institution who is capable of making one and then, if we are lucky enough to be in that position, we are not entitled to share them amongst ourselves, which means that every institution has to reinvent the wheel.

CHAIR—We will come to these issues in more detail in the next session as well.

Ms Browne—Could I just raise a final issue, which was raised in the AVCC's submission, in relation to the criminal provisions of the act? I have been asked to raise this at today's hearing by the independent schools and the Catholic education sector. Unfortunately I did not have it in our submission because we were seeking independent legal advice on sections 132AC, 132AL, 132AN and 132AO, but in particular 132AL, 132AN and 132AO because there are now these new strict liability criminal provisions in the act.

I alert the committee mainly to the AVCC's submission. I think there was concern that educational institutions might be held strictly liable for inadvertent acts by their teachers and lecturers and by students enrolled in the universities. A strict liability offence is one where you can be held liable even if you have no knowledge of what is happening or intention that it is happening.

We noted in our advice that there is a provision—I think it is section 7—which says that the Crown is going to be exempt from these provisions, which means, I think, that most government schools will be protected. This of course has raised concerns among the non-government schools sector that they do not have parity of exemption with the government schools. This may be raised separately. I note that in the AVCC submission they have made some recommendations that there should perhaps be an educational institutions defence and that:

- such a defence be clarified to ensure that educational institutions will not be exposed to criminal liability merely because they are found to have inadvertently authorised a staff member or student to reproduce or communicate copyright works or other subject matter.

We have raised this issue indirectly with one of the copyright owner groups, the Australian Federation Against Copyright Theft. We have a very good relationship with them, the schools

sector, and we are working very hard with them to do a lot of positive copyright education, but we are very concerned that we will be made to become copyright police in our schools, universities and TAFEs. We want to make sure that, much as our best intention is to educate people positively, we are not being held liable for acts that are very difficult for us to control.

CHAIR—Okay. Are there any further questions in relation to schedule 8?

Senator LUNDY—I want to ask a question about a comment made by the Australian Libraries' Copyright Committee—I note that they are not coming before the committee—as it relates to an amendment to section 50(8), which says:

… libraries will no longer be able to acquire two or more articles or published works in accordance with this section simply for the purpose of expanding their collections.

CHAIR—Do you want to ask these people, or the department?

Senator LUNDY—The libraries refer to the AVCC submission as being supportive, so I do not know whether the witnesses from the AVCC are able to answer a question about the impact on libraries, cultural institutions and collecting institutions.

Ms Flahvin—I know that Sarah Waladan could.

CHAIR—We cannot do that; I am sorry, Ms Flahvin. We can perhaps ask Ms Waladan to comment on notice.

Senator LUNDY—I will put a question on notice with respect to that.

Mr Lake—I have another point. I will not take up much time, but we have talked about the record-keeping system.

CHAIR—That was not my plan; nevertheless, go ahead.

Mr Lake—Certainly in the way in which the bill has been amended, the intention of the government is that all aspects of the statutory licence system, including the internal operations of collecting societies, are reviewable by the Copyright Tribunal. We welcome that and we certainly welcome the provision about record-keeping. In relation to that, the last time a tribunal actually looked at whether or not a university could keep records it found that true and complete records were not kept by educational institutions. So in our view, in the absence of an agreed records system and without tribunal oversight, such failures are inevitable and it is very difficult to control such large staff numbers. We certainly support the government's intention that every aspect of the operation of the statutory licence be able to have the light shone on it by the tribunal.

CHAIR—Thank you very much. That concludes questions in this area; I thank all of the organisations represented for attending today and for assisting the committee. Thank you also for your submissions, which the committee has found very helpful. We appreciate the assistance you have been able to give us.

[10.51 am]

KNIGHT, Mr William Peter, Solicitor, Apple Computer Inc.

SMALL, Mr Robert Bruce, Marketing Director, Apple Computer Inc.

SCOTT, Mr Brendan, Director, Open Source Industry Australia Ltd

CLAPPERTON, Mr Dale, Senior Research Assistant, Queensland University of Technology

FITZGERALD, Professor Brian, Private capacity

GONSALVES, Mr Maurice, Partner, Mallesons Stephen Jaques, Legal Representatives for Interactive Entertainment Association of Australia

HANLON, Mr Chris, Chief Executive Officer, Interactive Entertainment Association of Australia

CHAIR—I welcome our witnesses from the Queensland University of Technology, the Open Source Industry Association, the Interactive Entertainment Association of Australia and Apple Computers. Does anyone want to make a comment about the capacity in which they appear?

Prof. Fitzgerald—I am from the QUT School of Law.

Mr Clapperton—I am a senior research assistant at the QUT School of Law.

CHAIR—Mr Clapperton has lodged a submission, which is numbered 42; Professor Fitzgerald's submission is numbered 46; the Open Source Industry Association's submission is numbered 21; the Interactive Entertainment Association of Australia's submission is numbered 10; and Apple Computers' submission is numbered 63. All have been lodged with the committee. Does anyone need to make any amendments or alterations to their submissions?

Mr Knight—We made a submission in table format. On the first page, through an error of mine, in the fourth column, which suggests an amendment, we made an error. After proposing that—

CHAIR—Is this your appendix B?

Mr Knight—Yes. We recommended an amendment to the proposed bill in respect of the amendment to the Copyright Act, section 111. After the deletion of paragraph 1(a), the amendment is that in paragraph 1(b) all the words in that subparagraph, after 'private and domestic use', be deleted. We have put the amendments we propose into a marked up version of schedule 6.

CHAIR—Would you like to table that?

Mr Knight—I would like to table those for the convenience of the committee.

CHAIR—Thank you very much. In this section of the hearing, the committee intends to examine the provisions of the bill that relate to technological protection measures in schedule 12 specifically. These are amendments which, it is advised, seek to implement obligations

under the Australia-United States Free Trade Agreement. Under that agreement, the federal government undertook to implement a new liability regime for circumventing TPMs by 1 January 2007. Unless anyone has a particularly ardent desire to make an opening statement, we will go to questions and answers.

Senator LUNDY—Professor Fitzgerald, in your submission you make reference to the Stevens v Sony case and how the decision reinforced the fact that it is the infringement of copyright that is to be prevented or inhibited in relation to TPMs. Can you expand on that, and then provide the committee with an insight as to whether or not the bill before the parliament reflects the Stevens v Sony decision?

Prof. Fitzgerald—The exposure draft and the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs both evidenced the idea that a technological protection measure should be something that prevents or inhibits copyright infringement. The current version of this bill actually has dropped those words in the space of the last few weeks and replaced it with the words 'in connection with the exercise of copyright', thereby taking away a very clear link to copyright infringement. I think that is a cause of concern, particularly for Australian consumers.

The High Court pointed out in Sony v Stevens that we should be careful not to allow copyright owners to use copyright law to further non-copyright agendas. They cautioned against this idea of taking away the liberty of consumers to use lawfully acquired goods as they please. Just to give an example, if I went to the store and purchased a DVD to watch at home and took it home and played it, there is no copyright infringement, but if somewhere in the process there is a technological protection measure of some sort and if that technological protection measure for instance does not necessarily deal with copyright infringement, then circumvention of that technological protection measure under the current wording of the bill would be a problem. To give you are very silly example but one I think that makes the point clearly, if I bought a DVD that could only be played on Monday, Wednesday and Friday, it has nothing to do with copyright infringement, because when I purchase the DVD I have the right to play it on any day I want. Under this current law, something that restricts my user rights—whether it is the day of the week I play it on or the platform I play it on—could be covered, even though it does not necessarily prevent or inhibit copyright infringement.

Senator LUNDY—Could you tell me whether you know of any jurisdiction which has allowed this law relating to technological protection measures to go beyond the issue of the infringement of copyright as the basis or reason for it?

Prof. Fitzgerald—I think the most interesting jurisdiction is the United States, where the law on its face may not clearly provide that but recent case law in the federal circuit, which is really a specialist IP court, has used the words 'copyright infringement'—infringement is a key element that they refer to. I refer to cases like the StorageTek case.

Senator LUNDY—So even in the US that link with infringement has been retained in case law?

Prof. Fitzgerald—Cases interpreting the DMCA—the American Digital Millennium Copyright Act—have called upon a link to copyright infringement. That was noted in the House Legal and Constitutional Affairs Committee report as well.

Senator LUNDY—Because this is an area that is required to fulfil our obligations under the US free trade agreement, because I guess that has been established in the eyes of the law in the US, to insert such a provision to link infringement of copyright with TP measures would in no way not fulfil our obligations under the Australia-US Free Trade Agreement. Is that the correct interpretation?

Prof. Fitzgerald—I think probably what the free trade agreement says is a contentious issue. The Office of International Law gave evidence before the House of Representatives Standing Committee on Legal and Constitutional Affairs to say that a link to infringement was a reasonable interpretation of what the free trade agreement provides. If there is any doubt, the fact that US courts are actually drawing this link certainly would add much weight to the interpretation that requires a link to copyright infringement.

Senator LUNDY—Thank you. I have just one more question on this. Are you happy with the wording in the exposure draft as it was previously presented in drawing the link between the existence of TPMs and infringement of copyright?

Prof. Fitzgerald—There has been a lot of legislation over the last couple of weeks and I cannot guarantee that we have looked at everything in fine detail. But, yes, I think we were generally happy. There has been a lot of debate about TPMs and a number of different committees have looked at these things. There was a change in the last four weeks or so over the exact wording. If the wording had remained as it was in the exposure draft we would have been very happy that it kept that link to copyright infringement and, thereby, retained the right of the Australian consumer who purchases a copyright item to have proper user rights of that item that they have lawfully acquired. The exceptions that have been put in the current definition relating to regional coding and other goods go some way, but the regional coding one is really very limited, and we might make some comments about that as we go through this. The exceptions in the current definition are not adequate either.

Senator LUNDY—I will also ask you, with respect to your knowledge and understanding of decisions by the ACCC, how TPMs relate to the undermining of competition policy and that kind of area. Would you describe what the current situation is, from the ACCC's perspective, in regard to the use of TPMs to inhibit competition?

Mr Clapperton—The ACCC was involved in an intermediate stage in the Stevens v Sony case, which was dealing with the moding of PlayStations to allow them to play games which had been parallel imported from overseas. Since that case was decided, I have not been aware of any further policy statements by the ACCC with regard to the use of technological detection measures, but they were certainly at the time very concerned that the use of such ways as region coding tended towards the anticompetitive end of the commercial spectrum.

Senator LUDWIG—I wish to address some of the finer points. I refer to article 17.4.7(b) of AUSFTA in terms of paragraph 12.7 of the EM. Is it the case that it is just the EM that has led us into error or do you say that there are amendments necessary under schedule 12 to make it at least compliant with article 17.4.7(b)? One of the submissions raises the issue that there was an error in the way 12.7 of the EM worked. Article 17.4.7(b) says:

... any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter ...

Mr Clapperton—I think that the problem definitely lies within the schedule, not the EM. It is the wording of the schedule which causes the problem. There is debate as to whether the wording that was in the exposure draft is a sufficient implementation of what is in the FTA. We say that it is. There is an argument raised by numerous copyright holders that it is not a sufficient implementation and that it needs to go further and encompass a pure access right which is disconnected from any infringement of copyright.

Prof. Fitzgerald—AUSFTA provisions 7(a), 7(b) and, to some extent, 5.4 come together to give an interpretation that we would say requires a link to copyright infringement. So 7(b) could be seen as 'controls access' in that definition. It could be seen to be something that is purely an access right and does not require any link to copyright infringement. I am not sure if that is the point that you are getting at, Senator.

Senator LUDWIG—That seems to be the point that they are making in the submission. They did not actually get to come before the committee. I wondered whether or not there was a requirement to amend the EM, in your collective view, or whether it meets the FTA article. In other words, does it now meet it? I guess the germane question is: are you all satisfied that this schedule 12 meets article 17.4.7(b)? Does anyone have a contrary view?

Mr Clapperton—I do not wish to speak for the other groups.

Senator LUDWIG—I am only asking that you speak for yourself.

Mr Clapperton—I do not think there is any argument that it currently meets it. The argument is whether it goes too far or not. We say that it does.

Prof. Fitzgerald—On the basis of 7(a), particularly 'in connection with the exercise of their rights and that restrict unauthorised acts', which were words that the Office of International Law from Attorney-General's gave evidence on before the House of Representatives Standing Committee on Legal and Constitutional Affairs to suggest that that requires a link to copyright infringement. That would flavour the interpretation of 7(b) which, on its own, might just be seen to be read as not requiring a link through the words simply 'controls access', although those words interpreted in the US in cases have tended have to require copyright infringement.

Senator LUDWIG—Yes.

Mr Gonsalves—I just wanted to say that, in our view, the wording in the exposure draft did not meet the obligations under the FTA. The wording of 7(b) of the FTA is very clear. It covers:

... any technology, device, or component that, in the normal course of its operation, controls access to a protected work ...

There is no link to copyright infringement, and that link is not in the FTA, in US law or in the law of most other jurisdictions.

Senator LUNDY—But it is implied in observations and views expressed by the ACCC in Sony v Stevens.

Mr Gonsalves—The Sony v Stevens case was in relation to mod chips for computer games.

Senator LUNDY—I am just saying there is a general point from the ACCC about it being used to inhibit competition.

Mr Gonsalves—That, with respect, is a separate issue. It is a view that might have been expressed by the ACCC in that case, but it does not really relate to the protection of technological protection measures in most jurisdictions around the world.

Mr Hanlon—With respect to the Sony v Stevens case, that was an extremely complex case based on old PSone technology, which is now several years out of date. Since that time we have seen PlayStation 2 systems and Xbox systems come into the marketplace. We are about to go to next generation consoles with the PlayStation 3, Nintendo Wii and Xbox 360. Even in the High Court's findings, they said that, whilst the TPM that was used on the PSone may not have been purely for copy protection, the unintended consequence of the finding would be an increase in piracy.

In all the deliberations where we are discussing the impact of the carve-out for access TPMs and copy TPMs, we need to be mindful of how that impacts on piracy, which is a huge problem—a $100 million problem—in our industry. When the US Copyright Office looked at this whole issue they found that, yes, some consumers are disadvantaged. In Australia, the consumers that are disadvantaged are those that purchase a game from an NTSC country, but that needs to be balanced up against the overall impact of piracy, which in this country is largely led by organised crime gangs. When the US Copyright Office looked at this issue and they balanced it up, their argument was that the overall effect would be to lead to an increase in piracy, and that is a primary concern for our industry.

CHAIR—Senator Lundy, do you want to ask any of our other witnesses if they wanted to comment on the points Senator Ludwig was making?

Mr Scott—I guess the only thing I would say is that it is my understanding that the US law is requiring a link between copyright infringement and the TPM, but that is as far as I would say.

Mr Hanlon—Could I respond, please, to the question that Senator Lundy asked in relation to the ACCC investigation? That really was done several years ago and I believe it was actually done before the law on parallel import pricing et cetera was changed. I am not aware if the ACCC made any comments in relation to the LACA committee inquiry in particular, but you have to look at what is going on in the marketplace. Parallel imported games are freely available. If the region coding was being used to manipulate, in effect, pricing of games, that would create an opportunity for parallel importers to come in and import products from any comparable PAL territory and make that product available. I believe when parallel import laws were changed, in relation to music in particular, mass merchandisers like Kmart and Woolies entered the market and music prices were substantially different.

Senator LUNDY—Not for new releases.

Mr Hanlon—If that was affecting the games industry, merchandisers would move in, seize that opportunity and make product available. Parallel imported games are available in Australia, games are available through specialist games stores, you can buy them through mass merchandisers, you can buy them on the net and you can buy them from eBay. There is

huge competition in the market. If the ACCC issue that you are alluding to were a problem, it would be resolved in the marketplace.

Senator LUDWIG—I want to ask some questions in respect of the ABC submission. If you have not had a look at it, I am happy for you to take the questions on notice. They say at page 12, under the heading '1. Ss116An(2) and 132APC(2)—Reasonable grounds to believe permission granted', that they prefer the words 'if a person has, or has reasonable grounds to believe'. They say these words were contained in the first draft exposure draft and that the current bill does not have them; it uses a different phrase. Does anyone have a view on that? I am happy to take a submission from anyone on whether they concur with the ABC or think the current wording is sufficient. The ABC says in its submission that these words 'unequivocally include implied permission as well as express permission as a defence, and should be reinstated'. You might want to take that on notice and get back to the committee. If you are prepared to say something now, I would be happy to hear it.

Mr Gonsalves—I can address that. We certainly prefer the current wording, because it is an objective test: you either have permission or do not. I do not agree with the ABC suggestion that implied permission cannot mean permission for the purposes of the current wording. The current wording is consistent with the test for infringement, which is reproduction without licence from the copyright owner.

Prof. Fitzgerald—We are talking a lot about copyright owners, but we also need to be mindful, as the High Court showed us in Stevens v Sony, that we are also talking about consumers who lawfully acquire copyright items. Technological protection measures, which are not designed to prevent or inhibit copyright infringement, are being put in their way. I think the ABC suggestion is to some extent trying to soften the blow of the restrictions that consumers will face if this legislation is passed with its current wording.

Mr Scott—I do not particularly want to respond directly on the ABC submission, because I have not read it. But, in terms of this exception for permission, I think an underlying assumption is being made about the way these works are being produced and what is there. It talks about the copyright owner or the exclusive licensee. From our point of view, certainly for the works that we are producing and distributing, there is not a single copyright owner; there can be multiple copyright owners. I will use a simple example: if I were to write a paper and I quoted a substantial part of someone else's work—with their permission—if I apply a TPM to that, when someone wants to seek permission, do they have to seek my permission and the permission of the other person whom I have quoted? Moreover, how do they know whose permission they have to seek until after they have accessed the work? We think this permission exception is well intentioned but problematic.

Senator LUDWIG—If I have got this right, the difficulty and the tension that exists is between the fair use of a technical protection measure which is designed to protect the copyright owners and the use of a technical protection measure which extends beyond that to a consumer issue—that is, a competition matter—where it might be used as a technological device to assist more in the marketplace than to assist with a copyright owner's protection. Does schedule 12 meet that balance, if it is a balancing act? I am not convinced that it is a balancing act. It may be two sides of the one coin, where we try to achieve both, and the

drafting has failed—or it may be that the drafting needs tightening up or that it does work. Do you want to comment on that?

Mr Clapperton—The current provisions of schedule 12 go some way towards dealing with the past anticompetitive abuses of TPM type laws that we have seen in the United States. Senators might be familiar with examples involving printer cartridges, garage door openers and third-party servicing of computer equipment. These are all abuses that we have seen in the past. The exceptions in the definition of 'TPM' and 'access controlled TPM' seem to seek to avoid those types of situations. The problem with those exceptions is that they address the past abuses that we have already seen elsewhere in the world. They will offer very limited, if any, protection against future abuses of these laws because, without the link to infringement of copyright, copyright owners are free to come up with new and inventive ways to use TPMs to restrict competition. As long as they are not closely related to the ways we have seen in the past, they will not benefit from these exceptions.

Prof. Fitzgerald—It is a competition issue and it is also a consumer issue but, fundamentally, if you are going to use a technological protection measure to restrict the way a consumer uses something that has no link to copyright infringement, you are asking the state to endorse a preference in the marketplace for that activity. If someone wants to do that, why can't they do it without the legislative endorsement and see how they go in the market?

The other great concern is that we are really making it hard for the consumer but then we say there are some exceptions. But there is no guarantee that any of those exceptions cannot be contracted out of. One of the submissions we made to the House committee was endorsed by them and, as far as I understand, by the Attorney-General's office—that is, there should be a prohibition on contracting out of the exceptions that are in the legislation. Those protections, otherwise, will be just put in an end-user licence agreement and consumers will just tick a box, which they will completely ignore, and their rights will be completely taken away

Senator LUDWIG—There is no protection from contracting out, so you could contract out your right. As you said, it is an end-user licence on a screen—click 'yes' if you want the product.

Mr Clapperton—The parliament has recognised elsewhere in the Copyright Act—I am referring to the 'technological specific exceptions in sections 47A through H, which deal with things like the use of computer programs and reverse engineering computer programs for interoperability. Section 47H provides that these exceptions cannot be contracted out of. That was essentially a recognition that it is commonplace for copyright holders, through the use of end-user licence agreements and other contractual means, to try to reduce the scope of or to eliminate entirely those exceptions. The exceptions which we are dealing with here do require a similar provision; otherwise it will become commonplace, as it is now, for copyright holders to contract out of them and they will become essentially moot.

Senator LUDWIG—And it is your recommendation that 47H be reproduced in schedule 12 in some form?

Mr Clapperton—There should be a protection against contracting out in some format, and that was also endorsed by the House of Representatives Legal and Constitutional Affairs committee report.

Senator LUDWIG—Does anyone else have a view about that?

Mr Gonsalves—Yes, we do have a view about that. We think that having provisions that prohibit contracting out have the potential to damage online emerging markets because they interfere with the freedom of copyright owners and consumers to strike a deal and contract on certain terms in relation to the use of works.

I will come back to Senator Ludwig's question about whether this legislation achieves the balance. I believe that it does. There are numerous protections in the legislation. One is the requirement that the TPM be used in connection with the exercise of copyright. That in itself can be interpreted by a court to eliminate the potential abuses that we have seen in the US.

Furthermore, there are two very specific carve-outs which address those issues as explained in the explanatory memorandum. So I think there is ample scope for a court to avoid abuse of these provisions. I would like to discuss very briefly why it is so important for pure access controls to be protected without a link to copyright infringement. Again, it is because of the emerging and increasing online exploitation of copyright works. Xbox Live, for example, is a service made available by Microsoft for players around the world through the internet to play Xbox online. The playing of that computer game may or may not involve a reproduction. It may not involve a copyright right at all. Clearly there is a subscription model here—you pay to play the game online.

If the access controls which are applied to that game to protect the subscription model can be freely circumvented then that is the end of that business. That is why those sorts of models need to be protected. There are also potential child protection issues as well, because parental locks can be used and access controls can actually prevent children from gaining access to inappropriate material. Again, having strong protection for access controls allows the taking of action against those who might seek to peddle tools to get around those sorts of parental locks or circumvention devices.

Mr Clapperton—I would like to make a few quick points in response to the previous speaker. If, as he says, the use of games on this Xbox Live service does not involve the exercise of a right comprised within copyright then it is not currently an infringement. So that business model is not currently protected by copyright. Introducing an access control would not then be protecting copyright; it would essentially be legislative protection for a business model—and that is something that we are not really trying to achieve under the FTA.

Senator LUNDY—Mr Gonsalves, are you seriously arguing that copyright law should be used to protect the business interests of a technology company with respect to their capacity to derive revenue as opposed to protecting from copyright infringement? That is what I am hearing.

Mr Gonsalves—It is protecting the copyright. It is protecting the copyright right that is used in connection with the exercise of the copyright right; namely—

Senator LUNDY—I would like to clarify what I am asking. What you are saying, or the way I am interpreting what you are saying, is that because you as the copyright owner would deem the conditions for use—that is, if it is being privately purchased—then you are dictating the terms on which that should be used as opposed to creating a reasonable test for whether copyright is infringed. So it is about the silly example Professor Fitzgerald used which was

that you want to determine when and how each viewing of that copyrighted material is done by the viewer. Do you seriously think that is what this law should do?

Mr Gonsalves—I was talking about an online exploitation environment where the work is made available online, which is exercising the copyright owner's right of communication to the public. This is one of the new rights introduced by the digital agenda legislation to cater for the modern environment, the online environment.

Senator LUNDY—I would see that as a euphemism for a new business model.

CHAIR—Senator Lundy, could you let Mr Gonsalves finish.

Mr Gonsalves—In that online environment, there is no other way of protecting the copyright work other than using the technological protection measure. So without protection like this, that potential distribution model is eliminated altogether potentially—which is detrimental to consumers because those models will not evolve. The example which Professor Fitzgerald gave, I agree, is the silly example. It is an example that has not, to my knowledge, occurred anywhere in the world as a result of these types of provisions—for the simple reason that nobody would buy a DVD that they could watch only on Monday, Wednesday and Friday. So the marketplace actually sorts out most of these issues.

Senator LUNDY—I would like to ask the witnesses from Apple Computer what they think of this issue of the use of TPMs being linked to copyright infringement as opposed to the protection of a market model.

Mr Knight—We are in a bit of a tricky spot here in answering that question. We have not made a submission with respect to schedule 12. We have not made a submission in respect to schedule 6. This was the only slot that we could fit into.

Mr Small—That is why we have been silent.

Mr Knight—So all we can say is that there are many arguments both for and against and we understand them.

Mr Scott—Can I respond to something that Mr Gonsalves said—that is, that in the online environment this model and the use of TPMs is the only way to do it. We disagree. We think that within the open source community it has been done in this way for a number of years, and we are getting increasing traction without the use of TPMs. Just on that point, is this a necessary aspect to protect that business model? We do not think it is a necessary aspect. A couple of things were said earlier. One was that the words 'in connection with the exercise of copyright' were a link to judicial decisions in the US. I think it is a different issue because there is a fundamental shift in the weighting. When you are talking about 'in connection with the exercise of copyright', you are talking about an action that the person applying the protection measure is doing, whereas when you are talking about infringement of copyright you are talking about an action that the user or the recipient of the copyright work is doing. So I do not see them as equivalent. By that rewording, I see that there is actually a fundamental shifting in the concepts behind it.

Just going back quite a long way, a question was asked: does this raise competition issues? We are very concerned that it does raise competition issues under the TPM provisions. We are concerned that they can be used to lock customers out of their own data or to require

customers to be locked into a specific vendor. We were hoping to find an exception in the permission provision, which says that if you are the copyright owner you can give permission. But the issue for us there is just because I save a document it does not mean that I am the only person who owns copyright in the saved document. And that flows on to our main concern which is the interoperability exception.

Senator LUNDY—Can you outline your concerns about the interoperability exception?

Mr Scott—I guess it is more an extension of what I have just said. Our main concern is that if one of our potential customers is using a particular program and they are saving data and they have been saving data over an extended period, it is very difficult for us to sell to that customer unless we can assure them that, 'Yes, you can continue to access the data.' You can imagine if I came to you—and I do not know what word processor you are using—and I tried to sell you something and I said, 'As a result of using our product, your current vendor has conditioned the data in such a way that if you buy our product you can't use any of those documents you have already saved'—whatever they happen to be, your kids' birthday party invitations; proposals or submissions. What we would like to see is a provision in the legislation which says, 'If the customer is the one who saved the data then they are the one who has the ability to permit access to that data.' So if you save a document then you are the absolute arbiter of who you can permit to have access to the data.

To give you an example of where it might come up, when you save a word-processing file, sometimes you have the option of including a font within the file so that when someone opens it up the document looks the same as it looked to you, so it is not displayed with a different typeface. As the author of the document, you are the copyright owner in the document, but you are not the owner of the font information which will be encapsulated in the file. So we do not want the possibility of a stray copyright owner lost within the file undermining this permission exception. If you have saved the file, you can permit access and then we would be happy because we just go to them and say, 'You have the right to have access.' That is the extent of what we are concerned about.

If we can get there through the permission exception, that is great. We were thinking we might have to get there through the interoperability exception. The interoperability exception at the moment has some problems with it. Paragraph (c) looks like it is just hanging out in the middle of nowhere. Also it talks about relating to a copy of a computer program. So you are doing an act in relation to a copy of a computer program. In the scenario that I just talked about—the word processing file—I think it would be hard to read that as being an act in relation to a computer program.

There are some words there about computer program having the same meaning in 47AB, which extends it a little bit. But the 47AB wording talks about things which are 'essential to the operation of a function of a computer program'. In the word processing document example, I think we would also have a hard time arguing that a customer's word processing file falls within the scope of 47AB. If we were to get there via the interoperability exception, we would simply like that to talk about interoperating with data rather than a computer program.

Also, a little bit further down, it talks about the sole purpose of achieving interoperability with an independently created computer program. That, to me, raises the issue that we are not actually interested in achieving interoperability; we actually want to interoperate. Why is there this distinction between 'achieving interoperability', which seems to be a step before interoperating, and the act of actually interoperating? We would prefer it to just talk about interoperating with a computer program or, preferably, with the data that has been saved by the computer program.

CHAIR—I am going to ask for final comments for this session. Mr Hanlon has been indicating that he would like to make a contribution.

Mr Hanlon—I would like to make one final comment in relation to this access copy control issue. All the academic arguments we have heard today and the way that this legislation is worded is extremely important. It has an impact in the marketplace. In relation to the games industry, people do not chip a $1,000 games console to get around the problem and the inconvenience of not being open to play some NTSC game they bought in America; they do it to play pirated games. It is a $100 million problem in our industry. It has implications other than just piracy.

As Maurice mentioned, in the games industry now we embed the OFLC classification code—the P, PG, M, MA, M15+—in disks now. That is an access control. If access controls are not recognised under this legislation, it means that the additional efforts we go to to ensure that parents can monitor what games kids are playing in their homes is also compromised. All these decisions have a huge impact in the marketplace, particularly in relation to piracy

Prof. Fitzgerald—I make the point that the region coding exception, or carve-out as it has been called, only relates to specific things—films and computer programs. It does not necessarily solve the problem of something that has regional coding wrapped around it—such as a CD, an e-book or another form of copyright material. That seems to be something that is deficient in that specification there and the other one that only relates to computer programming in relation to other goods and services.

Fundamentally we have tried to argue here that Australian consumers, once they lawfully purchase a copyright item, have the right to use that item subject to controls that limit or prevent copyright infringement. Copyright infringement should be the touchstone of technological protection measures protected under the Copyright Act. If they are to be protected at all for other reasons, we should be looking at them under the other particular heads—whether it is consumer legislation or whether it is content legislation—but not under the Copyright Act.

CHAIR—Thanks, Professor. Mr Clapperton?

Mr Clapperton—Yes. I would like to pick up on the points that Mr Scott made about the interoperability exception. The exception as it is currently drafted seems to apply, as Mr Scott said, to only program-to-program interoperability, not program-to-data interoperability. As is further detailed in our submission, program-to-program interoperability essentially protects complementary programs, not competing programs. So, in order to facilitate competition within the markets for computer software, it is absolutely essential that interoperable

programs can access the data created by other programs, otherwise you are creating a market for add-ons, not a market for substitutes.

Senator LUNDY—Can I just—

CHAIR—No more questions.

Senator LUNDY—No, I know. I just have something that they could perhaps write a few notes on, and that is the impact on the capacity of software developers, particularly in the open source area, to be innovative and write new software in this complementary and competitive way that has been described—so we can get that insight.

Mr Scott—The strict liability provisions are scary for us. I will just leave it at that; we have covered that in the submission.

CHAIR—Mr Gonsalves?

Mr Gonsalves—I just wanted to conclude by saying that if any of the more fanciful scenarios that have been raised this morning do eventuate then the government is perfectly capable of legislating to fix those.

CHAIR—Indeed. Thank you all very much for your submissions and for your presence here today assisting the committee.

[11.37 am]

CARTER, Mr James, Senior Assistant Director, Commonwealth Director of Public Prosecutions

TAYLOR, Ms Julie, Senior Legal Officer, Commonwealth Director of Public Prosecutions

PECOTIC, Ms Adrianne, Executive Director, Australian Federation Against Copyright Theft

WEATHERALL, Ms Kimberlee Gai, Private capacity

CHAIR—I welcome our witnesses from the Commonwealth Director of Public Prosecutions and the Australian Federation Against Copyright Theft, and I also welcome back Ms Weatherall. The Commonwealth DPP and the Australian Federation Against Copyright Theft have lodged submissions with the committee which we have numbered 53 and 57, and we have already noted Ms Weatherall's submission. Do you need to make any amendments or alterations to those two submissions?

Ms Taylor—No.

Mr Carter—No.

CHAIR—Thank you. In this particular section of the hearing, the committee wishes to examine the criminal liability provisions in schedules 1 and 2 of the bill, and there was some reference briefly to those earlier. Schedule 1 creates indictable, summary and strict liability offences for copyright infringement, with a range of penalty options. The strict liability offences will be underpinned by an infringement notice scheme in the copyright regulations which, I am advised, aims to give police and prosecutors a wider range of enforcement options, depending on the seriousness of the relevant conduct. Schedule 2 contains amendments to evidential presumption provisions in civil and criminal proceedings which aim to assist copyright owners and reduce costs in the litigation process. If you have a real wish to make an opening statement, perhaps a couple of brief observations are fine; otherwise we will go to questions.

Mr Carter—We do not wish to, thank you very much.

CHAIR—Okay. Thank you very much. Questions—Senator Ludwig.

Senator LUDWIG—I will start more broadly. Are the changes to the regime for prosecutions and infringements part of the USFTA requirement, or are they just improvements to the legislative schema of the Copyright Act and this was a good opportunity to do it?

Ms Pecotic—We do not see them as being related in any way to the Australia-United States Free Trade Agreement but they are certainly very timely and necessary in view of the increases in copyright theft.

Senator LUDWIG—Do they come from the reform agenda?

Ms Weatherall—No, they do not.

Senator LUDWIG—I am just trying to find the genesis of them.

Mr Carter—That might be a question better directed, in policy terms, to the Attorney-General's Department. From our perspective, we see the amendments to the offence provisions very much in two ways. Firstly, they clarify the elements of the offences and the structuring of the offences and, in our submission, very helpfully set out the elements of the offences, clarify the elements and so on. We see that as useful.

Senator LUDWIG—Yes, I understand that. They fit better within the current guidelines.

Mr Carter—Secondly, we think that structuring the offences in the way that they do—indictable summary and strict liability, and the addition of the strict liability and infringement regime—is a very useful adjunct to the criminal offences that are currently in the act. We would certainly support that measure as part of the overall enforcement of copyright.

Ms Weatherall—I will make a very brief comment. It is not related to the FTAs, it is not related to the digital agenda review and there has been no public review which has led to these changes—there has been no issues paper et cetera. This comes out of an internal review within the Attorney-General's Department. The first that we had heard of the idea of a tiered regime was when the exposure draft came out.

CHAIR—Isn't there an intellectual property enforcement consultative group? If so, it is not clear to me who the members of that are.

Ms Weatherall—I am not sure who the members of that are either.

CHAIR—Ms Pecotic is nodding at me.

Ms Pecotic—James Carter, the Commonwealth DPP are members. AFACT is also a member.

CHAIR—So that does have external participation?

Ms Pecotic—External to government, yes.

Ms Weatherall—'External' meaning copyright owners, of course. The regulated are not represented in that group.

CHAIR—I understand. If might interrupt once again, Senator Ludwig, Mr Carter, can you outline for us on the record, you participated in the technical review process, particularly in relation to schedule 1, as I understand it, and also some of the provisions resulting in schedule 2 are pursuant to some concerns that you had raised in relation to evidential presumptions, things like that?

Mr Carter—Yes, we were consulted about the offence provisions and the presumptions. That is correct.

Senator LUDWIG—In terms of the structure of the offences—between where there is criminal liability, strict liability, provided for—do you agree with the strict liability offences being inserted into the copyright legislation? It would be for the first time, I take it.

Ms Weatherall—You have probably read my submission. I am fairly fundamentally opposed to the idea of strict liability provisions in the Copyright Act for a number of reasons, mostly relating to some of the principles that have been set out by the Senate Scrutiny of Bills committee, when it looked at the question of when strict liability should be introduced. It does seem to me that the copyright offences do not fit some of those criteria—for example, there is

a suggestion that there should be legitimate grounds for penalising people who lack fault before you introduce strict liability. You can see that that would apply to, for example, environmental protection laws, where there is the protection of the environment to be considered or where you are talking about speeding offences, where there is a very good reason to punish people who maybe do not know that speeding is illegal, because they could kill people. But I am not convinced that the same sort of reasoning applies in copyright law.

Another principle is that strict liability should not be used where a legislative scheme is so complex and detailed that breaches are virtually guaranteed to occur, regardless of the diligence of people and the care that they take. I am afraid that the Copyright Act, as it is—and certainly as it will be after these amendments go through—simply does not fit that. It is so complex that breaches are virtually inevitable.

My perspective also, which I have put forward in more detail in the submission, is that copyright is different. There are no signs that tell you when you are overstepping the boundaries of a copyright right. There are no speeding signs that say if you go above 60 you are going to be in breach of a rule. Simply put, people are not always aware that they are infringing copyright. Having said all that, I am fundamentally opposed—

Senator LUDWIG—Perhaps you could describe what consumers have been doing for the last 20 or 30 years as—

Ms Weatherall—An infringement, in fact. Admittedly, these offences do not cover every act of consumers, but they do cover some and I have some examples that I can give you. A further final point against strict liability is that, as far as I am aware, it is unprecedented. Certainly, no common-law country I am aware of has strict liability for copyright infringement; it has always required wilfulness, fault, awareness that you are doing wrong or recklessness as to the fact that you might be infringing copyright. Australia will be somewhat going out on a limb. Certainly, it is not true in the States.

Senator LUDWIG—Do you have a view about the infringement notice scheme?

Ms Weatherall—Look, I do, but if I could just make one final comment about the strict liability issue. My position, which I have put in the submission, is that strict liability should not be introduced. And I have had conversations with Ms Pecotic about whether there are certain situations in which strict liability might be appropriate. In my view, if there must be strict liability—I would be opposed, but if there must be—these provisions are drastically overly broad. There are many examples of fairly ordinary behaviour which would be covered by these provisions and so it does seem to me that the provisions, particularly the strict liability ones, could and should be confined further so that they do not apply in situations where it is simply not appropriate. That was strict liability. Do you want me to get to infringement notices?

Senator LUDWIG—Yes.

Ms Weatherall—Or would you prefer that I talk about my own problems with the provisions being overly broad!

Senator LUDWIG—No, I can understand the argument about their breadth. The infringement notice scheme—that is new as well, I take it?

Ms Weatherall—Yes, it is.

Senator LUDWIG—Is it reflected elsewhere in the world, to your knowledge?

Ms Weatherall—Not that I am aware of.

Senator LUDWIG—So it will be a first here as well.

Ms Weatherall—Yes, the on-the-spot fines—as far as I am aware, and I cannot say that I have gone and looked at—

Senator LUDWIG—We will have the opportunity; I was just—

Ms Weatherall—legislation everywhere. But as far as I am aware it is unprecedented.

Senator LUDWIG—The people who might be interested in this area have also had only a very limited time to look at these provisions, because there was no preceding review, there was no discussion paper and the draft was only introduced for exposure—

Ms Weatherall—And the draft was introduced at a time when everyone was also coping with the other 200 pages of the legislation, yes.

CHAIR—We know that feeling, Ms Weatherall!

Ms Weatherall—I am sure you do, Senator!

Senator LUDWIG—So, in your view, is there a place for an infringement notice scheme within the copyright legislation?

Ms Weatherall—In the principles set out in the various reports—the ALRC report on principled regulation and the Scrutiny of Bills Committee report on absolute and strict liability—it has been said that infringement notices should only go with strict liability offences. So of course my perspective would be that there should not be infringement notices, because I do not believe there should be strict liability. That said, it would be possible to considerably refine these provisions so that you could have infringement notices being applied only in circumstances where they might be appropriate—because, again, there are various principles in relation to infringement notice schemes that these provisions simply do not fit at the moment. Infringement notices are only meant to apply where the physical elements of an offence are clear. If you go over 60 in a 60-kilometre zone, you are speeding. But these copyright provisions do not apply just to counterfeiters—this is the issue—and they do not apply just to commercial behaviour.

If you take, for example, section 132AD, this is the very basic provision—sale of infringing copies. An infringing copy is an item that, when you make it, infringes copyright. That could be a counterfeit film, it could be a pirated CD or it could be a photograph taken inappropriately from online by someone who put it on the front cover of their annual report because they wanted to make it look pretty, and distributed that to shareholders. That is an infringing copy of the photograph.

It applies if you have a book where you have extracted too much of someone else's material beyond what fair dealing would allow and that goes into the book. It is an infringing copy if it goes beyond fair dealing. So we are not just talking about counterfeiting; we are talking about these much broader areas. As I said, infringement notice strict liability should only apply when the physical elements of the offence are clear. They are not. Deciding

whether you have taken too substantial a part and whether something is fair dealing is not clear. It is not a judgement that a police officer could make on the spot.

Senator CROSSIN—Take the example I described a few hours ago of a minor copying a CD onto an iPod, because they want to exercise various means of listening to music, without knowing they have intentionally breached a copyright law. What does this mean for a 10-year-old?

Ms Weatherall—It is important to realise that these provisions do not apply to simply making single copies for yourself. The criminal provisions kick in when you do things like sell copies, let them for hire, import them but also distribute them to an extent that prejudicially affects the copyright owner. So a person who copies their CD onto their iPod is unlikely to be committing a criminal offence. A person who—and this is an example from one of the other submissions—films themselves miming to a song and has the original sound recording and then puts that on their MySpace website is potentially distributing it to an extent that prejudicially affects the copyright owner and they might be subject to these criminal provisions.

CHAIR—Do you want to add something to that, Ms Pecotic?

Ms Pecotic—I would like to put into context what I understand the strict liability provisions have been introduced to deal with. Strict liability is a lower penalty aimed at low-range offences that equip police to make judgements about the nature of the activity that they are trying to deal with and make it easy to respond in a measured way to copyright crimes that are, in many instances, unfortunately out of control in the Australian environment. The sorts of activities that they are aimed at addressing are things like low-scale crimes that escalate into organised crime if they are not stopped at an early stage and the low-scale backyard operator type of crimes that are spreading out of control in a way that is adding up to a very significant amount of damage for copyright owners.

The sorts of crimes that the strict liability offences have been introduced, as I understand it, to address are things like people selling infringing copies in markets and public places and through local networks like workplaces, community groups and social groups; mail-to-order models using internet websites as advertising; direct marketing via internet auction websites; and importing and burning operations that facilitate that type of activity. So when you have people who are using what seem like innocuous devices, for example, for the support of commercial activity.

We are not, as Ms Wetherill has pointed out, looking at these as addressing the 10-year-old or the 16-year-old with their iPods. The problem is that we do not have a low-cost effective way for the police to respond to the sort of activity that I have been describing—the police are resource stretched as it is. There is a recognition that these copyright crimes are prevalent, that they are growing and that the police are not adequately equipped to address them. So it is about getting a lower penalty aimed at equipping them in a way that will make enforcement practical and efficient.

One of the biggest problems is the public perception that the police are doing nothing about this crime. At this stage we have, according to research, approximately one in five Australians involved in some way in piracy. We have many illegal DVDs, like the ones I am holding,

which are manufactured for sale—*Kokoda*, *Wolf Creek*, *Look Both W*ays. These were manufactured by people for sale. We have got these in the hands of one in five Australians at the moment.

So we have a crime that is creating a very significant problem. It is more profitable than drug dealing. It is also being taken up by both your backyard operator mum and dad style of person at a low level. The police are not equipped to address that quickly, easily and directly such as using a strict liability fine to say: 'This activity is wrong. Don't do it.' If the police are not acting because the only tool available to them is to charge somebody with a five-year penalty and a significant jail offence, what happens is that they do not charge those people at all and the activity proliferates; it becomes condoned within society and we get a greater and greater problem going forward.

That is what I understand the strict liability offences are aimed at addressing. Ms Weatherall has raised the issue that the kinds of activities that could be captured might be ones that are more innocuous. Unfortunately, you cannot easily draft a law that excludes the innocuous kind of activity and still capture the more culpable behaviour. While I endorse the strict liability offences and I believe they are a very important tool for police to be able to have, I do not at all think that they would be remotely used for those innocuous purposes.

Leaving aside the judgement of police and how they would approach the use of these laws—and I do also endorse the introduction of guidelines—we would have to be expecting the police to be able to use their resources for the sorts of cases that Ms Weatherall has outlined. That is, first of all, highly unlikely. If we take away from the police these tools—and they have made it clear that an on-the-spot fine capacity is something that would make it much more efficient and effective for them to deal with these crimes when they do find them on the street, when they go to a market and find somebody selling this sort of infringing product—you cannot actually define the law to exclude what we want to capture and then assume that the police will in fact use this strict liability offence for fining 16-year-olds with their iPods, for example.

It is extremely important to be aware that the Copyright Act is trying to deal with offences that technology has enabled. Technology that is innocuous in one person's hands is now being used and targeted by motivated infringers without even having to modify a device—for example, to record a performance or copy an entire film to then sell in a commercial way. That is what all the offences that we are describing are really targeted at—commercial style infringements.

Senator LUNDY—In Ms Weatherall's submission she says in recommendation 4:

(Schedule 1) This Schedule of the Bill should be deferred pending further discussion on the move to strict liability offences in copyright, and to give time to ensure that the provisions, if introduced—

and this is what I would like you to respond to—

are drafted in such a way as to ensure no ordinary Australian citizen, engaging in non-commercial activities, risks criminal liability.

Based on what you have said, you would support that aim of the legislation, wouldn't you?

Ms Pecotic—I believe the legislation as it is drafted meets that objective. Fishing, shopping and driving are all ordinary acts that are subject to strict liability offences in certain circumstances. It is not the ordinary act that is being targeted; it is that part of it that is causing significant damage to the community.

Senator LUNDY—Okay. So you do not disagree with that proposition?

Ms Pecotic—Could you repeat the proposition please?

Senator LUNDY—That the legislation should be:

... drafted in such a way as to ensure no ordinary Australian citizen, engaging in non-commercial activities, risks criminal liability.

Ms Pecotic—The concern I have is that you cannot draft a provision that will capture the culpable activity that the police are trying to address and necessarily exclude all the others. One of the examples that has been used is a 16-year-old taking an MP3 player to a concert and recording the concert. Recording the concert is the wrong thing to do—you are not supposed to take an MP3 player to a concert—but the likelihood that the police would use the strict liability offences against a 16-year-old with an MP3 player at a concert is low.

Senator LUNDY—Yes, but they are not doing it for a commercial activity.

Ms Pecotic—That is right.

Senator LUNDY—So that is a reasonable test, isn't it?

Ms Pecotic—If you look at the strict liability provisions as they are drafted, they include in them the use for commercial purposes. The police officer has to have a reasonable belief before issuing a fine that that is what will result. I believe that that is already embodied in the legislation.

Senator LUNDY—Based on your interpretation, you do not disagree with that statement?

Ms Pecotic—I believe so.

Ms Weatherall—May I respond to a couple of points that have been made. I do agree that it is not 100 per cent straightforward to try to draft the law in a way that excludes ordinary acts or perfectly legitimate acts but includes all of the things which are being targeted by these laws. However, I make two points in response to that. Firstly, we have barely tried. There has not been public consultation or an attempt to give adequate time to look at this exposure draft to discuss it and to try to find ways to exclude the sorts of things that should not be subject to criminal liability. Secondly, there are ways that you could try to reduce the scope of these provisions: one, limiting the provisions to situations involving reproduction of the whole of the work only, as opposed to parts of a work, would ensure that the strict liability is targeted to things such as full films, as opposed to a book that includes too many extracts from another piece of material; two, limiting the provisions to situations in which the object of the sale or hiring is actually the infringing copy—that is, not the MP3 player which happens to have a song still on it, which is an infringing copy once you sell it; three, limiting strict liability provisions to situations involving a certain number—for example over 100, over 200; I do not know what the number would necessarily be—so you are not including the single copy scenario. So there are ways to limit the strict liability provisions to avoid some of the overbreadth.

The other point is that there are a number of these provisions which have no commercial purpose involved and are subject to the strict liability provisions. Particularly striking here are the performers' provisions, where making a direct copy of a performance, regardless of commercial purpose, regardless of why you are doing it, is actually a strict liability criminal offence.

I can see the point that police might want to have a range of offences and a range of ways to deal with the real problem—which, as far as I can tell, is counterfeiting. Within that, discretion is appropriate. Discretion is appropriate to distinguish between a backyard operator selling 10 CDs to their mates when they should not be and the organised crime situation of mass importation amounting to millions of dollars of damage. You could exercise discretion—maybe one is strict liability and the other is the full $300,000 fine per offence—but, included in here, discretion covers that situation of the kid making an MP3 recording at a concert. We should just get those out. They are not necessary.

Senator LUNDY—I saw a news story recently where a company had set up a commercial operation—in conjunction, presumably, with that band's distribution company—to record the concert on the spot and to then sell the DVDs on the way out the door. That implies that there is the capacity to innovate to respond to some of these challenges anyway. Ms Pecotic, what do you think of that type of innovation? Do you think those sorts of innovations have the prospects to deal with this problem, as opposed to trying to use strict liability copyright infringement law to do it? How much do the people you represent innovate to resolve these problems, as opposed to using copyright law?

Ms Pecotic—I think both things are necessary and I welcome your question. Innovation is a very significant part of dealing with this problem, and the film industry is engaging in it wholeheartedly. Online services are now available in Australia, and they provide all sorts of choices about how and when you can consume your copyright films in exactly the way that you just mentioned. Technology makes it possible for a performance to be recorded and offered for sale at the end of the performance. That is something that is completely within the bounds of technology.

At the same time, technology has also introduced the capacity, widely, for infringements of this kind to come cropping up in every suburb and every town across Australia, and they are and they have been for some years. It is time to take some action about this. Ms Weatherall has pointed out various different types of offences that could be covered by strict liability. The strict liability provisions that have been suggested should be introduced into this law go no wider than the existing criminal provisions. They do not speak about taking a small proportion of a work and using it for a research or study purpose. That is not covered in any way by the criminal provisions. The criminal provisions are very specific; elements of them are very closely linked to what the person is doing with this that the police would have to make a judgement about before a fine would be an appropriate response.

No doubt James Carter could speak more closely on how these provisions are not designed to change dramatically the law as it exists. They are introduced because the enforcement of the law as it exists is not capable at the moment of addressing this sort of crime and the proliferation of this sort of crime. Yes, the film industry is investing in technological

protection measures, for example. Yes, the film industry is supporting new models of enabling consumers to use things in the appropriate way.

But what is not happening is that the police have not been given a practical and efficient way of dealing with copyright crimes—and we are talking about the sorts of things that I have mentioned, not the 16-year-old at the concert with the MP3. We are talking about the person who is at the concert with the MP3 and about to sell what he has recorded. It is about people who are going into a cinema and CAM-cording this—and this is in fact a CAM-cord that was purchased in Bangkok. It is about whole Australian films in a cinema being recorded using an otherwise innocuous device that police will go in and make a judgement about being able to address, being able to take some action. I really commend the fact that the government has looked at other examples of Australian laws, like in traffic, fishing, shoplifting and minor drug offences, and looked for ways to provide tools for the police to address something that is otherwise going largely unprosecuted.

CHAIR—Mr Carter, are there any comments you would like to make?

Mr Carter—Certainly, our support for these is on the basis of ensuring effective enforcement of the policy objectives that are currently contained in the Copyright Act rather than on the basis of an extension into new areas in terms of copyright policy. It is useful to look at the current section 132. There has been much concern about the use of devices and possessing devices that may be used for making copies. Subsection 3 of 132 says:

A person shall not, at a time when copyright subsists in a work, make or have in his or her possession a device that the person knows, or ought reasonably to know, is to be used for making infringing copies of the work.

That is the current position. It blurs this line between knowledge or 'ought reasonably to know'. Now we are having a structure of intention, negligence and then the strict liability so that the offence provisions draw out the strands and separate them, and the 'ought reasonably to know' is not that far removed from the strict liability. It is useful to put that in the context that the strict liability offence is not moving that dramatically far from the existing provision.

Another aspect is in relation to 132AC, which is the substantial infringement on a commercial scale. There has been quite a lot of concern expressed in submissions about that one in relation to the substantial prejudicial impact on the owner of the copyright where there may not be a commercial intention on the part of the person alleged to be infringing. In that offence, the infringement or infringements must occur on a commercial scale. So there is a very strong element of commerciality involved in that. And, indeed, the prosecution has to prove in relation to that circumstance that the defendant was reckless, that the infringements actually took place on a commercial scale. I think that is a useful context in order to think about some of these offences.

In relation to the strict liability offences generally, I think, as Ms Weatherall has noted in her submission, what we are really looking at in terms of these are the availability of offences in the situation of the final link in the chain, that you have an offence of a low penalty that can be used quite effectively where you have a situation where the person at the end of the chain can be prosecuted quickly and effectively for their part in selling, at the end of the chain, a copyright infringing article. Their part of the criminality of the whole scheme is really only

the final act; they may not have been involved in distributing that article or articles and they may not have been involved in the copying, importing or whatever substantial activity had occurred prior. But we would suggest their part—the selling to the consumer at the end—is an important part of the whole activity and should be attacked. It is obviously not as serious as all of the other parts that go before it, but it needs addressing, and the strict liability offence provides a quick and effective way of dealing with that.

Senator LUNDY—If you buy one of those pirated items overseas for your own personal use and bring it back into Australia, is that breaking the law currently or will it be breaking the law—and with what penalty—under this bill?

Ms Pecotic—There are no proposed changes in this legislation to the law in relation to possession.

Senator LUNDY—So are you allowed to do that?

Ms Pecotic—There is no specific prohibition against purchasing pirate DVDs. This is one of the reasons why police are looking for the sort of strict liability offences to deal with selling because there is currently no control on demand. There is nothing to stop the public unless we go to an offence of knowingly receiving or knowingly supporting the commission of a criminal offence. There is nothing in the Copyright Act at the moment that in any way deals with buying.

Senator TROOD—I just want to put a proposition to Ms Weatherall. I think I generally share your prejudice about strict liability offences. But I am wondering whether this is not an area of law where, in fact, people are increasingly well informed about the dangers of infringing copyrights and whether the particular concern you raise about ignorance—which is, I concede, a danger—is increasingly less of a problem? As we move down this line in relation to the use of this kind of material, people are, in fact, sensitive to the fact that they could well be trespassing on areas where they do not have any particular rights. If that is the case, shouldn't we be moving the law forward to take account of those circumstances?

Ms Weatherall—It may well be true that people understand copyright a bit better these days than they used to; I think that is probably quite accurate. I have two responses. I do think people have a perception, and it is probably reasonably justified, that you are risking criminal activity and being considered a criminal when you do things commercially—when you sell or distribute stuff to 50 million of your closest friends, perhaps, although not for profit. I do not think people accept or understand or should be expected to understand that the single copy on the MP3 player or giving the home-taped video to your mother-in-law—which, of course, is an infringement because it is not within the household—who then gives it to 30 of her bridge club partners, prejudicing the commercial interests of the copyright holder, should be a criminal act. Let us confine it to where people understand it to be criminal. Let us limit these provisions to the actual activities they are meant to target and not treat everyone else as criminals.

Secondly, one of the other things that goes with a strict liability regime that you do need to remember is corporate liability. A company can be liable, under a strict liability offence, where it does not have adequate systems in place to prevent the activity occurring. What we might be saying with this legislation is that companies and institutions all over Australia who

are dealing with copyright material in which copies might be made that might cause some commercial advantage—say, the employee who copies two extra copies of the software—are going to have systems in place to avoid that sort of activity. They are going to have to have copyright training.

Senator TROOD—I see the first of those points, but it seems to me that it is perhaps somewhat the wrong way around. You are assuming that people begin from a position of knowledge. What I am saying is that perhaps the law needs to force people into areas to be more sensitive to the need for this technology to be protected, given the copyright requirements that are there now.

Senator LUNDY—Leave the commercial interests to the copyright owners.

Ms Weatherall—There is this issue that infringement under Australian law goes a long way. There are a lot of things that are infringements that would be considered fairly normal acts, particularly now and even under the new legislation. I do not actually think it is reasonable to expect consumers around the world, or businesses that are not actually selling infringing copyright material, to be fully versed in all X-hundred pages of the Copyright Act—

Senator TROOD—I share that view!

Ms Weatherall—and having to struggle with it. This is the effect of these provisions. They could be drafted more narrowly. If we must have strict liability, let us spend some time and actually target what we want to target.

Ms Pecotic—Yes, copyright is complex in the same way as the tax act is complex, but I know that I have an obligation to pay tax. I know that, if I come to an area where I need to find out, I need to go and get advice about how to pay tax or whether I need to pay tax on this or that, as an example. I think the basic principles about copyright—permission to copy and permission to access—are indeed absolutely necessary to understand in the digital world, because everyone now has the opportunity.

I think that education and enforcement are both absolutely critical parts of the law, and I think this is a fantastic opportunity here, now, to take out these new laws that are made more clear, to tell the public what is right and what is wrong. I think that there needs to be a penalty to enforce in order to enable people to understand why they have to change their behaviour, why they need to be alert to these things, why they should think that something is morally as well as legally culpable. I think that the law first has to be clear and the penalty has to be appropriate in order for the law to be respected. These laws introduce a much lower range of penalties in order to try to encourage respect for the law and public understanding of what the law is trying to achieve. I think that for that reason it will earn the moral respect of the public and it is timely in view of the fact that the devices and the capability that technology allows us are allowing this crime to become uncontrollable by the average resources of the police. This is a timely time to have a low-penalty regulatory offence that actually deals with nothing more than the existing criminal penalties that are in the regime.

Senator LUNDY—Can I ask just one more question, going to the issue of supply and demand.

CHAIR—If it is only one question, yes.

Senator LUNDY—It goes to the owners of the copyright. Given poor-quality copies are available and sold for not much overseas versus purchasing in a shop here a movie that is legally distributed, what experimentation has the industry done in lowering the price point of the legitimate copy to try to test at what point in the market people are no longer lured by the poor copy of the pirate? We all know the copyright owners make a huge whack of money out of this distribution and that not all of that goes back to the creators and that huge profits are made. What area of exploration and innovation has been done to lower the price point to use the market to effectively reduce the demand for the pirate copies?

Ms Pecotic—The easiest way I can put it is to say that copyright owners include people who make films like *Kokoda*, *Ten Canoes* and *Kenny*, which are not necessarily perceived as products that are making millions of dollars around the world. The second thing is that these laws do not just protect copyright owners; they employ the 50,000 people who are engaged in the film and television industry in Australia—everyone from a local independent country cinema, a filmmaker or someone who is writing for a film to somebody who is trying to make a business out of a video store.

The most palpable example of what you are describing to me that I have seen is when I first went to Perth, where they have a very significant problem with accessibility to Bali and the over 90 per cent of pirate discs that are for sale there. Just driving along the street I found that video stores in Perth were offering videos for $1. There was no question that the market was trying to compete with what was actually a criminal offence and criminal activity. But, even offering a rental for $1, it is not possible to compete with something that is effectively completely stolen and to compete with people who are producing product at no cost. They are not paying any copyright owners anything, they are not paying any employees, and they are not paying any tax. So to expect a small, honest business—for example, a video store owner—that is trying to compete—

Senator LUNDY—We are not talking about a small honest business; we are talking about global distribution companies.

Ms Pecotic—No; we are talking about every single—

Senator LUNDY—When it suits your argument you talk about the small players, but when it does not suit your argument you do not refer to the multinational corporations that make a squillion out of this.

Ms Pecotic—I think we have to accept that there are companies that make a very substantial amount out of copyright exploitation and there are copyright owners and all of the online business that are supported by this industry that are not in that position. The law applies equally across the board to both. ARIA, in their submission, have raised concerns about the strict liability provisions being too lenient, and Ms Weatherall and others have made submissions about them being too harsh. That suggests to me that the Attorney-General's Department has perhaps struck a balance here. The law has to be there to protect all of the people.

CHAIR—As there are no further questions, I thank the witnesses for their submissions, for their attendance here today and for their assistance to the committee.

[12.23 pm]

AHLIN, Mr Sam, Acting Principal Legal Officer, Attorney-General's Department

BOWMAN, Mr Norman, Senior Legal Officer, Attorney-General's Department

CRESWELL, Mr Christopher, Consultant, Copyright Law Branch, Attorney-General's Department

DANIELS, Ms Helen Elizabeth, Assistant Secretary, Copyright Law Branch, Attorney-General's Department

DOWN, Ms Elena, Acting Principal Legal Officer, Copyright Law Branch, Attorney-General's Department

HAIPOLA, Ms Kirsti, Acting Principal Legal Officer, Copyright Law Branch, Attorney-General's Department

TREYDE, Mr Peter Richard, Principal Legal Officer, Attorney-General's Department

CHAIR—Welcome. The Attorney-General's Department has lodged a submission with the committee which we have numbered 69. Do you need to make any amendments or alterations to that?

Ms Daniels—No, Madam Chair.

CHAIR—Before we begin I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. Ms Daniels, do you wish to make an opening statement?

Ms Daniels—If I can, I will briefly refer to some of the comments that have been raised over the morning in relation to possible amendments that the department is already considering.

CHAIR—Before you start that, I acknowledge and thank you very much for your presence here during the morning's proceedings. It does make it much easier for the committee if the officers of the department with which we are consulting have been able to do that. We are very grateful that you were present during the morning proceedings.

Ms Daniels—Thanks. The committee may appreciate that any amendments that the government may move have to go through a formal policy approval process, and we are not yet at that stage in some of the amendments we are considering. But the Attorney-General in his second reading speech on the bill did hint that the department was already looking at some clarifying amendments in relation to the amendments that affect the Copyright Tribunal, educational copying and private copying. In the educational area, the two issues that were discussed this morning in relation to caching and communication in the classroom are the

particular examples. If we can provide the committee with any more definite information on what we are doing in those areas we will do so.

Senator LUDWIG—In terms of the amendments that you have considered, when will you have drafts available so that we can understand what you intend to pick up and what you do not intend to pick up?

Ms Daniels—There are two processes. One is getting the drafting resources to draft the amendments and the second is the policy approval process, both through the Attorney and other government approvals. So I cannot give an answer to that at this stage. But, if possible, we would like to at least be able to present to you, if not at this moment, later today or tomorrow what we are intending to do, without having seen the actual drafting of the amendments.

Senator LUDWIG—So you will take that on notice and provide to the committee the policy issues that you intend to pick up?

Ms Daniels—The drafting issues, yes.

CHAIR—You understand the committee's reporting time frame?

Ms Daniels—I do.

Senator LUDWIG—That is why I was curious. When will that be made available? I think we are reporting on Friday.

CHAIR—I think you said this afternoon or tomorrow.

Ms Daniels—I will try. I have my own approval process to go through back at the department.

CHAIR—I appreciate that.

Ms Daniels—So it is really dependent on that, but we will keep the secretariat informed.

CHAIR—Thank you.

Senator LUDWIG—I will start with schedule 6. That is probably the more interesting one. In 111(1)(a) it says 'in domestic premises'. Is it the intention to confine a recording to domestic premises? There could be circumstances where people want to put one on their iPod or in MP3 format and replay it in other than domestic premises. I think the 3G network is coming out, which will have the ability to replay on a device of some description. There are a range of products coming into the market. Is that the intention of the legislation?

Mr Bowman—I think there are two separate issues. The reference to domestic premises in 111(1)(a) specifies that a recording must be made in a domestic premise. But there is not a requirement that you have to watch or listen to the recording in domestic premises. The term 'private and domestic use' in the next paragraph is not intended to restrict people to listening to their iPods in the house but not outside in the street.

Senator LUDWIG—Yes, but in doing so you might be downloading it not in domestic premises but for private and domestic use—if you do it at work, I guess. It might be sanctioned at work, or at least not objected to.

Mr Bowman—To clarify: this provision applies to the recording of broadcasts. It does not apply to webcasts or to downloading podcasts; it has to be a broadcast. The policy intention is that the recording—

Senator LUDWIG—Yes, but if you have a computer with a TV tuner attached and you are in your working environment—you might be a computer tech or have your own business and therefore it is not part of your business but it is certainly within your business premises—and you download the broadcast that is on your TV tuner, does that breach the legislation?

Mr Bowman—The government's policy intention is that the recording should be made in domestic premises. So, for example, firms cannot, in a business, make copies that they could then give to somebody else.

Senator LUDWIG—But what about the scenario I outlined?

Mr Bowman—The government's intention is that the recording should be made in a domestic premises, even though you are not restricted to where you watch it or listen to it.

Senator LUDWIG—Will you inform the public that that is the intention—that the single owner of business premises that have a computer using a TV tuner cannot do it at his place of work, but if he works from home using the same technology then he can?

Mr Bowman—I believe the government would intend to have information available on what the provisions, as they are finally enacted, will allow and not allow.

Senator LUDWIG—So you agree with that scenario—that if they were working from home they could do it and if they were working from their business down the road they could not?

Mr Bowman—The intention is that you can record in domestic premises but not otherwise.

Senator LUDWIG—How do you define domestic premises?

Mr Bowman—Essentially, as places where people live.

Senator LUDWIG—Is there a definition?

Mr Bowman—No, one is not provided at the moment.

Senator LUDWIG—There is a range of places. Would a yacht or a houseboat be considered domestic premises?

Mr Bowman—If you lived on a houseboat, I guess that could be 'domestic premises', yes.

Senator LUNDY—What about an oil rig?

Ms Daniels—I guess that is part of the problem in trying to define domestic premises: what do you include and what do you not include?

Senator LUDWIG—A boarding house is another one.

Ms Daniels—Yes, that is right.

Senator LUNDY—So is an oil rig in or out?

Senator LUDWIG—I am looking for certainty, you see. You are the legislators and what I am looking for is certainty so that a person will know whether or not they will be subject to a

strict liability offence, or whether they will breach the criminal provisions in the copyright legislation if your bill is successful. We may all shrug our shoulders about some of these things, but if you then say, 'Well, we will leave it for the courts to determine,' isn't that unfair, when you have the opportunity now of defining it and defining which people are in or out of it so that there is some legislative clarity? Isn't that one of your purposes—to ensure that there is legislative clarity?

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

Senator LUDWIG—In terms of part 2, 43C, where it says 'reproducing works in books, newspapers and periodical publications', dealing with a couple of issues, does that include online books, newspapers and periodical publications? Are they within that definition? Could it include books, newspapers and periodical publications which are made available online?

Mr Bowman—The main requirement in subsection (1)(a) is that it is made by the owner. So you need to be the owner of the book, the newspaper or the periodic publication which you will copy—maybe one that you purchased online.

Senator LUDWIG—No, not purchased online. There are books which you can purchase as CDs—we will get to that later. You may be able to then change the format and listen to it on an MP3 player rather than a CD player. Is it permitted by section 43C to digitally download a book, a newspaper article or a period publication onto your PC to read or print, if you so desire? We will come to the definition of 'periodic publication' shortly.

Mr Bowman—It is clearly designed around activities where somebody has bought a copy of the material in the form of a book, newspaper or publication that they wish to use in a different form than the form in which they bought it. I would think that in many cases where you are buying online as a download that will be subject to licence conditions. In many cases licence conditions will probably be broader than what is permitted in section 43C. Section 43C provides a basic right to enjoy what you have bought, but if you bought a download with wider rights you will probably have greater freedom and flexibility than section 43 allows.

Senator LUDWIG—You are saying that a book or newspaper could be in a digital format and you could subsequently deal with it in terms of this provision, subject to contract requirements?

Mr Bowman—It could be.

Senator LUDWIG—Does 'periodical publication' include a range of things? I can think of a range of things. One that comes to mind is a publication I get as a service from CASA every six months which includes a range of maps. Is that a periodical publication?

Ms Daniels—The only reference to 'periodical publication' that may assist you is in the act proper. In the definition section it says:

… a reference to a periodical publication shall be read as a reference to an issue of a periodical publication and a reference to articles contained in the same periodical publication shall be read as a reference to articles contained in the same issue of that periodical publication

I do not know whether that takes you any further on your issue.

Senator LUDWIG—I was hoping you would tell me whether it includes a CASA publication of various maps published every six months.

Ms Daniels—If that were to mean it is a periodical, yes.

Senator LUDWIG—You are the writer of this. Do you need a definition to define what 'periodical publication' is or does anything that is regularly made available fit the bill?

Ms Daniels—The reference to 'periodical publication' in the Copyright Act has been there since 1968 and has not caused any problems to date.

Senator LUDWIG—When you say, in section 47J, 'reproducing photographs in different format for private use', is the intention that that is for only the original photograph? In other words, if it is provided in electronic form and you buy a format in such a way that you can keep it on your PC, can you then put it in a different format and print it out? I have asked witnesses about the need to include in the legislation reproducing photographs in different formats for private use, as is the case with books, newspapers and periodic publications. I am just trying to get an understanding of what you mean in section 47J, where you prescribe what the consumer can do for private use.

Mr Bowman—Under section 47JC, if you have bought it in electronic form you can basically put it in hard copy form—for example, print it off. If you have bought it in a hard copy form you can copy it in an electronic form—for example, reproduce it as a screensaver for your computer. But you cannot photocopy from one hard copy form to another. You cannot digitally copy it from an electronic form to another electronic form. In a sense, it is designed to allow the owner, the legitimate consumer, some flexibility but also to have fairly strong protections for the copyright owners as well—the creators.

Senator LUDWIG—Have you looked at the submission by the ACC and their inclusion of a paragraph (e)? Have you had an opportunity to look at their submission?

Mr Bowman—I have seen it.

Senator LUDWIG—What is your view on that?

Mr Bowman—Which part of the submission?

Senator LUDWIG—They indicate that paragraph (e) should be added after (d) in 47J.

Mr Bowman—The rights that are permitted under 47J are, for example, more narrow than those permitted under 43C or under the format-shifting of music. Given that you cannot copy between digital formats or between hard copy formats, it was seen in the drafting that the additional condition which is in (e) for a broader format-shifting right where there is no such restriction between digital and digital copying is not as necessary as the much more restricted regime in 47J.

Senator LUDWIG—So you do not agree it is necessary?

Mr Bowman—I make the point that 47J is much narrower than, for example, what 43C permits.

Senator LUDWIG—Today a range of submitters have discussed section 109A and the issues of what is permissible and what may not be permissible. Is this legislation designed to capture the circumstances of downloading a digital recording from a subscription service, keeping it in a format on the PC and then downloading that to an MP3 player in an MP format?

Mr Bowman—The legislation is intended to allow people who buy music in a physical article, such as a CD, to be able to transfer it to an electronic playing device, such as an MP3 player or an iPod. It is also intended to allow people who buy music as a digital download to format-shift it. However, I think the government would recognise that, in most cases, where people buy a digital download, they will buy with the music a licence to have a wider range of use than is permitted under 109A. Section 109A is more a base level. Most download licences will actually sell greater rights. But this is a minimum.

Senator LUDWIG—A range of submitters—I am thinking of the submissions by Apple Computers and a number of others—are concerned that this legislation would prohibit or otherwise restrict their ability to operate in the commercial market in the same way as they are operating currently. In other words, they are talking about using a digital download service, holding it on the PC—I hate using generic words—in their software system, then format-shifting that to an MP3 file and putting it on an MP3 player and utilising it. They say that, although it might be subject to contractual rights, this legislation does not seem to permit that, and that it might be confusing for consumers, if they were ever to read 109A.

Mr Bowman—Excuse me if I am not picking up your question correctly, but my understanding is that, in the digital download markets, most of the sites are advantaging themselves by saying that they are selling greater rights than their competitors. This is a way of attracting customers. For example, the Apple website might allow you to share your music on five different computers within your household in the same audio format. This is much more restricted. In probably all cases, the business running the website will apply DRM to the download to ensure that licence conditions are enforced.

Senator LUDWIG—Do you think it needs a more explicit note to the effect that is a base provision and does not deal with people's contractual rights?

Mr Bowman—I think contractual rights are a different issue, but certainly there is no intention of interfering here with DRMs at all. If you are buying material that has DRMs on it, it has the DRMs on it and you would need to have a separate exemption for circumvention to be able to remove that DRM or interfere with it, which this provision is not dealing with.

Senator LUDWIG—How do you intend to make the consumers aware of what their rights are in terms of explaining to them what the new regime under this bill will allow them to do? I take it that you are trying to, in effect, provide for what the public are currently doing to some extent.

Mr Bowman—The government's intention is twofold. It is first of all to ensure that there continue to be strong economic incentives for the creation of new material to protect

copyright and to the same extent give a greater recognition to the interests of consumers in being able to reasonably use the material that they purchase or legitimately access.

Senator LUDWIG—The word 'format' also seems to get a mention in a number of places, but in 109AD the format in which sounds are embodied in the main copy differs from the format in which sounds are embodied in the record. A range of submitters have raised question marks over the definition of 'format' and 'record', as well. Have you had an opportunity to look at those submissions?

Mr Bowman—That is one of the issues that, on the basis of public comment, we believe the government may be looking at in the possible amendments, but certainly we are taking on board the comments that have been made in that area.

Senator LUDWIG—We might know tomorrow at the earliest.

Mr Bowman—Yes.

Senator LUDWIG—So what do you intend to do? Can you say that or are you still considering your options?

Mr Bowman—I think these are policy decisions yet to be made.

Senator LUDWIG—Let's hope you can find the Attorney-General in time. I turn to part 3 in 200AB. There is a range of issues about importing the three-step test into the legislation and also the use of the word 'use'. The ABC raised it. The screen writers raised it as well. Then there is the issue of 'commercial advantage' in subsection 200AB(3)(c) and whether there is a definition of what 'commercial advantage' means. There is the difficult issue of parody and satire. Do any of the matters you have been considering touch on those issues, or do I need to go to those individually?

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

Senator LUDWIG—So are you going to provide a definition of 'commercial advantage' or leave it to the courts to figure out?

Mr Bowman—We would point out that 'commercial advantage' is already found in other parts of the act. This has not been invented for this provision.

Senator LUDWIG—I understand that. The difficulty now is that you are now amending it and giving it as an exception. The difference between 'communication' and 'use' that was

raised in the submission between schedule 6 and schedule 8—have you had an opportunity to look at that issue?

Ms Daniels—No, Senator. Is there a particular issue?

Senator LUDWIG—I guess, in the same way, in schedule 8 it says 28A is 'Communication of works or other subject-matter in the course of educational instruction' and it has 'Use by body administering educational institutions' in that section in 200AB. Communication and use: are they different?

Ms Daniels—I think 'use' is a broader term.

Senator LUDWIG—And that is how you find it, that in terms of 200AB 'use' there encompasses broader issues, then 'communication' in 28A—

Mr Treyde—In 28A the reference to 'communication' is a reference to one of the exclusive rights for the copyright owner, to communicate, so that is a specific and narrower concept. And 28A is aimed at only addressing the exercise of that particular exclusive right of the copyright owner.

Senator LUDWIG—I take it you have had a look at the Law Council submissions. You do not find favour with their view, then, in respect of this issue in 28A, communication?

Ms Daniels—I just think in relation to section 200AB the use is intended to be broader because it could be any of the copyright rights that we are referring to, not just communication. It could be reproduction. I think there is intended difference.

Senator LUDWIG—Yes. I am simply trying to gain your view. In terms of parody and satire, have you had an opportunity to look at the range of submitters who have indicated that there seems to be a difference which is obvious between parody and satire. Forgive me if I get this wrong, but parody seems to be one that they accept, but not satire.

Mr Bowman—This is an area where the definitions do overlap generally. For example, if you go to the *Macquarie Dictionary* and look at the first meaning given to 'parody', it is 'a humorous or satirical imitation'. So there is a degree to which the terms overlap.

Senator LUDWIG—They seem to suggest parody is a mimic and satire is satirical copying or borrowing. I am open, but I thought I would ask you your view.

Mr Bowman—There is one interpretation of the two terms where parody is more a burlesque or humour directed at an original composition whereas satire might be ridicule or humour directed at some broader social issue, such as a political or social subject matter. We are aware of the view that if you do draw a distinction between parody and satire which is not necessarily clear it should be limited to something that is like a comment or review of the original work but not going further for using the satire for broader social comment. But the government is also aware that there has been some support for transformative uses, where people take a work and use it for some wider social beneficial use, and that satire in that broader use of audiovisual material or other copyright works as part of political discourse might be a special area of transformative uses that the community might think is justified.

Senator LUDWIG—So you have not found favour with any of the submissions for either removing, changing or altering it or providing a better definition?

Mr Bowman—We are aware of the comments that have been made.

Senator LUDWIG—I know you are aware of them. I am asking whether you are actually going to do anything about it—or do you say it is sufficient the way it is?

Mr Bowman—I do not think it is up to the department to give you advice on whether something is going to be done or not.

Senator LUDWIG—No, but you can tell me whether you are actively looking at it.

Mr Bowman—We are certainly studying the submissions on this issue quite carefully and seriously.

Senator LUDWIG—I take it you will be able to provide a response about it this afternoon or tomorrow.

Ms Daniels—On parody and satire?

Senator LUDWIG—Yes.

Ms Daniels—Possibly.

Senator LUDWIG—Well, on all the matters that we have raised, really, because there is a very limited opportunity to provide a Senate committee report on these issues, and I did want the department's—at least, if not the Attorney-General's—view about whether or not the submissions that people have made on these various issues have found favour or not. It would be helpful to understand what the department's or the Attorney-General's view is about the issues, otherwise we get a bit short as to what we then say.

Ms Daniels—If I could clarify one thing: the information that we will be able to provide you is where we have already gone to the Attorney with some suggestions for changes. Where we are not in a position yet to go to the Attorney with suggestions for change—partly because we have read the submissions but also because we are interested in the Senate committee's views on some issues—we will obviously not be in a position to mention those matters to you. So it is only where we agree, no matter what the committee says, that the government's policy intent is not clear, or that there needs to be some change in wording to make the provisions work as they are intended to.

Senator LUDWIG—To deal with one issue with part 4—Fair dealing for research or study: is the 10 per cent cap one of the matters that the Attorney-General is currently looking at, or has looked at?

Ms Daniels—Is this the 'reasonable portion' issue?

Senator LUDWIG—Yes.

Ms Daniels—Yes, we are looking at that.

Senator LUDWIG—And will that be one of the advices you provide to the committee?

Ms Daniels—We are already talking to the drafter about some possible changes to clarify the intent.

Senator LUDWIG—So that is a 'yes'?

Ms Daniels—That is a 'yes'.

Senator LUDWIG—I have some more issues in schedule 8 but I thought it would be an opportune time to allow other people to also ask questions.

CHAIR—I will go to Senator Bartlett. I understand we will probably be dividing in about 10 minutes or so, Senator Ludwig. The committee is only authorised to sit until 1.30 pm, so we will not be going beyond then. Senator Bartlett?

Senator BARTLETT—The rationale for this fairly quick Senate inquiry, as well as the passage of legislation before the end of the year, is the components to do with the Australia-US Free Trade Agreement. Given the complexity, and just the need to get it right, leaving alone the policy decisions, is there any reason we could not put those parts through now and have a closer look at some of the other aspects to get them right?

Ms Daniels—The government's preference is to do it as one major copyright reform bill and to get it all through this year. So, apart from the Australia-US Free Trade Agreement amendments, there are also some other minor amendments in there that will allow us to accede to the World Intellectual Property Organisation Copyright Treaty, and that is a requirement under both the Australia-US Free Trade Agreement and the Singapore-Australia Free Trade Agreement.

Senator BARTLETT—Given the desire to get all the reforms through in one go—which I can understand; it is easier to only go through the process once—why doesn't the legislation also include the removal of the cap on commercial radio broadcasters? That was announced as a government decision at the same time as the fair-use changes were announced.

Ms Daniels—The government has not made a decision as to when that reform will be implemented.

Senator BARTLETT—So there has not been a reversal of a decision, it is just not proceeding with it at this time?

Ms Daniels—That is right.

Senator BARTLETT—Are you able to give us any bigger reason why not? I mean, given what you have just said about the desirability of getting all the reforms through in one package, this would be a fairly simple one that has been discussed for a very long time, and one which has also had a review process and had a cabinet decision made on it.

Ms Daniels—There is very little I can add to what I have said: that the government has decided not to proceed at this stage in the bill with that reform.

Senator BARTLETT—If it were to be introduced, by way of amendment or anything, that would not impact on anything else in the legislation, as far as you are aware?

Ms Daniels—If it were to go ahead—no, section 152(8) is fairly discreet as a provision. It would not impact on other provisions of the bill.

Senator BARTLETT—Okay. With the various issues that have been raised today—and I imagine many of them were not totally surprising to you—do you think there is sufficient time to be able to make sure we get it right? I am sure everybody, regardless of whether or not they agree with the policy prescriptions, would like to get it right and not have unintended consequences.

Ms Daniels—I am sure. Copyright law, as you are well aware, is very complex. So, yes, it is always desirable to have an airing of exposure drafts where possible so that we can fix up problems, even where there are policy differences. But the government is hopeful that, subject to what the Senate committee recommends by way of further reforms, we will get the problems that exist fixed up.

Senator CROSSIN—The Copyright Advisory Group of MCEETYA raised the issue about the TPM provisions for schools. I am not sure if you were here when they raised that. Do you have a comment about that? They are looking for schools to be granted the capacity to be able to contact the copyright owners. Is there consideration to take their suggestion on board?

Ms Haipola—The free trade agreement is quite clear on when a circumvention device can be manufactured or distributed. In ensuring that our exceptions are workable, a person can manufacture a circumvention device for their own use. There is not a permission exception for manufacture or other dealings with circumvention devices because that situation is quite different to the act of circumvention. With the act of circumvention, a copyright owner can say, 'Yes, you can circumvent the TPM on my work.' But when a copyright owner says, 'Yes, you can manufacture a circumvention device,' that copyright owner has no control over what that device could be used for. It could lead to the situation where copyright owner A says, 'Yes, you can manufacture a device,' and that device is used to circumvent a TPM on copyright owner B's work. It is my understanding that it was seen that it would be inappropriate for one copyright owner to be able to provide permission to create a circumvention device or to sell a circumvention device where it could be used to circumvent TPMs on other copyright owners' works. So there is some difficulty there in providing a permission exception for both types of liabilities. It is quite clearly appropriate for the act of circumvention, but there are some difficulties in providing a permission exception for dealings in circumvention devices and services.

Senator CROSSIN—Why would you not look at providing an exemption for schools or an exemption for schools that is qualified? Effectively, you are saying that you believe that schools would misuse it. Why is it not possible to exempt schools and put further protections in that would stop schools from doing that. Obviously, this is quite a big issue for the school sector.

Ms Haipola—The free trade agreement does require liability to be imposed where a circumvention device is manufactured with the intention that it be provided to other people. There are some limited exceptions, and the FTA sets out which exceptions can apply to that type of liability. There is no scope for an exception for educational institutions providing circumvention devices to other people under the FTA.

Senator CROSSIN—Are you strictly limited by what the FTA says or, in the operation of just common sense and good educational use of resources, could you have that flexibility?

Ms Haipola—The FTA is very clear on which exceptions can be created for which circumstances. It does allow some flexibility for the act of circumvention. It is very clear for dealings in circumvention devices in that there are only certain exceptions that can be created. I understand that, in the submission that the department made to the committee, a table sets out the exceptions that can be created for each type of liability.

Senator CROSSIN—I am not clear here. I keep hearing you telling me what the FTA says. I am asking whether the department or the government have sufficient flexibility to ensure that schools are part of those exemptions. If they are, can they put into the legislation measures that would alleviate your concerns?

Ms Daniels—I do not think there is that flexibility under the FTA in this particular area.

Senator CROSSIN—Can you just check that for me, if you are not certain? Can you go back and have a look and see if there is an ability to have that flexibility?

Ms Daniels—We will check that.

Senator CROSSIN—I just want to ask about the issue of the format. It became quite unclear early in the day whether the legislation talks about the file or the device. I am talking about the format shifting.

Mr Bowman—I am not sure how helpful this will be, because it may be that there are significant changes in this area if the Attorney-General is persuaded by the arguments being made. In essence, a very simple explanation of the format shifting was that it went to the audio formats—MP3 players do not use the same audio format as an Apple iPod. So it was to allow a person who bought their music in one audio format, but whose playing device used a different audio format, to transfer the music and be able to listen to it. So the format, as the bill was drafted, looked at those proprietary audio formats.

Senator CROSSIN—It was looking at the device, not the file?

Mr Bowman—No, the format in which the audio file had to be stored in order to be used by the proprietary software in the playing device.

CHAIR—A division has been called. The hearing will suspend until the conclusion of the division, and I remind senators that we are only authorised to sit until half past one.

Proceedings suspended from 1.06 pm to 1.16 pm

Senator LUNDY—I am very conscious of the time, so I have five or six key areas that I would like a response on. First of all, going to the issue of end user licence agreements, is it the view of the department that a consumer has an opportunity to negotiate the terms of such contracts with companies if they require them to be agreed to?

Ms Daniels—The amendments to the bill do not address that issue.

Senator LUNDY—I am asking because some of the submissions refer to the need for an end user licence agreement to basically not override some of the provisions of the law. I will just find the provisions. It is argued in one of the submissions that the legislation ought to deal with that so that the end user licence agreements do not override the exceptions. What is the department's response?

Ms Daniels—The bill does not address the broader issue of copyright and contract. That is the response to that. It does not refer to what happens in the contractual situation but, as Mr Bowman was outlining earlier, for example, in the format-shifting area, what is offered to consumers is often a lot more than this base sort of exception that we are offering in the bill.

Senator LUNDY—It was raised in recommendation 33 of the LACA review. Was it a policy decision of the government not to legislate with respect to that recommendation?

Ms Daniels—The government accepted in principle recommendation 33, which recommended that any agreements purporting to exclude or limit the application of permitted exceptions should be nullified. However, the relationship between copyright and contract is an issue that applies not just to technological protection measures but to other areas of copyright law, and for that reason—

Senator LUNDY—Consumer law?

Ms Daniels—yes—and for that reason the issue is going to be appropriately dealt with when the government looks more closely at the Copyright Law Review Committee**'s** report on copyright and contract, which we have not yet responded to.

Senator LUNDY—With respect to Stevens v Sony, why did the bill change to remove the reflection of the decision of that particular case, between the exposure draft and the bill that we now have before us?

Ms Haipola—Comments made in response to the exposure draft indicated that there was substantial misunderstanding of the government's intention behind those exposure draft provisions. Article 17.4.7(d) of the free trade agreement requires liability for TPMs to be independent of copyright infringement.

Senator LUNDY—We heard evidence today that was not another legal interpretation of the requirements of the US free trade agreement. So is it the government's view that that is in fact the interpretation you have described?

Ms Haipola—It is the government's view. It may assist if I read out a short part of the provision. It states:

(d) Each Party shall provide that a violation of a measure implementing this paragraph—

that is, a violation of the TPM provisions—

is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law.

The FTA clearly states that the TPM liability that we provide should be independent of whether copyright infringement has occurred.

The intention of the exposure draft was to provide liability where there was a possibility that copyright infringement might occur, and it did not look at a particular situation as to whether an exception under the Copyright Act would have applied. It was an objective test. The government's intention in the exposure draft was not read by the public. In the submissions we saw that there was a lot of confusion about the government's intention. Both users and owners sought greater clarity and simplicity in the operation of the definitions. They also sought greater certainty in the issue of geographic market segmentation. The drafting approach in the bill is the government's response to those concerns.

Senator LUNDY—In the inquiry into technological protection measures exceptions released earlier this year, the House of Representatives Committee on Legal and Constitutional Affairs held that the OFLC permitted retention of the Stevens v Sony language was permitted, and that was contained in recommendation 3. The government's own legal advice from the Office of International Law prior to the release of the exposure draft reached the same conclusion. It confirms, as we have heard from evidence this morning, that it is in

line with case law regarding the United States equivalent provisions. What has changed? What were the submissions that caused the government to essentially change policy on this matter?

Ms Haipola—To say that the change has been significant from the exposure draft to what we have now—

Senator LUNDY—That is how it has been interpreted by a number of witnesses.

CHAIR—Please let the officer finish her answer.

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

Senator LUNDY—Would you be able to provide the committee with the submissions received by the government that influenced their decision to change their policy beyond this matter, including the legal advice?

Ms Haipola—We are happy to provide the submissions.

Senator LUNDY—Thank you. The Australian Libraries Copyright Committee, CAL and a number of other organisations have expressed strong views about the impact on cultural institutions and collection policies. Are you contemplating changes with respect to a number of provisions that they have raised as being highly problematic and interfering with their public role in the preservation and collection of materials for their collections? Is that an area that you are looking at?

Ms Haipola—Was that in relation to technological protection measures or more broadly?

Senator LUNDY—No, it is a different issue now.

Mr Treyde—We are certainly aware of a number of the issues that have been raised. We are, as Mr Bowman said, looking at those. However, until we get a steer from the Attorney-General as to where we are going, I cannot provide you with much greater detail than that. Certainly we are aware of some of those concerns.

Senator LUNDY—Are you looking at the concerns about the Copyright Tribunal as well?

Mr Creswell—The one concern that those institutions you referred to had that I can recall offhand was in relation to conferring on the Copyright Tribunal jurisdiction to determine a records system. Is that what you had in mind?

Senator LUNDY—Yes.

Mr Creswell—This is really one that ends up being fairly evenly balanced. If an institution that has a records system on foot at the moment does not want to enter into an agreement with the collecting society to have a different records system, then they can stay on the statutory

records system. That is under a transitional provision which has perhaps not been the subject of much attention up until now. In other words, they cannot be dragged off the statutory records system unless they are induced to enter into an agreement with a collecting society on a different system. Once they have an agreement and if that agreement comes unstuck for some reason then that can be referred to the tribunal.

Senator LUNDY—I might need to put on notice a follow-up question on that. Can you confirm that only the one schedule relating to TPMs is required for the purposes of fulfilling Australia's obligations under the Australia-US Free Trade Agreement?

Ms Daniels—That is partly right. The TPM provisions clearly are under the US free trade agreement, but there are some other amendments that we need to do to comply with the World Intellectual Property Organisation Copyright Treaty and accession to that treaty is also a requirement under the US FTA. I guess, indirectly, that is an issue.

Senator LUNDY—Could you please highlight what those are?

Ms Daniels—The issue of 'reasonable portion' and how 'administrative purposes' are defined under the library provisions.

Senator LUNDY—My final question is about strict liability and the policy intent and the extent of consultation for the purposes of these bills with stakeholders. Many of the submissions make very strong points that there has been inadequate time. Many of the recommendations of many of the submitters are that the vast majority of these provisions—perhaps not the TPMs, because that was expected to be legislated prior to 1 January next year—should be deferred to have further detailed consideration and more time to contemplate the effect, discuss it and debate it.

CHAIR—May I ask the department to respond to that on notice?

Senator LUNDY—That is fine. What is the policy intent behind imposing strict liability clauses and does that mean that kids will be fined?

CHAIR—It needs to be a brief answer, Ms Daniels, and the rest you can put on notice.

Senator LUNDY—And where else in the world can you get an on-the-spot fine?

Ms Daniels—The policy intent is to provide broader options for law enforcement bodies to enforce copyright than exists under the act at present.

CHAIR—Okay, and if there is anything further on that we will come back to the department on notice.

Senator LUNDY—Could you take on notice any international precedents of strict liability fines?

Ms Daniels—Yes.

CHAIR—For copyright offences—correct?

Senator LUNDY—Yes.

CHAIR—Thank you very much. I thank all of the witnesses who have given evidence to the committee today and also members of the committee and the committee secretariat for preparing for this hearing today, which has been challenging. I also want to acknowledge the

number of submissions the committee has received. I think I said in my opening remarks that we received in excess of 70 submissions, indicating a significant level of interest. They are all very valuable to the committee.

I also want to place on record some remarks in relation to the committee process. It is no news to anyone here and no news to any of my colleagues that this is a busy committee of the Senate. It has a very onerous work program at the best of times and this is no exception. It is, however, not unusual for the committee to consider matters of great significance relatively quickly. We endeavour in each of those inquiries to do the best job we are able to do as senators, as a secretariat and as a committee, and this will be no different. I noted the value of the submissions that we have received. I noted there were over 70 of those.

Unfortunately, it is not possible for all interested parties to appear before the committee to participate in the hearing process, but that does not mean that their submissions are not considered in the development of the committee's report and the committee's consideration of the issues. Some organisations choose to deal with that in different ways. Some express their concern directly to the committee and record their disappointment at not being invited. Others may choose to issue press releases to do that, which three organisations have done today—a matter for them, not a matter for anyone else. What is a matter for the committee, though, is the impugning of the committee's professional integrity in a press release which asserts with absolutely no foundation that the committee is not sitting past 1.30 because the committee is 'breaking to watch the Melbourne Cup'.

Any casual observer of the parliamentary process, even a slightly informed observer, would be aware that the committee members are required to attend question time at 2 pm in the Senate chamber. They would also be aware that the Senate is sitting today. They would also be aware that the Senate is considering very important legislation to this entire nation today. The committee has obligations to itself as a committee process; it has obligations to the Senate chamber. We endeavour to do our best in meeting all of those within the constraints with which we are faced.

Committee adjourned at 1.32 pm