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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Copyright Amendment (Digital Agenda) Bill 1999

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 23 September 1999

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

Members in attendance: Mr Andrews, Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Mr Ronaldson, Ms Roxon and Mrs Danna Vale

Terms of reference for the inquiry:

Copyright Amendment (Digital Agenda) Bill 1999

WITNESSES

Committee met at 9.58 a.m.

BROWNE, Ms Kylie Elizabeth, Manager, New Technologies Section, Intellectual Property Branch, Department of Communications, Information Technology and the Arts

CORDINA, Mr Simon Mark, Principal Legal Officer, Attorney-General's Department

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

SHEEDY, Ms Joan Marie, Assistant Secretary, Intellectual Property Branch, Information and Security Law Division, Attorney-General's Department

SMITH, Mr Nick Samuel, Assistant Manager, New Technologies Section, Intellectual Property Branch, Department of Communications, Information Technology and the Arts

CHAIR—Ladies and gentlemen, I declare open—and hope I still have a quorum—this meeting of the Legal and Constitutional Affairs committee inquiry into the enforcement of copyright and the Copyright Amendment (Digital Agenda) Bill 1999. We will hear evidence on both these inquiries at this hearing today. I welcome the representatives of the Attorney-General's Department and the Department of Communications, Information Technology and the Arts. 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.

Can I thank you for coming today. We have previously had a briefing from Ms Daniels and Mr Fox in relation to the enforcement of copyright generally and I understand today you have provided us with a document in terms of issues arising from the non-confidential submissions on the bill. Do you wish to make some opening comments?

Ms Sheedy—Yes, Mr Chairman, we do.

CHAIR—Proceed.

Ms Sheedy—Firstly, I would like to thank the committee for inviting the Attorney-General's Department and the Department of Communications, Information Technology and the Arts, DCITA, to make oral submissions to you here today. If it suits the committee, I propose first of all to give some policy background to the bill and an outline of the bill's development. My colleague, Simon Cordina, will then outline the key elements provided in the bill and Ms Kylie Browne from DCITA will discuss the key changes to the bill since the release of the exposure draft earlier this year.

I would like to start by pointing out that the Copyright Amendment (Digital Agenda) Bill provides the most comprehensive reforms to Australian copyright law since the enactment of the Copyright Act 1968. The bill aims to address the challenges posed to copyright law by

the rapid development of digital technology and computer networks, particularly the internet. The central aim of the bill is to ensure that copyright law continues to promote creative endeavour and at the same time allow reasonable access to copyright material in the digital environment.

Technological changes have challenged the protection and enforcement of copyright throughout the world and the pace of development has the potential to disrupt the delicate balance that has existed between the rights of copyright owners and the rights of users of copyright materials. As the committee is no doubt aware, there are a number of strong competing interests in the copyright world who are concerned about the impact of new technologies on copyright: creators and owners of copyright material are concerned that they do not have an effective means of controlling or being paid for the use of their copyright material through new communication technologies; users of copyright material, such as libraries and universities, are concerned about being able to obtain reasonable access to copyright material in electronic form; and carriers and internet service providers, or ISPs, are concerned that they face uncertain and unreasonable liability for copyright infringements on their facilities.

The Digital Agenda Bill is intended to address these issues. The bill is an integral component of the government's strategic framework for the information economy. In particular, copyright law reform is part of the government's commitment to the development of a legal and regulatory framework to facilitate electronic commerce. The amendments provided by the Digital Agenda Bill will place Australia among the leaders in international developments in copyright law reform. It will position us to take advantage of emerging online markets for copyright material. The bill will allow copyright owners to benefit from the development of new technologies. The creation of a new broadly-based, technology-neutral right of communication to the public will allow copyright owners to commercially exploit their works in electronic form.

The introduction of new enforcement measures will provide copyright owners with the tools to control online piracy of their materials. However, it is important that while we are enabling these new markets to develop we also allow reasonable access to digital material for copyright users. Having this in mind, the bill seeks to balance the interests of copyright owners and users, replicating as far as possible the balance struck in the print environment.

I would like now to briefly turn to the history of the development of the reforms in the Digital Agenda Bill. The previous government first comprehensively considered the copyright implications of the new communications technology in 1994. The then Minister for Justice, your very own Duncan Kerr, established the Copyright Convergence Group which was tasked to examine the impact of new technologies on copyright law. The key recommendation of the group's 1994 report was the introduction of a broadly based, technology-neutral right of transmission.

In the international arena, the World Intellectual Property Organisation, WIPO, has also been considering the impact of new technologies on copyright. In 1996 the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty provided new international standards to improve copyright protection in the online environment. Australia played an active role in the diplomatic conference held in December 1996 that agreed to these WIPO

treaties. The two treaties are yet to enter into force; however the enactment of the Digital Agenda Bill will be a major step towards aligning Australia's copyright laws with the standards prescribed by the WIPO treaties.

The policy in the Digital Agenda Bill reflects a wide-ranging and transparent consultation process with affected interests that has been ongoing since 1997. In July of that year the government released a discussion paper entitled, 'Copyright Reform and the Digital Agenda.' The discussion paper drew on the standards set out in those new WIPO treaties. The discussion paper received widespread industry support and was the subject of extensive consultation with copyright interests. Over 70 written submissions were received on the digital agenda proposals and many consultation fora were also held on the paper.

On 30 April 1998, the Attorney-General and the Minister for Communications, Information Technology and the Arts, Senator Alston, announced the government's decision to implement the digital agenda copyright reforms. That decision was largely based on the proposals in the 1997 discussion paper. Following this decision, in February this year the Attorney-General and Senator Alston released an exposure draft of the Digital Agenda Bill for public comment. The government received more than 80 submissions from copyright interests in response to the exposure draft. The government also undertook numerous consultations with affected interests, including holding three workshops on the key areas of the bill. These workshops focused on the issues of exemptions, enforcement measures, and carrier and ISP liability. We have provided the committee secretariat with copies of the submissions and a summary of the comments received.

The bill has been substantially revised since the exposure draft in response to the comments received from both copyright owners and users. The changes in the areas that have attracted the most comment will be outlined later by Ms Browne. We will provide the committee secretariat with a written submission containing further details about the changes made to the exposure draft. I would now like to hand over to Simon to outline the main elements of the bill.

Mr Cordina—Thanks, Joan. I will now turn to the key elements of the Digital Agenda Bill. The centrepiece of the bill is the introduction of a broadly based, technology-neutral right of communication to the public. The new right will replace and extend the existing technology specific broadcasting right which is limited to wireless transmissions. It will also replace the limited cable diffusion right. Further, the new right will encompass the making available of copyright material online through on-demand interactive services—an example of the exercise of this right would be the uploading of copyright material onto a server which was connected to the internet. The right of communication will subsist as an exclusive right in all protected subject matter, except for published editions. That is, the new right will subsist as an exclusive right in literary, dramatic, musical and artistic works, sound recordings, films and broadcasts. As the right is technology neutral, it will apply to future developments in technology without the need for constant amendments to the Copyright Act.

The bill also introduces an important package of exceptions to the new right of communication. Further, it introduces new exceptions to existing rights to ensure reasonable access to copyright material online. As far as possible, the exceptions replicate the balance struck between the rights of owners and the rights of users that has applied in the print

environment. Past experience has shown that the exceptions in the bill have received the most attention from copyright interests and this area is likely to be the focus of much attention in the committee's inquiry.

The extension of the current extensions into the digital environment and the creation of new exceptions was specifically recognised in an agreed statement which accompanied the 1996 WIPO treaties. Further, the extension of the balance between copyright owners and users into the digital environment was specifically recognised as one of the fundamental principles underlying the treaties. It is important to note that the current exceptions have not been simply transplanted without alteration into the digital environment. The exceptions, as provided in the Digital Agenda Bill, have been drafted to take into account differences which exist between the print environment and the new online environment. The bill provides that the existing fair dealing exceptions in the Copyright Act will apply to the new right of communication to the public. The reasonable portion test has been extended to apply to the reproduction of literary and dramatic works in electronic form for the purposes of research or study. The extension of the reasonable portion test is necessary to provide users of copyright material with some certainty as to what is to be regarded as a fair dealing. It also provides a unit of measurement which is necessary for the practical operation of the library and archives exceptions and the statutory licence for educational institutions.

Ms Browne will outline how the reasonable portion test has been amended since the exposure draft in response to comments received. The bill extends the existing exceptions for libraries and archives to the reproduction and communication of copyright material in electronic form. These provisions have been carefully reviewed since the exposure draft to ensure that an appropriate balance has been achieved between the rights of owners and users. The exceptions in the bill will allow libraries and archives to play a vital role in providing reasonable access to copyright material in electronic form, whilst at the same time protecting new commercial markets for such material

The existing statutory licence scheme for copying by educational institutions has been extended to allow these institutions, such as schools and universities, to electronically copy and communicate works. Such use is subject to educational institutions paying equitable remuneration to copyright owners. The extended statutory licence scheme for the electronic use of copyright material has been drafted broadly to enable it to encompass future technological developments. The key to the new scheme is flexibility, based on agreement between educational institutions and relevant collecting societies. If the parties fail to agree on certain issues they will have recourse to the Copyright Tribunal.

The bill establishes a similar statutory licence for the electronic use of copyright material by institutions assisting persons with print and intellectual disabilities. A new exception is introduced for temporary copies made in the course of the technical process of making or receiving a communication. Examples of such temporary copies include incidental copies made as a result of a direct communication from a website to a user that are created by ISPs, or carriers. Other copies include cached reproductions made on the hard drive of a user's PC as a result of the operation of their browser, for example those created by Netscape or Internet Explorer. The temporary copies exceptions include the browsing of copyright material online. The exception does not apply in relation to temporary copies made as a result of an unauthorised communication. An example of an unauthorised communication

would be the transmission of copyright material without the authority of the copyright owner.

The bill introduces three new enforcement measures in response to the problems posed by online piracy and the unauthorised reception of subscription broadcasts. Along with the exceptions, this area of the bill is also likely to be focused upon by copyright interests. The first enforcement measure will put in place civil remedies and criminal sanctions against the manufacture of and dealing in devices or the provision of services for the circumvention of technological protection measures. An example of a circumvention device is a computer program which is designed to crack and gain access to copyright material that is password protected.

The new enforcement measures are subject to important exemptions which will allow a person to undertake activities that the bill otherwise proscribes. These are referred to in the bill as 'permitted purposes'. The exemptions will facilitate the operation of specific exemptions to the rights of copyright owners and are necessary to ensure reasonable access to copyright material in electronic form. The permitted purposes relate to the operation of the exceptions for libraries and archives, educational institutions and government users, and also to the exceptions for the decompilation of computer software. A further exception to the enforcement measure provisions exists in relation to activities carried out for the purposes of national security and law enforcement.

The second new enforcement regime provides both civil remedies and criminal sanctions against the intentional removal or alteration of electronic rights management information, or RMI—RMI include digital watermarks embedded in or attached to copyright material in electronic form. RMI often includes details about the copyright owner and the terms and conditions of the use of the material. The bill also proscribes certain activities in relation to copyright material from which the attached RMI has been removed or altered.

The third new enforcement regime provides both civil remedies and criminal sanctions against the manufacture of and dealing in devices for the unauthorised reception of encoded subscription broadcasts. Such devices include decoders which allow the unauthorised reception of cable pay TV signals.

The bill clarifies and limits the liability of carriers and carriage service providers, such as ISPs, in relation to copyright infringements by others using their facilities. Under the amendments, carriers and ISPs will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material communicated. Typically, the person responsible for determining the content of copyright material would be a website proprietor and not a carrier or ISP. The amendments overcome the 1997 High Court decision of APRA against Telstra. In that decision, Telstra, as a carrier, was held to be liable for the playing of music on hold by its subscribers to their clients. This was found to be the case even though Telstra exercised no control in determining the content of the music played.

The bill also provides that a carrier or ISP will not be taken to have authorised an infringement of copyright merely by providing the facilities on which the infringement occurs. Further, the amendments provide an inclusive list of factors to assist in determining

whether the authorisation of an infringement has occurred. These factors include the consideration of whether a person complied with any relevant industry codes of practice.

Finally, the bill provides a statutory licence scheme for the paying of equitable remuneration to the underlying rights holders whose works are contained in retransmitted free to air broadcasts. The scheme provided by the bill is consistent with the related amendments to the Broadcasting Services Act 1992, and those amendments have been proposed in the Broadcasting Services Amendment Bill 1999 which is currently before the House of Representatives.

The government acknowledges that in some areas the new legislation is entering into uncharted waters, particularly in relation to the extended statutory licence scheme for educational institutions and the new enforcement measure provisions. New technologies and business models for the online trade of copyright material are still evolving and the Attorney-General and Senator Alston have therefore agreed that the bill should be reviewed in the next three years. The review will focus on ensuring that the appropriate balance between copyright owners and users is maintained. I would now like to hand over to Ms Browne who will outline the major changes to the Digital Agenda Bill since the exposure draft.

Ms Browne—I propose to outline the changes to the exposure draft that have attracted the most comment from interest groups, namely the library copying exceptions, fair dealing in the reasonable portion test, the temporary copies exception, statutory licences for educational institutions, retransmission of broadcasts, and the ban on manufacture of and dealing in circumvention devices.

Under the Copyright Act, provided certain conditions are met libraries can currently photocopy material and supply it to a user in response to a specific request for research and study purposes. The exposure draft extended those provisions to allow electronic copying and communication of material in the same circumstances. Where only an article from a periodical or a reasonable portion—being 10 per cent of a published work—is requested for research and study, the library may copy and supply the material electronically, for example by email, without making any further inquiries as to the commercial availability of the material. If more than that amount is requested, the librarian must have regard to whether the material can be obtained within a reasonable time at an ordinary commercial price before it can be supplied. Material may also be supplied between libraries on a similar basis.

Copyright owners, such as Copyright Agency Ltd, CAL, representing authors and publishers, objected strongly to these exceptions in the exposure draft, saying that they allow libraries to compete with publishers who may wish to exploit new markets in supplying small portions, such as individual articles, by online delivery. It was argued that libraries could build up an electronic database of requested articles in competition with commercial online publishers. Copyright owners also maintain that one library could electronically supply material to all other libraries, thus undermining publishers' sales to libraries generally. They also argue that libraries in businesses such as law firms should be required to pay for this use of copyright material. Of further concern was that the exception was not restricted to articles in the library's collection. It was submitted that libraries could use devices to decode encrypted articles and then supply them under the exception without ever having to acquire the articles as part of their collection.

In response to copyright owner concerns, the exceptions in the exposure draft were narrowed so that no electronic material, including articles, may be supplied between libraries unless the librarian is satisfied that a copy cannot be obtained within a reasonable time at an ordinary commercial price. Therefore, each library will have to acquire its own copy of electronic material if it is commercially available. Libraries will also be required to destroy the electronic copy of the material they have made as soon as practicable after it has been supplied so that they are not be able to build up a database of articles and reasonable portions in competition with publishers. The exception now clearly applies only to publications held in the collection of the library. Libraries will not be able to supply material without first acquiring it themselves. The exception will also not apply to libraries maintained for the purposes of a business run for profit; thus libraries operated by corporations and law firms will not be able to rely on the exception.

Libraries will be required to provide a copyright notice to recipients of material in electronic form advising that the reproduction was made under the exception and that the article or work is subject to copyright protection. Subject to these amendments, the provisions which allow libraries to supply individual researchers with articles and small portions were retained. This is in accordance with the principle that the exceptions which exist in the print world should, where appropriate, be extended in the digital environment, as was also recognised by the WIPO treaties. The exception was also considered necessary for libraries to maintain their public role of providing reasonable access to research material in the digital environment, particularly for regional and remote users. However, in answer to copyright owner concerns about the exception, it can be said that there are similar exceptions in US legislation allowing libraries to electronically supply small portions such as articles. Library users are required to make declarations that the material will only be used for research or study and no other purpose and that they have not previously been supplied with a copy of the article.

Penalties also apply for failure to keep proper records and notations and for false declarations in relation to copying and supplying material. Libraries may only charge for supplying copies on a cost recovery basis. The exception does not apply to a request for a copy of two or more articles from the same periodical publication unless they relate to the same subject matter. Given that the online market for supply of copyright material is still evolving, it is also proposed to conduct a review of the operation of the legislation. The review will look at how efficiently copyright owners are remunerated in the online environment and the costs of providing material for research and educational purposes.

Changes to the library provisions were also made in response to user concerns. The exposure draft allows libraries to communicate material that was acquired in an electronic form to users within the confines of the library on terminals that allow for viewing only. Libraries were concerned that this prevented users from making fair dealing copies of electronic material and noted that users could make fair dealing photocopies of hard copy material in the library's collection. The provision was changed so that users could print out the electronic material but not download it or communicate it.

The exposure draft also provided that libraries and archives, including galleries and museums, would also be able to copy and transmit material for preservation and management purposes in much the same way as they make and supply hard copies. The exposure draft

was amended in response to strong submissions from the National Gallery of Australia for a change to allow electronic versions of artistic works to be made available within the confines of an institution on computers which allow for viewing only. This change assists preservation of works and allows the public access to the entire collection, a large part of which will not be on display at any one time. It is expected that Viscopy will oppose this reform on behalf of visual artists. However, the exception only enhances the preservation and display of the artistic work as a user may not make a permanent reproduction from the viewing terminal.

The exposure draft provided for the fair dealing exceptions to apply to the online environment. These exceptions permit copying for the purpose of research or study, criticism or review, reporting the news, judicial proceedings, or providing legal advice. The provisions permit use of a work for these purposes provided certain conditions are met, regardless of the technology used. The fair dealing exceptions are normally subject to a series of five principles, including users having to make an assessment of the potential market for the work and the effect of their use upon that market. These judgments can require technical expertise beyond that of the ordinary user. To provide a simpler means for users to access the fair dealing exceptions for research or study purposes, the copying of an article or a reasonable portion of a work is deemed to be fair so that user does not have to make any further judgments about the effect of their use on the market for the work. The existing reasonable portion test, which deems copying of less than 10 per cent of a work to be a fair dealing, will extend to the digital environment.

The extension of the fair dealing provisions and the reasonable portion test has been strongly welcomed by user interests but opposed by copyright owners on the grounds that it could lead to electronic copying and communication of large amounts of material. For example, copying 10 per cent of a database or a computer program could amount to the reproduction of significant amounts of material. It was also opposed on the ground that there may now be commercial markets in the online delivery of small portions of works or articles. Databases and computer programs have now been specifically excluded from the operation of the reasonable portion test to address the concern that large amounts of material could be copied under the provision. The modified test also no longer applies to musical works. In addition, an individual may not make a copy of a reasonable portion of any other part of the same work—for example, having copied chapter one as a reasonable portion, the individual could not also copy chapter two of the same work. The test also only applies to the reproduction of material and not its subsequent communication; thus users would not automatically be able to transmit the reasonable portion they have copied.

The application of the reasonable portion test to the online environment was considered necessary to allow users the same certainty in the application of the fair dealing provisions in the electronic environment as they have in the print world. It is also considered necessary to have a concept of reasonable portion applying to digital material to enable the operation of other exceptions in the act, such as the library exceptions and the educational statutory licence.

Under the exposure draft users also gained a new exception so that they would not be liable for temporary reproductions made as part of the technical process of making or receiving a communication, including looking at material on a computer screen. This was strongly supported by a wide range of copyright users involved in viewing material on

screen, as well as ISPs involved in transmitting material. However, copyright owners contended that the exception should be subject to the additional qualification that the temporary reproduction have no independent economic value. They also argued that the exception should not apply where the communication was not authorised by the copyright owner. The provision has been amended since the exposure draft to make it clear that the exception does not apply to any temporary copy made during the course of an unauthorised communication. A further requirement that the temporary copy have no independent economic value was not imposed as this would make the practical application of the provision less certain for the users, requiring them to have regard to the independent economic value of temporary reproductions of which they may not even be aware.

It was considered that the copyright owners' economic rights are fully protected as they retain full control over the communication which delivers the material in the first place. Viewing the result of the communication is analogous to reading a book and while copyright owners have been able to control the distribution of books through the reproduction right, they have never been able to control the reading of books. Similarly, copyright owners will be able to control the electronic distribution of their material through the exercise of the communication right to the public, but not the viewing of that material on screen, simply because there may be a reproduction in RAM when it is called up on the screen.

In response to concerns from both copyright owners and users, the statutory licence that enables educational institutions, subject to the payment of equitable remuneration to the collecting society, to electronically reproduce and communicate material was changed to give a more flexible and practical application in the digital environment. Changes were also made to the statutory licence for the retransmission of free to air broadcast to provide a more practical operation for both the relevant copyright owners and the retransmitters.

The exposure draft provided civil and criminal remedies against the manufacture of and dealing in devices designed to circumvent copyright protection measures, such as software locks. However, to be liable under the section a person had to know or be reckless as to whether the device would be used to infringe copyright. This requirement was to enable the device to be supplied to people who wanted to make legitimate use of copyright material under the exceptions. Copyright owners argued that the ban on the commercial dealing in decoding devices was too weak. They said that as long as the manufacturer or supplier advertises the device as being only for a fair dealing purpose it could, in practice, be supplied to anyone for any purpose. To address copyright owner concerns, the exposure draft was amended so that a device may only be supplied to a person where the supplier receives a signed declaration from the customer that the device is to be used only for a permitted purpose. A permitted purpose would be for use under a library, government or educational exception or to facilitate the legitimate decompilation of computer software. Devices may not be supplied to allow general fair dealing copying. This has considerably strengthened the ban on circumvention devices while ensuring important exceptions cannot be overridden by technological means.

CHAIR—Thank you very much. Can we come back to the library exceptions referred to at the outset. If I go back a couple of decades to when I was at university, a lecture was given and there was a reading list of articles provided and it was then up to the student to go and find the articles in the library for him or herself. There was an old five cent coin

photocopying machine which you had to laboriously stand over if you wanted to copy the articles—

Ms JULIE BISHOP—You are showing your age.

CHAIR—I am showing my age, yes—it might have been 10 cents. When I go and give a lecture now at law school, which I do from time to time, I go in and I find that all the students have a collection of articles already put together for them by the faculty, and printed off by the university in their printing shops, with everything that they could want for their courses. I suspect as a consequence that for many of the courses taught—not only in law school but I presume in many other faculties and departments in universities around the country—textbooks are almost non-existent because it seems to me that the market has been completely taken over by the universities in doing this. That seems to me to be an extension that the universities, to take one example of libraries, have been able to achieve through the library exemptions, and through, they would say, legitimate use of the exceptions in the copyright legislation.

What concerns me about the change to the digital environment is that if they are able to do that now in such a whole scale way, why would that not be something which they exploit further in this new environment? What incentive will there be for anybody to publish, given that you can put all this together almost instantaneously, download it, have it available? Why won't they simply be handing out floppy disks or saying, 'Come into our website for this department,' or this lecture or this subject, 'and everything is there.' Does that not really circumvent the original objectives of copyright law?

Mr Cordina—I might be able to help you there with that query. The supply of course packs to student is done under the statutory licence scheme for educational institutions and that is a scheme which is based on equitable remuneration—there is actually payment made in those circumstances to copyright owners for the supply of those course packs to students. What the Digital Agenda Bill does is extends that statutory licence to the electronic use of copyright material, both in the reproduction of material in electronic form and the communication to students of that material in electronic form, say over a local area network or whatever system is set up. In that instance where those course packs are supplied electronically, again that must be a remunerated use, and that is something which would fall under the statutory licence.

CHAIR—I understand what you are saying, and perhaps I was not making myself clear. In the future why will not the lecturer in whatever subject say, 'These are the articles which you should read and you will find them at these websites,' and all you need to do is go in and copy them off in that way? That seems to be one way in which they will make use of what is available, and you might say that is a legitimate exercise of what they are doing. Or if you are simply able to go in and copy them from the library's holdings itself, is that not again effectively diminishing the value of the property held by the copyright owners?

Mr Cordina—We would see that circumstance as being similar to what applies in the print environment where if a lecturer recommends a particular article to a student and it is not supplied in a course pack—say, further reading and a student happens to be particularly

keen—that student could always go into the library and make a fair dealing reproduction of that article for his own research or study.

Mr KERR—But apart from anything else, did the library not have to have a certain volume of physical copies previously?

Mr Cordina—In relation to material in electronic form, the exception only applies to libraries for material which they have acquired in their collections.

Mr KERR—But they will acquire one electronic copy.

Ms ROXON—Why would you not just charge more for allowing your publication to be put in electronic form to start with? You know, a book costs $20 to buy but it costs $700, or whatever it is, to put it on in electronic form because you make some sort of assessment of how many people are going to use it in that way.

Mr Cordina—I suppose that is a matter of contract between the owners and the purchasers and—

Ms ROXON—But if that is what the legal environment turns out to be, is that not what any author, publisher, supplier or person who is setting up a website would negotiate as part of their contract?

Mr Cordina—I am only speculating here but I assume that because of the convenience of having material in electronic form they may want to set a higher price for the provision of that material than what they might do, say, if the material was in print form.

Ms ROXON—It just seems that might be an easier way of dealing with the problem. How you work out what the cost is would, I guess, be the big question.

CHAIR—There would be a particular difficulty though for journals more so than books, would there not? Journals have a higher value in a sense anyway. Why would anybody bother to publish a journal in this new environment?

Mr Cordina—I am glad you raise that because I was having a look at the Franki Committee report and a similar argument was raised in there that the introduction of the photocopier into libraries would destroy encyclopedias or article-based material. The case was that that market was not destroyed and the industry survived. I think it could be a similar argument which is being raised again in relation to this new wave of technology having material now in electronic form. I might just say that because these markets are evolving it has been specifically recognised that the bill should be reviewed in three years to ensure that the actual balance struck between owners and users is the appropriate balance. I suppose the bill is provided in recognition of that.

Ms ROXON—With the new bill, or the bill rather than the exposure draft, do the provisions in relation to circumvention devices deal not just with the production of or dealing in circumvention devices but also the use? I think Ms Browne was talking about some exemptions for use, but if you are able to buy a circumvention device overseas and not

breach the laws of this country, come to Australia and use it, not being within any of the permitted exemptions, is that prohibited under the new bill or not?

Ms Browne—No, the use is not prohibited under the bill; it is only the dealing and the manufacture that is prohibited. I suppose one of the reasons was that it would be difficult to enforce against individual users—

Ms ROXON—Why is that? It would be difficult to find out who is using them?

Ms Browne—Exactly.

Ms ROXON—But if you did find out, is there some reason that the department or witnesses might want to talk about why you would not prohibit that?

Ms Browne—Another reason was that it was specifically thought that you would be able to use circumvention devices in some circumstances, for example libraries being supplied with the device and being able to use it in that instance, so the use was not prohibited.

Ms ROXON—But if for some reason or other I am at home and using one of these devices and not linked to a library or institution that is permitted to and someone finds that out, why would there be no reason to prosecute me for that? Is there any legitimate reason or public policy reason why we want to allow people to do that, other than if they are clearly within the exceptions?

Mr Cordina—If we were to proscribe use we would have to look at cutting out certain exemptions in relation to the use of those devices, say, if that use was to facilitate a specific exception under the Copyright Act. The way we have approached it is we have tried to attack where we think the most damage can occur to copyright owners—that is, through commercial manufacture and commercial dealings in these devices—rather than the user sitting at home who is to use one of these devices.

Ms ROXON—I can understand why you would not want to spend the money to pursue prosecuting someone—that is a different thing—but is there actually any legitimate reason, other than perhaps the cost of enforcement or the impracticality of enforcing it or the unlikelihood of people knowing? I know we are only at the start of our inquiry, but I do not really see why and I am wanting information as to why you would not prohibit that. Whether you act upon it often or not is a different thing.

Mr Cordina—If you were to proscribe that there would have to be certain exceptions cut out to that proscription in relation to certain exemptions.

CHAIR—I do not follow that. Why cannot there be a general provision, worded in more eloquent legal language than this, but to the effect that any use other than that provided for in this act or this section or whatever is prohibited and the penalty is such and such, just a general anti-use provision except for the exceptions already provided in the legislation?

Mr Cordina—If it facilitated those exceptions then that would be a possible way of proscribing use.

Ms Daniels—In that sense, Mr Chairman, I think the fair dealing exceptions would be picked up under a provision such as that, and, of course, they are less certain than other exceptions under the act; their breadth is less certain.

Mr Cordina—The American Digital Millennium Copyright Act does provide an exception for use in relation to fair use, which is their equivalent of our fair dealing.

Mr MURPHY—Through you, Mr Chairman, listening to this discussion I was just going to ask a general question. How confident are you that an author is protected under this bill and that there will still be a significant market for the author so that people will go out and pay the $39.95 at Angus & Robertson for the hardback copy?

Mr Cordina—The key element of the bill is this introduction of a new right of communication to the public, which is there to allow copyright owners to exploit these new electronic markets. There is also the introduction of these enforcement measure provisions—and one of these relates to circumvention devices, which we are talking about, the others relate to rights to managing the information. So it does try to provide the basis upon which copyright owners can exploit these new online markets, but at the same time it is also trying to allow appropriate exceptions to copyright owners' rights to facilitate the access to information. Copyright has always been a balancing act between the rights of owners and the rights of users.

Mr MURPHY—Does it not look to you that, human nature being as it is, more people will be inclined to pay a small fee through the library to get access to a particular work at a significantly discounted rate? The extension of that is the capacity then to put a mint copy all around the web.

Mr Cordina—The only way they could get it through the library is that it would have to be for their own research and study and there would have to be a signed declaration to that effect. Also, we are not talking about whole works here; we are talking about a reasonable portion of a work, so it is 10 per cent of the number of words in a literary or dramatic work or an article from a periodical publication. Under the reasonable portion test they would not be allowed to access, say, 10 per cent of a chunk of one literary work and then come back another day and access another 10 per cent of it; they are only allowed to take the one bite. So it is only access through libraries in a limited form for the purposes of research or study, and there has to be a signed declaration saying it is for the purposes of research or study. Also, when the library actually provides them with that material the library would have to provide a notice saying that the copyright material is subject to protection under the copyright law.

Mr MURPHY—How do you check that an individual would not have 10 visits to the library or a group of students might as individuals have a visit and collectively you have 10 students able to get access to the whole document?

Ms ROXON—They could do it now.

Mr Cordina—I suppose a similar problem would currently exist in relation to print material where they could go into a library and each copy 10 per cent of a book or a chapter of a book.

Mr KERR—It is a bit cumbersome now though.

Mr Cordina—I agree, it is more convenient to be able to make these reproductions in an electronic way.

CHAIR—We had evidence of an allegation that a group of teachers in a school, each abiding by the 10 per cent rule, nonetheless managed to copy an entire work and then use it in that way rather than purchasing the work. The point Mr Kerr is making is that in the photocopy environment there are certain built in disincentives, if I can call them that, in terms of the effort and the cost involved, whereas in the new digital environment those disincentives virtually disappear. It seems to me that you are confident that the same provisions can simply be translated over from the current environment into a digital environment as if all the surrounding circumstances are the same. Given that you have instantaneous copies, as Mr Murphy says in mint condition, I am just questioning whether once you have it in the digital environment we are really talking about a different world and whether or not we should be applying the same parameters to that world and expecting the same outcome when in fact many of the parameters have already changed by definition of the new technology.

Mr Smith—To take the example that Mr Murphy has given about a work being placed on the web and being directly available to the whole world, if you look at the example today of musical works, MPEG3s, being put on servers around the place, they are quickly chased down by record companies. Because of the new digital technologies there are extra capacities for owners to look after their own rights. If you put up an infringing work, say an entire novel cobbled together from 10 reasonable portions, it is very easy for an owner to chase down that work on the web by having things like software bots which chase all over the web and look for bits of information, in the same way that the web is indexed today through Alta Vista or whatever, which are pieces of software recording the content of the entire web. In that same way you can use software bots to track down infringing material. So pirates who did put material up on the web, as MPEG3 pirates do, are quickly shut down again because their acts are found out in that way.

Mr MURPHY—With great respect, Mr Smith, after listening to a number of owners who had had their works pirated, it is extremely time-consuming and extremely expensive and you have to have vast resources to be able to prosecute your rights to defend your works. From the submissions that I have listened to in the time that I have been on this committee I do not accept that. I think it would be very costly to the owner.

Ms ROXON—Can I ask a question at the other end of the spectrum. I do not really get the discussion of this bill introducing a whole new right of communication to the public. I want to know how confident you are that, instead of the information technology boom meaning that people have access to a whole lot more information, we are not actually going backwards, depending on the terms of this bill when it finally is passed. I am a little bit concerned about the public library sort of comparisons. I come from an electorate where

people rely very heavily on being able to have free access to libraries and materials in a whole range of ways and I do not fully understand how this new system will give us an equivalent of how you can borrow or browse materials in a library—you know, you pay your membership fee of $5 a year, or whatever it is, and you can borrow that library's whole collection over the course of time and do what you want with it for as long as you want with it. From my point of view, unless you have a computer at home to print the material—which although we talk as if everybody does many people still do not—it is not realistic that there is some sort of equivalent. That is my first point.

The other is an issue that one of you raised about exchange between libraries. I always thought that the exchange between libraries was a way of saying that if you live in Footscray but the Perth Library is the only library that has a collection of the University of California's journal on something or other they can send it over and share that information so that the public actually have as much access as possible in circumstances where it is not realistic or cost effective for a library to maintain a whole collection of a particular journal. So I just do not really understand the language of this right of communication to the public and I do not really see why the bill is at all dealing with rights of communication. I understand that it is dealing with protecting authors' rights and it is dealing with users' rights, to some extent. I would be grateful if someone would address how the proposed system for electronic technology will continue the public access that we have through our public library system for people who do not have computers at home and do not have access and do not have the money to do that.

Mr Cordina—The library will provide access through allowing the communication of reasonable portions and articles of works for people's own research or study. If they are off-site, the library will be able to email to them an article from the periodical publication if they provide a declaration that it is for their own purposes of research or study.

Ms ROXON—Email it to another library?

Mr Cordina—No, email it to a user.

Ms ROXON—I am talking about users who do not have their own computer terminal at home.

Mr Cordina—The bill specifically provides for an exception to allow libraries to make available within their premises material which they have acquired in electronic form. A user would be able to go into the library, sit on the terminal there and browse the library's electronic collection. They also will be able to make—

Ms ROXON—Mr Cordina, I would like to stop you there. That is not the same as being able to walk off the street and borrow from the library a book that you can take home for two weeks, is it? Most of us cannot read a 500 page book at a terminal in 20 minutes with five other people waiting to use the terminal. What is the equivalent of that?

Ms Browne—You will still be able to supply photocopies to people so if they do not have terminals at home you can supply them with a print-out—

Ms ROXON—Sorry, I did not hear that. I am hearing Mr Murphy running to the Main Committee.

Ms Browne—Libraries will still be able to supply hard copy material to users. If the user does not have a terminal at home they can make a request for material and if it is only in electronic form the library could make an electronic copy, or even get a print-out, and send it to the person at their home. There is no requirement for the user to have a terminal to be able to access the exceptions; they will still be able to get material for research and study purposes. As between libraries, libraries will still be able to supply hard copy material as between themselves. If they want to supply electronic material between themselves they will only be able to do it if the material is not readily commercially available.

CHAIR—Is there a print-out they can supply subject to the 10 per cent rule?

Ms Browne—Yes, you can supply a print-out of an article or a 10 per cent rule without making any further inquiries about the commercial availability of the material.

Mr KERR—To tease out the point that Nicola has raised, in a sense there are two possible ways to remunerate content providers in this library environment. The first would be to have some remuneration scheme. What you have done is to say, 'Well, we will ban the exchange of electronic publication between libraries,' and that in a sense puts a levy on libraries because all of them will have to independently acquire the electronic database. That is one way of ensuring content providers are paid, but it does mean that the Footscray Public Library, which Jeff Kennett has just trashed, does not have the money to buy that material—I am sorry, I meant to be flippant.

Mr CADMAN—He apologised last night; what is wrong with him?

CHAIR—Let's stick to the topic.

Mr KERR—That means that public library A will have to acquire that. Now, each library is going to be limited in terms of its financial resources to acquire a comprehensive collection, and one of the things that I thought would be advantageous in the electronic world is the fact that you can make these rapid information searches and link into a much wider inventory of knowledge than, say, the old interlibrary loan system facilitated. So in a sense the compromise you have adopted is one which says, 'We recognise that there has to be some remuneration to content providers but it will be at the expense of availability to people whose local libraries or information access points are inadequately funded to have the comprehensive range of materials.' I am just exploring whether there might be a better compromise which would be to say, 'We recognise that there does have to be direct remuneration to content providers for this material, but we allow the rapid exchange of information so that we do not have these blockages in the system.' I am just wondering whether you gave some thought to an alternative model, because I think you have obviously understood the content providers' argument, and you have accepted it to some extent, but you have accepted it at a price that seems to me to run against the fundamental objective that you say that you want to actually protect—that public interest access issue that you have given priority to in a whole lot of other areas.

Ms Browne—One point I would like to make in relation to electronic material is that, given that it can be supplied from one library to a user basically anywhere if they can make an email request, we thought that it was less necessary for every library to have a copy of that material. It is not so necessary for your local library to hold the electronic material if you can send off an electronic request to, say, the state library or National Library for that material.

Ms JULIE BISHOP—If you have a computer.

Ms Browne—If you have a computer, indeed.

Ms ROXON—Or if you can afford to.

CHAIR—Is it envisaged that that request could be made from a library? That is, can I go into the Footscray Library, or into the Manningham Library where I am, and make an electronic request of the State Library of Victoria or the National Library of Australia from there?

Mr Cordina—There would be no reason why you could not do that under the Digital Agenda Bill. Building upon what Kylie said, another reason why we restricted the transfer of material between libraries is that it is trying to strike a balance where we recognise that there are these new emerging markets and material as articles or smaller portions of works may now end up being part of that market. To allow libraries to transfer that type of material between themselves without any restriction would mean that only one library would need to acquire that material and then another library could make a request for that to be transferred to supply a user at that particular library. You could have a quick and very convenient dissemination of these articles or reasonable portions through all libraries with only one library being required to acquire that material.

Ms JULIE BISHOP—On this library to library commercial availability provision and the test as it relates to works in electronic form—and it is no longer relevant how much of the work is to be copied—what is the work about which the librarian must make the investigation?

Mr Cordina—The work would either be the article which is to be supplied to another user or it would be the work from which 10 per cent is to be taken. It is just in relation to the article which is to be supplied to the other library.

Ms Browne—They only need to have regard to the commercial availability for parts that are more than a reasonable portion or more than one article from the same periodical. If the library gets a request from someone to be supplied with an article for research and study purposes they can supply that article, but if the person requests them for a whole work, a whole published work, or two articles, then before they can satisfy that request the librarian has to have regard to whether those articles or the whole published work is readily commercially available at a reasonable price.

Ms JULIE BISHOP—I guess it depends how the publisher presents the work in the first place.

Mr KERR—Just exploring this, what worries me about the compromise that you have adopted, and the discussion has even made it more likely, is that what you are likely to get is one or two libraries becoming specialist libraries in electronic acquisition that you go to knowing that they have a comprehensive range and most municipal and ordinary libraries will not have a comprehensive range so you will not go to them for electronic purposes. So the objective of using this mechanism to find a way of remunerating or recognising content interests does not get achieved because essentially you will disaggregate the library market. I can just see how this is not quite going to achieve your objective and I am wondering whether there was any thought about a mechanism which might sit somewhere in the middle which talks about an equitable remuneration measure or some way which may still maintain free access for some of the traditional pursuits that have been allowed but which generally attaches some remuneration to the transmission of this information and encourages it. I actually do not like the idea that you cannot transfer information between libraries. I think you should be able to go to your municipal library and if technology now allows easier access than interlibrary loans used to, well, that is a terrific thing for the community advantage.

Mr Cordina—I think one of the points we considered was that the government's policy has always been that copying by libraries and archives has always been free copying and not remunerated copying. That free copying by libraries and archives was something we tried to transfer across into the digital environment. This is one of the cutbacks which we implemented as a result of trying to do that.

Ms ROXON—Does it not come back to the question I asked before on how clever the publishers are in what they develop and promote and sell to the libraries in the first place? If I was a publisher now, I would not be waiting for the libraries to get their technologies up to date, I would be developing a system or marketing my products in a way so that I can go into the library and say, 'I will sell you this and it will give you access online and in hard copy to all of these.' Maybe you will pay more for it, maybe you will not, and maybe that is too great a disincentive. I am sure we will hear from the publishers about whether that would be prohibitive, which obviously has public policy problems for it. But I share Duncan's concern about the compromise that seems to have been struck at this stage.

Ms Daniels—I guess the way the market is going to go for publishers and the contractual dealings with who they supply to will be something that will develop.

Mr KERR—Can I ask a couple of specific questions about the relationship between contract law and these provisions and the right to be encrypt or broke. Let us assume that you are a publisher of medical journals. What is the circumstance that you can contract with any library to restrict or to require remuneration per use? This legislation anticipates that in the absence of such contractual arrangements there is free access, so what is the situation if you enter into a contract that says, 'Payment shall be on the following basis,' and it is a full use basis, irrespective of whatever the act says.

Ms Browne—That is an issue we looked at in formulating the provisions and that was what was a capacity for libraries to contract out of the free exceptions. There was some argument to and fro about whether there should be a similar provision as there is in relation to decompilation which prevents you from contracting out of the free exceptions. There is no

specific provision in the bill which says that you cannot contract out of the free exceptions, but I guess that is certainly a bargaining point in the first instance for a library. If a publisher comes to them and says, 'You can pay this much for this use,' the library can turn around and say, 'But this is a guaranteed free use under the Copyright Act so the licence agreement should reflect that.'

Mr KERR—But taking Nicola's point, is it not also the case that a commercially minded publisher would say, 'We are not going to supply this to any library, except on these terms.'?

CHAIR—We accept the statutory deposit provisions require you to deposit with the National Library and the state library in each state—

Mr KERR—With electronic copy?

Ms Browne—But not electronic.

Mr KERR—So there is no statutory deposit and there is a capacity to say, 'We will not make them available, except on these terms,' so why would any publisher with a brain not immediately simply say, 'The terms upon which we supply now are as follows.'?

Mr Cordina—I think there are two issues. Firstly in relation to statutory deposit, whether or not that provision should also apply to material in the electronic form was specifically raised in the Copyright Law Review Committee Simplification Report and that is something which the government will be specifically considering, probably this year- it is the next thing on our copyright list of things to do.

Ms ROXON—Sorry, what were the recommendations of the review—or there have not been any; it was just raised as an issue?

Mr Cordina—I would have to check this but I think the recommendation in the CLRC report was to extend the statutory deposit provisional requirement to material in electronic form. The government is going to be considering the CLRC report.

Mr KERR—We can come back to this afterwards if necessary, but you have mentioned the US provisions. I have had various contentions put to me that the US exceptions are narrower than ours and others who assert they are, in practice, similar. I would appreciate some analysis of that, either now or later. My second point is: I have also had reference to the EU draft directives which are asserted to deal with this matter in a different way. I would be grateful for advice about what the EU draft directives prescribe—what is the status of them, and how would they address this situation?

Mr Smith—On the issue of the US library copying provisions, if you want me to get technical, section 108(d) of the US Copyright Act permits libraries to supply users with material under similar circumstances to those which our bill permits. You will get argument on that question from copyright owners: they say that it will not permit that and it will. Our information from speaking to American university general councils is that in fact it does

permit that. For whatever reasons, American universities do not currently use it to the fullest extent, but it certainly does permit that usage.

Mr KERR—And what about the EU provisions? I would appreciate legal advice because people I have spoken to intend to provide legal advice, either to the committee or certainly have indicated to me—

Mr Smith—If you would like I can provide you with the actual provision in the US act.

Mr KERR—To be honest, I do not know what it means. I think you need to read commentary on those things in general terms and you have to have a framework that allows you to understand what they mean.

Mr Cordina—Perhaps that is a question we can take on notice and provide you with a full response.

Ms Sheedy—And on the EU directive as well.

Mr CADMAN—I am just trying to get my head around what Mr Kerr is driving at and wondered if you could cross-check me. It seems that we are discussing whether or not libraries need to acquire a particular product or whether or not they only need grant access to the public; is that right? If they provide terminals and access at no cost to me as a member of the public, they are fulfilling their duty to supply information, or they may have it stored within their own resources and be a licensed site for a whole range of products. Is that the conflict or the dilemma?

Mr Cordina—I suppose that is right. Libraries will be providing access to material they have acquired in their collections, but if it is just a general terminal connected to the internet a person can come in and use that terminal to surf the web and gain access to material which is beyond what is acquired in the library's collections. So by having computer terminals available to users they are providing access in two ways.

Mr CADMAN—Okay, fine, and a limiting factor is the conditions of distribution that the generator of the material or the publisher may place on that material. There will be a sole agent of outlet and that person may make significant charges, or there may be wide distribution of a scientific document, for instance, and anybody can pick it up at no cost. Is that the sort of thing that we are trying to confront? You might have a site with something that I really want and you are going to charge me $100 a hit and so the public library has people queuing up to get this stuff at no charge because if they go through a commercial route it will cost them $100 to hit that site?

Mr Cordina—Yes, but for the library to provide a user with access to that material the library would have to enter into a contract with the owner of that website. The material would then in effect be material the library had acquired for their collection and the library would be able to provide users with access to that material.

Mr CADMAN—Do we not face the conflict—and I am talking about the non-scientific and perhaps more artistic material—that if creators of material can see no benefit in its

creation they may want to do it on weekends as a hobby but they will not see any commercial benefit, unless we have in place a regime that has a degree of rigour and confidence in it?

Mr Smith—As Mr Kerr mentioned, we are trying to find a compromise model that allows creators to be paid on the one hand but not to cut off access to everyone in the community on the other hand.

Mr CADMAN—But if they want to they should be allowed to cut off access. They are the creators of the material, are they not?

Mr Smith—That is one argument. Another argument is that this is the sum of human knowledge which ought to be accessed by everyone in the community and they ought to be remunerated but at the same time the knowledge that they have created ought to flow through educational institutions, through libraries, to anyone who wants to access it.

Ms Browne—For the library to supply material to the public they will need to have acquired it from the publisher in the first place, under whatever contractual arrangements. The library cannot then just make whatever material they supply available to everyone over the net; they can only supply limited portions under limited circumstances to individual users in response to specific requests. The users have to comply with standards in the Copyright Act and they have to make declarations—there are penalties for false declarations and the library has to keep records of the declarations. Libraries say they take their responsibilities very seriously.

Ms ROXON—By the way, if the publisher is the owner of the copyright and they want to make the whole work freely available on the internet to anybody—and I am not saying they would want to—is there anything to prohibit them doing that?

Ms Browne—If the publisher wants to do that, certainly, they can do that.

Ms ROXON—I thought you were saying that they could not.

Mr Cordina—There is an exception to that in relation to published material in print form. The publisher is required by law, I think under section 201 of the Copyright Act, under legal deposit to provide a copy of that material to the National Library so that you are at least providing some access in a limited circumstance through that particular library.

Ms ROXON—We always talk about the creator of the work having to be protected, but I would have thought the authors themselves mostly get pretty much nothing from royalties anyway. I am happy to be corrected, but I thought the money that most authors get is the payment from the publisher to actually produce it to start with, so it is the publisher's financial interest that we are really concerned about. We are not really talking about the creativity of our authors and our academics, are we?

Ms Daniels—I guess under the first principles of the Copyright Act the creator or the author is the first owner of copyright in his or her work that is created and—

Ms ROXON—Which as soon as anything is published they sell to the publisher basically.

Ms Daniels—That is right, so it is a contractual arrangement between the creator and the publisher as to how their works are further exploited through the right—

Ms ROXON—So when we are talking about the interests of making sure people are still encouraged to write and create, we are really talking about looking after the publishers to the extent that they will still pay people to write this material; we are not really worried about royalties as such or anything that goes directly to the writers. Is that right?

Ms Daniels—The bill is providing a new economic right to copyright owners and under the law that copyright owner is the creator in the first instance, unless you are an employee. So, the first principle of copyright is extending to this new right of communication to the public and then, secondly, the arrangement between a creator and whoever is going to exploit the creator's work, whether it is a sound recording company—

Ms ROXON—Does that mean that if I am a writer I can do a deal with my publisher that says, 'I'll write this for you but I'm going to maintain my copyright interest in it and I'll then distribute it freely on the net to anybody who wants it.' Why would a publisher do—

Ms Daniels—But in that example you would not need a publisher, you have become the creator and the publisher in your example.

Ms ROXON—So what I am saying is: in practical terms anyone who wants their material published has to have a deal with the publisher to hand over the copyright.

Ms Daniels—Whether the copyright gets handed over every time may vary, but it would be a creator's decision whether it is in their interest to use a publisher to exploit their work in this new electronic environment and if it is in their economic interest to go through that next step up the line.

Ms ROXON—I do not want any of these comments to be taken as me having an objection to publishers' interests being looked after. I just want to know where we are focusing it. It really seems to me that it is the incentive for them to continue to sign up writers, authors and academics. That is still just as important, but it is a different step to focusing on the actual authors and creators themselves.

Ms Daniels—I guess from the government's point of view we just focus on the copyright owners, and, depending on the nature of the work and what field we are talking about, they are the creators or the publishers.

CHAIR—Can I just take up Mr Cadman's point, and it rises my mind in this context: if you are creating a new right, namely the right to communicate, is there not equally the right not to communicate?

Mr CADMAN—That is good.

Ms ROXON—If it is equal, it is an exclusive right.

Ms Daniels—It is an exclusive right so you can license it any way you like, including not doing it, yes.

CHAIR—So you would argue, therefore, that the statutory deposits should not extend to the bundle of rights involved in the publication; statutory deposit should not extend to the right to communicate that?

Mr Cordina—I suppose this is one of the things we will be considering when we look at the sort of legal deposit and whether—

CHAIR—I understand that, but I am trying to look at it in the sense that here we are creating a new right and on one hand we say, 'If it is a right to communicate, then logically there's a right not to communicate,' but it may well be that statutory deposit is extended which would then include that right, because so far in statutory deposit we have not disaggregated the rights; it is just the whole kit and caboodle.

Ms Daniels—Yes.

CHAIR—I do not have a view about this; I am just trying to explore where we are going.

Ms Daniels—It is an interesting issue.

Mr CADMAN—You see, the electronic process does not restrict you so easily to the 10 per cent statutory limit or the reasonable thing; you can just grab the lot, and you can do what you like with it once you have downloaded. You have what amounts to an original copy. If as the creator I decide to limit access but then the statutory requirement gives a public library access to anybody and everybody who wants that material, you have overridden my rights as a creator to limit communications and access, have you not?

Ms Browne—If you published the material in electronic form, the library is going to have to purchase or acquire that material; the statutory deposit provision does not apply to electronic material at the moment. There is no compulsion on you to give it to the library; the library would have to acquire it from you by whatever means, either purchasing it or licensing it in the first place. Then once the library has acquired the material as part of their collection, they can only use it without consulting you further as a publisher in those limited exceptions that apply at the moment in the print world.

Mr CADMAN—I am just trying to look into the future a bit.

Ms Browne—Can I just come back to the point that the Deputy Chair raised before about the remuneration of the creators and the authors., That would also be something that would be picked up as part of this review that Simon has mentioned. Because this is a new and emerging market, the review would look at the operation of the legislation and the remuneration to copyright owners and primary creators for online use of their works.

Ms ROXON—But we would want to be careful that we do not scare off every writer, creator, academic from Australian shores within the three years before we have the review, so we have some interest in taking care that that does not happen first.

Ms Browne—Yes.

CHAIR—Are there any other questions? If not, can I thank you for the submission this morning and thank you for the discussion. It may well be that we will want to come back to you again when we continue to tease out some of these issues with other witnesses to the inquiry. Can I thank you for coming along this morning.

[11.26 a.m.]

BRITTON, Mr Charles, Australian Digital Alliance

BURN, Ms Margy, Australian Digital Alliance

PAGE-HANIFY, Ms Christine Ann, Australian Digital Alliance

WODETZKI, Mr Jamie, Adviser, Australian Digital Alliance

CHAIR—I welcome the representatives of the Australian Digital Alliance. I should advise you that although the committee does not require you to give your evidence under oath, the proceedings 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 and I invite you to make some opening comments. Without wishing necessarily to restrict you, can I say that a number of members have other commitments at midday so if it were possible for us to deal with this in about half an hour that would be helpful.

Mr Wodetzki—I would like to open the comments firstly by thanking the committee for taking the time to hear us. Perhaps I will begin by very briefly introducing the Australian Digital Alliance. We are a broadly based alliance of different interest groups who have each had an interest in copyright issues for some period of time. The membership includes groups such as libraries, educational institutions, supporters of interoperable systems, an IT industry body, consumer groups, and research organisations. Within that grouping you have both owners and users of copyright, although we tend to focus on user issues because there are plenty of people looking after owner issues.

Today we need to try and touch on two sets of issues: there are the enforcement issues and there are also the digital agenda issues, and I think we need to be careful differentiating between those two aspects of this hearing. I might perhaps confine my comments very briefly to the enforcement issues and move onto digital agenda issues because I suspect that they are more to the front of everyone's mind.

CHAIR—Can I just briefly break in on you and say that in a sense we are under some constraint with the Digital Agenda Bill in that we are required to report by December, whereas we are not under the same constraints with the broader issues of enforcement. It might be more useful to the committee to deal with the digital agenda issues and we would be happy to hear you again on the enforcement issues. I do not want to cut you off but it is best that you know the constraints that we are working under as well.

Mr Wodetzki—We are more than happy to concentrate on digital agenda. We will try and keep our opening comments brief to give you an opportunity to ask questions. We were listening to the previous speakers and there were also a number of questions in this morning's session which we can add comments to and it would be useful to do so. I will begin with some overview comments, Margy will then make comments about libraries,

Christine will talk about educational issues, and Charles will make some comments about the consumer issues that arise under this bill.

By way of overview, I think in many respects copyright is a complicated issue; everyone knows that. The act is not straightforward, it is full of traps and it is full of issues which can get really quite confusing—even for people who are supposedly experts it gets confusing. We appreciate that it is important to try and get everything in its proper place and there are problems with that from time to time with different interest groups representing issues in a way that distorts the reality. Everyone knows that copyright is about balance, I have never heard anyone dispute that, so we need to move on from that and ask what is balance all about. What copyright really is is a statutory grant of rights to a group of people, copyright owners, to encourage them to create. It is a limited grant of rights and it is subject to a number of exceptions. There are exceptions in so far as the scope of those rights is limited—it does not cover everything: if you are a copyright owner you do not control all use. There are also limits on those rights by way of specific exceptions which say that other people—users, for want of a better term—have rights also. There are also things like exceptions for libraries and exceptions for fair dealing, which students and researchers rely upon, and exceptions in the context of computer software which is intended to encourage competition.

All of those things make up the balance and really the question we face at the moment is: how do we maintain the balance? This digital agenda process is not about shifting it; it is about saying, 'We are moving slowly into an electronic world.' It is worth doing the reality check on that because, as was pointed out this morning, not everyone has a computer on their desk at home or in their bedroom, not everyone has access to the internet—lots of people do and lots of people will continue to get access to that but the old world will continue for some time: people will still read books, people will still do other things, and what we do here will affect the balance, not only in the printed world but also in the digital world.

So in moving forward we try to maintain a balance, and this balance is a longstanding one. The exceptions for libraries and users, or the fair dealing type exceptions, date back to the beginning of copyright. They are not a new thing and they are not a tax on authors, they are a public interest device designed to promote public interest objectives. In amongst those devices are many things and they are all concerned with maintaining a balance, but the exceptions are something that we need to carry forward. It is well established now that the international consensus in moving forward into a digital environment is that you do maintain existing exceptions. In fact, at the WIPO treaty negotiations and the final conclusion of the WIPO treaty on copyright back in 1996, which lies at the heart of this bill in many respects, there was a specific resolution passed by the conference that said the objectives of certain provisions of that treaty were to maintain and carry forward into the existing environment—and in some circumstances to extend—exceptions and limitations to copyright that have existed in the old world.

That is the base from which we are starting. If I can, I wanted to touch on a few myths that often get tossed around in this sort of debate. One of the most important ones is that libraries are a threat to the online market. I think we really need to stop and dwell on that because it is just not true. Libraries are not a threat to the development of the online market. It is almost laughable, but it is too serious to laugh at because those statements are being

made and those statements are really quite concerning. Libraries are heavily constrained in what they can do, and Margy will talk more about that. They are not a threat to the online market, they are not a threat to the publishing market, they never have been and they never will be, and this bill does nothing to suggest that they will be. I also want to touch on perhaps myth number two, and that is that exceptions, such as fair dealing and library exceptions, are some sort of tax on authors or a tax on the rights of copyright owners. Again, exceptions have been around as long as copyright owners' rights have been around. They are a qualification on the rights that were put there for very good reasons. They are put there partly to address market failure—if you place too many exclusive or monopoly rights in some hands you end up cutting down the information flow—and partly for other reasons such as the promotion of education, research and efficient flow of information. Those reasons remain today: they are not new reasons and they are not going away. Just because we enter the digital world does not mean they are not true.

We should probably now get into other issues in terms of specifics because I do not want to slow us down in the time available. Perhaps if I throw first to Margy she can pick up on some of the comments that were made this morning and make her own comments.

Ms Burn—Thanks, Jamie. I would just like to say that my experience as a librarian has entirely been within the cultural heritage sector at the National Library, the State Library of South Australia and the State Library of New South Wales. I have also had a lot of experience as the library sector representative on Australian Museum Online and understand museums' interests in some of these issues. As an employee of two state libraries, I have been actively involved in working with public libraries in metropolitan areas, but also in remote, regional and rural Australia. I have visited and given advice to public librarians who are truly at the coalface in communities as diverse as the Olympic Dam Roxby Downs community, Millicent in South Australia, and Gilgandra and Broken Hill in New South Wales.

Lots of my personal beliefs are very much reinforced by seeing the struggle that librarians in these small and disadvantaged communities have to try to provide services, even in the new age—and of course state libraries play an important role in assisting public libraries to develop the information infrastructure so that Australians, wherever they live, do have reasonable access to information from anywhere in the world and are not disadvantaged because they are 500 kilometres from a capital city, or whatever it may be.

There are a lot of positives about this bill: obviously the confirmation that fair dealing applies to digital material and confirmation that the library and archives exceptions apply to digital material in the communication right, and some of the other changes, such as the ending of the 75 year rule and so on. But we do have some key concerns in libraries and I will just focus on them and make some comments that are very much born from my practical experience as a librarian. The first one of course is the definition of a library, and, somewhat to our surprise in the library sector, the exclusion of corporate libraries and those in the for-profit sector from the definition of library in the Copyright Act. This was not a feature of the exposure draft. Another key concern is the additional requirement for libraries which are supplying copies of electronic material under the document supply provisions—that the commercial availability test is now an extra test under that Section 50 supply. Another concern is the requirement that for supplying copies to persons by libraries under

section 49, or the supplying copies to other libraries by libraries of digital material, that material must now be held in a library collection, and I will give some examples of the impact of that were it to come into force. Libraries with cultural heritage collections, such as state libraries—and indeed public libraries with local studies collections which are an important part of the distributed national collection of our cultural heritage—are also concerned about the introduction of the administrative purposes phrase in section 51(A) which, if it were narrowly interpreted, may mean that material which has been scanned by a library for preservation reasons may not be available on site within the premises to users. Finally, we are also concerned about some of the limitations of the permitted purposes in so far as effective circumvention measures and effective technological protection are concerned.

Just quickly to focus on the exclusions of corporate libraries, this will account for 10 per cent of libraries in Australia. On the Australian Libraries Gateway, a directory provided by the National Library of Australia, there are 5,000 entries; 500 of them are in the corporate or business sector. The corporate or business sector does not just include multinationals or enormous law firms; it also includes pathology labs, pharmaceutical companies, Amway supporting small business sellers, as well as Arnotts research libraries, and the ones that have been mentioned in our discussions. Not only does the exclusion of corporate libraries mean that these very specialised collections of corporate libraries cannot be used as a source of information by other libraries, but also that these corporate libraries can no longer borrow under these proposed provisions. They will not be protected by the Section 39(A) notice that applies to other libraries and protects them merely by providing a copying device from having been seen to have authorised an infringement that a user may have made on that. Certainly, they will not be able to rely on things like the preservation provisions, and in a small country like Australia preservation happens everywhere; it does not happen just in the state and national libraries.

There is some ambiguity about the definition of libraries in the explanatory memorandum and the libraries owned by business organisations which are available for use by members of a profession—that could include engineers, lawyers, accountants, all sorts of people—and the impact on those persons of not being able to use those now defined corporate libraries is hard to quantify but we imagine it will be quite significant. The impacts on cooperative research centres will also be affected by this provision. At the moment CRCs have partners such as universities, CSIRO, corporatised government departments and business enterprises, and also industry partners. The exchange of information through libraries in the CRC mechanism will be affected by this. Again, it is hard to quantify the small business impacts, but we believe there will be some.

I would now like to turn to the new requirement that a supplying library must hold a work in its collection in order to be able to supply either to a person or to another library. The National Library provides an important service called Supply 1. This service enables the National Library to receive a request from another library, or indeed from an Australian individual, for a copy of an item for research or study and if it is not held in an Australian library the National Library is able to obtain that copy from another library and supply it to the requesting Australian institution. The emergence of services like this is very much to help small and medium libraries to obtain material which is not held in Australia and it very much comes out of the fact that Australian libraries have had to make massive cancellations to serial collections and so forth and are now very deprived as a result. Also, the library

document supply environment is incredibly complex and it is impossible for small libraries, or librarians who are not document supply specialists, to keep up with it. There are also requirements for exchange accounts and foreign currency requirements that small libraries just cannot accommodate. Indeed, some major supplying libraries overseas will not supply to other than a national library, so a medical research institution or a doctor who wanted to get material from the National Library of Medicine could not do so. The National Library of Medicine in the US will only deal with the National Library of Australia or other national agencies.

To give you a quantification, in three months when we looked at Supply 1 at the National Library there were 426 requests in total: 250 of these came from not-for-profit libraries and 147 came from corporate libraries. Now, if this provision that something must be held in the library collection goes through, none of those libraries would have had their requests met; it would only have been the 29 individuals who requested the Supply 1 service and who are being supplied under the Section 49 rather than the Section 50 provisions. I would like to say that, in terms of the additional requirements for checking the commercial availability of works in electronic format, I wish that it was as easy as the testimony of one of the earlier witnesses suggested. You cannot believe the administrative difficulty and sheer impossibility for libraries of checking whether in fact material is commercially available. Even if that material is commercially available, what happens if the rights holder is not prepared to supply a portion of it and only prepared to supply the whole lot?

We also have some concerns about 'on the premises', and I think that has been well covered in submissions that have been lodged so I will not take time about going into it now, but there are lots of libraries with multiple premises.

I would just like to make some comments on the public policy and national interest side of things and comment on the role of libraries. As Jamie has mentioned, what libraries supply is in fact very little, and let us remember that Australia is a net importer of copyright material: six out of seven of the dollars paid for licences to electronic material goes overseas and $3 out of $4 for copyright material is purchased. The document supply environment in libraries is actually quite limited but it is really important in maintaining the balance. The State Library of New South Wales, for instance, supplied last year just less than 9,000 copies to other libraries from a total collection of four million items. Users on site at the State Library of New South Wales—and this is the library that does not lend, so anybody who wants to read something outside the premises has to take a copy—one million people visited the State Library in a year; two million copies were made on all the copying devices in the library. That is two copies per head.

Digital publications are a substantial portion of library collections and we need to be able to use these as efficiently to meet document supply requirements as we do other publications. Again, in the State Library's serial collection of 13,000 titles, and still continuing, 3,000 of these are now received in electronic form. So electronic digital collections are now very much the bread and butter of libraries, but libraries can see no evidence of the massive copying that is claimed by users. Again, the CD-ROM network in the State Library of New South Wales, 280,000 copies were printed in one year, but that includes 400,000 out of copyright photographs and a lot of other material such as that. So our estimate is that

perhaps only 80 pages per electronic title per annum were copied and this is not excessive copying. I think that is about all I want to say. Thank you.

Ms Page-Hanify—I will keep it brief because I think questions and examples may well illustrate some of the issues facing our part of the sector. I would like to say I do welcome the intent of the act and I think it is important. We have been struggling for four years in our sector to find a way of working within the digital environment and at the moment the way we have been able to move forward is single relationships with the rights owners—we go to publishers, get the right to make them available online. I might make a distinction between the internet and online and what we call our intranet. In most cases the material that we are provided with, whether it is subscription or not, is provided within the environs of our own campus—not the physical campus, but those authorised to access. This act actually starts to bring it back to a physical definition, as opposed to the logical definition, and I think we need to understand there are mechanisms that work in a virtual world and allow us to say, 'You are authorised to use and therefore you can view and see and operate in that context,' just as you, as members of parliament, would do working in your office; you do not need to physically go to the Parliamentary Library and work on a terminal there. The same principles apply.

A concern that is emerging in examining the bill is the complexity of implementation, the fact that there are more specific definitions of how we need to operate, as opposed to the principle of statutory licences operating and we seek remuneration to allow us to copy. There are elements in there that are not technology neutral, despite the efforts to get there. I think Margy touched on the fact that if something does not fit under statutory licence and we need a voluntary licence it makes it more difficult for us to be able to operate—the statutory licences actually make it easier for us to work and it does allow us to remunerate based on use.

The third item relates to a system that may be in place, not the rights notice but the electronic use system that is referred to. It specifies a specific arrangement that gives no choice. At the moment in the print environment we can choose to have a full record keeping system of any copies that are made or work under a sampling system. That allows organisations in particular to pay for what they do, as opposed to pay on the basis of maybe what the whole group does. I think that that option needs to be available in the digital environment because there are some organisations that will depend on it heavily because of their remoteness and the fact that they have students distributed across Australia, and those who are more campus-based and would be able to get away with it because people can physically walk to the library. So those options still need to be there. We need to make sure that as we take the act forward we do take it forward in a way that allows the framework to operate in a similar way. I'll leave it at that at this stage.

Mr Britton—Just very briefly, my concern is the preservation of consumer access to information in the balancing act. Our specific concerns are, firstly, the availability of things that might be characterised as circumvention devices to consumers, and here I am talking off-line if you like. An example the committee might like to look into is the DVD issue of the zoning and people dezoning DVDs and the impact that sort of impingement on people's rights to look at the discs is having on the adoption of that particular innovation. We are concerned about the exclusion of for-profit libraries because those specialised collections can

get locked away from users. We are concerned about the way temporary copies are being treated in the sense that temporary copies which are not part of a communication may potentially become infringing as a consequence, and here we are thinking of caching and increasingly popular devices like CD players, mini disc players, things like that, consumer devices.

Finally, we are concerned about the treatment of archive copies which have been digitally stored and the fact that it seems that access to those digital copies will be confined to library officers and not available to users of libraries.

CHAIR—Good, thank you. I understand your point about saying that the definition of libraries should not exclude corporate libraries because of the transmission of information, but on the other hand there are obviously corporate libraries also that are very much part of the business enterprise of those corporations. You can make an argument to say, 'Leave the corporate libraries in,' but there are the Minter Ellisons of this world—to take one example that comes to mind at the moment—for whom the library and the service provided by the library is very much an integral part of the legal services provided. In a sense they gain some commercial advantage out of that. Obviously you cannot have a situation that says, 'Minter Ellisons are out but the little law firm around the corner is not,' et cetera. At the moment I would have to say you have not convinced me of your case. I do not know about the other members of the committee; I am talking for myself now, but if the only argument is, 'Well, there are some that are less corporate than others and there's less commercial advantage than others,' it does not seem to be a great argument.

Ms Burn—That is not my only argument and we will certainly be making a more detailed submission next week. You have to remember that not only are corporate libraries consumers, and therefore benefiting from, as you would put it, being able to acquire copies from other library collections, but they are also suppliers. The specialised collections of corporate libraries in Australia are an important part of our national information infrastructure and our distributed national collection and removing corporate libraries from the distributed national collection by not enabling them to supply to other libraries is, I think, probably an unintended consequence—

CHAIR—Can you give me some examples of that? It is only because you are here that I will talk about Minter Ellisons—it could be anyone else—

Mr MURPHY—Clayton Utz.

CHAIR—We could use Clayton Utz or some other hypothetical example. Can you give me some examples of libraries that fit into the category that you would describe as corporate libraries where there is going to be some great detriment to the national good?

Ms JULIE BISHOP—Can I just add to the question so you can answer it all at once. In terms of the 500 out of the 5,000 entries in libraries, how many of those 500 would you consider to be important specialist libraries that contribute to the national public interest?

Ms Burn—I just printed a list, but the reality is that not even the largest library can any more have the vast collections that might once have been the case in universities and other

publicly accessible libraries. So, whether it is water purity and electricity generation, whether you are talking about baking, the Australian Chamber of Commerce and Industry is down here, medical research, biotechnology companies, it is those libraries that have the specialised collections. They are probably the ones that we should be focusing on, not the large law libraries, for example, whose holdings will to some extent be replicated in university libraries.

Mr Wodetzki—Can I make two points there, and as Minter's is being targeted—

CHAIR—No, this is free publicity.

Mr Wodetzki—Firstly, it is very easy to have a go at law firms, and I understand that, but this is broader than law firms. In fact, it should be pointed out that if you go after law firms and cut them out of the picture there are many other provisions in the act that give law firms far greater copying rights for the purpose of giving legal advice and for the purpose of legal proceedings which—

Mr KERR—We always knew you'd cover your ass.

Mr Wodetzki—Not quite as well as parliamentarians cover theirs—probably the broadest exceptions ever apply to the Parliamentary Library, so I would like to get a little bit of perspective on this. But leaving all those things aside, the best examples would be, say, cooperative research centres, CRCs. There are a lot of CRCs around and they are private, public sector cooperative centres engaged in research. They could have any number of companies in any number of universities, and usually CSIRO because it has its finger all over the place. You will find that those people share resources in amongst the CRC; they each have specialised collections in their area of research. If you do this to this act you will cut that to pieces and it just will not work, they will not be able to share resources.

Ms JULIE BISHOP—That is concentrating on them as suppliers, but what about from the user perspective?

Mr Wodetzki—It will be a two-way flow: you cut libraries out and you cut the flow. As soon as you have a library that is not a library, it cannot request and it cannot supply—that is the way the bill works at the moment—it just throws a spanner in the library's system, and completely unnecessarily, because in fact there is nothing in the act now to say that these people cannot make fair dealing copies. You can make a fair dealing copy for research or study, and it is not private research or study; it is research or study. The test is are you engaged in research and if you are you can make the copy. So this is a pre-emptive strike on private sector research. It is basically saying that if you are in the private sector you are somehow dirty and undeserving of an exception that is targeted at research—

Mr KERR—Isn't it just saying you have to pay?

Mr Wodetzki—No, it is not; it is saying that you lose the exception. If you want to pay you can take out a licence, and the licence would have to be a voluntary licence, it would cover CAL's repertoire only, which is not a blanket coverage, so you would be forced to—

Mr KERR—Isn't this really an argument for a statutory licence?

Mr Wodetzki—There are arguments for statutory licences all over the place but this is a separate argument.

CHAIR—A division has been called in the House. Could you bear with us while we attend this division and then we will resume.

Proceedings suspended from 12.02 p.m. to 12.11 p.m.

CHAIR—We will resume the hearing.

Mr MURPHY—With regard to the provisions in the bill which relate to circumvention devices, you have said at paragraph 21 of your submission:

> The provisions have been designed to bring about the effective enforcement of the rights protected by copyright, without providing protection beyond those rights.

Why do you not support a stronger ban on circumvention devices as called for by the copyright owners?

Mr Wodetzki—Effective technological protection measures are in fact what you could call a second bite at the cherry. The Copyright Act sets out the respective rights of owners and users. It strikes a balance and it strikes a balance after long, and sometimes tortuous, public debate. It says, 'These are the owners' rights and these are the users' rights,' effectively, and it is a very finely struck balance. If content owners can now take a technological protection measure and run roughshod over that balance, we are deeply concerned that that balance becomes irrelevant and that the new technical regime strikes a new balance dictated by the content owners. So we do not mind banning devices in some circumstances, provided that people who have a legitimate and valid need to exercise their rights under the Copyright Act can get access to the devices so that people cannot lock them out of their rights.

A good example is in the context of computer software, and that has largely been addressed in the bill. It illustrates the point that there is now a provision in the Copyright Act that creates an exception for decompilation of computer programs to make interoperable or compatible products, because it has been shown in the past that in order to maintain their market power dominant software providers will try to stop their competitors from understanding how their programs interface.

So by decompiling and getting access to those interface specifications you can make a compatible product and there is more competition in the software market. It is nothing to do with piracy; it is about making compatible products and it does not let you go any further that that. That is an exception to copyright infringement where you make a copy just for that purpose, just to make a compatible product. If someone could come along with a technological device that then scrambled and locked up all the interface information, again it provides them with another opportunity to frustrate that competitive balancing provision under the

Copyright Act, so you will need access to a device that stops them from blocking you from doing that, and that is our position.

Mr MURPHY—Why do you think that the copyright owners do not see it that way?

Mr Wodetzki—Because the copyright owners will get what they can get; they have an interest in making money. If they can extend their rights, they will, and that is completely understandable. If you are in the business of selling information you want to have as many rights as possible because you trust yourself to do what you think is right for yourself, and that is understandable. There is no question in my mind as to why copyright owners push for stronger rights; it is just that somewhere in the middle there is a right balance and it is dangerous to assume that they only ask for it because it is right. They ask for it because it suits them, not because it is necessarily in the public interest.

Ms Burn—I can give another example which is in the preservation area. In terms of statutory deposit, in the case of hard copy publications a publisher has to physically send an object to a depository library. In the case of electronic publications, rather than it being sent by a publisher, it is harvested by a library, even though the statutory deposit provisions do not currently apply to electronic publications for the National Library and some of the state libraries. We use harvesting software to capture electronic heritage materials that we want to preserve. Now, that material is not made available without the publisher's or owner's consent at the moment but it is vital that it be preserved, and that is another limitation on the permissible purposes that will work against the interests of libraries with preservation responsibilities, such as the state and National Library.

Mr MURPHY—I understand that and, like Ms Roxon, I am very keen for as many people in my electorate of Lowe to get access through a library to some of these sources, and particularly those poorer people who do not have a computer and cannot get hold of the product because they do not have the resources to pay for it. But against that background I am also cognisant of the fact that you had some author who slaved their guts out. I would be hopping mad if I thought that I had done something very, very worthwhile, particularly to advance this country, and then people could get access to it very, very cheaply. Hence, although it is a second gate mechanism, the circumvention devices do not make it any easier. You talk about striking a balance, but it is not easy. If I put myself in the shoes of those who are the originators of some of these works I am a bit sympathetic to them.

Mr Britton—Can I make a point in relation to that because I think the DVD argument is an interesting one in that regard. The concern there is the geographical zoning around the world and there would be some question whether in fact fixing the zoning in your player was circumventing or not. Somebody might have bought a bunch of DVDs in America, come here and thought they would be able to play them on the machine. The other side of that relates to innovation in our markets. What is happening at the moment is there is what has been termed a 'backstreet industry' of people changing the DVD players so they will be multi-zone players, and I do not know if that is a grey area or not but it would need to be defined. The wisdom coming out at the moment basically seems to be that without the multi-zone play people do not buy the things: if they were stopped from multi-zoning the single zone players people talk about sales dropping by 50 per cent. So the other side of these protection schemes is limiting markets and the interest of the originator is in a broad market

and selling lots of products. There is a risk of limiting things and locking them up so that we do not have the velocity and growth that has actually brought us to where we are now.

Mr MURPHY—So you are suggesting that in relation to the bill we 'suck it and see'?

Mr Britton—No, I think we are basically saying we would like to see better availability of those devices for consumers, as it was in the exposure draft, rather than the way it has been changed in the bill.

Mr Wodetzki—It is probably worth nothing that there are arguments going around that these devices are going to destroy any form of protection that currently exists. All of this discussion is very premature because if these devices exist anywhere they are pretty thin on the ground. I am personally not aware of them. I know there are some things that could probably get caught by some of these definitions which probably should not, and I can think of examples specifically in the software context where people do engage in encryption techniques and decryption techniques for specific purposes for developing products. But in terms of the wider world, the circumvention device debate is kind of premature. In many respects what the bill is doing is saying, 'We need to ban these devices before we even know what they are,' which to my mind is a bit premature in itself. The 'problem' is very ill-defined at the moment. It is sort of an anticipated problem, and I do not see any great harm in trying to take a more balanced and slow approach to addressing this issue until we have clearer evidence about how devices are being used, or how protection measures are being used, and whether there is a big problem with people circumventing these measures. I think it may be the subject of more hype than reality.

Mr MURPHY—Thank you.

CHAIR—Just on that subject, what is your view on the proposition that a number of us were putting to the departmental officials earlier of a general provision in the act about use subject to the exceptions already in the act?

Mr Wodetzki—Our original position was that we should only ban the conduct of circumvention; you should not ban devices at all. It is the age-old problem of targeting a technology rather than targeting behaviour. The content industries were very gung-ho in favour of a device ban, and they got one, and now they turn around and say, 'Oh, and we also want a use ban,' which I guess is understandable—they got one thing, they want another. In terms of its practical effect, I was listening to the debate this morning and thinking about it and there is a fairly simple answer: you ban devices, so they are off the market by and large, except for certain permitted purposes. Whether there is any great advantage in banning use in addition to that is, I think, an academic question. The bottom line is: let us say an individual user gets hold of a device, takes it home and circumvents a copy protection device. The first response is: so what? The problem arises when they infringe. They circumvent the copy protection device and if they then make an infringing copy they have infringed copyright anyway. If they circumvent and do not make an infringing copy, who cares? You will get them on infringement anyway so you do not really need to ban the use of a circumvention device because the use of the circumvention device is not the problem. The problem is when you have infringed copyright and that is an enforcement issue, not really a banning issue.

CHAIR—Can I thank you for your submission and for coming along and discussing it with us today.

Mr Wodetzki—Can I make one last comment. There was a question earlier about who really gets the money in this. It is not really a critical question but it is an interesting question that focuses the mind as to the difference between looking after authors and looking after publishers. I am not about to suggest that we should not be looking after publishers, because publishers have a genuine interest as well, but it is worth noting that the core of this debate is about scholarly publishing, academics writing articles in scholarly journals. That is the real game in this debate. In the vast majority of cases—with a few exceptions, maybe always—the copyright in works written by academic writers is transferred to the publisher for no payment, not for a small payment but for no payment.

Ms Burn—And sometimes academic authors must pay to be published in some scientific journals.

CHAIR—Yes, but there is a broader issue than that. A colleague of mine, who I think is on the board of the CSIRO publisher—and I do not know his exact title—says to me that at the current rate there will not be any scientific journals left being published in Australia in another few years time, simply because of the changes which are occurring. Maybe the answer to that is that it will be published but it will be published electronically, digitally, in different format, all of that. But I think there are some concerns. If our joint concern is about academic publishing, then unless something is going to replace those journals which are no longer going to be published then we have a void there which there should be concern about filling.

Mr Wodetzki—There is no question that there is a sort of spiral of problems going on in the whole context of that publishing cycle.

Ms Page-Hanify—The issue is the way that most of the information is being distributed. We are moving from print to electronic, which is the push by the journal publishers because it is actually a lot cheaper—an article in chemistry may have cost $10,000 to produce; now you can do it in the order of hundreds. So in that respect we are moving to a point where we have no choice but to use electronic sources. As it is now, the act prevents us from operating or having a choice of using print, which allows us to operate in a way that is consistent with fair dealing and copies for people for research. So we have to be very careful in understanding that the market is moving to the digital printing of academic material very rapidly and is making it available online through subscription to us now, and we pay for that and the cost for those subscriptions are higher than they used to be in print form. So for Australia we have a very serious issue in the sense that because the educational institutions are principally publicly funded we are losing a repository of academic knowledge within the boundaries of Australia, very rapidly—there have been massive cancellations over the last three or four years—in a response to the fact that the alternative is more expensive. I think, again, in terms of the balance we have to be very careful that we allow the only copy that will be available to us to at least reach Australia in some form and be made available to our scholarly community in the way we can do now with print form. This is a concern we have in terms of the market actually driving. As Jamie said, most academics have their material

published through a refereeing process and that is the process where they hand over their basic rights in copyright and the publisher owns the materials.

The other issue that has been emerging in the market is that the publishers themselves are consolidating. Eighteen months ago in Europe there were two major publishers, Reed Elsevier and Kurtz Wollner, who were looking at a merger. That basically would have brought the majority of medical and legal material in the hands of one publisher and at that point, because they own the copyright, they can actually choose not to publish. So, again, it is choice and allowing competition in the market that we also have to be aware of—that there are other trends occurring and that if we are not careful we will create unforeseen consequences in our inability to access material. That is a big concern we have.

Mrs VALE—Christine, I just wanted to understand—I am a dinosaur when it comes to this sort of technology so this has been a great learning experience; I just employ very smart staff and they do all that for me. When you spoke of publications being cancelled, do you mean hard copy publications, and being cancelled by libraries or being cancelled by the publishers themselves?

Ms Page-Hanify—No, being cancelled by the libraries. We are finding that the educational institutions are not able to afford to continue serial acquisitions. One of the things that we have been looking at is who is cancelling what so at least there is one copy available in Australia. That is one thing that we have been trying to do collectively with the National Library.

Mrs VALE—Because I understand that university libraries have actually cancelled quite a lot of their research.

Ms Page-Hanify—Absolutely. And part of it is because at the moment there is a transition and the transition by the publisher is towards print. So where there is a choice between print and electronic, if they still make that available, you can have a subscription that gives you both, but some of them are moving away from providing any print. If that happens, the cost of that then increases, because there is an investment in place that they have to—

Mrs VALE—Yes, but did you not say that it was cheaper for publishers to make it digital?

Ms Page-Hanify—Yes.

Mrs VALE—But they charge more for the digital subscriptions?

Ms Page-Hanify—Yes. There are infrastructure set-up costs that are being recouped.

Mrs VALE—I see.

CHAIR—But is it not also a reflection of what I think Nicola or Alan were saying before, that no matter what we put in place, because of this law you can—

Ms Page-Hanify—It is a captive market.

CHAIR—Well, not only a captive market but, no matter how good this law is, once you have a digital copy floating around the system somewhere it can be reproduced quite easily. Now, if you are a publisher you are going to put a premium on that contingency, are you not?

Ms Page-Hanify—Except that in the case of the education sector, which is the group I am representing, we do acquire access to those databases of journals via a licence and we remunerate the publisher accordingly. That does take into account the fact that they allow us to make it available online to our students, that irrespective of their location they have a right to access that information and exercise, in some case, their rights to fair dealing

CHAIR—But that is why there is a premium, is it not?

Ms Page-Hanify—It probably is partly that. I think the issue that we need to also look at is where is the cost being borne in terms of distribution? The end users in many cases now are paying: it is a pull, not a push form of distribution now, so the actual economics of being an author and somebody reading it at the other end, the component costs are actually shifting more towards the end user.

CHAIR—Thank you again for your submission and your comments today. It may well be that we will hear from you again as we try to tease out some of these issues. Thank you.

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

Pursuant to the power conferred by section A of standing order 346, this committee authorises the publication of evidence given before it at public hearings this day.

Committee adjourned at 12.33 p.m.