



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

**HOUSE OF  
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND  
CONSTITUTIONAL AFFAIRS

**Reference: Enforcement of copyright**

TUESDAY, 7 SEPTEMBER 1999

SYDNEY

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**HOUSE OF REPRESENTATIVES**  
**STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**  
**Tuesday, 7 September 1999**

**Members:** Mr Andrews (*Chair*), Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Mossfield, Mr Ronaldson, Ms Roxon, Mr St Clair and Mrs Vale

**Members in attendance:** Mr Andrews, Mr Cadman, Mr Murphy and Mrs Vale

**Terms of reference for the inquiry:**

- (1) The Committee will inquire into and report on issues relevant to the effective enforcement of copyright in Australia and, in particular, on:
  - (a) evidence of the types and scale of copyright infringement in Australia including:
    - (i) the availability and accuracy of data on copyright infringement;
    - (ii) the scale of infringement in Australia in comparison with countries in our region and Australia's major trading partners;
    - (iii) the geographical spread of copyright infringement in Australia;
    - (iv) the cost of infringement and impact on Australian business;
    - (v) whether there is evidence of the involvement of organised crime groups in copyright infringement in Australia, and if so, to what extent;
    - (vi) likely future trends in the scale and nature of copyright infringement.
  - (b) options for copyright owners to protect their copyright against infringement, including:
    - (i) actions and expenditure undertaken, and that could be undertaken, by copyright owners to defend their copyright;
    - (ii) use of existing provisions of the *Copyright Act 1968*;
    - (iii) use of legislative provisions other than those of the *Copyright Act 1968*;
    - (iv) technological or other non-legislative measures for copyright protection.
  - (c) the adequacy of criminal sanctions against copyright infringement, including in respect of the forfeiture of infringing copies or devices used to make such copies, and the desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement;
  - (d) the adequacy of civil actions in protecting the interests of plaintiffs and defendants in actions for copyright infringement including the adequacy of provisions for costs and remedies;
  - (e) the desirability or otherwise of amending the law to provide further procedural, evidential or other assistance to copyright owners in civil actions for copyright infringement;

- (f) whether the provisions for border seizure in Division 7 of Part V of the *Copyright Act 1968* are effective in the detention, apprehension and deterrence of the importation of infringing goods, including counterfeit goods; and
  - (g) the effectiveness of existing institutional arrangements and guidelines for the enforcement of copyright, including:
    - (i) the role and function of the Australian Federal Police, and State Police exercising Federal jurisdiction, in detecting and policing copyright infringement;
    - (ii) the relationship between enforcement authorities and copyright owners;
    - (iii) the role and function of the Australian Customs Service at the border in detecting and policing copyright infringement; and
    - (iv) coordination of copyright enforcement.
- (2) In undertaking the inquiry and framing its recommendations, the Committee will have regard to:
- (a) Australia's obligations under relevant international treaties, in particular under the World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights*;
  - (b) the provisions of the *Copyright Act 1968* and any amendments to that Act that have been introduced or have been publicly proposed by the Government, to be introduced into Parliament;
  - (c) established principles of criminal and civil procedure which apply in cases generally;
  - (d) Commonwealth criminal law policy;
  - (e) enforcement regimes for other forms of intellectual property;
  - (f) existing resources and operational priorities of Government enforcement agencies; and
  - (g) the possible effect of any proposed changes on the operation of Government and private sector organisations.

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**Committee met at 9.06 a.m.**

**BROWNE, Ms Delia, Executive Director, Arts Law Centre of Australia**

**McCAUSLAND, Ms Sally, Legal Officer, Arts Law Centre of Australia**

**CHAIR**—I declare open this meeting of the House of Representatives Standing Committee on Legal and Constitutional Affairs in its inquiry into the enforcement of copyright. I welcome representatives of the Arts Law Centre of Australia to the hearing. I have to advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission to the inquiry. Would you like to make some opening comments?

**Ms Browne**—Firstly, I would like to thank the committee for allowing us to make a further oral submission to our written submission. The first opening comment I would like to make is to explain in a little more detail the extent of our legal advice service and the sorts of people we advise. As stated in our submission, we are a national community legal centre for the arts and we provide telephone legal advice initially to anybody in Australia who contacts the centre. We have a toll-free line.

We give advice on all sectors of the arts, not just visual arts—but also film, multimedia, video, literature, performing arts and music. We get a wide range of people asking for assistance in the legal advice area. They are mainly from the creative industry, such as graphic designers, photographers, composers, musicians, performers, up-and-coming film makers and small businesses, like publishing houses, which are establishing themselves and web designers—that sort of thing. A broad range of people contact the centre and obtain legal advice from us.

About 50 per cent of our work is in the provision of legal advice, to the extent that we also provide a legal advice night service nationally in the main cities around Australia with the assistance of panel lawyers who are lawyers from private practice. We have around 300 who provide face-to-face consultation under our instruction to our subscribers for up to two hours. That is for an additional fee for subscribing to the organisation. That is the basis on which we are giving information and evidence to the committee on enforcement. Our submission is really centred on one main premise, which is access to justice and a desire to see a first-rate copyright system working in Australia which also effectively protects the investment made by small business in the area of copyright.

We have tried to think of ways or practical means of ensuring that there is some sort of mechanism or procedure that also allows smaller businesses to enforce their copyright. It is interesting that the figure that we received recently on the economic significance of copyright was estimated to be \$19 billion in Australia around 1991. We are not aware of any further figures on that, but we understand that further study is being undertaken, I think by the Copyright Council. I do not know what aspect of those figures actually reflects—or in fact even if it does reflect—the investment made by small business. It seems that those statistics normally deal with the larger corporate industries.

I turn to the recommendations that we were trying to make in our submission. In looking at ways of providing cost-effective and timely remedies for copyright infringement to small business, one of the first ideas that we put forward in our old submission was that of extending the Copyright Tribunal's powers to resolve a range of copyright enforcement disputes. One of the things we have stated is that it might be an idea to introduce into that tribunal a type of unfair dismissal conference procedure equivalent to the New South Wales Industrial Relations Commission as a way of getting an up-front, quick resolution to a dispute. We have given you an example there that is analogous. So the idea is to have some sort of quick conference procedure which would encourage parties to resolve the dispute.

I would also like to draw the committee's attention to a later submission that we have made to the Copyright Law Review Committee which was to do with looking into the jurisdiction procedures of the Copyright Tribunal. I am happy to provide the committee with a copy of the latest submission that we have made to that committee, in which we have also thought about this further, as we always do for every submission we make on copyright and access to justice. If we cannot extend the jurisdiction of the Copyright Tribunal to deal with matters because of constitutional restrictions, perhaps we should think about creating a special court with the jurisdiction to determine matters of copyright infringement and, of course, giving that court the corresponding judicial power to grant copyright remedies. One thing we suggested in that submission to the Copyright Law Review Committee was setting the amount of damages at around \$40,000, which is the equivalent of a small claims court jurisdiction.

The other thing we mentioned in our latest submission to the Copyright Law Review Committee was to provide a tribunal or a specialist court—if one is established—with the jurisdiction to require mediation of matters at a pre-hearing level. So again an informal means of resolution is attempted before a matter actually proceeds to the tribunal. We operate a mediation service at the Arts Law Centre. All the mediations coordinated since 1997 have been successful, but we should put a caveat on that that, unless mediation is undertaken in good faith by both parties, it can lead to additional costs in litigation where there is clear inequality of bargaining position and lack of financial resources. So it is absolutely essential that it is undertaken in good faith; otherwise it is a waste of time and a waste of money and could prejudice you in later proceedings. We do not necessarily believe it should be made compulsory for applicants to go into mediation because sometimes it will not be an appropriate means to resolve a dispute. Injunctions are still an effective remedy, particularly if there is wholesale infringement going on. But we think that if there is a court established, or the tribunal's powers are extended, they should have the power to order mediation where appropriate.

I would also like to point out to the committee that international trends show that alternative dispute resolutions can be quite successful. A cyber-tribunal is being set up where there is an online mediator. It seems that the mere intervention by the online mediation has brought the offending web site operator, who has taken the infringing material from someone else's web site, into line very quickly. There seem to be examples of that overseas.

The other main part of the submission we have been trying to bring focus to is the cost of actually bringing litigation and the fact that we do get a large number of complaints from smaller businesses and the creative sector that it is too costly to enforce their copyright.

Through increasing education by various agencies such as ours and the Copyright Council, people are actually aware of their private rights in copyright, but they have none of the financial resources to enforce them. It is really only the rich and well organised who can afford to take litigation. There are the court costs that the claimant has to pay, the legal costs associated with engaging a solicitor and perhaps even a barrister to take the matter to the Federal Court.

There can be a situation where there may not have been a blatant infringement because a lot of people sometimes infringe copyright due to a lack of knowledge or understanding of how it works. But once you get legal advice, they will never admit liability. You have to engage in the whole letter of demand process, backwards and forwards, backwards and forwards, between the claimant and the infringers' lawyers before you can even embark on a meaningful dialogue. This is standard practice with law firms, that you never admit liability in the first instance.

The other area that is of concern is in the indigenous area. Sally McCausland, the legal officer of the Arts Law Centre, has recently toured the Northern Territory. We actually go into the communities themselves and present workshops to indigenous artistic communities around the country. Again, there has always been a problem there. They say, 'Okay, you are telling us what copyright is, who owns it, and that it is a possible means of deriving income from our work. But what happens when someone infringes it? What can we do? Is there any service out there that can act on our behalf?' And, generally speaking, there is not.

We have, in some instances, managed to get lawyers to act pro bono to a certain extent by writing letters to people, but no lawyer we have come across will actually engage in litigation with them because it is just too costly for a law firm in terms of time and resources. But we do have a lot of assistance from the legal profession in actually trying to negotiate a settlement, which they do on behalf of our subscribers. I will end my comments there and would be happy to answer any questions.

**CHAIR**—I want to ask about the statistics in your submission, on the third page. This is for 1996. I understand the total advice is 3,444 and copyright infringement is 144. Can you explain exactly what those figures mean?

**Ms Browne**—When people contact the centre for legal advice, we record on a database what the issue was, who the parties are and if there is a conflict of interest. We are able to search our database and search for any copyright infringement, et cetera. We can effectively identify when the words have actually come up.

**CHAIR**—Does that mean that of the 3,444 advices there were 144 involving infringement of copyright?

**Ms Browne**—Yes.

**CHAIR**—And you say this should not be seen as an indicator of the number of copyright infringement cases affecting small businesses. Do you have any idea of what is the level of infringement?



**Ms McCausland**—It is very difficult to know because some of them do go and brief their own lawyers, and some of them do not know that we exist, for example. So it is impossible to know, out of the people who have contacted us, what percentage that is of the total.

**CHAIR**—I understand the thrust of your submission, and that is a more and more simple, easily accessed system. Can I just raise with you a couple of things that were raised with us and seek your comments. One is that the New South Wales police service yesterday suggested to us that there should be something similar to section 5.27C of the Crimes Act which enables a conviction following a charge and court proceedings heard summarily where a person is in possession of material which is reasonably suspected to have been stolen. They were suggesting a similar sort of provision in relation to counterfeit or pirated type material which is reasonably suspected to be infringing copyright, that there should be some sort of summary offence provision that operates, presumably at a magistrates court level. Do you have any thoughts about that?

**Ms Browne**—I can see the benefit of such a provision in the area for large scale copyright infringement. I have to say I do not see much benefit for that provision for the small business. There have always been criminal provisions available for all copyright owners to use, but they have not been used very effectively in the past. I know of an instance that was reported in an article by Justice Laddie in the UK where a criminal provision was used over a criminal remedy or action where the directors of a small publishing company were taken to court as certainly a very effective means of bringing people into settlement. The criminal section or provision for imprisonment still will not reward the use of the work. So I do not see how it is going to affect the small business. I do not know if the New South Wales police can chase around every possible copyright infringement. The main purpose is for wholesale piracy.

**CHAIR**—They were saying that virtually now they can do nothing. This at least would give them some powers.

**Ms McCausland**—I do not know that a lot of the people that come to us with copyright infringement issues would actually want to involve themselves or their infringer in the criminal justice system. Really what they are looking for is a quick commercial resolution whereby they stop the infringement and give a message to other people and they get compensated for a licence fee that they would have been paid. I do not think that it would be particularly popular. That is just a matter of having to advise people.

**CHAIR**—Your clientele, I presume, is different in that the infringer may well have a legal entitlement to the particular item in question but has not got the entitlement to be published always.

**Ms McCausland**—They may have exceeded their licence or they have got the material from somewhere else and thought that they had a licence or something like that. Often it is a matter of pointing out that in fact they have exceeded it.

**CHAIR**—So somebody republishing a photograph or photographing a painting or something like that—

**Ms McCausland**—That is right. And it may be quite clear once it is actually pointed out what they have done. As Delia was saying, they might try and deny liability on some technical ground but the criminal law might be a blunt instrument to use in that one-off type of situation.

**Ms Browne**—Particularly if you depended on the copyright industry for your work. If you are, for instance, a photographer dealing with a magazine or an advertising company, you are unlikely to invoke criminal action against a potential contractor or employer.

**CHAIR**—So, from your perspective, from the perspective of the types of clients that you represent, you are really looking for civil remedies rather than any criminal remedies?

**Ms McCausland**—Yes. The employment law model that we have suggested comes pretty close to what we think would work in that employment situations are often very sensitive. They may need to be confidential. They need to be resolved quickly. You need to get a resolution without having to incur large legal costs in order to level the playing field. That is probably more the analogy that we would want to use.

**CHAIR**—The suggestion you made about extending not the jurisdiction so much but the operation of the copyright tribunal, as I recall, has been around for quite a while. In fact I think Professor Simpson was advocating that some years ago. Is there an impediment to that occurring?

**Ms Browne**—The main impediment I can see is that, if you are going to grant the Copyright Tribunal powers to make orders, they will need to have the constitutional basis to do it. We are concerned about whether the tribunal is acting as a tribunal or whether it is acting as a court. So that is why in our later submission we said that either you are able to establish a special court or just making them aware that there may be that problem and giving the tribunal such power to make orders. That was our main problem: we thought either you are extending it and giving them judicial power or you are setting up a specialist court with judicial power under the constitution.

**Mr MURPHY**—I will just pick up on what Kevin was saying. We had some submissions yesterday which suggested that there is a way to go with this because copyright enforcement is just so difficult when it comes to reversing the onus of proof and putting it on the alleged infringer to demonstrate that the receipt of the material was obtained bona fide. I just say that by way of introduction and to get any more comment that you want to make on that. I, too, am an accredited mediator and I am interested in what you said about the online mediator and, I presume, the success that you have had there. Could you just comment on that for the committee?

**Ms Browne**—The Online Copyright Tribunal is something that operates overseas. I am actually not quite sure if it operates from Europe or the US. I think it may operate from the US. My attention was drawn to it recently by looking over some conference papers that originated in Europe. So it does not operate in Australia yet and does not operate through us yet. But it is something we would look at.

With the suggestion that reversing the onus and making sure that the criminal sanctions are enough of a deterrent, I still fail to see how it is going to help small business because the only people who can afford to take litigation are the copyright industries and the publishing industries. It is not the original author or creator who has got the ability to enforce their rights. It is evident, even in the contractual dealings with the copyright, that there is unequal bargaining power. I do not see how that could be a benefit when it may be two small businesses having a problem of again showing the onus. They do not actually get to court.

**Mrs VALE**—I was particularly interested in the subtlety of how you see, if you like, the enforcement. It is very persuasive, isn't it, the fact that you are actually suggesting mediation. To me it is just another incidence of how complex and different the enforcement of copyright is in this country. We had people here yesterday where obviously persuasion or mediation was not going to work. There was a real, deliberate breach of copyright by producing items, say, to be sold at sporting events or at huge events where that is very deliberate. It was a definite criminal intention. Do I gather that perhaps with your client base education would be something that would be very important for people who are actually breaching copyright without meaning to or without really intending to or without really understanding the full ramifications?

**Ms Browne**—I think some of the infringements that have come to our notice are through ignorance, but also quite a lot of them are deliberate, and this may be by particular copyright industries themselves which will actually use someone else's work and reproduce it and then offer them a fee later, knowing that they are not going to be able to take them to court. So the boot is on both feet. You have got one instance where industry complain there are not enough sanctions there, although industry has enough financial resources to protect their investment because that is what copyright has become. Initially it used to be there as a form of remuneration to create it, but really it is now to protect investment and corporate balance sheets.

It is a very important industry and it does employ a lot of people that we advise, but it is trying to get a balanced regime in place which does not allow overboard tactics to be used on the emerging creator, which is also an important part of our economy, particularly small business. It is a very hard thing to balance, but I do acknowledge that there are some people who actually do not have enough education in the area. We and the Copyright Council both provide it, as do other people who will also be giving evidence today.

**Mrs VALE**—Yet there are other people in the industry who know that it is difficult to enforce copyright so they actually use that as a leverage for what they want to do.

**Ms Browne**—Yes, we come across that quite often. The Grant Matthews case is probably one.

**Ms McCausland**—I have picked one of the case studies we looked at, because I think it really typifies the type of game playing that goes on. There are many examples like this where we have given advice. Quite a well-known photographer based in Adelaide had done a book on body piercing. It came to his attention that a newspaper in another state, I think, had used one of his photographs to advertise a particular body piercing studio. He had not

authorised that. Basically, what happened was that there had been a lift—somebody had said, ‘That’s a nice picture. We will use it to advertise our studio.’

The problems were that, firstly, the model used in that picture worked at a competing body piercing studio and would have been in quite a lot of trouble had it been thought that they had endorsed that; secondly, there was no permission given whatsoever; and, thirdly, the photographer was somebody who had won quite a number of awards. He regarded his reputation as being very important and would never have allowed one of his photographs from this glossy book to be used in a small advertisement.

He came to us and I helped him draft a letter of demand. He sent it off to both the newspaper and the studio, and they said, ‘Yes, we are very sorry and will not do it again.’ But, because advertisements run in two-week batches, they did not stop the second one. The photographer became more irate about this and sent further letters. Because he did not have any legal representation at that time, it seemed to me that they were basically calling his bluff. They said, ‘We will publish an apology but we do not want to pay you anything.’

Finally, he sought legal advice in Adelaide through our program and got some advice about what it would actually cost to take infringement proceedings. He was horrified, but he decided to spend the money. He briefed a lawyer in private practice in Adelaide to send a letter.

At that point he had incurred quite a lot of time and cost and some legal fees. Luckily, the letter and a couple of subsequent letters managed to negotiate a settlement. In that case it was, firstly, because he had decided to spend that extra money to protect his reputation and that of his model; and, secondly, because it was such a clear case, particularly in the second instance, that the newspaper really did not have a leg to stand on.

That took three months, or something like that. That is quite typical, except that in the majority of cases the person is not going to be prepared to brief a lawyer. So you get this sort of game playing back and forth when, really, had you been able to serve a notice saying, ‘You are required to appear before this tribunal and attend a videoconference and explain yourself,’ it would have been all over in 10 days perhaps.

**Mrs VALE**—Yes. We need something that is a little more in your face.

**Ms McCausland**—That is right. You need to bring the person before a tribunal where they have to say, ‘No, I do not have a defence,’ or something like that—it happens in the Industrial Relations Commission—so that the person actually has to spend some energy in defending what they have done rather than always putting the onus on the plaintiff.

**CHAIR**—Thank you very much for your submission and also for coming along and discussing it with us this morning. You made reference to a further submission to the Copyright Law Review Committee and said that you could provide us with copies. That would be useful.

**Ms Browne**—Yes, we would be happy to do that.

**CHAIR**—Thank you very much.

**Proceedings suspended from 9.34 a.m. to 9.49 a.m.**

**FRASER, Mr Michael, Chief Executive Officer, Copyright Agency Ltd**

**SYMONS, Ms Marie-Louise, Corporate Lawyer, Copyright Agency Ltd**

**CHAIR**—I welcome representatives of the Copyright Agency Ltd. Although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have your submission, and I now invite you to make some opening comments.

**Mr Fraser**—I appreciate greatly the opportunity to speak to the committee at a time of mind-bogglingly rapid change in the field of intellectual property—change which is legal, technical and administrative—and at a time when we are undergoing, moreover, a profound social change, which people call the information revolution or the information age. I think it is very timely, and we greatly appreciate the government's intention to look at the issues of protection of intellectual property through not only the amendments to the Copyright Act, which are under way at present, but also this enforcement review.

I think one of the hallmarks of this information age is that the value of information in the broader sense, including all copyright works, is increasing. In fact, some people say that we are entering into a time of information economy, where information will become a kind of economic currency.

For my own part, I believe that copyright, which provides the framework—the only framework for trade in intellectual property in the sense of copyright works—is the only creation and structure for a market in intellectual property. And unless we establish that framework—that structure—correctly, we will not be able to realise the potential value of our creative and productive people here in Australia.

On the other hand, if we frame these laws correctly and we are able to enforce them and protect copyright, there will be enormous trading opportunities in terms of the copyright market in Australia and an international market for Australian talent and production in the region and internationally.

For a very long time, Australia has relied on primary produce and manufacture, but I think that in the next century we will rely more on information product. In order to protect the value of this property right, the first thing that is required, in my view, is a deep cultural change in the Australian community to value the work of innovators, of creators—those who create new products for the benefit of the community.

We value real property and we value personal property, but there is a deep lack of understanding in the community at large about the value of copyright as intellectual property. It is an abstract concept, and people feel that once they own a book as a thing in specie they can do what they want with it. Because the technology now allows them either to photocopy it conveniently and inexpensively, in the case of books, or to scan it and transmit it around

the world instantaneously, they feel that they have the right to do it, but of course the right remains with the copyright owner.

I have taken the liberty of making this kind of introduction because I do not think any kind of protection measures will be very effective until we have a cultural shift in this country that does not see intellectual property as something that arrives from the United States in the form of software or films, but something that we create with work, talent and investment here and that needs to be protected. Until we have a feeling in our community that there is value in works of the mind and that they are worth protecting and are respected, as other property is respected, then any work in protecting and enforcing copyright will be pushing uphill.

I think the government has an important role to play in moving Australia into this information age, in educating our community from students on about respect for works of the mind as a product to be nurtured and rewarded for those who create and invest in those kinds of products. I think that is the groundwork for any consideration of how in fact intellectual property copyright work should be protected, and no other measure will be successful in the long term without that.

Moving down one level of abstraction, as you may know we are the copyright collecting society. We are a not-for-profit company and, approved by the Attorney-General as a declared collecting society, we submit our accounts to parliament annually. We represent practically all authors and publishers in Australia and, through bilateral agreements, authors and publishers around the world.

It is an important part of our role to obtain payments for copyright owners when their works are copied, until now, by photocopying and, more recently, by digital copying, scanning and transmission. In the case of photocopying, we already face the problem that this kind of new use of works by copying since the 1970s happens in a private and individual kind of way. People tend to dismiss it because each instance of copying is small, but in effect there are hundreds of millions of copy pages being made out of books and journals in offices, corridors, institutions, government departments, corporations and media monitors every day. This represents an enormous impost on the market of the creators and producers of those works, who invest their time, talent and money into creating and producing them. It is extremely difficult to detect and measure that kind of copying, and people are rather dismissive of it, but the effect is cumulative. In fact, there are hundreds of millions of copy pages being made all the time, and around the world there are billions of copy pages being made of the works of our members, authors and publishers.

The problem is only exacerbated, as I am sure you would appreciate, on the Internet—the World Wide Web environment. Where there is a distributed networked environment, it is all the more difficult to protect copyright. It is very difficult to detect copyright infringements in the first place, so copyright is very difficult to protect.

This widespread infringement, made up of cumulative individual acts of disregard for copyright law, cannot effectively be managed by the individual authors and publishers. They cannot go along these corridors and see if someone is photocopying their work; they cannot

go trawling through the Internet continually to see if somebody has scanned their entire book online and transmitted it to a thousand people, thereby flooding their entire potential market.

It is very difficult for individuals to protect their rights and protect their livelihoods. So it is important that not-for-profit copyright agencies or copyright collecting societies, like ours, can act on their behalf to detect infringements and to enforce their rights. We ourselves, though, find it very difficult under the current law to have the necessary power and authority to deal with all the copying that is brought to our attention, including all the infringing copying.

The government wants us to facilitate legalised copying by licensing the copying and making a market of what is currently infringing and pirating photocopying and Internet digital copying. But when we detect the copying, we find that the works copied are those of not only the top 150 publishers in the Australian Publishers Association but also, in fact, the tens of thousands of publishers and authors who are publishing journals from their university departments, who want to get paid for that copying, and textbook authors who are writing for primary schools. Unless there is an easier way for us to represent them, we have to find them and obtain membership from them in order to license that copying and obtain the payment. Until we can license them and obtain the payment, there is not much incentive for an author or a publisher to go through the paperwork.

What we are proposing here is a kind of deeming provision in the Copyright Act, such as applies in Canada and the UK, which allows the collecting society to license all the infringing copying of works which are detected and protects the copyright agency in that activity by limiting damages in case an author or publisher would not want to authorise it and would want to be excluded from the scheme. It also gives the collecting society the right to represent all copyright owners, unless copyright owners actively exclude themselves from the scheme and do not want to be represented. Otherwise, it is very difficult for us to represent authors and publishers individually. There are tens of thousands of them who are now using the new technology to publish their works.

**CHAIR**—There is a Canadian provision along those lines?

**Mr Fraser**—Yes, and there is one in the UK. They work in different ways, but they give the copyright collecting society more power to represent all those thousands of authors and publishers in the community and, thereby, on the other hand, legitimise the copying as well for the users by offering them comprehensive licence. Without that it is too difficult—there being thousands of users and thousands of owners—to be able to give comprehensive licence to the users to get on with copying and paying the copyright owner.

I think that provision would be a powerful provision for a copyright collecting society, such as ours. I do not think it should be applied to any copyright collecting society that was not transparent and under government scrutiny, such as ours is, as a trustee, but I think it necessary in practical terms.

I would now like to turn briefly to a contentious issue and just touch on it. As you may know, the Copyright Amendment (Digital Agenda) Bill 1999 was tabled—and I believe that it has been referred to your committee—to which, in due course, we will be making



submissions, if we may. I would say here in an overall sense, a global sense, that, with the exceptions that apply to libraries, which would allow libraries to copy entire works—say chapters from a textbook where that is an entire work—or entire articles from journals, while those journals are for sale from electronic web sites belonging to the authors and publishers, the libraries themselves could sell online those same articles and chapters to any user who requires them for research and study and charge a fee to that user for that online service or, indeed, photocopying service, but without payment to the author and publisher who is trying to market that work in the same way online. This amendment to the act, in my view, would breach our obligations under the WIPO Copyright Treaty and consequently would breach our Australian obligations under the TRIPS agreement. It would amount to piracy under the terms of TRIPS and WCT.

I am sure you would get an argument one way or the other from lawyers on either side about that. In any case, it was put to me by a visiting American head of a large publishing house yesterday morning that he would see it that way, that he would refer the matter through his government to the World Trade Organisation juridical body and, if that were, in fact, to be the case, that Australia would possibly be subject to trade sanctions, including cross-sectoral trade sanctions. It is my view also that that particular provision does not meet our TRIPS obligations.

I turn to another subject: I referred to this distributed networked environment in the digital paradigm and also to photocopying on thousands of machines in corridors and offices, in corporations, where books and journals are being copied all the time with very harmful cumulative effect. Part of our problem here is the great difficulty we have in gathering evidence of this kind of infringement—a pharmaceutical corporation, for example, where they are copying continually in their R&D department from all the scientific, technical and medical journals that they use, and they are not subscribing to those journals. Consequently, the prices of those journals are going up and up because the subscriptions are going down and down; you are getting into a vicious circle which is not good for our members and, I would submit, not good for the community.

It is very difficult for us to get any evidence of that kind of copying within a corporation. And, were we to get evidence, we would have evidence of only one instance of the copying of a single article. It is almost impossible for us to prove the systematic copying, the cumulative effect of that copying, the trend, and it is that systematic use that is crippling and eroding the legitimate market of our authors and publishers.

**Mr MURPHY**—What if you got a search warrant?

**Mr Fraser**—I think we could try and get something like an Anton Piller order, but the courts are very reluctant to give that kind of order. It is very expensive and in any case the value of the infringement is going to be of that copying of that one particular article that you happen to come across, not the fact that year in and year out they may be copying and making multiple copies and distributing them by putting them on their Intranet and sending them worldwide. These are problems that are now posing fundamental structural issues for our members' businesses for publishing business, because in fact anybody can now have access cheaply to technology which makes them a publisher—a secondary publisher—of what had previously had to be printed by a publisher.

I am afraid I do not know what the best answer for that is, but we know that when we talk to a corporation, while one corporation like BHP said, 'Oh, we want to be a good corporate citizen. We respect intellectual property. We want people to respect our intellectual property and we will enter into a licence with you,' that, unfortunately, has been the exception. Many corporations ask us to go away and to prove that they have been infringing copyright and when they see us in court, if they see us in court, they might talk to us about licensing copy. They do not deny that they are copying. They just invite us to prove it. That is a very big hurdle for us as a representative of an author or publisher and an almost impossible hurdle for an individual author and publisher, especially when they want to keep their client who is subscribing to or buying their work.

The next difficulty we have in relation to that is the difficulty of showing the ownership of copyright—the title, the trail of ownership—because publishing is an international business. The primary publisher might be overseas, the author might be overseas, the illustrator might be overseas or local or moved, sometimes the contracts are informal and when we are put to proof of copyright, sometimes it is very difficult for us to prove the chain of title of the work and all the included works within it.

Again, I am sorry to say that I do not have a proposal for you as to how that could be best ameliorated. Obviously we have to prove that we do represent the rights, but the fact is that it is very difficult for us to do that and often it prevents us from taking infringement actions. If the hurdle could be lowered there that would, in certain circumstances, make life easier for copyright owners.

We were concerned in the exposure draft of the bill about the use of copyright circumvention devices by individuals and libraries using the exceptions under the Copyright Act and the ease with which they could be obtained. However, we note, gratefully, that that has been tightened up in the new bill and, although it will be possible to obtain copyright circumvention devices to make use of the exceptions, those who trade in them and sell them are put to a higher standard in selling them to users who will indeed only use them for fair purposes.

Again it is a concern to us that copyright circumvention devices will be available in the market. We note that the government has tightened up the ease of availability and it is very hard in a developing market to know whether that will be good enough to protect our members' rights—our authors' and publishers' rights—sufficiently. We would like to keep a watchful eye on how copyright circumvention devices are actually used in the community as to whether they entirely erode the market by allowing large numbers of people and institutions to hack into commercial databases.

**Mr MURPHY**—Does that mean, Michael, that the circumvention devices are now prohibited in the new bill?

**Mr Fraser**—No. They are allowed and they are allowed to be provided to libraries who may use them to hack into commercial databases for certain purposes, and also to individuals under the fair dealing provisions who can use copyright circumvention devices but only to a limited extent.

So they are allowed to be used, and obviously they are a very powerful weapon when authors and publishers are trying to market their works online and they are protecting them by encrypting them. That some users will be able to lawfully obtain and use them is of great concern to us. There are restrictions in the act and they are tighter than had been the case in the exposure draft. We simply do not know whether the use of them will be restrictive enough not to erode the market.

Moving on to a last couple of matters, if I may, we have made numerous submissions since the 1980s relating to the Copyright Tribunal. The Copyright Tribunal has jurisdiction, in our case, for the copyright agency for the statutory licences which allow copying in educational institutions and government departments in return for equitable remuneration. We are well satisfied with the Copyright Tribunal's expertise in dealing with these issues. We have made many submissions, however, that they should be better resourced because cases are taking years to come to decision. It being a commercial tribunal, really they ought to take a matter of months to come to hearing, and to get a decision, I think, ought not to take more than six months. At the moment, cases are taking three years. I think the tribunal ought to be better resourced by government.

Finally, we have also made many submissions over the years to government that other licences, apart from the educational and government statutory licence—commercial contractual licences with corporations, media monitors and others and all these other licences—ought to come under the jurisdiction of the Copyright Tribunal in order for these matters to be dealt with more quickly and more effectively without the cost and drama of going to court. We should be able to go to the Copyright Tribunal to deal with copyright licensing issues, including setting rates where the parties cannot agree and setting conditions of licences where the parties cannot agree. We would be happy for the tribunal to have a larger role.

From our point of view, it would facilitate our ability to negotiate with users who are doing this copying because at the moment they say they are not willing to cooperate and our members are often not willing to go to court. But if there were a less expensive and less formal way, such as a copyright tribunal that these disputes could be brought to, then I think we would far more quickly achieve an equitable licensing regime in areas outside the statutory licence. We would like to see the Copyright Tribunal take a greater role, and that would establish the conditions for equitable remuneration for our members and a fair deal for the users as well.

**Mrs VALE**—Part of that equitable solution really is the speed with which you can get some sort of commercial satisfaction, isn't it?

**Mr Fraser**—That would be essential in our mind. We would not be likely to refer matters to the tribunal when it takes three years, as it does. I should make it clear that, with respect, I believe the tribunal is working extremely hard with cases before it but it is just that it lacks resources.

**CHAIR**—Thank you. As you indicated, we are expecting the formal referring of the bill to us. It has been intimated but we do not actually have the piece of paper yet. That will come in due course, no doubt. Before going into a couple of things, it would assist us if you

could identify very briefly just what are the major issues you see as outstanding with the digital bill? There is the question of the use by libraries.

**Mr Fraser**—Libraries have the ability to photocopy and transmit to users whole articles and chapters for research and study and charge a fee, and not pay the author and publisher for that use when the author and publisher are trying to provide the same service and collect payment for their work. It is true that the library now has to own the work in its collection and it is true that the use has to be for research and study, but I believe that that will just be a tap of one key so that they can say, ‘Yes, it’s for research and study’—a very broad term. That seems to us to be extremely unfair and extremely damaging to the development of an online market.

**CHAIR**—There is a reason for asking this. Obviously, with a short period of time to deal with the bill, it would be preferable for us not to have to deal with every clause in the bill, many of which will not be contentious and not in issue. Without precluding anyone from raising other matters, it would be useful if we could narrow our consideration of the bill to those matters which are truly in contention. That is why I am asking, because it will help us.

**Mr Fraser**—We will be making a full submission in due course. I have not yet had time to study it really closely, but other areas that jump out—and I think perhaps that is what you are asking me—include that we have a concern, in the digital environment, about the ability to copy insubstantial portions of works. We are not sure what that means, first of all, in the digital environment—one per cent of a work or one or two pages of a work. Section 135ZMB talks about one per cent of the total number of words in the work. That could mean, say in an encyclopedia, that a very large proportion of the encyclopedia could be used in that way without payment, and that is precisely the kind of thing that Britannica and Encarta and others will be marketing online. We have a concern about accompanying illustrations which may be copied without additional payment from the user. We think that in a multimedia environment where works include other works, including artistic works, that it is an outmoded notion to think that an illustration is a worthless accompaniment to the text. That is not the way people read anymore, and we think that the exclusion of payment for the copying of illustrations is unfair to visual artists and also unfair to the authors of the text because they have to then share their payments with artists but without receiving a payment from the licensee.

Another area of concern that I have noted, and I just note again, is the copyright circumvention devices. We are just not certain about that. I think those are the main areas of concern. The way the statutory licence will operate, we reserve our position to make a comment on that—we are still studying it very closely—and perhaps the other matters as well.

If I may make one comment overall briefly, of course the bill has been tabled and it is an enormously detailed bill. One section of it dealing with the statutory licence for copying by an educational institution in exchange for payment, equitable remuneration, seems to me in principle to take a promising tack by enacting broadly based copyright principles.

Other areas of the bill, though, go into enormous detail in regulating the digital online market, the digital online economy. That market does not really even exist yet, and it is a great worry that it should be so very regulated while it is still taking shape. The effect of that kind of very detailed regulation about fair dealing provisions and library copying without any kind of analysis of market effect or economic impact is of great concern to us. I think in a fast-moving environment the broadly based part of the act, the statutory licence, is a better approach to take than trying to micro manage a very fast-changing technological environment and a fast-changing market where people are using and copying and reading works in different ways.

I am sorry; I forgot one matter there. We are concerned about the deeming provision in the act. It should never be the case that copying should be deemed to be fair by quantity—10 per cent or a chapter for copying for research and study should not be deemed to be fair. The fair dealing provisions—the factors that apply to fair dealing, the effect on the market, the type of copying, the purpose of the copying—should apply. But it should not be the case that a quantity of copying should be deemed to be fair. I think that could be very damaging.

**CHAIR**—I understand that, but isn't there a need for some sort of rough working guide? What do you do in the university library? You have got a notice up on the top of the photocopier now saying what it says. From a philosophical point of view I understand what you are saying, but let us bring it down to the practical reality of how this operates. A lot of university students would say 100 per cent is pretty fair.

**Mr Fraser**—Yes. It might be fair to an individual student, but there are 15,000 educational institutions all just taking their fair 100 per cent. There is an educational publishing industry. It is an industry that is providing the materials for our schools and for our universities which we will destroy if the fairness does not cut both ways.

**CHAIR**—I understand that. I suppose what I am suggesting is that for the practical day-to-day use you need some sort of certainty. For an individual user to have to decide what is fair in certain circumstances, not knowing the law or the background, I suspect is, to use a colloquialism, a big ask.

**Mr Fraser**—Yes. I take that point and I appreciate it. In an ideal world, I would have liked to see us sit down with the educational institutions and the libraries, with the government preferably as, as it were, an honest broker at the head of the table to keep everyone to the point, and work out an industry code of practice. By putting an article or a chapter on the departmental database and allowing everybody to download it means that there is no market for that particular textbook anymore because you have got the chapter on the physiology of the eye from this one and you have got the chapter on the physiology of the ear from the other textbook. No-one is buying textbooks anymore. Maybe that use is not fair. But for an individual student going through the library pulling down a book from the shelves and making a photocopy of that for their project, maybe that is very fair. Those would both be fair under the deeming provisions, arguably. But are they really the same things?

I would like to see, obviously, a simple and straightforward industry code of practice which actually takes account of the nature and the purpose of the copying and the potential

effect on the market, and which comes up with some simple rules—at least broadly based rules—that would separate out those kinds of ends of the spectrum. Maybe it is too late in the day for that. Another way of looking at it would be to allow it only for analog copy. After all, these rules have been stretched from a person sitting in the library and taking notes from a book to the photocopiers in the 1970s where you had to wait a minute for the machine to warm up, and now they are stretched to the Internet, as if they were all the same thing. I do not think they should apply in the same way to the digital at least.

**CHAIR**—Shouldn't we be going back to some sort of basic principles here?

**Mr Fraser**—Yes.

**CHAIR**—Your complaint about libraries and being able to digitally copy—I am still trying to get on top of all the technicalities of what is involved in that—is that, effectively, in a digital age, you can copy virtually anything. There are no time or necessarily cost constraints in doing it. If you are photocopying a book you have to stand there and photocopy the book, and the product you get at the end may or may not be worth reproducing again. It has a kind of half-life, if I can put it that way, whereas, in a digital age, that is not true: you can have a copy which is just as good as the original which can be instantaneously transmitted, downloaded or whatever.

**Mr Fraser**—Yes.

**CHAIR**—I understand your argument on that. The question is: how do we address it? Do we address it by specific constraints which we try to put in place, and specific parameters that we draw around it as in parts of the bill, or is there a need to go back to some basic principles?

**Mr Fraser**—I would say, ideally, the need is to go back to basic principles and see how they apply in different circumstances. I would stick to the basic principles in a very fast-moving and elaborate environment where people are using the technologies in very imaginative and new ways all the time—and so they should. Some things will be systematic and really commercial in nature, even though it may be within a not-for-profit institution like an educational institution. It will certainly have a commercial impact on the people who have invested in creating the work. Some things will be the kind of secondary research and study uses which authors and publishers have always been happy to allow students, researchers and readers in general to have.

The problems in drawing the line, though, are the broad factors which you have said, plus the fact that the publishing is no longer a mass medium. It used to be that the publisher had the means of production and there would be a mass print run and they would be distributed. Now it is always a one-to-one student who wants this textbook. It is always one-to-one but multiplied a millionfold on the Internet. When you look at the one instance, the student reckons that 100 per cent is fair because they are studying. But each one of those students can make use of the technology in the same way, and that expropriates the entire market unless fair dealing is kept within narrow bounds because of the power and the reach of the technology. I think broad principles need to be applied, and they will be applied with

different effect to analog copying as to digital copying. With respect, I believe the mistake in the bill is to equate the two.

**Mrs VALE**—I note the time, but you actually mentioned the role of government in education. Did you have any suggestions about what the government could do to educate, if you like, the whole Australian population about how important this is? You talked about—I think you used the words—a cultural shift. From what I can see so far, I am inclined to agree with that. There have been breaches of copyright where people are not even aware that they are actually breaching copyright, or somehow have a little bit of an uncomfortable feeling that maybe they are doing the wrong thing but can rationalise it away. Do you feel that if the government put more resources into the Copyright Tribunal and perhaps strengthened its bite, if you like, and even established, as part of the Australian Federal Police, a particular copyright unit that was just looking at copyright infringement, that that could be one way the government could send signals to the whole population that we are really serious about copyright enforcement?

**Mr Fraser**—Yes, I would adopt both those suggestions. In addition, the sanction and the judgment end apart, although it might fall outside this brief to say so, I think about teaching respect for copyright in our educational institutions as part of the curriculum and what I hope will be a shift in Australia's terms of trade. We will not indefinitely be a Net copyright importer. We are clever and intelligent enough and back ourselves enough. We have the expertise in copyright law, telecommunications and education. We have the talent to become a Net copyright exporter to the world. This means that a cultural shift does have to take place from the idea that we rode on the sheep's back or that we dig it up and sell it cheap and buy it back in the shape of a watch.

We are the ones that create the software, the films, the music, the books and the textbooks. We provide these educational and legal services online to the world. This needs a profound change in our way of thinking, so that copyright intellectual property is not something off on the side, but something essential to our national welfare and our national finances. That is an educational campaign as well which governments should be promoting by every means.

**Mrs VALE**—Would it be fair to say that it is a projection of a vision of being the clever country? We really have to invest in that to protect that.

**Mr Fraser**—I think we do have to invest substantial amounts. I think that this will be the greatest treasure of our nation. The returns will be manifold, repaying that kind of investment, if we turn ourselves into a knowledge based economy. That means educating ourselves into respecting works of the mind as intellectual property, paying for their use and attracting talent that does not have to rely only on generous government grants and subsidies, but professionalises it so that our best minds are drawn into creating and producing new innovative, imaginative, intellectual property copyright works for the benefit of our community and for our cultural and economic development, and for our exchange and trade with the region and the world. I believe a lot of work could be done by government in educating our community into that culture and economy.

**CHAIR**—I want to just explore something else with you because I want to try to understand the background to the digital agenda bill. I would like to know about arrangements with libraries. My example would be university libraries but there may be other ones. When I was doing an undergraduate degree, you went to lectures and the lecturer often handed out a course guide, which was a bit of an overview of the topics, and a list of references that you could go off to the library and find if you were so motivated. If your mate did it, you could pinch his notes. You did that sort of thing as well.

Now I go back and give guest lectures from time to time at university. I go in and find that each of the students has a booklet—at least this big if not bigger—of a collection of photocopied or printed articles on the subject. If I am lecturing in health, law and bioethics, which is an area I practised in, I find that everything that has been written on this subject is collected together and each student has a copy of these articles.

Presumably, none of these articles infringes the 10 per cent rule because you take one article from one journal and another article from another journal, et cetera. You take maybe one chapter out of a textbook. You take one section out of this piece of legislation and one out of that piece of legislation, and they are all collected together. You have in the end what we used to call a legal textbook or a casebook, but it is done by the department and the university. That is happening. Is there an arrangement for copyright fees in relation to that? I presume it happens in every department of every university and tertiary institution in the country, and maybe schools as well. What is the basis of the arrangement?

**Mr Fraser**—Thank you for raising that example. Indeed, the universities have used the act to sometimes invest in multi-million dollar—and in most cases at least a good part of a million dollar—print shops where they buy these so-called docutech machines which are phenomenal digitally based printing machines that bind out these beautiful copies. They then sell these course packs, which are made up of articles and chapters, to the students. Under the statutory licence, they pay a fee of 5c per copy page to us which we distribute to the authors and publishers of those works. However, they now propose to put those works onto the database and transmit them to students under the fair dealing provisions because each student is going to access that database for their research and study. The universities propose to do that under the fair dealing provisions of the Copyright Act. That is a very good example of how the way the law applies is not the same in the new technologies. Because the copying is not done by the institution but by the individual, they say they need not pay for that copy.

**CHAIR**—That is why I want to take it step by step. Are you happy with the arrangement where they produce the course booklets currently not in an electronic form? Perhaps ‘happy’ is not the best word—is that an arrangement which you can live with? You are not saying, ‘Let’s go back from that’?

**Mr Fraser**—‘Happy’ is too strong a word, but we can live with that arrangement.

**CHAIR**—You can live with that. What is being proposed now is that, instead of having that collection of articles in a hard bound collection produced by their print shop, this would be digitally put on a database. A student would then be able to go into, for example, the law



school database for that subject and the whole collection of articles would be there. You would just click on what you wanted and download it. Is that their proposition?

**Mr Fraser**—Yes.

**CHAIR**—Their proposition is that, because they do it that way, licence fees should not apply.

**Mr Fraser**—That is right. That is their proposition, if I may speak for them. There can be no doubt that it is their proposition.

**CHAIR**—Why isn't that a three-card trick?

**Mr Fraser**—Yes, and not only that but, if I could also relate it to the library provisions, say, hypothetically, that was shut down and they were not allowed to do it under the fair dealing provisions, they could certainly then go to the library and download it under the bill as it now stands. The student could go to the library and get all the articles and chapters that they wanted without payment to the copyright owner, although they would pay the library for the service.

**CHAIR**—I am trying to relate it back to the hard copy. If there are some principles in relation to hard copy which may not be ideal from your perspective, but nonetheless are workable in the case of the hard copy, a student can go into the library, obtain a journal off the shelves and say, 'I want to photocopy this article from it,' and photocopy that article. That is okay.

**Mr Fraser**—That is okay.

**CHAIR**—But you are paid a fee for that.

**Mr Fraser**—No, we are not, and we do not want to be paid a fee for that. If a student is wandering around a library doing some research and they find an article that is interesting for their research and study and walk with that to the photocopying machine and put it on the machine and copy that article, then our authors and publishers do not need to be paid for that kind of secondary use. That is not the kind of use that destroys their market or for which they should have a legitimate return. The limiting factor of that is just the physical limiting factor really.

**CHAIR**—There are two limiting factors. The first one is you have to put the money in the machine, so there is a cost. Whilst that may not be a big cost per article, you are still going to be limited cumulatively by the number of articles. So there is an economic factor. The second one is the time and effort involved in doing that.

**Mr Fraser**—They have to get on the bicycle, they have to bicycle down to the library and they have to make a physical copy.

**CHAIR**—So, with the digital electronic form, neither of those limiting factors apply?

**Mr Fraser**—They reach over from their bed and download it.

**CHAIR**—I suppose there is the cost of a floppy disk if you use a floppy disk, but otherwise it goes onto your hard drive or whatever anyway?

**Mr Fraser**—It is infinitesimally small and the product is perfect. It is the digital publication in perfect form which can be retransmitted to 10 of their friends who retransmit it to 10 of their friends. I once had this done for me. You have to go through only three or four reiterations and you have got a million users.

**CHAIR**—I understand that. So what are you proposing—that the library should not be able to copy those journal articles in digital form, for example or, if they copy them, they can only be browsed and not downloaded?

**Mr Fraser**—If they are allowed to copy them and download them to users for research and study and they are charging a fee for it, then the author and publisher ought also to get paid a commercial rate because that service is in direct competition with the book or journal which the publisher is marketing online.

**CHAIR**—If the publisher is marketing it online so it is available online, why should the university be entitled to circumvent in effect the publisher's market, if it is already available? It is not a question of the information not being available.

**Mr Fraser**—I would like to take that point of view too, but there has been since 1981 a statutory licence to educational institutions precisely to circumvent the publisher so that universities would be guaranteed access to copies of works. The right of the author and publisher to refuse permission to copy was taken by that statutory licence. But the statutory licence does require equitable remuneration to be agreed between the party or, failing that, the tribunal.

The question I take it to be, with respect, a very penetrating one. Why do you need that guaranteed access now in a digital environment where, in effect, everything will be available online and there will not be such a thing as not available?

**CHAIR**—Or to put it another way: why cannot there be a distinction between what is available online and what is not? You can preserve the current arrangement for that which is not available online, but to say we are moving into a new world and it should not just be translated where things are available online—that is, your statutory licence can still apply where material is not available online. Obviously, much currently is not available and some probably will continue not to be available online, so you are preserving the current situation without carte blanche moving into the digital world.

**Mr Fraser**—That is what our members would say. If I could speak for the other side, they want to be guaranteed that they will be able to make multiple copies whether the publisher wishes to allow them to or not. They want to be guaranteed that their payment will be equitable as determined by the tribunal in the last resort.

The statutory licence is a derogation of our members' rights to give or refuse permission of access and copying to the user on their own terms, but at least it provides for equitable remuneration. In the case of the current library provisions, it does not even provide for equitable remuneration for what, although is an individual transaction, will amount to a systematic use of our members' work online even when it is commercially available online.

So we say that it ought not to be allowed where it is commercially available for the libraries to copy or, if it is, then they should pay a fee to the author and publisher as well as their legitimate fee that they charge for the service. In a way, it surprises me that I should have to argue it. Perhaps I have been saying it too long, but it seems so startlingly self-evident that the author or publisher should share in the exploitation of their work.

**CHAIR**—We have not heard from the universities and the libraries yet, but no doubt we will. So, in a sense, we will continue to explore these details pertinent to the bill and the inquiry. I just wanted to spend some time examining that so that I understood where the argument is at least. Thank you for that. As there are no other questions, I would like to thank you for your submission and for coming along this morning and discussing it with us.

**Mr Fraser**—Thank you for giving us so much time.

**CHAIR**—We will now have a short adjournment.

[10.54 a.m.]

**BRITTON, Mr Charles Crawford, Senior Policy Officer, Information Technology and Communications, Australian Consumers Association**

**CHAIR**—Welcome, Mr Britton. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received the submission from the ACA. Would you care to make some opening comments?

**Mr Britton**—Yes, if I may. I am particularly interested in talking about the consumer position in copyright enforcement in the context of digitalisation. Our submission noted the need for business models to take account of the changing basis of value in a world of pervasive networking. We touched on themes of timeliness, navigability, authenticity and context as stores of value, as well as simple possession of copyright. It is interesting that that has been picked up by some of the key players in industry. Coles Myer's chief executive, Dennis Eck, in the *Business Review Weekly* on Friday, 2 July 1999, said:

We are entering an era where things will be very different. . . . In this atmosphere, the winners will be the companies that have title to goods and ideas for the shortest time with the least investment for the most profit.

He is talking there about the velocity of information, I think.

There is a lot of alarm about copyright on the Internet. It is almost like Scott McNealy in his famous statement, 'You already have zero copyright, get over it'; whereas what he actually said was, 'You have zero privacy, get over it.' That theme was picked up in the words of Oliver Freeman, Vice President of the Australian Publishers Association. In the *Sydney Morning Herald* on 4 June, he said:

Far from being a threat to authors' copyright, the Internet opened up possible new revenue models. . .

Anything which can take an electronic charge, like a chapter of text which has been created or captured digitally, can communicate vital information about the transactions of which it is part—where it is, who the user is, whether it is being copied and so on. . .

In bringing together the themes of commercial opportunity and privacy, he touches on the first of several trends which concern us in terms of threats to consumer access to information in a digital environment—that is, if you like, personalisation. But with pervasive rights management technology spread through the digital domain, it is quite possible to be intrusive monitoring of people's use of information. In theory, that can be worldwide. It is a World Wide Web, after all.

We think, under the circumstances, in the trade of people's personal intellectual property—if you like, their private information—for commercial intellectual property, consumers may not always get the best of the bargain. An interesting example reported on Wired News on 25 August was that Amazon.com set up shopping communities which let

anyone view books, movies and CDs ordered by Amazon.com customers at corporations, non-profit groups and government agencies. So anybody can see who has bought what. The trouble was that Amazon did not ask groups for permission before using employees' and members' orders to create the corporate profiles that appear on its web site. So you are starting to see, if you like, the use of that digital identifier to create value perhaps not referenced to the consumer of the goods.

The second trend of concern is that of ephemeralisation, which is the movement of content into impermanent states over which the consumer may have no control in the end. So you are talking about the pay per view, per every viewer copy sort of situation. In a sense, the consumer potentially loses the right of reuse that they currently enjoy with paper type copies—where you buy a newspaper, you share it with your wife, you give it to somebody else, it circulates around and you do not have to pay for each thing. You can file it in a filing cabinet. It is not ephemeral. It does not disappear once you have read it.

This also relates to the concept of atomisation, which I touched on in the submission. The content gets broken into smaller and smaller units, each of which can be charged and accounted for separately and tracked individually. This marries into the fourth trend which is of concern which is microenforcement. So you get computer based compliance and movement tracking with a robotic efficiency down to that automatic level.

An example of something which is a concern is in the United States Uniform Computer Information Transaction Act. Legislation has been approved by a group that is seeking to harmonise state laws. That enables software vendors to repossess software by disabling it remotely, so you are getting this potential for remote manipulation of things that people have bought and paid for, but the connections are there. You get the micro penetration of control. All those trends potentially end up leading to a significant shift of paradigm—to use an overworked word—from perhaps the control of copying to the control of reading, which is a potential serious disadvantage to consumers.

We have commented on the limits to legal enforcement in our submission, and one of our submissions is that we do not feel there is any need for further legal enforcement at the consumer level. Perhaps we need fair use provisions such as in the copyright simplification suggestions, better value propositions from business unencumbered by technological strings, education for consumers where that is relevant and possibly even legal protection for access. An interesting view on that by Lawrence Lessig, who is a law professor at Harvard, was published in an editorial in *The Economist* called 'Digital rights and wrongs'. I thought his financial paragraph was quite telling. He said:

After repeatedly strengthening the rights of copyright holders in the face of new technology, therefore, governments may begin to think about protecting the consumers of intellectual property—perhaps by limiting what digital-rights-management systems can do. Mr Lessig observes that the day may soon dawn when students are taught not of "copyright" but "copyduty"—the legal obligation of copyright holders to provide public access.

I think the consequences of overzealous copyright enforcement and intrusive technology could be threefold. It could be diminished equity in access. There is talk of a digital divide, if you like, or the information rich and the information poor. With ephemeralisation, you do not have any second-hand type market and perhaps the concept of circulation disappears.

A second consequence could be the inhibition of innovation, because one of the things that consumers have in the final analysis is the right to say, 'No, I won't buy something.' That resistance could then lead to people failing to adopt innovation and it could stifle the diffusion of innovations. An example at the moment is the adoption of DVD, with its international zone coding and the way people are perhaps reluctant to embrace that.

The third consequence could be a reduction in the velocity of information so that you may even see reduced economic growth in the final analysis. It could even be that an ironic self-limiting factor for the information revolution which has occurred chiefly because of the free and easy circulation of information will, when it comes around in its final culmination, actually lock up the very circulation of information that gave rise to it.

**CHAIR**—Thank you. You say that there is no need for any further enforcement provision so far as the consumer is concerned. Much of the evidence we have had is to the contrary—that is, that whilst there may be enforcement provisions on the books, the mechanism by which they can be utilised is unwieldy, has difficulties in proving chains of title, has considerable delays built into the system, et cetera. That suggests that there is a need to continue to reform and modernise the enforcement system.

**Mr Britton**—Yes. In our submission we did differentiate between what we called commercial misappropriation, I suppose, and consumer level copying. I think it is quite realistic to say that there are difficulties in commercial enforcement. That is a business to business problem, if you like, and I think that certainly needs to be addressed. We talked about the fact that there is a need for consumers to be protected against counterfeiting, if you like, and people marketing things falsely as Dior bags or Gucci ties or whatever. That element of counterfeiting definitely needs to be addressed. We agreed with that.

**CHAIR**—One of the problems with the consumer level is that, if we are talking about software, the Internet and electronic digital forms of communicating information, I am not sure that the dichotomy between consumer and non-consumer continues to be valid. It seems to me that, to modify another expression, we are all publishers now.

**Mr Britton**—There is an element in that, I agree. But we are saying that in some ways a lot of those industries are quite capable of looking after themselves. When I look at the technological type rights management system—which is where a lot of them are putting their weight—in the sense of what I was saying before, I am trying to look at the balance of that.

As Scott McNealy said, there is zero privacy. Perhaps there is zero copyright. People are a lot more alarmed about the copyright than about the privacy aspect of things. A lot larger companies and very substantial interests around the world are flat out protecting their intellectual property rights in the Internet domain. There is not quite the similar alarm about the impacts that might have on consumption, on people's use of that technology. I am just trying to establish a balance between those two.

**CHAIR**—Yes. Although now that somebody has managed to hack into Microsoft's mail system, there may be some more acceptance of that. But, generally, my view is that when people use the Internet they know that it is not a safe environment. They do not presume

that people have willy-nilly access to it, but they accept that it is not a safe means of transmission, that there is the possibility that somebody else could have access to it.

**Mr Britton**—Yes, it is a public domain, essentially. But there are quite effective ways of locking things up.

**Mr CADMAN**—But that is the point: Microsoft could not lock it up.

**Mr Britton**—With respect, that was a security breach on Microsoft's part, as far as I understand it. They did not get it right, but it was because they did not code the thing correctly in the first place. It was a mistake, essentially, rather than somebody cracking it. There has been talk in the press recently of breaking encryption on transmissions, but the thing about that is that it is a very computationally intensive thing to do. In that sense, it is a question of making it uneconomic or untimely, which goes back to what I was talking about in terms of where the business value lies.

The business value for Microsoft, for example, has not lain in them locking up their software; it has lain in them doing things in the marketplace such as innovating rapidly. In some ways, we do not approve of some of their marketing styles, if you like, such as the constant revising of software, the changing of file formats, et cetera. But that is how they have used their business model to address how to grow their market and how to protect their interests in ways that are not necessarily to do with saying, 'This is ours. We will lock it up so tightly that nobody can look at it.' They have used marketplace value and created that to police their rights. I suspect they will go on doing the same on the Internet.

**CHAIR**—You made a comment in relation to parallel importing suggesting that you did not believe that the free admission of such items and the allowing of parallel importing created additional piracy. Do you have any evidence for that comment, or is that just an assessment that there isn't any additional piracy?

**Mr Britton**—You probably have evidence from people more knowledgeable than I about the difficulty of establishing levels or otherwise of piracy, so I think we are in a bit of a swamp there anyway. But, from our assessment, we do not see that. It is difficult to establish the levels at all, so it is difficult to establish a baseline situation of more or less. I have heard comments from people at conferences about the fact that any trends were established before the decision about parallel imports was taken. I guess there are some logical conclusions in looking at the fact that parallel importing creates a price premium and that one of the places where 'piracy'—commercial misappropriation, perhaps—flourishes is where there is an increased value proposition to pirate.

Part of the point we are trying to make is that it is the gap between the real value and the price charged, essentially, which gives people the opportunity to pirate commercially and also, to some extent, in the domestic consumer environment. By and large it is not completely free. There are costs and people make balances. But if people see the proposition being made to them as fair and good value, by and large people will not invest the time and effort in copying; they will simply go and pick it up. That is where another source of value lies: in the utility to the person. Businesses usefully target that sort of area rather than depending on enforcement. I guess that is what we say.

**Mr CADMAN**—You seem to be not concerned about the level of prospective abuse in Australia by international piracy and you provide statistics about Australian losses, mainly in IT and electronic areas. The committee has taken evidence within the last couple of days from the Business Software Association which claims that 30 per cent of all PC software programs are illegal copies. Would you agree with that?

**Mr Britton**—I really do not have a basis to challenge it, but I also noticed in a report that I have a copy of that 10 years before that they had estimated it would be 50 per cent. So even on their own figures there has actually been a decline over time. They were talking about a number that they admitted themselves was actually lower than their previous estimates. In relation to the 30 per cent type of estimate, I could not comment specifically on their methodology because I am not aware of it, but very often those sorts of things include an approach that suggests that every copy is a lost sale, which may or may not necessarily be the case.

**Mr CADMAN**—They were only talking in percentage terms. They do then go on to extrapolate it into dollar terms, it is true, but they are saying that 33 per cent of all PC software programs are illegal.

**Mr Britton**—I think that is consistent with the sort of figure that is in the submission.

**Mr CADMAN**—Would you say that is low use, or low abuse?

**Mr Britton**—If we take the figures that I was quoting in my submission, for 1998, they cited that for software it was 31 per cent, which is exactly what the BSA says. However, if you try to look at it as a global comparison, only Germany was worse, at 28 per cent. On those numbers that we were looking at there, and so far as you can get some sort of international norm, you would have to say that, yes, it is low. That was using the figures of the International Intellectual Property Alliance. Without necessarily saying I would agree with those figures, on the benchmarks they have established Australia is low in the world and, in fact, is beaten only by Germany, at 28 per cent.

**Mr CADMAN**—The point they are making is that if, rather than importing pirated copies, we were doing that work of software production and reproduction here in Australia that would be better for the Australian economy and better for Australian jobs.

**Mr Britton**—It would really depend on what copying they are including, because if that is including copying by people in offices and homes then it is not imported piracy as such. I do not know what percentage of the number they are talking about there would be imported holus-bolus as product and how much would be copying in the confines of Australia in general. Without knowing the mix, it is difficult to say.

On economic activity that would be generated, if by some means you were able to stop all that happening, whether all those people would in fact go and buy the software is the issue in terms of whether it would then generate economic activity. I am not necessarily saying that that is something they should or should not be doing. But on the question of whether, if you stopped them doing it, they would actually go and spend the money, the



answer may well be no. I think that puts a ring fence around what the consequences are, and I do not think it is a one-to-one relationship.

**Mr CADMAN**—That leads me to the point about the legality of the process and where the consumer stands in that. You would, as an organisation, say, ‘We are not going to get involved. We would not condone criminal activities.’ But we have had put to us that the civil respites require a lesser standard of proof, that there has been a reluctance to use the civil process and that the industry is generally looking for criminal processes.

**Mr Britton**—To my mind, there is a continuum of usage that ends up, if you like, down in the very ephemeral copies where, to see a thing over the Internet, it necessarily gets copied over the Internet and put on your screen. I think the digital agenda bill addresses some of those very transitory things. Coming up the scale, you have got back-ups, you have got copying vinyl discs onto tape, because your vinyl player is about to die, you have got the concept of people copying a CD onto a cassette so they can put it in the car or possibly creating a compilation tape to listen to and then giving that compilation tape to a friend. You are starting to come into a grey area there, but most of what I have already described most Australians would regard as fair use. It may be illegal under the law, and that is one of the things I am talking about, that if the law manifestly does not apply in practice then it is not held in good repute and then when you get to the grey area it is more difficult for people to make decisions. One of the things we would say is that there should be a fair use provision of some fashion which—

**Mr CADMAN**—For individuals, you seem to be saying, as distinct from any corporate area.

**Mr Britton**—Definitely, yes—as a consumer group we are interested in the behaviour of consumers. Certainly if people are taking material and re-manufacturing it, if you like, and then touting it as a genuine copy or even, for that matter, as a good enough fake, then, no, we do not agree with that at all. Then the consumers’ interest is to be protected from an inferior product or from being ripped off by people appropriating the premium. If people make a judgment they want to buy highly expensive goods because of a brand or because of a particular way they are presented, fine, that is their choice and they should get what they pay for and not be sold a counterfeit. So, yes, we would make a fairly firm distinction between the individual and the commercial.

**CHAIR**—If you go to the Sunday market and there is a Louis Vuitton bag for sale, you know it is not a Louis Vuitton, don’t you?

**Mr Britton**—Yes, and we would not approve of that being there.

**CHAIR**—I thought you were suggesting that it is only if people are being misled?

**Mr Britton**—Misled or being offered value that is not there, because it is not—

**CHAIR**—But they are not being offered value that is there—we all know it is not.

**Mr Britton**—It is not a Louis Vuitton bag.

**CHAIR**—That is right.

**Mr Britton**—They are getting a product which is not what it says it is, so in that sense it is a false product. If it was in some way a Louis Vuitton look-alike, which did not breach the ownership that those people have of that, I guess everybody would say, ‘Look who has got an imitation Louis Vuitton bag!’ But if it is being masqueraded as a legitimate product, then that is wrong, unequivocally.

**Mr CADMAN**—One of the things we are struggling with a bit is the sort of thing the chairman has hinted at, but it goes a bit further than that in that, when you are dealing with this environment, you may come across material which is imported and which does not meet Australian standards. Are you aware of consumers either being hoodwinked or inadvertently purchasing imported goods that do not meet Australian standards?

**Mr Britton**—I could not cite cases. It is one of the things that we started off saying we did not see as one of the big pressing concerns because we do not get lots of complaints about counterfeit material. I recently got a letter from, I think, IIPA on worries about safety issues and whatnot with regard to imports. I have not quite finished reading it, but I understand there are concerns in some parts of the industry about labelling and safety issues. To the extent that things are labelled in a fashion that leads people to think they have got confidence in them, then that confidence should be assured.

**Mr CADMAN**—That is good. We have had stuff from Mattel with regard to toys. Something that is legal in, say, the Philippines—and I do not know whether this is true or not—is not legal here. The size of a part that can be taken off a doll, for instance, may be legal in the Philippines but not legal here because it is considered dangerous. The parallel importing process would allow an importer to take a product which looks the same as the Australian approved product, but is really approved for sale in the Philippines, and bring it into Australia. Mattel then becomes liable for any damage or hurt caused.

**Mr Britton**—We would certainly be in favour of anything that is sold in Australia being in conformance with Australian standards, particularly safety standards.

**Mr CADMAN**—That is good. Thank you.

**CHAIR**—Thanks very much for your submission and also for coming and discussing it with us this morning.

**Mr Britton**—Thank you very much for your time.

**Mr CADMAN**—That really has helped us. Thank you.

[11.30 a.m.]

**BAULCH, Ms Elizabeth Mary, Executive Officer and Principal Legal Officer,  
Australian Copyright Council**

**CHAIR**—Welcome. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We are in receipt of the council's submission to the inquiry. I invite you to make some opening comments if you wish to do so.

**Ms Baulch**—I will not go through the submission in detail because the committee already has it. I will just make some brief comments to initially explain who the Australian Copyright Council are. We are a non-profit organisation. We receive some funding from the Australia Council, the federal government's arts funding and advisory committee. We carry out a number of activities. They include a free legal advice service and activities related to education and awareness about copyright, including publications, a web site and a seminar series. We have 23 organisations who are affiliated with us. They are organisations whose own members are owners of copyright. Some of those organisations have already made submissions and appeared before you.

Our activities do not include enforcement of copyright, so we are not involved in litigation. We do not have any role in enforcing copyright although, as pointed out in our submission, we do get inquiries from people who think that their copyright may have been infringed. We do give advice as to whether, in our view, their copyright may have been infringed. If it has, in some cases we are able to assist them to write a letter of demand to the other party. But that is a letter from the inquirer, not from the Australian Copyright Council, so we are not acting in a solicitor-client relationship there.

We do not collect statistics regarding piracy. I understand that some of those statistics and information have been provided in other submissions to the committee. We did provide to the committee some statistics about the value of copyright based industries in Australia. That study was published in 1994. We are updating it, but we may not have the new figures ready in time for this inquiry. If we do, we are happy to provide those to the committee.

One of the things that we raised in relation to options for protection were the technological protection measures in the draft of the digital agenda bill, which was circulated in February of this year. As the committee is probably aware, a later version of that bill has now been introduced into parliament. The provisions in the version introduced into parliament relating to technological protection address some of our concerns that we refer to in our submission to this committee, but we still have concerns about the bill allowing the manufacture or importation or sale of circumvention devices for what are called 'permitted purposes' in the bill. Our concern is that, once a digitised work is made available in an unprotected form, then the genie is out of the bottle, and it can be infringed by other people. For example, allowing a library to provide a work in an unprotected form to a user means that the work is out there in an unprotected form and it is open to be infringed.

In relation to the adequacy of civil and criminal sanctions, we made some comments about online infringement. One of those comments was a technical issue relating to the wording of the Copyright Act in the criminal provisions which refer to an article. Clearly, when those provisions were introduced, what the legislators had in mind were physical articles such as CD-ROMs, video cassettes and computer disks. It is not clear that the term 'article' covers a copy of a digital file where it is available and may be distributed or sold online but may never be distributed in a physical format such as a computer disk.

We note that in the digital agenda bill introduced into parliament there is an amendment to 132(5A) which seems to be intended to address this issue to a certain extent. Our view is that there are still some difficulties with the application of those communal provisions to infringing copies of work distributed online.

We also made some comments about possession of infringing material in the course of a business. We referred to a recommendation by the Copyright Law Review Committee in its 1994 report on computer software protection which is still under consideration by the government. In our submission, we recommended that it be an offence and an infringement to possess infringing material in the course of a business. Something not noted in our submission which I would like to comment about today is that we think that this type of provision should also apply to circumvention devices for circumventing technological protection measures and broadcast decoders. Both of those areas are subject to provisions in the digital agenda bill, but the sanctions in the bill only relate to the manufacture, importation and sale of those things and not the possession of them. Our view is that, if somebody has possession of them in the course of a business, then that should be subject to sanction.

Another issue which is not referred to in our written submission but which I would like to raise is the desirability of a provision for the delivery up of circumvention devices. It is similar to the provisions that are currently in the act for devices used for making infringing copies. It is possible that the wording in the current provision would cover circumvention devices, but we think it would be desirable that it be made expressly.

We made some comments in our written submission about presumptions in the Copyright Act. We referred to a provision relating to presumptions about ownership of copyright in sound recordings that was included in a bill introduced in 1992 that was not passed. There was subsequently a recommendation for a similar provision relating to computer software by the Copyright Law Review Committee in 1994 and that recommendation is still under consideration by the government. The Copyright Law Review Committee in a later report in 1998 looked at the provision in the 1992 legislation and recommended against its introduction now. The CLRC was of the view that it was up to copyright owners to better document the chain of title. I think that the CLRC may have misunderstood the effect of the provision and may not have adequately taken into account the difficulties faced by copyright owners in bringing legal action to enforce their rights. That is an issue that we would ask the committee to reconsider.

Lastly, we made some comments about the importation provisions. As the committee would be aware, there were amendments to the Copyright Act last year to allow the parallel importation of sound recordings. At the time, the government announced that its policy was

to reverse the onus of proof in relation to importation of sound recordings. Our view is that the policy was not implemented in the legislation as introduced last year.

In this written submission that we have put to you, we have submitted that the onus should be on the importer to prove that he or she did not know that the imported article would infringe, rather than it being up to the copyright owner to prove that issue. They are the only comments that I wish to make on the written submission. I am more than happy to answer any questions the committee may have.

**CHAIR**—I just start with your last couple of points. Do you think it would be desirable to have a system of registration of copyright in Australia?

**Ms Baulch**—Probably not. I think, at this late stage, it is certainly an issue that is raised from time to time with reference to the United States. As the committee may be aware, it is no longer necessary to register copyright in the United States, but there is a long history and people, as we understand it, still tend to do it, and there are some advantages in getting costs on litigation. So there are some benefits in registration. In fact, we are not able to do it and be consistent with our international treaty obligations to have a compulsory registration system. You could have a voluntary one provided that was not a requirement for protection. If it was a requirement for protection, it would be inconsistent with our obligations under the Berne convention and the TRIPS agreement. That is the difficulty. I guess the other difficulty is misunderstanding about the effect of registration and how easy it may be for people to mistakenly or fraudulently register for material that they are not the rights owner of.

**CHAIR**—Should we have provision that recognises, for evidentiary purposes, certificates of registration of copyright material from the States?

**Ms Baulch**—That would be a possibility. I am not sure how it would be done in the legislation, but certainly the committee could look at that being part of the presumptions as to ownership.

**CHAIR**—What about a presumption or some sort of rebuttable presumption of ownership or an averment provision in relation to ownership? Do you have any views about that?

**Ms Baulch**—If I have understood the question correctly, that is similar to what was proposed in the 1992 bill that there be a presumption as to ownership if certain information appeared on a sound recording, but that would be a presumption only that it could obviously be rebutted. Yes, we would be in favour of those types of presumptions.

**CHAIR**—You may not be aware that the digital agenda bill is being referred to this committee for inquiry, so you may wish to make a further submission specifically about provisions in the bill as it was introduced.

**Ms Baulch**—I understood that was likely but I did not know that was official.

**CHAIR**—On the circumvention devices you are saying—as I understand it—that, in addition to all these other things, for example in section 116A, that possession of such devices ought also be illegal.

**Ms Baulch**—Yes. What we said is that, possession in the course of a business, we acknowledge that possession for private purposes may be unenforceable from a practical point of view, but we have submitted that possession in the course of a business should be—

**CHAIR**—Being unenforceable and being illegal are two different things.

**Ms Baulch**—That is true.

**CHAIR**—Why would you make an exception. If you are going to include possession as one of the prohibited activities, why would you make an exception for non-business use? Isn't that just opening the door?

**Ms Baulch**—It may well be. Certainly, we would have no objection to having sanctions against possession per se, if the committee was so minded.

**CHAIR**—Why do we need circumvention devices—this may be my ignorance—apart from questions perhaps of national security or the like?

**Ms Baulch**—We submit that you do not need them.

**CHAIR**—Is there some legitimate use for them that you are aware of? I am probably asking the wrong person this.

**Ms Baulch**—Yes. No, I am not aware of them, I suppose is the answer to that. As I said, our view is that the act should not allow their use for any purpose, although I accept your point about national security. There may well be some issues there that we are not aware of, but certainly their use by libraries and educational institutions is a proposal we have difficulty with.

**CHAIR**—Yes. In one part of your submission you say:

In our view, a copyright owner should have rights against Internet service providers in some circumstances. For example, if a service provider hosts a web site which has infringing material on it, the copyright owner should be able to take legal action against the service provider to at least have the material removed.

We have all had the experience of being inundated with email from service providers because of the online broadcasting services bill which, in some circumstances, places some requirements on service providers. I am not talking for all service providers but for those, at least, who inundated us with email a few months ago, I think I could summarise their position fairly by saying that they do not believe they should have any obligation to do anything about the material on their web sites. I would suggest this is going a step further because, in the case of that bill, it was where there was offensive material on a web site, whereas you are saying that, if there is infringing material against copyright, there should be some obligation to remove it.

**Ms Baulch**—Our concern there was that the person who uploaded the material may be out of the jurisdiction, there may be no practical way of taking action against them and you have no recourse for having the material removed. Whether or not the Internet service provider is aware that the material was infringing once they are put on notice, there should be provision for the copyright owner to be able to have that material removed.

**CHAIR**—Isn't there provision now? Isn't the service provider publishing or transmitting—however you wish to describe it—material which, in itself, would be in breach of copyright?

**Ms Baulch**—I would need to check what the wording is in the bill now, but it is the person who is responsible for the content of the communication who is directly liable. I understand that the intention is that it would be the person who is uploading to the web site or sending the email rather than the ISP.

**CHAIR**—If there were such a provision, should it be restricted to circumstances where the person uploading the material is outside the jurisdiction? Should the primary responsibility still rest with the person who is placing the material on the web?

**Ms Baulch**—Yes. Obviously, it should still lie with them, but there should be some responsibility on the part of the Internet service provider as well. There may also be some liability under the authorisation provisions where the Internet service provider is on notice.

**CHAIR**—I presume the Internet service providers would say to us, though, that this would just be used as a short cut for alleging infringement. We would not be in a position to know whether there had been an infringement of copyright; we would be left in a situation of not having much choice, except to take the material off, and that is hardly fair.

**Ms Baulch**—Yes, I think that is probably what they will say.

**CHAIR**—Isn't there some validity in that proposition?

**Ms Baulch**—There are difficulties on both sides. The copyright owner needs to be able to take action, and it depends on how the provisions are worded as to when that obligation would arise for the Internet service provider and on what sort of evidence needs to be provided to it in order to give rise to the obligation.

**Mr CADMAN**—From listening to your conversation with the chairman, you are not implying penalties but asking for a provision that the copyright owner ask for the removal of that material.

**Ms Baulch**—That is right. The Internet service provider may not be aware prior to that that the material is infringing but, irrespective of the Internet service provider's knowledge, there is still damage to the copyright owner caused by the infringing material still being available.

**Mr CADMAN**—While you could nail the person who broke the copyright use, your fear is about the ongoing use of material that that person may have generated, which is a continuing infringement of copyright. Is that right?

**Ms Baulch**—That is right, and you may not be able to find the person who has communicated that material. They may be out of the jurisdiction—that may be the reason—or you may not be able to find them, anyway, even if they are in the jurisdiction.

**Mr CADMAN**—They could be anywhere in the world, couldn't they?

**Ms Baulch**—Yes. You may have no recourse to have the material removed.

**CHAIR**—I suppose the other argument—not that I am necessarily attracted to it—is that if you have these provisions in Australia, people would simply put their material on service providers in some other jurisdiction to which there is no recourse at all.

**Ms Baulch**—It may have that effect, but I am not sure it would be a big enough consideration to cause people to do that. There are obviously other advantages in dealing with an Internet service provider who is in the jurisdiction, who is operating locally.

**Mr MURPHY**—On page 3 of the Australian Copyright Council submission it is pointed out that the digital technology has also created new opportunities for infringement of copyright. It goes on to say that it is of fundamental importance that copyright owners are able to effectively enforce their rights in the new technological environment. While accepting that this is very difficult, what would your best advice be to this committee to address this problem?

**Ms Baulch**—One of the positions that has been reached following a lot of debate about whether copyright is dead in the digital environment is that there is still room for enforcement provisions in the copyright legislation in addition to technological protection measures and rights management information provisions. So I think we have that starting point that we are not just looking at the technological protection measures as the only way of enforcing copyright in the online environment. We still need to have enforcement provisions in the Copyright Act and we still need to look at whether those enforcement provisions apply effectively in the online environment.

As I mentioned before, in one area, in the offences, there are references to articles which were in provisions that were introduced to deal with things like CD-ROMs and video cassettes. That is one area where you look at those provisions and say, 'These don't really apply in the way that we would want in the online environment because the wording is wrong.' It can be solved by amendment to clarify that these provisions also apply to digital copies that are made available or distributed online.

**Mr MURPHY**—Do you think that copyright is dead in the digital environment?

**Ms Baulch**—No. There has been that discussion, but I think that time has passed, certainly in terms of where things have gone internationally, particularly with respect to the international standards that were adopted at the end of 1996 by the World Intellectual



Property Organisation. There was clear international consensus that copyright standards still have a role in the protection of online material.

**Mr CADMAN**—I would like to pursue the institutionalised abuse of copyright in universities and libraries. Do your members regard that as an area of concern?

**Ms Baulch**—I am not sure that there is a lot of evidence of infringement of copyright by institutions such as educational institutions and libraries. Our members' main concern is with the library provisions that allow libraries to make free copies, unremunerated copies. The provisions in the digital agenda bill will introduce new free exceptions that will allow libraries to digitise and communicate digitised material.

The concern of copyright owners is that that is where they want to go; that is where they want to take their business, and where they want to take their business will be undermined by free copying that can be done by libraries' reliance on these provisions in the Copyright Act. That is a major area of concern. It is not illegal activity; it is activity which is allowed under the Copyright Act, but our view is that it should not be allowed under the Copyright Act because it interferes with the way that copyright owners themselves want to market and exploit their works.

It has arisen out of provisions which were originally introduced to allow copying of small parts of books and journals, on the assumption that what the Copyright Act was trying to protect was the sale of the book or the sale of the journal and that copying a small part of the book or journal was not going to undermine that sale. That assumption does not apply in the digital environment: you can sell whatever part of a book or journal you want; you can sell a chapter or you can sell an article, and it is easy to do that. So carrying that assumption from the print environment to the digital environment has caused difficulties. We would say that the provisions in the digital agenda bill that allow that are not consistent with our international obligations.

**Mr CADMAN**—Libraries have also said to us, if I remember correctly, that pictorial material, illustrative material, is, in their view, the material most in demand for people to copy illegally, rather than text. Would you agree with that?

**Ms Baulch**—I am not aware of that being a preferred area of copying. They raised that as a type of material which is subject to illegal copying?

**Mr CADMAN**—No, they said that that was the most attractive material for people wanting to make copies, whether it is illustrations, graphs or diagrams—illustrative and pictorial material.

**Ms Baulch**—That may be the case. We do not have any special information about that issue.

**CHAIR**—I thank you for the submission and also for coming and discussing it with us this morning.

**Ms Baulch**—Thank you.

**Proceedings suspended from 11.57 a.m. to 12.08 p.m.**

**SPECK, Mr Jorg Michael, Manager, Music Industry Piracy Investigations Pty Ltd**

**WILLIAMS, Mr Michael John, Solicitor acting for Music Industry Piracy Investigations Pty Ltd**

**CHAIR**—I welcome the representatives from Music Industry Piracy Investigations. In what capacity do you appear before the committee today?

**Mr Williams**—I am a lawyer at Gilbert and Tobin, which is a legal firm representing MIPI and ARIA.

**CHAIR**—Thank you. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission. Would you like to make some opening comments?

**Mr Speck**—I would like to open by asking you to consider that this evidence is taken in camera in the first instance. My reason for that is, so far as I can anticipate what the committee might ask of me, there are things that relate not only to current operations but also to the identification of persons who are not convicted of offences but who are, we would be asserting, in fact, committing offences of various sorts. We will also, so far as we can anticipate what you might ask, potentially be exposing the Achilles heel in various operations and also the legislation in some instances that we might rely on to pursue infringements.

**CHAIR**—I had some forewarning that you might make that request, Mr Speck. Therefore, I have had some discussions with the other members of the committee about it, and we are prepared to accede to that request at this stage.

**Mr Speck**—Thank you, Senator. I have no objection to any of the persons who are in the room presently remaining as they are closely related to the submission.

**CHAIR**—I think if we are going to take evidence in camera, it will have to be in camera.

**Mr Speck**—Certainly.

**CHAIR**—I do not think we can be a ‘little bit’ in camera—it is a bit like pregnancy. So, in those circumstances, I think if we are going to take it in camera, we will do it properly, and I will have to ask the others to leave.

*Evidence was then taken in camera, but later resumed in public—*

[2.10 p.m.]

**McCULLOCH, Mr David, Director, Broadcast Policy, Federation of Australian Commercial Television Stations**

**ROTHERY, Ms Catherine, Legal Counsel, Regulatory and Business Affairs, Seven Network**

**SUTHERLAND, Mr Trevor, Station Operations Manager, Golden West Network**

**ACTING CHAIR (Mr Cadman)**—I welcome witnesses from the Federation of Australian Commercial Television Stations. I wish to advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have had your submission and it has been authorised for publication. Do you want to make a brief opening statement before we proceed?

**Mr McCulloch**—Yes, Mr Chairman. I would like to highlight very briefly the two essential matters that we raised in our submission. The first involves the need for legislation to protect against the unauthorised reception of encrypted signals. The second is the need for copyright protection to be extended to all program carrying signals and not limited to broadcasts that are broadcast directly to the public. I will just briefly outline the framework of those two issues and then ask Mr Sutherland and Ms Rothery to illustrate practical difficulties that GWN and the Seven Network have encountered respectively that have led to these two main submissions.

FACTS is an industry body that represents all 47 of Australia's commercial television licensees. These broadcasting services are primarily delivered terrestrially but four of the services reach remote communities by means of satellite delivery. It is particularly in the satellite context that we make our submissions.

I will very briefly outline the copyright framework in relation to broadcasts. Under the Copyright Act, the broadcaster has copyright in its broadcast. This has been recognised internationally for some time and it recognises the endeavour of the broadcaster in scheduling and programming and in the equipment necessary to distribute its signal. The copyrights in the broadcast are over and above the copyrights that exist in relation to the underlying works that are broadcast, they being the film and the musical content.

The first issue we wish to raise concerning the unauthorised reception of encrypted broadcasts builds upon the submissions that were made to you yesterday by ASTRA, representing the pay television industry. In the case of pay TV operators, their concern is to protect against the unauthorised reception of their signal for the purpose of avoiding a subscription fee. The problem for ASTRA is those people who get access to unauthorised decoders. As a matter of principle, we support their submissions in relation to the need for provisions dealing with the unauthorised reception of encrypted signals and devices that allow circumvention and interception.

The commercial television context is a bit different. Clearly, the concern does not relate to the payment of a fee as free-to-air broadcasts, by very definition, are free. The issue concerns the fact that, in Australia's broadcasting system, television services are licensed for broadcast in discrete licence areas. This ensures delivery of broadcasting services across the entire nation, including remote areas, and the delivery of services of local relevance. This licence area concept of the Broadcasting Services Act is crucial.

The prospect for unauthorised reception relates to satellite transmission. There are four satellite services, including two in regional and remote Western Australia operated by Golden West Network, which is part of Prime. More recently, WIN has commenced a satellite service in Western Australia. There are also two satellite services in remote central and eastern Australia operated by Imparja and Telecasters Australia.

These services are provided by satellite on a national beam. That means that theoretically they can be accessed anywhere in Australia and even in New Zealand and Papua New Guinea. To get the signal in the licence area, the viewer needs to purchase the appropriate satellite receiver, which is then enabled by the broadcaster to receive the signal. The problem has been that these receivers tend to wander out of licence areas. This allows the particular satellite delivered service to be received in any licensed area in the country or in New Zealand and Papua New Guinea.

This threatens licence area integrity and the basic concept in the Broadcasting Services Act that services are licensed in discrete licence areas. It also has the potential to seriously threaten the licensee and the owner of rights in the underlying program. The concern is not a theoretical one and it has faced GWN significantly over the last couple of years. I will ask Mr Sutherland, who is from GWN in Bunbury, to outline the concerns that they have faced.

**Mr Sutherland**—I want to expand a bit on what David has said and give you some real case scenarios. First of all, I just mention the means we use to ensure that, as much as we can, any service area and reception area of the GWN satellite service is kept within regional WA. Once an enablement has been requested, we will get those details over the phone of name, address, receiver location, phone number and the receiver owners. We will then confirm that the number, phone number and location and postcode given are within regional WA. We will then enable the receiver, phone the number given to confirm that the receiver has been enabled, and confirm that the owner and the receiver are at that number. This is complicated where a mobile phone is used or no phone is available.

There have been a number of occasions when it has been threatened due to an unauthorised broadcast outside the licence area, without our permission and beyond our control. On probably all occasions the problems have arisen with regard to the AFL broadcasts, whereby GWN broadcasts live an AFL match being played in Perth, but the AFL does not allow the broadcast live in the metropolitan area. On one particular occasion, there was a north Perth publican who owned a holiday house in the state's south-west. He had a decoder enabled for viewing at his holiday house, but then took his decoder and received disk up to the hotel in Perth, and tuned it in and turned it on.

**ACTING CHAIR**—The boys would have liked that.

**Mr Sutherland**—They certainly did, until we found the correlation between the licensee and the south-west resident and disabled the decoder. During that time, he did not contact GWN to make us aware of his intentions or give us any knowledge of his move of the disk.

Another scenario happened when the changeover from GWN's analog to digital transmission service was set up last year. Then there were two sets of decoders in the marketplace—GWN's PanAm satellite using scientific Atlanta power view decoders and Optus Aurora UEC decoders. During that digital changeover there were some outstanding still enabled analog B-mac decoders. Some of these decoders, which were now outdated, found their way into pawnbrokers, and some were found in the metropolitan area for sale for about \$50. Therefore, the GWN signal reception area could not be guaranteed.

The Seven Network, safeguarding contractual arrangements with the AFL, refused permission for GWN to broadcast Perth AFL games live. So we had 480,000 viewers held to ransom by a minority group stopping the free-to-air broadcast of the AFL to regional WA, in particular the first game of the season, which just happened to be a West Coast versus North Melbourne game. This all happened even though the first game was not scheduled to be live but to be delayed until after 7.30, due to our news and current affairs commitments that night. For us, it became quite catastrophic. GWN had to put on three receptionists to attempt to handle incoming phone calls. Talkback radio in Perth and the country was inundated with calls and pleas for live AFL. Local politicians got heavily involved, as they received numerous calls themselves. There was even a mining company up north who were going to fly a delegate to the ABA's office to intervene and attempt to resolve the problem. The public outcry was incredible, all because GWN could no longer guarantee that its signal would not be received outside its licence area. There was a real threat of no live AFL to regional WA.

Through all of this and earlier on, since 1996, there was a particular ale house in Mount Hawthorn that remained one of the major problems for GWN. Again, it was in relation to unauthorised live transmission of Perth AFL games to the patrons in the hotel. By sending staff to the premises while the games were on we verified that it was actually a GWN signal and not a Seven signal, because it had our logo superimposed over it. The licensee refused access to the decoder for the serial number acquisition. We sought legal advice, and responded by advising the licensee in writing to provide a decoder serial number or our lawyers would be instructed to take whatever action was deemed necessary to protect our rights, which was very difficult at the time. The licensee's name could not be found in our database, so we could not go to the first scenario.

The signal was only being distributed in-house, so we could not record it. What we need to do to record it is what enables us to find the decoder itself. What we can do from work is send out a trigger print and pick up that signal on the screen—individual decoders will send out a signal once we push that trigger. However, if we cannot record the signal, we cannot identify it because it only appears for one-fiftieth of a second so we cannot see it with the naked eye.

**Mrs VALE**—Do you have special equipment to read it?

**Mr Sutherland**—No, the way this works is that if we record it off air, then we can jog through, frame by frame, and find that number and decode it. The only other way would be to point a camera at the screen and then try to record it that way, but in a public area like a hotel that is not going to be possible. Also, there was another problem at the same hotel as they thought that it might be the Channel 7 feed as well, because it was moving from the GWN one to a clean feed. This was only seen once but Channel 7 went to the extent of putting a helicopter up in the air to look for the satellite dish on the roof and see where it was pointed to try and establish whether it was that signal or not. That one did not come back so we do not know what happened with that.

Until the analog to digital changeover was finalised, or the B-mac decoders were disabled and only verified decoders were enabled, they were the original analog ones. Since then the transmission at the ale house has ceased, so we can only presume they had an analog decoder. With all the digital decoders out there now, it is fairly easy to get one and get it enabled if they have a residence in a country area and they can then do what they want with it. We have no power over them, so with our signal on both PanAmSat and Aurora we do not know where it is going to turn up next.

**ACTING CHAIR**—Thank you very much, Mr Sutherland.

**Mr MURPHY**—David, in your submission you say on page 1:

Copyright protection needs to be extended to all program-carrying signals, and not limited to the signals that are broadcast directly to the public.

Would you like to discuss that in some detail and, also, how effectively it can be achieved within the Copyright Act?

**Mr McCulloch**—That was the next issue I was going to address and to ask Ms Rothery to talk about in some detail.

**Mr MURPHY**—Okay.

**Mr McCulloch**—Before doing that, could I expand a bit on what Mr Sutherland has said in relation to the unauthorised reception of encrypted signals?

**Mr MURPHY**—Of course.

**Mr McCulloch**—At the moment, under either copyright or broadcasting legislation, there is no ability of the Golden West Network to take action against the publican where these decoders are being used outside the legitimate licence area. That is what we are seeking in legislation, that there be provisions which prevent the unauthorised reception of encrypted signals. The digital copyright legislation goes some way with respect to the dealing of devices for subscription purposes, but stops short of including provisions relating to the actual use or interception of subscription signals. There is a public policy concern that that inappropriately invades people's domestic environments. In this free-to-air context we would argue that different considerations apply, given that the most flagrant use of this is for a commercial benefit and therefore those public policy concerns do not apply.

The government, in the exposure commentary on the draft digital copyright legislation, indicated that it does intend to introduce legislation with respect to the interception of decoded broadcasts. Our discussions with the Attorney-General's Department and the department of communications make us a little uncertain in what context that is going to happen. We think it is important that it happens in the context of the digital copyright legislation. I understand that this committee will be considering that bill in detail—

**ACTING CHAIR**—Yes, we will.

**Mr McCulloch**—and we will be making submissions to that effect in that context.

To address your question, Mr Murphy, as I have indicated previously, copyright exists in a broadcast, the broadcast is the signal that goes from the television station to the public, and an integral part of a broadcast is that it must be to the public. A concern arises where signals which are not broadcast in that technical sense are intercepted. Stations routinely, many times a day, send signals via satellite or through other means which are not broadcasts. The program feeds that, for example, the Seven Network will send to its other network stations and affiliates can be intercepted and used. There is no copyright in that signal, and we think consideration should be given to incorporating some sort of copyright in program carrying signals. I will ask Ms Rothery to talk about some practical problems that the Seven Network has experienced in that respect.

**Ms Rothery**—I will take up from where David just left off. He says there is no copyright in the signal itself, which is true. A lot of the material that we feed throughout the network using the satellite does have underlying copyrights in it—for example, it might be movies or it might be television programs, which have copyright in themselves. But, again, our biggest problem comes with live sport. Live sport is filmed as it happens, so there is no copyright in a film as such and there is no copyright in the feed because it is not being broadcast at this stage to the public.

Following on from what Mr Sutherland said, the main problem we have had has been with AFL. What happens with AFL is that quite often you have a local blackout in the city where the match is being played—the AFL insists on that to maintain attendances at the grounds where it is being played. So we have contractual obligation to enforce a local blackout in the city where the match is being played. What happens is that we will send an OB crew out there, we will tape the match as it is happening and we will send that feed via satellite around the country for live broadcast in areas where there is no blackout and for a delayed broadcast in the area where the blackout exists.

As I said earlier, that feed is not actually recorded on tape. It goes live to the satellite, so there is no copyright in the feed itself. Once it is broadcast as a program, there is copyright protection in the broadcast but not in the feed. We have two problems arising from that. Because the feed is intended only for the Seven Network stations and their affiliates and not for public reception, we do encrypt the sound in the broadcast—they call it a tight encryption; it is very hard to unencrypt the sound; you would have to have special equipment—and we loosely encrypt the vision.



It is much easier to undo the vision encryption than the sound encryption, and we have discovered that there are certain pubs in Melbourne and Adelaide that fix a decoder when there is a local blackout so that they can have unauthorised reception of our feed. I understand it does not take much to do, that people who know what they are doing can do it quite quickly. Because they can unencrypt the vision quite easily but the sound usually stumps them, they usually get the feed—that is, the pictures—and match the radio commentary with that.

We have had a huge problem with that in pubs in both Melbourne and Adelaide and a similar problem in Perth. We also had another interesting variation on that problem where a very enterprising gentleman was running a cable service in a New South Wales country town. He got a decoder and pulled down the feed. It was a great selling point for him. He advertised it as ‘uninterrupted AFL without advertisements’. He was actually selling his subscribers our network feed plus the 3AW radio commentary as a pay television channel.

When we sought legal advice to try to stop him, we discovered that because the satellite feed was not to the public it was not a broadcast, so there was no copyright in that, and because the match was happening live there was no underlying copyright in the action taking place that we were sending around. So we did not have any copyright action that we could take against this fellow who was making a business from selling our network feed.

**Mr MURPHY**—On page 2 of your submission, David, you said:

The right in the broadcast signal exists in addition to the rights that exist in the audio-visual subject matter or works that are being broadcast. For example, if a pirate copied off-air the Sunday movie for other than domestic purposes, then the owners of copyright in the film and underlying works, as well as the broadcaster, would be able to take action.

What recommended changes would you make under the act to strengthen it in that area?

**Mr McCulloch**—We think that the provisions of the act in that area are adequate and appropriate. The difficulty that Ms Rothery was referring to is that, where a signal is pulled down that is not in fact a broadcast, there is no copyright. There are two ways of redressing that. The first is through our initial submission that there need to be provisions that prohibit the unauthorised reception of encrypted signals, not just of encrypted broadcasts. That would deal with the situation where Mr Sutherland’s GWN signal—and his GWN signal is a broadcast—is being intercepted by a publican in Perth. It would also deal with the situation where the Seven Network’s satellite feed—which is not a broadcast—is being intercepted by the cable operator in Mildura.

**Mr MURPHY**—Is this sort of infringement rampant in the hotel industry in remoter areas?

**Mr McCulloch**—The infringements in hotels occur in the capital cities which cannot get the live sporting events. I would not describe it as rampant, but it has significant adverse commercial consequences for the stations concerned. GWN faced a situation where the Seven Network, as the rights owners of the AFL, refused to provide GWN with the live AFL signal to provide to its regional customers, because GWN could not guarantee that the signal

would not turn up on a pub screen in Perth. The political and commercial consequences that GWN suffered were immense.

**Ms Rothery**—That was not the Seven Network just being a bully. That was because the Seven Network has contractual obligations to the AFL that it cannot permit a broadcast of the match in a city where the blackout is. By the Seven Network supplying GWN with that feed and GWN not being able to guarantee back to the Seven Network it would not be received in Perth, the Seven Network would have been in breach of its contractual obligations to the AFL.

**Mr MURPHY**—Do you accept the proposition that the primary responsibility for enforcement lies with the copyright owners?

**Mr McCulloch**—In the submissions we have made in relation to unauthorised reception, we think there should be criminal and civil sanctions. Civil sanctions are probably most important to us, because that gives the copyright owner or the owner of the signal who does not have a copyright on that signal the ability to take direct action.

**Mr CADMAN**—We need to be fair dinkum here. If you signed a contract you could not deliver on—and knew you probably could not deliver on when you signed it—to guarantee to the AFL that you would not allow anybody in Perth to watch the footie, you could not enforce that. You said yourself that there were analog things floating around in second-hand shops for fifty bucks a head. If you knew about them, why did you not buy them up?

**Mr Sutherland**—At that stage we were changing over to digital, and they were going to be phased out anyway.

**Mr CADMAN**—I know, but you knew they were out there in the marketplace and you had the contract running.

**Mr Sutherland**—That was just an example to show you that they could easily be found.

**Mr CADMAN**—Are you looking for us to implement an easy way out for you? Just from reading your submission, the fact of the matter is that the World Intellectual Property Organisation have not even come to a view that you own the signal, that the signal is capable of being copyrighted.

**Mr McCulloch**—That is a somewhat different issue. The question of the unauthorised interception of the encrypted signal is something that the government has given some sort of commitment to implementing. We are a little uncertain as to the context or when it is going to be implemented. That is a somewhat different issue than granting a copyright in a program carrying signal as opposed to a broadcast.

**Mr CADMAN**—I thought that was one of the solutions you wanted us to introduce to assist you in the digital copyright legislation.

**Mr McCulloch**—What we have said is that provisions dealing with the unauthorised reception of encrypted signals are vital and should be introduced in the immediate term. We

think they should be introduced in the digital copyright legislation. It should be emphasised that the copyright in a broadcast does not allow the broadcaster to take action or prevent or authorise the reception or the public display of the signal. The copyright in the broadcast gives the copyright owner the right to prevent or authorise the broadcast or the rebroadcast of the broadcast or the copying of the broadcast for other than domestic purposes. When the digital copyright reforms are passed, it will also make it clear that the broadcaster can control the cable distribution of the signal, and that will be effected through the communication to the public right.

The World Intellectual Property Organisation is considering the issue of granting some sort of copyright protection to the non-broadcast. Without that protection, when the digital copyright reforms are passed, this cable operator in Mildura will still be able to pull down Seven's live AFL football feed and transmit that to his customers without the Seven Network having any ability to take legal redress. We accept that that is a policy issue. The granting of a copyright in a non-broadcast signal is a slightly more significant step and one that needs to keep pace with international developments, but that should not be confused with the remedy with respect to the unauthorised reception of encoded broadcasts, which is something different.

**ACTING CHAIR**—It is like trying to put copyright on a page of a Dickens's novel: the paper has little value; it is the words that go on there that really are the value of the work of art or literature. Is that right?

**Mr McCulloch**—As far as the broadcast signal is concerned, there is value ascribed to the endeavour that the broadcaster puts into scheduling, the programming and transmitting it. That has been a long understood right internationally. That is in the 1968 Copyright Act.

**Mrs VALE**—On page 3, you indicated that in the United Kingdom there was an approach relating to the unauthorised reception of encrypted broadcasts. You suggested that it could be applied in Australia.

**Mr McCulloch**—Yes.

**Mrs VALE**—Could you give us some more information on the measures that they have taken in the United Kingdom provisions and how you think that we could apply them here?

**Mr McCulloch**—The United Kingdom, like the proposed provisions in the digital copyright legislation that ASTRA were talking of yesterday, have provisions relating to the dealing in circumvention devices for the purpose of avoiding the payment of a subscription fee. They also go further, and ASTRA yesterday advocated that the provisions in the digital copyright legislation should similarly go further, in providing a prohibition on—and I will read the words of the UK legislation—'fraudulent reception of a subscription broadcast or cable program service'.

We are saying that those UK provisions, which I should mention were recommended by the former government's Copyright Convergence Group as being appropriate for an Australian model, should also apply to the free-to-air situation where encoded broadcasts are received outside the licence area. Australia is obviously in a different position from the UK

in that respect because our broadcast areas are specifically licensed into local areas which does not happen in quite the same way in the UK.

So we are saying that those UK provisions relating to fraudulent interception should apply such that GWN, for example, can take action to prevent the pub owner in Perth intercepting its broadcast which is intended for only the GWN licence area.

**Mrs VALE**—Under what kind of legislation do you think it should fit?

**Mr McCulloch**—We see no policy problem with it appearing in the digital copyright reforms. I do understand that there are concerns in the Attorney-General's Department that it should appear in broadcasting legislation. There seems to be a bit of handballing back and forth the responsibility for this issue which has resulted in us not getting the provisions that we would like in the current bill.

**Mrs VALE**—Thank you.

**ACTING CHAIR**—I wonder whether you have involved yourselves in any private investigations or monitoring processes such as broadcasters have in the music industry piracy investigations—those sorts of organisations. You have not set up a separate entity to monitor this abuse?

**Mr McCulloch**—The concern of broadcasters is not quite like that of, for example, subscription services, where it is very difficult to determine where breaches are occurring and the incidence of unauthorised reception, because in most instances there is not an incentive for people in a domestic environment to gain access to a free-to-air service that is not the free-to-air service that is provided by their local licensees. Where the situation does occur, it occurs in a way that often readily comes to the attention of the broadcaster—for example, the pub owner in Perth providing a live AFL signal, or the cable operator in Mildura.

**Ms Rothery**—What we can do at the network is that, alternatively, it can deliver the network feed by bearers, which is cables, I guess. So what we are forced to do now with most AFL matches is that, rather than put them on the satellite, which is much easier and much cheaper because it is just the one feed that covers the whole of Australia, we have to put them on bearers to each station that is actually taking it. That is what we have done, particularly at this time of the year as you get towards finals time, to stop the pubs and clubs from profiting from these unauthorised broadcasts. We just have to feed everything out on a bearer. Obviously, it would be much simpler and easier for us if we could put these things out on the satellite feed, if it was safe to do so.

**ACTING CHAIR**—There being no further questions, thank you very much.

[2.49 p.m.]

**DWYER, Mr James, Legal Adviser, Australian Visual Software Distributors Association**

**EPHRAIM, Mr Michael, Vice-Chairman (Interactive), Australian Visual Software Distributors Association**

**SIMES, Mrs Megan Mary Barry, Chief Executive, Australian Visual Software Distributors Association**

**CHAIR**—I welcome representatives of the Australian Visual Software Distributors Association. Do you have any comments to make on the capacity in which you appear?

**Mr Ephraim**—I am the Vice-Chairman of the Interactive committee of AVSDA, which also includes a separate body within AVSDA for video, and I am also the Managing Director of Sony Computer Entertainment.

**Mr Dwyer**—I am a partner at Allen, Allen and Hemsley and I am here as the lawyer for Sony Computer Entertainment Australia, having been involved in a number of court actions.

**Mrs Simes**—I am appearing as the Chief Executive of AVSDA.

**CHAIR**—Thank you. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We are in receipt of the association's submission. I invite you to make some opening comments.

**Mr Ephraim**—The submission was by the MPA for the video division of AVSDA. There are two separate committees within AVSDA: video and interactive gaming. We have endorsed the MPA submission on behalf of the interactive committee but are here to give you some facts regarding the interactive gaming industry and the occurrences of piracy that we are aware of and the activities that we, Sony Computer Entertainment, have headed up along with AVSDA to fight piracy. This has given us some first-hand knowledge of the kind of activity and scale that is occurring out there, specifically on PlayStation, but this would cover other game software such as PC games, Nintendo and Sega. AVSDA is made up of all the members. The members are made up of the full industry body of Sony, Sega and Nintendo. It includes about 10 other publishers who, whether they are local companies or international companies based here, publish games for different formats. We call them third-party publishers.

To start, the colourful document we have put in front of you is to give you an idea of the size and scope of the industry globally and locally. The first page of the document shows a comparative worldwide entertainment figure. These numbers have been received by their respective industry bodies globally. They are to put in perspective the size and growth of the video games industry globally and locally. As you can see on the front page, the music

industry is by far the largest entertainment category, but the next statistic, where you can see video games, surprises quite a few people. I will just explain exactly what video games are. That would be the revenue generated by the sales of consoles which you buy for your home which you plug into your TV set.

**CHAIR**—This is the Nintendo type of thing.

**Mr Ephraim**—It is the Nintendo, Sega and now Sony PlayStation, including the consoles and peripherals that go along with them, like additional controllers, joysticks, memory cards and software played on those consoles. It also includes PC software, but just in the gaming category. It does not include application or education software but just PC games and does not include the PC hardware sales. That is really not construed as a video games machine. It is really a home office piece of equipment that happens to play games as well. They are the figures that the video games industry is made up of. As you can see, in 1997 the growth was considerable, up to about \$17 billion from 1996.

On the next page, we show you the video game revenue and its growth over the last four years. The forecast is \$22 billion for 1999. That was achieved in the fiscal year 1 June 1998 to 31 July 1999 and reported by Bloomberg and several other press reports. In Australia, bringing it back to a local level, the figures give you a comparative Australian entertainment revenue from the four major categories. ‘Box Office’ would be revenue from the box offices. These are industry figures, so ‘Music’ is the sales value into retail. ‘Home Video’ would encompass video sell-through and, if I am not mistaken, video rental sales as well. ‘Video Games’ would encompass the categories I mentioned earlier. At wholesale level that is \$426 million. That is probably about 85 to 90 per cent of the total figure because AVSDA does not have all members, one critical member being Microsoft, which is a very big producer and distributor of PC games. There is another company called Playcorp in Melbourne.

We think that is about 85 per cent of the value of the industry in Australia. If you take that to a retail level, with the retail margins that are made on this category, we are looking at a retail category now that is worth in excess of \$600 million. The growth in Australia has been duplicated pretty much by what has happened globally.

There are categories that are under misconception of being a toy or kids category, but with the new generation machines—like, for instance, PlayStation—our demographics really reach from anywhere from five-years-old up to 80-year-olds playing PlayStation, with our core demographics being 18 to 34. The point I am making there is that it is now a mainstream entertainment product and acceptable and not something that just little kids play in the room. Those demographics are based on approximately 280,000 registration cards we have received from our consumers. That is a pretty good snapshot of what the industry is.

The next page is just showing you the market share in Australia between the competitors. Currently PlayStation is dominant in Australia. Since launch, which was November 1995, we have sold in excess of 1.2 million consoles into homes. We are very proud of that number. That exceeds the Internet hook-up in homes and total cable hook-ups in homes. It is a mass market product now. Nintendo, our closest competitor, has approximately 600,000 consoles in homes. If you look at the penetration rate of all consoles, we are in excess of about 25 per cent of homes, so it has become a mass market product.

The piracy issue has been affecting the industry tremendously, especially over the last six to 12 months. Because of that, we have embarked on an anti-piracy strategy in Australia. Sony Computer Entertainment is leading that strategy at the moment. This year we will expend \$700,000 within a 12-month period. We have invited the other AVSDA members to join us by contributions and support. We already have a couple of the members joining in with contributions of \$120,000, so our fighting fund is now totally \$820,000. That money will be spent in recruiting the resources of Allen, Allen & Hemsley and the PricewaterhouseCoopers dispute analysis and investigations division. PricewaterhouseCoopers is one of the largest investigative firms in the world. Many people do not know that because they are thought of as accountants. With Price and Allens, we have the team to investigate piracy in the marketplace.

What we mean by 'investigate' is to follow up leads that we receive from retailers, our staff, and other industry members and consumers, and establish that piracy activities are occurring by attaining evidence, putting together documentation, forwarding that on to Allens. In conjunction with the three companies, we meet weekly and decide what action to take: be it civil, letters of demand or looking for criminal action for assistance by the Australian Federal Police on search warrants.

**Mrs VALE**—Would you have any idea of how much revenue you are losing because of piracy?

**Mr Ephraim**—We were just talking about that. It is very hard. You cannot go out and do research and ask the pirates how much money they are making. Pricewaterhouse did a research document for the Business Software Association, which is a different association that covers Microsoft and so on. They established that approximately 32 per cent of their revenue on business software is going to pirates. That would not be far off, based on the US figures of about 30 per cent. We have used a very conservative estimate of 10 per cent. Even if you say 10 per cent, we are looking at revenues of approximately \$30 million lost to piracy.

With GST coming in, piracy will attract the 10 per cent like everything else. If you look at piracy not just on games but the CD medium, which is the one that is being pirated at the moment because of improved technology in CD burners, and you look at the total revenue of not just games, but music, business software, Microsoft and so on, those four industries total \$2 billion in revenues. Even if we take an extremely conservative figure of 10 per cent, we will be looking at \$200 million in revenue and impact to the tax office of approximately \$20 million.

**Mrs VALE**—Of course, that is something that I find particularly interesting, and I did not know that before I started this particular inquiry. For me, the greatest learning curve has been finding out exactly how much it is costing the government in loss of tax revenue. It is huge.

**Mr Ephraim**—It really is.

**Mrs VALE**—And it is going to get bigger, isn't it?

**Mr Ephraim**—It is getting bigger because there is a perception out there that it is victimless crime—it does not hurt anybody to make a copy. The law does say you can make a backup copy, but we know it has gone beyond that. Jim Dwyer will touch on all the cases that we have come across, including the amount of activity in the *Trading Post* and in flea markets. The activity is rampant. That is why we had to take this initiative and spend the money.

We contacted Senator Vanstone's office, asking for a quote on our press release, and she was very kind to offer us the fact that Sony is working with the government—understanding the workload of government in everything from drugs to illegal immigrants and that the agenda for the Federal Police is heavy—to flush them out.

The impact too is being felt by our retailers—the industry is distributed by traditional retailers such as the Coles Myer group, Woolworths, Harvey Norman, Retrovision, Toys 'R' Us and Harris Scarfe. Just about every retailer out there right now is very involved in this category. I will just make one point about how important this revenue now is for the likes of Coles Myer. For a period of about eight months, the PlayStation console itself has been one of the top three selling value items in their stores across everything. So this category has injected a lot of revenue into K-Mart, Coles Myer and Big W. The third party publishers that have come here from international organisations to set up here are losing money.

There are a couple of other issues that I wish to quickly cover before I pass on to Jim. The Sony music plant in Huntingwood has now started local manufacturing for us on PlayStation, and we will manufacture in excess of four million units this year in Australia for consumption in Australia.

On the development side, two international companies are investing in Australia. One, Electronic Arts out of the US, which is listed on the NASDAQ and turns over \$1 billion globally a year, has set up a studio in Queensland and will be investing over \$3 million to develop the games here using Australian talent—there is a plethora of Australian talent in games development. That product will be sold not just in Australia but for export. The second big company is Infogrames out of France, which has just bought a company in Melbourne—this was written up in all the business sections about four months ago. The company it bought in Melbourne is called Beam Software. It has the same purpose as Electronic Arts: to develop and sell games in Australia and also to export the product.

On the copyright issue, the concern for these companies also is their investment in Australia where they feel that possibly their rights on copyright are being compromised or eroded. It is an industry that is growing and that needs nurturing by the government. It will generate a lot of revenue in taxes and in exports over the coming years. The IT industry, as you know, is one of the biggest growing categories. On that point, I will pass you on to Jim to give you an update on the activities and some of the wish lists that we have on piracy.

**Mr Dwyer**—I will briefly try to walk you through and give you a snapshot of the antipirate activities that we are involved in and to give you, as best we can, some sort of profile on the pirates that we have come across. In the little folder that has been handed out today, we have attempted at the first attachment to give you the most up-to-date figures, as of today.



As Mr Ephraim has said, the antipiracy campaign was launched in May of this year and there has been very considerable activity on three fronts. First of all, letters of demand have been sent to persons from whom trap purchases have been made. As you are probably aware, in order to get the evidence you actually have to get a trap purchase from the person involved in this activity. That is not always easy, given the way some of these people operate with post office boxes and their identity is not always easily ascertained. As of today, 212 letters of demand have been sent out by us on behalf of Sony to persons not just in New South Wales but in Victoria, Western Australia, Tasmania and Queensland.

The role of the Customs Service has been very significant in the way in which we have approached this. We have nothing but the greatest admiration for the Australian Customs Service in the way in which they intercept infringing copies entering Australia. As you can see, over 17,000 infringing copies have been seized and forfeited to the Commonwealth. I point out that on no occasion has an importer whose goods have been seized ever sought to defend the seizure. That is their right, but at no point has that been our experience.

The number of Federal Court proceedings commenced is 35, as of today. I will make a couple of points on that. Whilst the terms of reference of this committee are primarily devoted to the copyright legislation, in the terms of reference there is reference to use of legislative provisions other than the Copyright Act. Legally, there are two courses of civil action that we have open to us: copyright infringement or trademark infringement.

We want to show to you examples of pirate copies which I have here. You will see that on them they have reproduced the trademark. I point out to you the PlayStation trademark, a 'P and S' device. That is a registered trademark, as is the word 'PlayStation', so there are two registered trademarks there. It has been our experience, and that of Sony, that those involved in this activity reproduce the artwork on the slick so they reproduce the trademark. That gives rise to a right of action for trademark infringement. If you look at the disk itself, they reproduce it on that as well. In addition, if you put one of these disks into a PlayStation console, the trademark would appear visually as well.

**Mr Ephraim**—The first thing that comes up is Sony Computer Entertainment and then the PlayStation logo.

**Mr Dwyer**—So what we have found, for a variety of procedural and cost-effective reasons, is that pursuing pirates under the trademark legislation has been a very effective way to proceed.

I mentioned that 35 proceedings have been commenced in the Federal Court. Some of you may want to know: why the Federal Court? It is for a variety of reasons. Procedurally it is easier to sue in the Federal Court, particularly when you are dealing with infringers interstate, as we have been. The judges before whom these cases come understand the legislation. They understand the serious commercial ramifications of piracy. And in most of these cases that we commence we are seeking urgent interlocutory orders. We are not just suing with a view to the case coming on in 12 months—that is not a particularly desirable objective. We want the case to come on very quickly. We want urgent injunctions because the people involved in this activity are not the sort of people who are going to wait around and be there in 12 months time.

On the Anton Piller orders, you will see on that sheet that to date we have sought and obtained six Anton Piller orders—we have been successful in all cases. I read from the other references that you are familiar with that procedure. Without going into any detail, because we are not permitted to under the terms of these orders, I think it is important for the committee to understand that the sorts of things one sees when one executes an Anton Piller order are very interesting: drugs—not in all cases, I stress; pornography; other copyright infringing items; software programs; videos and sound recordings. That suggest that pirates are not just going to go into the business of reproducing PlayStation games; they are into the business—and one cannot generalise, of course—of duplicating other intellectual property items and also involved in serious activities like drugs and pornography.

You can see from what I have been saying that the whole approach which Sony is taking in relation to its antipiracy is a blend of three things: one, making maximum use of the customs provisions, again, I stress, under the Trade Marks Act because of the way in which the trademarks are reproduced; two, taking civil action, with the emphasis on very prompt action, urgent relief, and actions in the Federal Court; and, three, cooperating with the Federal Police or state police.

The debate in the submission is very clear about the role of the law enforcement agencies. The view Sony has taken is that the police have limited resources, that the matters which are referred to the police for consideration are the larger acts of infringement and, in doing so, a kit of information, the research information, is presented to them. That is the way we think, that we, as a copyright owner, should work closely with the police enforcement agencies. As we sit here today there are a number of pending criminal investigations. One is with the Victorian police, who executed a search warrant and seized hundreds of games, equipment, labels and books of record. Two are pending with the New South Wales police and one is pending with the Australian Federal Police.

To complete the statistics, since this program began some 280 reports of piracy have been or are being investigated. I do not know whether any of you have been involved in pursuing pirates. I have been for some years. What you have to deal with in many instances are experienced criminals and they do not make it easy for you. So the investigation process can take some time and you might hit a brick wall and not get the information you seek.

The debate about the appropriate legislation is an interesting one. We have found that the Trade Marks Act is preferable. We have not found any pirate who has seriously defended any of the civil actions. There might be a bit of huff and puff on the first day in court, but the reaction, either when they are unrepresented or, as in most cases, are represented, is that they want to submit to final orders and bring the proceedings to an end.

**CHAIR**—To get out of there?

**Mr Dwyer**—Yes. Let me move on; I am conscious of time. What suggestions would we make? We think that the committee should give some consideration to the introduction into the Trademarks Act of an equivalent of section 115(4) of the Copyright Act. That is the section which allows a court in copyright infringement circumstances to order punitive damages. We see great difficulty distinguishing the copyright breach from a trademark

breach, and we would submit that it should be looked at. Just let me remind you of 115(4). It reads:

Where, in an action under this section:

- (a) an infringement of copyright is established; and
- (b) the court is satisfied that it is proper to do so, having regard to:
  - (i) the flagrancy of the infringement;
  - (ii) any benefit shown to have accrued to the defendant by reason of the infringement; and
  - (iii) all other relevant matters;

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.

I think there is a strong argument for looking at that in the context of the trademark legislation.

Moving along to what other suggestions would be made, you have seen the submission that Megan Simes has put forward from AVSDA. By way of supplementing that, we would suggest, as appears on page 1 of this document, that consideration be given to a new provision in the Copyright Act along the lines of section 130 to deal with computer programs. Then there is the more controversial suggestion that the committee consider a provision similar to that which appears in the copyright ordinance in Hong Kong, which is attached in this folder as attachment 3.

This works as an affidavit to be put on by the owner of copyright, in which first publication, the identity of the maker and of the owner, subsistence and exhibiting a copy of the work are dealt with. Once that is addressed in the affidavit, then there is a presumption in favour of the copyright owner and the affidavit is presumed to be true and correct, so the burden would shift to the defendant.

There is no doubt that, in bringing copyright infringement proceedings, particularly where overseas copyright owners are involved, the logistics of getting evidence in a matter of 24 hours or 48 hours with a view to bring an interlocutory injunction can be difficult. I do not say that is always difficult. It can be difficult. It depends on the title involved, the location, and a number of things. I do not subscribe to the view that it is a burden which can never be achieved. I do not put it that high, but there is no doubt that there are serious practical difficulties.

Moving on to criminal actions, we have read the debate in the A-G's papers. I understand the position that the A-G takes. He is very reluctant to see any shift in onus of proof from the prosecution. I just say this in response: we are, after all, talking about theft here. However much we might want to dress it up, that is what we are talking about. I think that there is a case for having a serious look at shifting the onus. It has been done in Hong Kong. The defendant in a criminal prosecution in Hong Kong bears the onus of proving a negative. I understand all the arguments that it throws up.

So far as the committee is concerned, it may well be that you could consider some sort of a threshold. If you were minded to adopt that sort of a suggestion, you might want to consider confining it to shipments of pirate product having a commercial value above a certain dollar value. If you were to take, for example, the number of pirate copies involved and convert what their commercial value would be if they were legitimate copies, then you might have a benchmark because of the serious nature of the commercial enterprise.

We do not play down the arguments. We think that there is a need for government to review the penalties and that was something I had not mentioned. It is difficult to read the minds of the pirates who engage in this activity, but I do not think that anyone has been sent to jail, either for copyright breaches or for trademarks breaches over the last 25 years. I think there might have to be some guidelines provided to the judges to better educate them as to the seriousness of this problem. At the moment, we think that the penalties are not sufficiently serious and the fact that no-one has been sent to jail means it is just a cost factor which the pirates work into their operations.

On that first sheet you will see that we have looked at the way other countries approach intellectual property right enforcement on the criminal side. We think that there is an argument for establishing a special branch of the Australian Federal Police. We accept completely the arguments put forward by the Australian Federal Police as to the many claims on their time. We are conscious of what appears at pages 120 and following in their evidence before the committee.

When you look at the statistics on page 120, in relation to copyright, you will see that of 23 referrals, 20 were rejected, two were investigated and one was withdrawn. I think that sends a very clear message that they have so many competing claims on their time that, if there is going to be a serious enforcement policy at the criminal level, it needs more resources. That is the extent of my submission.

**CHAIR**—I float with you two other suggestions made to us over the course of the last two days. One was that there should be a section or provision in the Copyright Act equivalent to section 527C of the New South Wales Crimes Act which provides that, where there is a reasonable suspicion of goods being stolen, that amounts to a summary offence which can be used by police where they believe there are stolen goods and the circumstances indicate. The suggestion was made of goods infringing copyright in some way—for example, counterfeit. Your CDs would fit into that sort of category. That was one proposition put to us.

The second one was that it would be desirable to have in the Australian legislation some provision equivalent to the provisions in the UK copyright trademarks legislation which provide for a notice of forfeiture to be served upon someone found in possession of goods alleged to be in breach of copyright or which are pirated goods or counterfeit goods. That notice has the effect of immediate forfeiture and delivery up to a police station of the goods. It does not prevent the person who had the goods from then challenging that. The evidence that we had before us is that such challenges are extremely rare, if they ever occur. I would be interested in your comments on those sorts of provisions?

**Mr Dwyer**—My reaction is a positive one to both. I think that the first suggestion, section 527C, has the advantage of a great deal of simplicity. I would not have thought it would require a great deal of amendment to the legislation. I think that it would work. It is a very sensible idea. Similarly, with the suggestion of following the UK act, I assume that the notice of forfeiture would be issued by the police.

**CHAIR**—No, it does not have to be, as I understand the evidence. I am just trying to remind myself of who gave the evidence about this matter; anyway I can tell you the circumstances in which they described it. It was in relation to the bootlegging of counterfeit or pirated T-shirts and the like around concert venues, sporting venues, the test cricket, the Olympics, et cetera, where a person in a civil sense can serve upon someone they come across with a bag of pirated T-shirts a notice demanding forfeiture of the goods, and then the subsequent provisions which apply.

**Mr Dwyer**—At the moment, in those circumstances—and these situations arise—you have to get a John Doe order. That has been referred to elsewhere. Again, I think it is a sensible suggestion. It would necessarily be directed to the smaller pirate activities, so I would see it as a suggestion supplementary to the other steps because that piracy has to be looked at at different levels. Pirate activity can range from school kids—and so far as they are concerned, it is really a process of education; that is something that I did not mention but it is certainly part of the antipiracy campaign that we are working on—up to the highest level where you have people who are involved in serious commercial operations which often involve other activity which is criminal. So I think that those two suggestions are very sensible ones and, on our side, we would react favourably to them.

**CHAIR**—In relation to your proposal based on section 121 of the Hong Kong Copyright Ordinance, I note that, under subsection (5) it provides that:

Notwithstanding that an affidavit is admissible as evidence by virtue of this section, a defendant or his solicitor may, within 3 days from the service of the copy of the affidavit, serve a notice requiring the attendance of the deponent to the affidavit in court.

Do you know whether that has caused additional difficulties? I can imagine that, if you are wanting delay and the owner of the copyright is in the United States, you would serve a notice. I am not suggesting that members of the legal profession would do this just for the purpose of delay.

**Mr Dwyer**—Our information out of Hong Kong is that, whilst that mechanism is there, it has not been taken advantage of very often. One other thing about Hong Kong I would like to mention is that it used to have a special branch called the Preventive Service. I remember this because I had occasion in the late seventies and early eighties to work with them. They were a branch of law enforcement officers whose sole responsibility was to deal with intellectual property breaches. I am not aware of whether they still operate under that name but they were effective—some might debate whether as effective as one would like, given the levels of piracy in Hong Kong.

**Mrs VALE**—With respect to the idea of the affidavit, we have the presumption of ownership. From what we can understand, that is the hardest thing to get across in a court. In America, of course, they have a registration system. There is some thought that perhaps

we have left it too late in Australia to establish a registration system of ownership. The affidavit that you have suggested seems to serve a similar purpose. Has it been effective in Hong Kong?

**Mr Dwyer**—Yes, indeed.

**Mr MURPHY**—On page 2 of your submission, paragraph 1.6 reads:

AVSDA therefore supports the call by the Motion Pictures Association . . . for amendments to be made to the *Copyright Act* to enable copyright owners and distributors to rely upon a statement embedded in a film, including a video game, as to the identity of the owner as proof of that fact.

Wouldn't it be easy to falsify that? If someone embedded their name in the film, how does that satisfy you or anyone that that is a bona fide product?

**Mrs Simes**—What you are doing here is relying on it in the first instance. You could be challenged on it, as could somebody who is bringing in a product illegally or pirating a product. It does give you that statement to go forward with alleging ownership one way or the other.

**Mr MURPHY**—I can understand it where they put the logo on films and sporting events to make it quite clear who owns the product. I find it hard to think that that would be very satisfactory because I am sure people could forge or falsify—whatever the word is—ownership of the product.

**Mrs Simes**—I guess it is the same as the sort of thing that Michael has been talking about with the trademark on the Play Station. One of the difficulties is that Sony Computer Entertainment owns that Play Station logo. A lot of distributors are what are called third party distributors. For example, Roadshow Entertainment, which is an Australian company, purchased the distribution rights in Australia to a particular product that somebody else has developed overseas. It is not their company that owns the copyright in it; they own the distribution right in Australia. Therefore, they do not own the trademark, as Sony owns it. Therefore, they would be relying on something like this in a similar way to the way in which Sony relies on its trademark.

**Mr CADMAN**—It has been raised with us that it is a procedural matter that creates a difficulty in establishing rights. I would not imagine that that is a problem with Sony and Play Station.

**Mrs Simes**—That is why Sony has gone with trademark actions rather than actions under the Copyright Act, because it is much easier to prove.

**Mr CADMAN**—There was an interesting proposition put to us about whether there should not be an equal responsibility to display—both between the plaintiff and the defender—their link or claim to copyright, in the same way as the Trade Practices Act, for consumers, has a process whereby the consumer and the person they are complaining against almost have equal responsibilities. It is a bit of an oddity in the way in which it is done, drawing on the trade practices process. Is it reasonable to say, 'You're the defendant; you establish your link to the person who has got copyright. We will do that equally'?

**Mrs Simes**—At the moment, because the onus of proof lies entirely with the person claiming the copyright, what happens is that the person distributing the product illegally challenges you to prove it. The hurdles which you need to overcome to establish that proof are very high.

You heard yesterday about the case of *Aladdin*—and I think it is mentioned in somebody else's written submission. It all devolved down to the fact that somewhere, on some piece of paper, the company was referred to as Warner Brothers instead of Warners, and the whole case fell apart. So the burden of proof has become so difficult as to be virtually impossible—as also happened in the Searle case. There were a large number of titles at the beginning and it came down to three or four at the end where the chain of title could be documented satisfactorily. All that the importer, in those cases, had to do was challenge you to do it. Certainly, if there were some sort of balance, or some equal responsibility, it would—

**Mr CADMAN**—Whose baby is it? Are we going to cut it in half or are we going to—

**Mrs Simes**—I think Mr Dwyer would say that in all cases where they have taken people to court, they just fold as soon as they have to prove that they have got any entitlement to use that logo.

**Mr CADMAN**—Do you base your actions on trademark because of the nature of your client or—

**Mr Dwyer**—No. The reason why we go on the trademark, as we have shown you in the samples, is that it is the clearest breach. But let me come back to your point about copyright. We can all think of examples of copyrighted items, be they books, sound recordings or these sorts of CD games. In most, if not all, cases you will see a copyright line somewhere on display, identifying the year of publication, the place and the person asserting the copyright ownership.

One of the suggestions that is made in the paper before you from this organisation is the presumption that if items like these computer games are put out with a copyright line on them, similar to section 130 in relation to records, that should trigger a presumption in favour of the manufacturer putting them out. I think that is consistent with the whole development of copyright ownership. Sure, it puts the onus on the owner to include a copyright line, but that is not a particularly burdensome thing. What I am having some difficulty with is following what further things you are testing that the copyright owner should do.

**Mr CADMAN**—No, not the copyright owner, the person who has abused copyright. I, as a copyright owner, have huge hurdles to overcome. The abuser puts me through a whole circus of infinite paper trails back to the originator of the product, whereas he goes scot-free from this process and does not have to establish that he or she has a right to the product. Should there not be some more equitable sharing of onus of proof of responsibility?

**Mr Dwyer**—I think there should because these infringers, not just in this experience but in other industries, will put you to strict proof, they will put you through the hoops you have

described and then they will not put on any evidence. You will get your orders and then they will go bankrupt. So I think your suggestion as to whether there should be a burden on a defendant in copyright infringement proceedings to put on an affidavit and explain the circumstances in which the defendant acquired the allegedly infringing items has a lot of merit.

**Mrs VALE**—I think he actually does have it legitimately. It is not such a burden for him to come up with this bit of paper—

**Mr Dwyer**—Precisely.

**Mrs VALE**—whereas, from what I can gather, it is quite burdensome for the owner to prove ownership of the copyright. It is not an even burden. It is very easy for the defendant to come up and, if he has it, show his bit of paper or whatever it is.

**CHAIR**—Why shouldn't we go further than section 121 of the Hong Kong ordinance and require an affidavit from a defendant setting out certain things?

**Mr CADMAN**—Yes.

**Mr Dwyer**—I would endorse that vigorously. One of the orders we seek in the proceedings we have referred to is that, in our interlocutory injunctions, the defendant, within X days, put an affidavit identifying the source of supply, units purchased, units sold and dollars and cents, in order to take our investigations to the next level.

**CHAIR**—Do you usually get those orders?

**Mr Dwyer**—Not always, no.

**CHAIR**—There are some commercial aspects to it, but I was thinking of something less than the commercial information, for example, the source of supply—the details of the agreement through which a licence was provided to that person to produce that—or something of that nature. I am talking more narrowly about the legal—

**Mr Ephraim**—The legal rights of the person—

**CHAIR**—The legal rights, yes. So you have on the affidavit at the outset—from the plaintiff or applicant; that is, the owner of the copyright—the details which you suggested on the Hong Kong ordinance, and you have on the affidavit from the defendant details which, if the defendant is going to base a defence on them, are there for the court to see at the outset. If you are right, I presume that those affidavits will not be filed, and that will be the end of the proceedings. We will not even get to the next step, let alone get to court.

**Mr Dwyer**—I think that is a very good idea.

**Mr Ephraim**—It is a fantastic idea; it really is. There are hurdles we have to get over. Repeating what James said, it is easy for Sony, but in the interactive development world it is not that easy. Sony is a publisher and then you have people who are developers: small



development houses that Sony is publishing for. When we do distribution—we also distribute for companies such as Namco and Konami who are giant publishers in Japan—we have distribution rights. So there is a plethora of agreements that we have. Some are in house, and the titles that are developed in house are easy for us to prove copyright for—I will not say very easy; there is a paper trail—but there are a lot of different commercial applications for which we cannot prove copyright all the time, so it is very burdensome. Again, if they were the ones infringing, as you said, and they were just asked to prove their legal rights to distribute this product, that would be much more expedient for us.

**CHAIR**—I am not even asking them to prove it, Mr Ephraim. I am simply asking them to assert on affidavit what the legal basis is of their rights. If they wished to prove it and there were a dispute, that would be up to the court to determine, but this is looking to find a short cut in the provisions. It has been a while since I practised but, when I was in practice, the whole thrust of the court's administration at that stage, particularly in commercial disputes, was to try to make them as streamlined as possible. It seems to me that we could streamline these processes a lot more.

**Mr Ephraim**—I could not agree with you more.

**Mr Dwyer**—I agree.

**Mrs VALE**—There have probably been a few infringers who did not have the right to throw up their hands at the mere thought of having to put in an affidavit in order to assert their rights.

I was interested in your suggestion, James, of creating a special branch in the Federal Police. I think it is a brilliant idea—because I thought of it myself! It was something we thought about on the way home in the train last night. It seemed to me that the government really does have to provide some sort of educative role. You were talking about the attitude that people have towards breaching copyright: it does not really seem like stealing to probably 80 per cent of the population. I wanted to ask you how effective it has been in these countries. I would have thought that, more than anything else, it would have sent a strong message from the government that we are really serious about enforcing copyright.

**Mr Dwyer**—Yes, I feel very passionate about copyright in this country. If you look at the history of Australia and the way in which it has reacted to technological change, this country has been at the forefront of changing the law when technology moves ahead. Some would say it has been a bit slow. I would dispute that. When you look at the amendments to the Copyright Act following the Apple case involving computers back in 1984, Australia acted with lightning speed. So I think Australia as a country has a very strong record in this area.

Addressing your point, one of the facts of life now—and none of us can put precise figures on the level of piracy; we can only do our best—is that, as a result of a number of factors, the piracy levels in many industries are high and rising. Therefore, if the government were able to send a very strong message in this way or in a variety of ways, I think that would arrest that increase. Piracy, like any criminal activity, will always be around, but I do think that there is a role for government. The Federal Police—and in their submission they

mention the 8,000 or however many references they have had—have so many competing claims on their time. We do not argue about their need to prioritise there. That is a fact of life.

**Mrs VALE**—It is just that this is a very specialist jurisdiction, isn't it?

**Mr Dwyer**—Absolutely.

**Mr Ephraim**—You could have a special division of the Federal Police that dealt with this and was up to date on the information, the laws and so on. Just dealing with copyright is not an easy thing for a lot of people, so if you have a specialist group that lives it and breathes it, I think the results would be fantastic. I agree with Jim, the message the government would give is that this will be dealt with severely.

**Mrs VALE**—I think we have a vested interest in it too because we have such a loss of revenue. You talk about the loss of revenue to yourself as an industry, but the loss of revenue to the government must be equal or it must follow on from that anyway.

**Mrs Simes**—From listening to evidence and reading submissions, often it seems to be an either/or: either it is industry's responsibility or the police's responsibility. We do not see that at all. We see it as a joint effort and that there is a strong role for a police presence and criminal enforcement because that is what people take notice of. It does not have to be 10 per cent or five per cent of the cases, but some criminal cases need to go forward for the community to realise that it is a crime, not just having it as a crime in the act to satisfy international treaty obligations. Australia's future is in intellectual property as an industry for development. We have to recognise that for other countries' IP if we want them to protect ours as we export it.

**Mrs VALE**—Exactly. James, what has the success rate been like for Singapore, Canada and the United States where they have had a special branch of the federal police?

**Mr Dwyer**—My information is not as precise as I would like and perhaps I could have the opportunity to furnish the secretary to the inquiry with some supplementary facts and figures. Our research indicates that it has been successful. I think the Canadian one has only relatively recently been established. I think the indicators are supportive of the submission that we should consider following their example.

**Mrs VALE**—That is interesting to note. Thanks very much.

**Mr Ephraim**—That is one of the components where they have a specialised federal police. There needs to be a review of the penalties and the laws surrounding copyright. As Mr Dwyer said, no-one has been put in jail in 25 years. So you have to have the enforcement and you have to have the prosecution, and the laws have to be elevated.

When we met with Senator Vanstone's office and Andrew Kirk, who was a principal adviser, he pretty much agreed with us that the laws have not been looked at in ages. The IT industry is growing tremendously, and the revenue for companies and government is so high that maybe the laws or the penalties are a bit behind the times. So we need to have a Federal

Police specialist; we need to increase penalties; and also, as Mr Dwyer said, we need judges to act on those penalties to really deliver serious warnings to people infringing copyright.

**CHAIR**—Thank you for your submission and for coming along and discussing it with us today.

Resolved (on motion by **Mr Murphy**):

That the submission from Mr Dwyer be received as evidence to the inquiry and authorised for publication.

Resolved (on motion by **Mrs Vale**):

That the materials provided by Mr Ephraim be received as evidence to the inquiry and accepted as an exhibit.

[3.56 p.m.]

**KERRIGAN, Mr Robert, Managing Director, Kitmog Pty Ltd**

**CHAIR**—Welcome, Mr Kerrigan. I should advise you that although the committee does not require you to give evidence under oath the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We are in receipt of your submission, Mr Kerrigan. Would you like to make some opening comments?

**Mr Kerrigan**—Thank you. Briefly, Kitmog Pty Ltd is a our family company. We have a number of interests in agriculture and other activities, but the two that concern me are out two trading divisions: one called Equine Education, which specialises in horse books, videos, computer programs and CD-ROMs; and the other called Rural Media Australia, which specialises in similar communication material related to other rural industries, be it cattle, pigs, sheep, goats, sheepdogs or whatever.

The submission largely revolves around the horse book side of our business, because that is where I am having the greatest problem with infringement of copyright. Very simply, that business started off in 1986 with a book that I wrote. It was actually a series of TAFE lectures that I had given. I had an accident and was confined to the house, so I wrote a book. Various people said that it was not worth while publishing. We published it ourselves and, while we had one title in 1986, by Christmas we will have 20 of our own.

We import from about 18 overseas publishers or suppliers. As at October—we are redoing our catalogues now—we will have something like 800 books, videos and computer programs on our lists. We service just about every university, college, TAFE, bookshop or saddlery in Australia that sells horse or rural books. Worldwide, there are about 18 to 19 publishers of horse books of a technical nature—I am not talking about coffee-table books or first-horse type stuff—and there are only three who have bigger self-published lists than ours.

**Mrs VALE**—When you say that the books are technical, are they about how to ride horses?

**Mr Kerrigan**—We divide the market into two sorts: fiction, of course, which are stories that anybody makes up; and what we call coffee-table and first-horse books, which are the sort that a person who does not own a horse buys. They have lots of pretty pictures in them. The big publishers produce those in print runs of 200,000 to 250,000 in Taiwan and fly them all around the world. We are the next level up. In other words, people have already bought those coffee-table books, and ours are technical books on all sorts of things—from how to fit a saddle correctly up to involved books on feeding and training racehorses.

Of course, it is a much smaller market and a very restricted market. We buy in those coffee-table books and sell a few of them, but we do not produce them. We produce the more technical type of book. There are about 18 or 19 publishers in the world that produce

that type of book. We are roughly the fourth or fifth largest, which we think is quite a compliment.

Our problem has been largely the fact that there has been considerable photocopying of our books, particular the first book I wrote called *Practical Horse Nutrition*. Originally I was a part-time teacher in TAFE. I actually designed and established the New South Wales TAFE course in horse management in 1976, I think, and my technical expertise has always been in nutrition. I had something like 14 or 15 years as a part-time TAFE teacher, controlling a lot of others.

Quite frankly, as a TAFE teacher, I was left with nothing except, 'Here are so many hours a week. Go and teach a course.' I make no bones about it in the submission and no bones about it now that I illegally photocopied because it was the only way I could do it. When you have a group of students, you have to give them something. I illegally photocopied out of my own library. That developed from one course at Maitland of about 10 students and, when I finished in 1985, I think we ended up having at Maitland, Charlestown and Curry something like 24 part-time teachers. It grew tremendously. But it was all with resources provided from my own private library.

Briefly going back to something in my submission, I wanted to do a book on foaling by a particular lass who was encouraged by some of our veterinary friends of staff. She had actually supervised over 4,000 foalings in her lifetime. She was teaching foaling at Scone TAFE and Kurri TAFE, but she did not have a full TAFE certificate so she was doing the balance of the subjects. The girl's name was Sue and she just happened to say to me that copies of *Practical Horse Nutrition* were being handed out in toto at Scone TAFE as lecture material.

I said to Sue, 'That's brilliant. I would love to get a copy of that.' She relented and gave me a copy but she was frightened that, if the chap who was her boss found out that she had given me a copy, she would lose her part-time teaching job and she could not afford to lose her part-time teaching job. Whilst I did an example of getting some concrete evidence, that evaporated for reasons which I understand and I guess for reasons which you understand.

That was only the culmination of things that I had heard as I had wandered around the countryside. I spend around seven months of the year travelling around Australia—at horse studs, colleges, TAFEs and universities. I am off to Perth on Saturday. I do lectures at universities. On Sunday, I will be at Murdoch. I will be at Northern College on Tuesday night. I am doing an EFA lecture on Thursday night and I will be at Murdoch University on Saturday. I am giving lectures, apart from calling on shops. So I still lecture all around the place. You get students saying to you, 'Gee, that is a good book of yours. We got the lecture notes photocopied.' Then while I am away I go on to studs, shows or something and I am getting the same comments about it all the time.

The problem that I have got is getting proof because I cannot go and buy the lecture notes. I am so well known in the horse industry that, if I go anywhere near a college, all that stuff just disappears. It is out of the system. As I said, when Sue mentioned this, I thought, 'We've got proof.' But we did not have proof. I know it is going on. I have given you

figures in there of how it has affected our business. Our Australian business could be double the size of what it is.

**Mrs VALE**—Can't you get a friend to sign up for the course and see what material is handed out to them?

**Mr Kerrigan**—Yes, I will give you the names of the colleges they sign up to. I even know the colleges that are still doing it. I approached CAL in 1997. I finally got a letter from them the other day—two years later. But it did absolutely nothing. We had a meeting here in Sydney three weeks ago sponsored by RIRDC which I was at. There were a lot of the people from colleges there and you could tell the ones that were photocopying; they did not want to come and talk to me. I knew it before the meeting started anyway. But those who were not photocopying or were doing it properly, we were in conversation with for the three days of the conference. So it is a very big problem.

The situation is very complicated. We are currently producing books, computer programs and CD-ROMs. As I understand it, fact is not subject to copyright. A horse has four legs so it does not matter what the heck you do, a horse still has four legs. So the fact is not subject to copyright. But what is subject to copyright is typeset, text, design, layout, photographs, cartoons, original material. So what we are doing now is that a book that we have got at this moment will be copyrighted five ways. I discussed this with CAL and it has thrown them into absolute confusion. The text will be copyrighted to the author. The edit will be copyrighted to the editor. The design and typeset will be copyrighted to the typesetter. The photographs will be copyrighted to the supplier of all the photographs. I think there is going to be about six suppliers of this book. So we will have at least four or five copyrights on that one title.

We are doing that to protect each individual interest, because currently, as it has been explained to me—but I may be wrong—the author holds the copyright. We have a straight out physical problem in our industry in the author asserting or finding out that the copyright has been breached. I have one author, for instance, who is 67. She has written three books. She lives 28 miles out of Tenterfield. She does not travel very far. I know her books are being photocopied all around the place. How is she, in her physical location, able to police copyright? She is not.

I have talked to CAL and suggested that people, like ourselves, who are travelling and moving around, who can go into this and that library, should act as legal representatives or the right should be assigned to us to access copyright information, but apparently that is in the too hard basket. Currently under the legislation, as I interpret it, it is much easier to abuse copyright of an author who has copyright in a sphere—like in the horse industry—where people do not move around and tend to stay in their location.

I could go on for hours, but I think I had better shut up. I think I have said enough. A lot of it is in my submission anyway. I have been a little repetitive—I know that. That really came at a bad time, but I got it out. I read it again this afternoon, and I thought, 'Gee whiz, I should have edited that a bit better.' I think there is a number of questions that you could probably ask, and I would be only too happy to try to answer them.

**CHAIR**—Thank you, Mr Kerrigan. We have the entire submission, so there are probably a couple of things that we could tease out beyond what is there. My question is, with the availability of photocopying machines on a widespread basis, what do we do? Have you got some suggestions? If there is, as you suggest—and I am not doubting it—widespread copyright abuse at the kindergarten, school and TAFE levels, and some of the suggestions involve almost what you could call a conspiracy amongst teachers to breach copyright—

**Mr Kerrigan**—It is freely discussed—whether you want to call it a conspiracy or not is another matter.

**CHAIR**—I am using ‘conspiracy’ in the sense that a number of people are involved in common actions. Do you have any suggestions on how it can be dealt with?

**Mr Kerrigan**—There is an unbelievable big culture out there of photocopying. This is only coming from my friends in educational institutions—remember, I used to be in an educational institution—and a lot of these people are still good friends of mine. Some of them are working with me as co-authors or participators in books. There is no money for resources in the education sector. There is money for staff. So what they tend to do, or what a couple of colleges have done—and I am not really answering the question—is that they put on staff just to copy existing resources so they can sell them.

If I can get back to your question—and I am sorry if I got a bit off it—the problem is big. What I suggest is that the copyright agency would not know. Firstly, the colleges would say, ‘No, we are not photocopying,’ because no-one has been to really check them. We catalogue around 800 books. I have a private library now of around 1,200 books. With due respect, I probably have a bigger private library than any college in Australia. We have horse books at home starting from 1620.

This is what I said to CAL, when they were talking to me on the phone the other day. I have talked to the Federal Police who, as I said, were extremely nice on the phone. They said that, although they could see the problem, they did not think they had the resources, but to put my complaint in writing. I think the simplest way to do it—and I am just talking about the horse sector here—is, if you made it an obligation on all colleges or universities to send all their lecture notes to CAL or an enforcement section of the Federal Police every year, I would freely make my time and my whole library available to a police officer, or whoever. They could come to my home and, within X hours, we could say, right, right, right, wrong, wrong, wrong, because we would have the original and the photocopied material there, and we would be able to go bang, bang, bang.

The reason I suggest that it be done in the horse industry is that I am the only one in it, for a start. That may or may not be a good thing. It is a small industry. I know everything that is going on. That is what my job is all about. We would be able to do it really quickly. If the message got around in the educational sector that, suddenly the horse industry had been under intensive scrutiny, I am certain that it would have a dramatic change in the whole lot.

**CHAIR**—The difficulty is that, as I understand it, under the statutory licensing arrangements for universities and tertiary institutions, where course notes are reproduced for

students, there are licence fees payable. But I understand from your submission and your comments that the problem you are complaining about is the individual teachers and individual lecturers who, quite outside what the institution does, engage in photocopying.

**Mr Kerrigan**—You have three problems. You have the institutions themselves who produce their set of lecture notes with the University of Sydney logo on the front or whatever.

**CHAIR**—For which there is a statutory licence arrangement and, theoretically at least, some fees flow back to the author.

**Mr Kerrigan**—Theoretically. Then you have the full-time lecturer who is very short on funds and resources who will photocopy because he does not have to do any preparation time. Then, particularly in the TAFE sector, and now coming into the university sector, you have the part-timer who does not use the machines in the institution but uses machines outside the institution. He definitely photocopies because most of them do not think they get paid for preparation time. That only applies to horse subjects. From my total experience of some years ago, I think you will find that applies across all subjects.

**CHAIR**—It might be possible to get the university to submit to some agency, or have available for inspection, the authorised course notes. Maybe the licence provides for that to occur anyway. I think it does because there is a provision for, as I recall, the Copyright Tribunal to determine any disputes that arise. The difficulty is: how would you get every individual full-time and part-time lecturer to submit any material which they photocopy?

**Mr Kerrigan**—Maybe you just say, ‘We need this; if we do not get it, you are going to get a visit from the federal police.’ You are going to need some form of willingness to make them comply. It has been a game now since about 1992. It has been a game now for seven years in the horse industry.

**Mrs VALE**—Before you can actually even take them to the Copyright Tribunal or anything, you really have to get some evidence that they are actually doing it.

**Mr Kerrigan**—Yes, but the lecturers are not going to give it to me. The students will not because they have got something for nothing and they do not have to pay \$40 for a book or something. They are not going to give it to me. So no-one is going to give it to me. As I said, one of my authors had it and was not going to give it to me because she was frightened she was going to lose her job.

**Mr CADMAN**—What is the solution? Do you want somebody to go round and find it for you?

**Mr Kerrigan**—I made the offer to copyright it. I will go around and find it for myself, if I have legal permission to do so, because I go to these colleges and universities at least twice a year.

**Mr CADMAN**—What sort of powers do you want to be able to get it for yourself?



**Mr Kerrigan**—Basically, just to walk in and say, ‘I want to have a look at your photocopied notes; I want all your notes you are giving to your students.’ But I need to do it unannounced.

**Mrs VALE**—Couldn’t you get a friend to go and sign up for the course and then get the course notes?

**Mr Kerrigan**—No. My problem is that I do not move at that level now, with due respect, not being snobbish or whatever.

**Mrs VALE**—No, that is all right.

**Mr Kerrigan**—I am extremely busy running a business operation. Yes, I still lecture to first horse people but I do not mix much with first horse people, if I can use that phrase.

**Mrs VALE**—Okay.

**Mr Kerrigan**—I have just come back from King Island after spending five days with an author. I am off to Perth, as I said, for 10 days and I will be flat out. I just do not mix with first horse people much, unless I am lecturing them in groups. Then I am there and gone.

**Mrs VALE**—Even on the basis that you could get the evidence that this is happening, what would you do with it then? What would be your next step? To take it to the copyright tribunal?

**Mr Kerrigan**—I needed to be guided by you people and others more involved who have more expertise in this than I have. I am just concerned about the fact that it is going on in horses. It must be going on elsewhere. I just happen to be with horses in a very small restricted area, which is a problem because you have TAFEs in Richmond, Tamworth, Cloncurry, Gatton, Rockhampton and Emerald. It is spread all over the place. You have Wagga, Wangaratta and Geelong. It is not as though someone can leave the office in Sydney for a day and be back in the office in Sydney again.

**Mrs VALE**—I understand that. Have you ever taken it to your own lawyer to see what they can do for you?

**Mr Kerrigan**—Yes, it is in the too-hard basket.

**Mrs VALE**—Is it?

**Mr Kerrigan**—Yes. I do not have a legal degree, but I have a specialist agricultural consulting practice. It does litigation and financial work and has done so for 40 years. I have a fair knowledge of the law. I do have legal friends in that field, but it is far too complicated. They have just said, ‘Forget it.’ The law is too complicated as it exists at the moment.

**CHAIR**—The other thing you say is that now this is happening by scanning books onto the Internet and then being downloaded. Is that widespread?

**Mr Kerrigan**—That came to me from Bendigo Books—Linton Peterson. They run an extremely big bookshop.

**CHAIR**—This is in Bendigo, Victoria?

**Mr Kerrigan**—You and I know Canberra well. I go to most of the bookshops down there. It would be bigger than any bookshop in Canberra. They have a very big trade round the north-east of Victoria. Linton happened to mention that to me two years ago. I was in the shop three weeks ago and asked him what was going on. He said, ‘We’ve given up, it is too hard.’ They had an extremely big trade in kindergarten and primary school material. They worked out what is happening now. The group of kindergarten teachers and primary teachers who they used to sell around 120 to 140 books to in all the schools now buy one book. As I said, every eight days, 10 per cent of that book is scanned in on the Internet and it is knocked off next morning.

**Mrs VALE**—They are doing it incrementally?

**Mr Kerrigan**—Yes. That is how they are getting around the 10 per cent.

**CHAIR**—They are exploiting the 10 per cent.

**Mr Kerrigan**—That is what I have said. What is 10 per cent—ten per cent per book per year or 10 per cent today, 10 per cent tomorrow or 10 per cent next day? That is with Bendigo Books and Linton Peterson.

**CHAIR**—I am not suggesting you should have gone and pursued this, Mr Kerrigan. But I would have thought that, if this is on an Internet site, that there would be some way of going into it.

**Mr Kerrigan**—I did not go any further with Linton, because it was a kindergarten book and not really in my interest. I was talking to David Roderick yesterday and this morning. He is the sales director of Simon and Schuster who list 7,000 books. He did not even know the inquiry was on. He was very pleased. He said, ‘Go for it; it’s a big problem for us.’ It is recognised in the industry. One I did mention in there about a tertiary educational situation is Narnia Bookshop in Tamworth. They have the bookshop at Tamworth TAFE. Enrolments are increasing 25 per cent a year and their sales are going down 22 per cent a year.

**CHAIR**—I think we understand the problem. Mr Kerrigan, I thank you for your submission and for coming along and telling us about it today.

**Mr Kerrigan**—Thank you for the time. I hope you are able to do something because now, having gone public, I have let everybody else know what is going on.

**Mrs VALE**—There certainly is a culture, isn’t there, where people think that they can access this and it is not really stealing and they are not committing an offence?

**Mr Kerrigan**—It takes us a lot of time to do original work. I am unusual in that I am an author, a publisher, an importer, a wholesaler and a retailer. I am one of those funny buggers that cover the lot. It does take a lot of time to do a book.

In March we will be bringing out the biography of a very well-known horseman. The author will have put over 300 hours in that. By the time I finish, I will have put in over 500 hours in editing and typesetting and getting that book out. There will be 800 hours in that book. Now that is not a book that will be photocopied, but we are similarly doing a technical book with probably twice the time input and that will be photocopied. It has got to the stage now where we do not design a book for Australia. We design a book for England and America because photocopies are not as nearly as bad over there as it is here. I am sorry to say that in Australia.

**CHAIR**—I thank all in attendance.

Resolved (on motion by **Mr Cadman**):

That this committee authorises publication of the evidence given before it at public hearing this day, with the exception of that evidence given in camera. There being no objection, it is resolved.

**Committee adjourned at 4.20 p.m.**

