COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Copyright Amendment (Digital Agenda) Bill 1999

THURSDAY, 30 SEPTEMBER 1999

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 30 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 Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Ms Roxon and Mrs Vale

Terms of reference for the inquiry:

Copyright Amendment (Digital Agenda) Bill 1999

WITNESSES

Committee met at 9.30 a.m.

CANDI, Mr Emmanuel, Executive Director, Australian Record Industry Association

O'BRIEN, Ms Cathy, Solicitor, Australian Record Industry Association

CHAIR—I declare open this public hearing of the Legal and Constitutional Affairs Committee's inquiry into the Copyright Amendment (Digital Agenda) Bill 1999 and the inquiry into the enforcement of copyright. I welcome the representatives of the Australian Record Industry Association. Do you have any comments to make on the capacity in which you appear?

Mr Candi—I am also the executive director of PPCA, the Photographic Performance Company of Australia, and some of what we have to say today is from PPCA as well, so take it as a joint submission. My colleague Cathy O'Brien is employed by ARIA and PPCA. She is a solicitor with the company. We welcome the invitation that we have been extended and we are happy to be here.

CHAIR—I 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. Mr Candy, we are in receipt of a number of 'dot points', I suppose I could call them, from you in relation to the bill and the matters which you consider that ARIA has some concerns about. I wonder whether it would be best for you take us through them as to what your concerns are.

Mr Candi—Let me first apologise. I am struggling with the flu, so if I sound a bit strange or look a bit dopey, that is my excuse. The points that we got down—I think on Friday night or Monday—were in the context of getting something down to you quickly. We have not finished our review of the bill. We will be finished that in the next couple of days. These were some preliminary points that stuck out at us.

There are a couple of points that are incredibly important—like the anticircumvention provisions—which I can speak about today, but I must say I am not completely satisfied that I will be able to explain our position properly yet. I need a few more days to order those thoughts. However, I will try. I can take you through a number of provisions that are of concern to us that I can deal with today. Some are very simple. Some are quite complex. There are also one or two provisions that did not even make it to the bill, which I would like to raise as well. So I can do that.

CHAIR—I think if you take your points one by one, we might discuss them as you go through them.

Mr Candi—Fine. By way of an opening statement on the context of the bill, it is about bringing the Copyright Act into the e-commerce age—or the digital or online age. The main part of that is that communication right. The communication right really corrects some very specific language that was incorporated in the act in 1969 that was so technologically

specific at the time that cable diffusion—piano wire of sound recordings—was not even envisaged, so that cable diffusion right did not even make it into the part of the act that protects sound recordings.

Nowadays, of course, anything can be diffused from our industry—and increasingly so. Sound recordings and, as we go, even our music videos that are produced by the industry are being zapped all around the world in any number of ways. So the new rights are desperately needed. It is a very important piece of legislation. It deserves priority by this committee and I know that you have given it priority.

The record industry is extremely desperate to get these rights because we are seeing a multitude of our products misappropriated on a daily basis in the online world. Equally, the record industry is very keen to get on with setting up the systems and selling direct to its consumers at home. The online world is really just another retail channel. It offers—if you like—a very good, easy way of mail order. Record companies will be able to offer more for less. They will be at the forefront of digital delivery systems. The same rights, of course, will allow us to clean up a lot of the piracy and misappropriation that is going on.

For those of you who have not seen what is going on, I will pass this around. That is the equivalent of an MP3 player. That is an MPMan. It fits in the palm of your hand. It has all the features of a CD player. As frightening as this is, it is also fantastic. I bought this one on the Internet from America. It was $100 in America. By the time I got it here and Customs finished with me, it ended up being about $600. But they are in the shops now.

I will hand up a one page sheet by one of my techno people. The frightening thing is that on here is an hour of music. There are no moving parts. In the back of here is some type of thing about as big as your fingernail that stores recordings. You can wipe it and store more. You go to your Internet site and look up any number of sites that are offering music. Most of them are offering recorded music without permission. They give you the software that you download into your computer for free. Then you download the music, create a file in your computer and then transfer it to this. When you get sick of this, you just simply transfer some more.

This holds an hour. Some of the next generation of these, which are coming out before Christmas—there are various types coming out in various models—will hold up to 2,000 minutes, which I make to be about 500 recordings. So it is the new age. It is part of why we need new rights. The record companies had to respond to this, and they have.

I will pass that up. I think the batteries are still working. My little girl threw it on the floor the other day but it is pretty robust and it is still working. Here is the one page document on just simply how to go to your computer and download the music.

So in that context the bill is very important. I will start with the items that I can talk about today. Perhaps I could start with something pretty simple—the redefinition of ‘broadcast’ in item 1 of the explanatory memorandum. We are okay with it. It has been redrafted substantially. We do not think we have any problems.

On item 6, there is just a small matter—the new definition of the new right of communication. It is expressed as being 'right to communicate'. This is just a simple matter. We just wonder whether the words 'online' have any meaning at all. We know they are there to import the meaning of 'non-physical' as opposed to the physical product, as a CD is. But, given that the words 'whether over a path, or a combination of paths, provided by a material substance or otherwise' are in the definition, we query whether 'online' is needed.

Given that the empowering sections for 'works' and 'subject matter other than works'—which are section 31 and section 33 and section 85 and section 86 of the act—refer to 'communication right' and this item 6 refers to 'communicate', although I think any judge could make the link, I just wonder whether the words: 'the word "communication" when used in this act will have a corresponding meaning to the word "communicate"' need to be added. As I say, it is a drafting point. It is a clarification point.

But in terms of the section itself, we support the way the drafting and empowering provisions of the communication right have been done. We think they make good sense. It is the right way to go. We have a lot to say about the circumvention of items 4, 5 and 8 and how they relate to section 116, which I think is around items 98 to 100. If I can just get my thoughts together, I would like to come back to that because it is a very technical section and I am not completely there yet, although we can see some glaring errors with it.

With your permission, Mr Chairman, I will skip to item 9. It is another very simple thing but a very important thing. Item 9 is there to cover the electronics rights management information, which the record industry, the film industry and book publishers in particular will be using as a standard matter. Embodied in a recording will be a subcode or a watermark. If our technology people get it right, that watermark or subcode will be incapable of being stripped away unless you go out of your way to do it. The fundamental premise is: whatever we can do with technology someone can undo. That is why we need provisions in the act to protect these things.

We have three problems with this section. One is that, as the Attorney-General said in his second reading speech, rights management information 'typically' includes certain information—and he gives some examples. 'Typically' is right. There is no hard and fixed way the rights management information will be expressed. It will typically involve identifying the publisher, the producer, the artist, the record company, the year and things to do with the factory or warehouse it came from. The rights management information is supposed to reflect article 19(2) of the WPPT treaty, but it does not. This is our main problem. I can hand up article 19, too. It is a simple matter. You can see for yourselves that it says it should also refer to:

. . . the performer, the performance of the performer, the producer of the phonogram and the phonogram . . .

It does not do that. I will pass this up. You can see very simply that it documents the requirements under what is called the WCT—the same treaty that deals with works—but it omits to deal with the provisions required under the WPPT, which deals with the record companies and performers. I will just put a star next to it. I think it is a non-contentious matter and can be fixed up pretty easily.

The other problem that we have with it is that it uses conjunctive language rather than disjunctive language. If you look at item 9, which is section 10.1, paragraph (A)(i), it finishes with the word 'and'. This means that (ii) has to be joined with it in order to have the rights management information that this section is looking to cover. The 'and' at the end of (i) should be an 'or'. It should be disjunctive. If it remains conjunctive, as it is, it makes the section overtly narrow or prescriptive. As the Attorney said in his second reading speech, it needs to say that it is typically information like this, not exactly like this. It will change from time to time.

CHAIR—Is that an argument for saying that, where this definition says 'electronic rights management information means', the word should be 'includes' rather than 'means'?

Mr Candi—Our original response to the first draft said exactly that—it should be a non-exhaustive rather than an exhaustive definition. You could do it that way. You could use the drafting technique to say 'and includes information such as the following'. That was part of our submission in the first round.

CHAIR—That of course leaves it a little more uncertain as to the coverage or the extent of the definition because, being an inclusive definition, the court has more flexibility to decide whether anything else is included in that definition.

Mr Candi—That is right. A pattern will emerge; we just have to see over the next four or five years how the rights holders develop their watermarking and all that. But even if you use that technique, you would still need to change the 'and' at the end of (i) to the word 'or'. If you look at that section, article 19(2) of the WPPT, it reflects that premise. I do not think it is all that contentious; it is just an important matter.

Just so you know, the rights management information is crucial. In the world we are heading for, where there are thousands and millions of electronic transfers of our recordings, both in the collecting society side—where we are dealing with radio stations and broadcasters—and with the record companies dealing directly with their customers—either through retailers or direct to the home—the rights management information is there to ensure absolutely correct sales data, royalty data, bookkeeping and proprietary information. It will also be used in our piracy actions. So it is important.

I will move on to another fairly simple matter. Item 14, which deals with reception equipment, has been redrafted since the first draft. To be consistent with the way the act is drafted, we think the words in brackets 'over a path provided whether in whole or in part by a material substance or otherwise' should be included as the last lot of words in this section. It would match up with other parts of the act. The other amendment that the department made—

CHAIR—Before you go on to that, you are suggesting some further words after 'available online or electronically transmitted'?

Mr Candi—Yes.

CHAIR—Can you give them to me again?

Mr Candi—Yes: 'over a path provided whether in whole or in part by a material substance or otherwise'. Those words are used elsewhere in other definitions. It is just a rounding off or housekeeping thing, but it would make the section better. There is one other addition I would make. There was a change from the first draft which changed the words 'hear sounds or see visual images' to the words 'hear or see a work or other subject matter'. We think that is a vast improvement in this section. We would simply add one more thing. We would add 'to hear or see or both a work or other subject matter' just to make it clear that it is one or the other or both. That would save us a court case and probably about $300,000. It is just a technical thing, but it will save an argument.

CHAIR—So you want to add the words 'or both' after 'to hear or see'?

Mr Candi—Yes. We have these ready to hand up. I can get them down to you tomorrow.

CHAIR—Thank you.

Mr Candi—That is all the easy stuff. I will jump to items 23, 24 and 25 only to say that, particularly in our case, the addition of subparagraph 6 to section 26 is very important. We support the addition of that, which was in the first draft and second draft. The reason it is important—and I would hate to see it ever come out in the process of the committee looking at this stuff and hearing submissions by other people—is that it clarifies that when a sound recording is taped or transferred into a computer and becomes a series of ones and zeros and electronic messages, it is taken out of the computer and put on to what I just passed around, like an MP3 or something else—this section clarifies that that is a reproduction.

The reason we need to clarify that is that there is an argument—and I hate to say this on the public record—concerning section 85 in that we have a right to copy, not a right to reproduce. There is an argument that, by taking it from here, putting it into a computer and then taking it out, you do not end up with an actual copy of the sound recording, because it has been changed on the way. I have argued in public that I still think we would win the court case, but that section absolutely clarifies it. It is consistent with the treaties that this bill is being drawn from, the WPPT, in particular. It is a very important provision which must survive into legislation. That is the work it does.

There was a lot of work done on the definition of 'broadcaster' in item 26. We think the redraft is fine, and we do not propose any further changes. I would now like to jump to the parts of the act that deal more particularly with sound recordings, which are towards the higher numbers. I will try to deal with item 94, which is a vital section. I am a bit underdone on it, but I will try my best. This is section 111, and the equivalent for works is section 43A, which is in item 45. I will deal with it by reading from item 94. This was included in the note we sent down on Friday.

The changes that have been made to this since the first draft are very good. They need some more changes to make it completely satisfactory. In particular, the addition of subsection 2 is absolutely vital. It confirms that it has to be a lawful or non-infringing item of copyright which is chuffed through the process. We are very pleased to see that it made it

into this draft. That makes it consistent with what is happening overseas as well. It also means that the ISPs and the telcos know they have to take steps to put in some procedures. They will probably come and sit down with us to establish a protocol about how we will deal with infringing products that are not immediately recognisable by the ISP or the telco as being infringing products. I have to say that until now my invitation to the ISPs to come and talk to us about a protocol has been met with a completely blank look. No-one has come to see us. That is in stark contrast to the way the developments in the USA went. This section will ensure that the industries talk and that protocols are set.

Where I think the problems are is that temporary copying still extends to all forms of temporary reproductions and caching. It does not apply only to transient copies. My understanding and my advice as to where this all came from, and the discussions in Europe when the treaties were put together, was that transient copies cannot be avoided in the process of making the communication. When something chuffs through a computer system, there is a reproduction of some type. Certainly in the round table discussions that we had before the first bill came out, I was the only one of the copyright owners representing a sector of the industry who said, 'We're okay if there's an exemption there, if it's a transient copy only and if it is something that has to occur in the process of making a communication.' If the communication right is properly documented in the act, what we as individual people in industry will be licensing is the communication transaction. But we were only talking about those temporary copies that were absolutely incidental and unavoidable in the process of making that communication. It has to be an authorised communication, which is what subsection 2 is about. That is good to see.

If I can express it another way, it is about temporary copies which are part of the technical process for the internal working of the equipment to make the communication. To put it another way, what this section should really be saying is that temporary copying should only apply to those temporary copies that are transient; that are internal to the equipment and the technology indispensable to enabling the use of the work or the subject matter of the work, such as a sound recording, for which the equipment was designed; and that the temporary copies do not survive the lawful use of the work or the subject matter of the work, the sound recording, and have no independent existence.

One other problem I have with the section is that in subsection 1 it says 'a copyright subsisting under this part'. That includes all the items of copyright that are included in our bundle of protection. The work of this section is in regard to the reproduction right. It should not apply to all the items of copyright. It should apply only to the reproduction right, because it is about the copying. In our case, it is a copyright. We have a suggestion on how it should be reworded, which we can hand up.

CHAIR—Thank you.

Mr Candi—We have suggested it before, but it did not make it through the process.

CHAIR—Perseverance is a great thing, Mr Candi.

Mr Candi—I firmly believe in that. I have spent a lot of time following that advice. I can read it onto the record; it is only one short paragraph. We believe it should say this:

'The right of reproduction subsisting under this part is not infringed where a transient copy of an audiovisual item is made as an indispensable step in a technological process in the making of a lawful communication.' We will hand that up tomorrow or on Friday night.

I think it is a very hard section to get and, without sounding silly, it is just something that you have to sit down and read and digest. I assume you have had people from the industry tell you what the three main issues are and where this issue was coming from, which is hopefully what I have done. I could speak on this for another 10 minutes, but I do not think I would make it any clearer. So I will try to field your questions.

CHAIR—In your notes you say that it is out of step with the US and the European Union positions. Do you have copies of the way in which the US and the European Union deal with this?

Mr Candi—Yes. In the notes that we will send down tomorrow, we have made observations about the US and EU positions.

CHAIR—Do those notes go to the extent of including the wording of their provisions?

Mr Candi—They can.

CHAIR—That may be useful for us as a matter of comparison.

Mr KERR—I still do not understand the evil to which you are directing your concerns relating to temporary caching. What do you think can occur if we do not limit it in the way that you are suggesting?

Mr Candi—Access to the products without engaging them in the communication that the owner is trying to sell to you or that you should be seeking to buy, and also survival of the product after the process or the terms of what the lawful communication is about. As I say, this whole thing came up because, in the process of making this communication, which is a non-physical or electronic thing, in chuffing the message down the wires and through computers as a technical thing, there is a reproduction. It exercises, therefore, the reproduction right, which is basically the fundamental right of copyright.

You leave your user and the ISPs on the way through in a position where you are saying, 'Yes, you can have this communication, but in the technical process there is unlawful reproduction.' We say that part of the reproduction that is unavoidable and transient in the technical process of getting that communication down really falls into what you are selling as a communication right. You should not be bothering someone about the technicality of the reproduction. I must say that the other copyright industries did not support this view when we had the round table discussion leading up to the first bill. I look at it as a commercial situation. A record company is going to sell a communication to a person in their home. Part of that will be a choice: to listen to the recording and then it disappears or to listen and make a copy of the recording. That will be part of the transaction you buy under the communication.

With the way this is drafted presently, you can still have your communication and, after whatever the communication was about, a surviving reproduction, which is not what the temporary copying situation is about. I hope I have explained it. I find it very hard to explain. I understand it but, for once in my life, I find it very difficult to talk, which shocks a lot of my colleagues.

CHAIR—I have a question arising from that. When the communication occurs, there is a temporary copy. I understand that, but why does the temporary copy survive?

Mr Candi—This is where I mean to do a bit more work to come back and explain that to you in more plain English technical terms.

CHAIR—I think that would be useful. I am just trying to think it through myself. If what you were purchasing was to listen to a recording, obviously in order to listen it there would be a temporary copy there. I have to confess that I am not up with the technicality of this, but maybe it is that temporary copy which may continue to exist.

Mr Candi—To hang around.

CHAIR—Yes.

Mr Candi—Or preceding that, yes. That is right. That is why it has to be only something that is transient and indispensable to making the communication. My advice is that the way this section is working at the moment falls short of that transient, indispensable step. It is too wide. The issue about caching is another very big debate and, as I said, at the beginning of a bidder. I was caught a bit by surprise. Today was originally slated for something else, so I have not had a lot of time. I have also been sick. I need to come back to you another day and go through this—the anticircumvention provisions, in particular. These are crucial sections to all the copyright owners. While we are dealing with the anticircumvention provisions, I tend to think the best thing we could do as copyright owners is talk amongst ourselves and come to you with some type of unified position. I am going to try to do that as well, although it is quite hard.

If you will indulge me then, I will try to jump from that section because I need to come back to you with more detail. I will jump to items 98 and 100, which are the changes to section 116. Having just said I will come back to you another day about the anticircumvention provisions, I can flag something that is immediately wrong with the anticircumvention provisions. It is this: they do not proscribe or prohibit the act or the conduct of engaging in circumventing a protected communication or product. I am not exactly sure why that has been left out. I thought we made a pretty good case the first time around. In America it does, and the latest from the European Union—as I understand it, it may be as late as this week—is that the European Commission has accepted the parliament's conclusion that the acts of circumvention per se should be explicitly prohibited.

Mr KERR—I think the logic of this is simply that we do not want the copyright police dealing with individual citizens.

Mr Candi—That is fine. I understand that. It is like the blank tape situation. It has always been a situation under the Copyright Act that recording a sound recording onto a blank tape is an infringement of copyright. It is a copy made without permission—it is a pirate. By the same token, the record industry and music publishing and composers have never at any time gone bashing down individuals' doors.

Mr KERR—I just think there is a reasonably heightened fear. But I think the public policy rationale that may underlie its own mission is simply that putting in a provision which in practice would not be enforced does not take anyone very far if you actually deal with what is thought to be the real evil.

Mr Candi—Yes, it will be enforced but it is not the individual situation that you are talking about; it is the individual engaging in a process or a form of conduct that is serious or semiserious or leading to larger piracy or conduct of anticircumvention to get around the copyright protections that are embodied in these products.

There is one other element that might help you with where we are coming from. These sections—and again I said I would not talk about it today because I am a bit underdone—talk about devices, they talk about the equipment and in one part they talk about components. They need to talk about components in another part that has been left out. But, essentially, the computer people and the user groups will say, 'Well, a PC can do it.' And that is true. We can prescribe—and we should—as much legislation as we can against creating equipment or components of equipment specifically designed to circumvent, but the reality of it is that it will be just a simple process of getting a software program down off the Internet into your computer which will allow you to circumvent.

We can try to proscribe as much equipment and the primary purpose or the significant purpose or however we want to explain it but, at the end of the day, the Copyright Act has always proscribed as its primary point the conduct of engaging in an infringement. That is how it will be. There will be 100 different ways every year of supplying the product. The other thing, by the way, is that the act refers to products and devices. The software program will be the anticircumvention device and the software program under the Trade Practices Act and other laws I think are services, not goods. There is already a technical problem with trying to catch the technical equipment in this.

CHAIR—Isn't that an argument though, Mr Candi, for saying, 'Why don't we just have a general prohibition on circumvention, on the behaviour or the conduct, without going into the detail of the various technical ways in which that could be done?'

Mr Candi—I say it is an argument for both.

CHAIR—I am asking you: isn't it an argument for one or the other? As a matter of legislative policy, if you are going to proscribe certain conduct or behaviour, why should you then try to list as many of the ways in which that could be done? Why not just leave it as a general proscription?

Mr Candi—On the act of—

CHAIR—Yes.

Mr Candi—I think it should be both. Certainly without proscribing the conduct it is woefully deficient. The Copyright Act in the remedy or enforcement provisions has always referred to the fact that when you find the unlawful act being done the court is empowered to order the delivery up of the devices or the equipment used in the process of infringement. I think where the international thinking came on also proscribing the equipment and the devices was to stop this normal human behaviour. These are all going to be encrypted. Instead of this plastic CD I am holding up being produced with the message in it, our people will have huge warehouses of digital computer equipment which will deliver the message down the wires and it will be encrypted. We know from human behaviour that as soon as you encrypt something there are those splendid risk taking individuals out there—to refer to them in a nice way—who will engage in selling the equipment to uncode it.

The thinking behind all this, as I understand it, is to say, 'Well, no. We don't want a market to be established in that type of equipment, so we are going to proscribe that.' I firmly say that that will get us some part of the way down the road. But unless we also proscribe the conduct of engaging in anticircumvention, there will be a huge hole in the legislation that will cause us problems. As I understand it from my advisers yesterday, the European Union, after quite a lot of debate, came to this conclusion this week as well. I also understand that the US legislation prohibits the conduct of circumvention.

The act goes to some trouble to say that there are some permitted purposes. I think it can do that, although I have a problem with some of the permitted purposes which I would like to talk to you about next time. This is the most glaring problem we have with the combination of sections that start off about technical measures and end up in section 116 and section 132 about the enforcement provisions. I suppose what I have just outlined is really a precis of what we have to say. I can come back in writing or make a further oral presentation about more of the details. We will certainly get you the rest of that stuff that came from Europe.

I will just jump to item 201. This is a very important issue for us as well. Item 201 deals with section 136, which is one of the sections where you can get your way into the Copyright Tribunal to argue about a licence—to broadcast or make copies of things for broadcasting purposes. On page 66 you will see subparagraph (a) and subparagraph (b) and the last line of words in subparagraph (b), starting after the comma, read:

. . . or to broadcast the recording in a broadcast transmitted for a fee payable to the person who made the broadcast.

We are absolutely opposed to this. These words were added. This allows those people who will set themselves up as subscription broadcasters—that is, those people who will charge you a fee directly or indirectly to get their broadcast—to, without the permission of the artist or the record company, take those recordings and broadcast them and then will end up in the tribunal arguing about equitable remuneration.

There are a few points here. The first point is that we are the commercial product. At the end of the process the recording is made and sold and it is the commercial product in the marketplace. There are windows of marketing involved in that. Subscription broadcasters are

different from general broadcasters who use a hit and miss situation. Fundamentally, we say that if somebody wants to charge for the broadcast they should acquire the products they want to include in their broadcast first and pay for them first.

Probably the best way to make this really crystal clear for you in the market sense is this: this is the final marketable product. If I had a film here, a film would be the final marketable product. No part of this act says or will ever say, for example, that Foxtel, Optus or any other pay TV operator can merely acquire, at its whim, any movie produced by MGM, Roadshow, Universal, Steven Spielberg and say, 'This is what we have on our movie channel. By the way, movie producer, I don't need your permission. I will see you in the Copyright Tribunal and we will work out a fee.' That is a commercial nonsense, for the same reasons it is a commercial nonsense with our final product.

I will tell you something else about the market. When the pay TV operators set up their music video channels, they specifically avoided a collective licensing situation, which is what this leads you to, and sought individual copyright licences from individual copyright record companies for their music videos. The reason is quite simple: that is part of their job. They have to go into the marketplace and acquire products to bundle together in their set of services that they will sell to a consumer. They compete in the marketplace to have the best movies or the best news services or the best music video channels. It is exactly the same with subscription broadcasting.

If this section is left the way it is, Mr Chairman, then you and I could get together and start a Beatles channel. I will tell you what, it will do really well. We could start a Fleetwood Mac channel. We could start a Cold Chisel channel. We could be playing every one of those artists' recordings every day for 24 hours a day. We could say to the copyright owners, 'I will see you in the tribunal. Don't worry about it.' This is a commercial nonsense.

The pay TV operators want to bundle on the side of their audiovisual programs 10 or 20 or 30 audio only channels. They want to have five classical channels—for example, light classics like Waltzing Bright and heavy-duty classics like Mahler and those ones that enthusiasts like. Then they will have five categories of adult contemporary music, like ABBA and Fleetwood Mac. I could give you a list of all the different genres. My favourite one was 'JAPO Mutant' or something like that. I have yet to hear it, but I cannot wait. I am going to Tokyo next week, so I will have to ask.

If this is left how it is, these people can set up as close as they can to a substitute for what the communication is about. Fundamentally, if they want to bundle together a subscription situation of what is supposed to be a set of radio channels but what is really delivering very specific channels of music, then they should go into the marketplace, clear it with the copyright owner individually and compete amongst themselves.

I can almost guarantee you that a copyright owner will not give a licence for a new release product. That is the first window of marketing. It is exactly the same as a film producer. A film producer is not going to put their brand new $100 million blockbuster on to TV or pay TV or sell it through video outlets before he puts it through the theatres for bums

on seats in theatres. He would go through each stage. If this is left how it is, it will cause us immense problems. I say that it needs to be struck out.

We do have an alternative position. By the way, the position that I am outlining is exactly how it is in the UK. If two or more copyright owners say to the PPCA, which is the collecting society that licenses radio broadcasters to play these things, 'Look, some of these subscription services are as close as you can get to the general notion of open general broadcasting, hit and miss broadcasting; licence them collectively,' that should be their call. At that point I have no problems with that type of collective licence being subject to the Copyright Tribunal's jurisdiction. In fact, I would prefer it. However, the copyright owner has to be left in the position, in the same way that the film-maker is, to make the decision whether they want their product at a particular time in its particular window of marketing to go to subscription broadcasting. It is a very, very important point. I think that is the best way I can express it to you.

CHAIR—What is the corresponding provision in relation to film?

Mr Candi—There is not one.

CHAIR—So with film there is no ability to go to the tribunal at all. They have to come to some private commercial arrangement.

Mr Candi—Yes. You go into the marketplace, as the TV channels do, and strike a deal with MGM or Universal. I think Channel 9 have a deal with Warners, and it is a longstanding one. I think they pay $40 million or $50 million a year. I do not know the figure, because I am not privy to the contracts, but that is what I hear the figure is, from reading the papers, for a year's supply of Warner Bros movies for Channel 9. When that deal is up, Channel 7, Channel 10, Optus—everyone—can bid for Warner movies. Equally, I think Channel 7 have MGM movies. Optus and Foxtel had a pretty grand battle about what types of movies they were going to get on their networks. Section 86 of the Copyright Act says the owner of the copyright in a film has these exclusive rights. Section 85 of the Copyright Act says the owner of the copyright and sound recording has these exclusive rights. They are the same.

Mr KERR—If I could play the devil's advocate—

Mr Candi—Sure.

Mr KERR—You make the comparison between film and sound recording, but you refer to a factual difference in the sense that there is a bums on seats point in the distribution of film, which does not apply in the case of sound recordings. The first point of distribution of sound recordings at the moment is their sale into record shops, but you will have your online direct sales presumably.

Mr Candi—Yes.

Mr KERR—That is always contemporaneous with general release on radio stations.

Mr Candi—On general broadcast radio stations?

Mr KERR—Yes.

Mr Candi—Yes.

Mr KERR—All I am saying is that at the moment there is not that marketing disaggregation that exists in film with sound recordings, and you are seeking to establish a different pattern of distribution than has hitherto applied. I accept that it may give you some commercial advantage, but it is a change of what now currently exists, presumably.

Mr Candi—That is a very good question, and I can provide clarification. I think they are exactly the same. The new release phase of a recording is the same as a new release phase of a movie. You have all the expense. In the case of a recording, it might be $200,000 or $2 million, depending on the artist. You have the full promotion out into the marketplace, and you are looking for that explosive period of sales—which happens in only about one out of 10 sound recordings, but that is another matter—to have a successful return on investment in the first window of marketing. Then, as the product ages a bit and the shine goes off its fashion, you go to the secondary, the tertiary and whatever comes after the tertiary marketing stages. That typically is budget or mid-price. It is also compilation albums. It is also inclusion in relaunching an artist's career somewhere down the track after 10 or 20 years. So there are stages of marketing.

In the communication age, it will be exactly the same. The record companies will connect with hopefully millions, if not tens of millions, of consumers through the electronic media. What makes the industry work is the new release—getting the new release primed, getting people primed to buy it and having the fashion element take over. That is exactly what it will be. Commercial radio does play the lead track, which is called the single, but that is hit and miss broadcasting. That is different from subscription broadcasting, which will be coming in a digital form down through a box. That can also include another channel on the TV which tells you exactly what is coming, when it is coming and what all the titles will be. That puts the consumer at home in a position to simply tape it. In fact, I know people who are taping one of the services now. I was shocked when a consultant whom I used to use played me a tape, and I asked 'Where did you get this from?' He said, 'I taped it off a digital service.' I had a heart attack. I think that is exactly the same as the film situation. How the record industry and its artists engage in the recurrent investment and marketing of products to get a return is a commercial reality. That is what it is about.

CHAIR—So, to take the bums on seats analogy, your argument would be that the bums on seats in the theatre are analogous to the bums on seats sitting in front of the computer with it coming down line?

Mr Candi—It is the first release stage, the explosive marketing stage. Hopefully, if you are lucky, you get a return on your investment. That is a very crucial part of the whole process. As I say, only one in 10 albums get going financially. They might be critically fantastic, but only one out of 10 actually make any return on money. It is a very important part of the whole way the industry works. I think it is the same for the film industry. I think,

from memory, my film counterparts tell me that it is about only one out of 10 films that make any money as well. This is a very important point.

CHAIR—They are better odds than a racehorse.

Mr Candi—Yes, I agree with that, having owned one once.

Mr MURPHY—What is your assessment of the impact on the music industry of the amount of counterfeit and pirate products?

Mr Candi—On the online world?

Mr MURPHY—Yes.

Mr Candi—It is big and getting bigger each day. The rights that we have already do put us in a position to chase piracy on the net, but they are clumsy. The communication right in this bill will make it a very precise and defined process that we can go through for antipiracy purposes. There are three types of online piracy. There are the boffins, who love an artist or author and are putting up their works and playing around. We have not chosen to sue any of those people. We have in fact rung them up and said, 'The artists reckon we have a problem with this.' We explain to them, and most of the time the boffins go, 'I'm out of here. I didn't mean to do that. I'm sorry.' They will close their sites down.

The second lot are the boffins who start getting a lot of traffic, as you would if you were giving away something for free, and become a part-time piracy business. Then there is the third lot, which is just straight-out piracy. They are using the net instead of using the factory to punch out the physical disc as a CD. Within that lot, there are two types. There are the ones who are providing download facilities for people to make recordings and then sell them; then there are the others, who are equally bad. To get into their site, they ask you to deliver to them first through your computer an infringing copy. Once you have delivered an infringing copy, that opens the gate to get into their menu of hundreds, thousands or tens of thousands of infringing copies.

I had a debate with a professor of law from Harvard the other day who felt that that was all pretty neato stuff. To me, all of those items are straight-out piracy, and one of them is inciting people to become pirates as well. Inciting conduct has always been proscribed by the act as well. So it is growing very rapidly.

We have developed search engines out of London. We have all contributed to some search engines and techniques in London to constantly search the net for infringing sites. We get a list every week. MIPI, the piracy unit, which is a separate operation that chases piracy, is also chasing those up. But we definitely need more resources as an industry to do that. The watermarking that we are developing, which is what the rights management information provisions are about, plus the new laws that we are trying to get in place all around the world should reduce the amount of piracy substantially within a couple of years. My big fear is what I said at the beginning of this: whatever we can do by technology someone can undo. That is why you need solid legal provisions as well—you need to take legal action. Sorry, that was a long answer.

Mr MURPHY—Of the products that are actually seized, are the bulk of them imported?

Mr Candi—Are most of the infringing sites overseas?

Mr MURPHY—Yes.

Mr Candi—Yes, they are. There are still quite a lot in Australia, but Australia is only two per cent of the world so the probability is reflected in what the actuality is, which is that most of the sites are overseas.

Mr KERR—I think John was raising physical seizures. I think there is a bit of a crossover here. He was I think talking about 'pirate' in terms of CDs.

Mr Candi—Physical copy piracy?

Mr MURPHY—Yes.

Mr Candi—Sorry. I thought you were still talking about the Internet. The answer is still yes, from my knowledge. Most of the catching of piracy product is product that has come from overseas. You would need Michael Speck, from Music Industry Piracy Investigations company, back here to give you the exact breakdown. But I also know we increasingly have a problem in what I call 'home factories' setting up in Australia and making counterfeit or pirate CDs in this country as well and then passing them off as imports.

Mr MURPHY—Would you have a wild guess to quantify what percentage of the products out there in the market are pirated copies?

Mr Candi—The last figures I saw from Music Industry Piracy Investigations, the estimates were around seven per cent of the value of the market. It fluctuates from time to time, but I think the industry has done a fairly good job of trying to keep it under control. This has got more to do with the other terms of reference. But there are problems—which I think we are back in February to talk about—about how we could stitch that up and make it a better enforcement situation.

Ms JULIE BISHOP—A new product was brought to my attention the other day. I think it is the next generation Walkman. Sony have got this little thing that is about the size of a credit card. It operates like a Walkman except that you download music off the Internet.

CHAIR—They have got one.

Mr Candi—No; the Sony one is different. It is this thick, isn't it?

Ms JULIE BISHOP—It is far smaller than that. It is literally like that. It is as thin and small as a credit card.

Mr Candi—Yes.

Ms JULIE BISHOP—Have you had a look at that product and what sort of impact will these proposed laws have on that sort of scenario?

Mr Candi—That product and the one that I circulated earlier which is the—

Ms JULIE BISHOP—That is a very cumbersome version.

Mr Candi—Yes.

Ms JULIE BISHOP—The one I saw was literally—

Mr Candi—The credit card one is even sexier or cuter.

Ms JULIE BISHOP—It appeared that way.

Mr Candi—Sony and a number of companies are developing these things. It is the way the hardware people are taking us. The hardware people have always come up with new ways of storing the music and the record industry has had to move with it. It all comes back to the communication right. There will be a whole lot of inventions over the next five to 10 years and beyond about how to store the recorded music. But essentially you should not be storing a recorded music product, or a book or an art work or any other copyright product unless you have purchased the product or the right to store it in the first place. It does not matter what they develop. We have got to have this communication right and we also as an industry have to develop technological watermarking and security devices to go with it. The Sony one, as I understand it, is going to comply with what is called the SDMI—the secure digital music initiative—that the software industry and the record companies are developing as a standard. It will comply with that so that only legitimate recorded music will go in. Unless it has the encoded message that it is legitimate and that it is getting to the person with this little card in an authorised communication, it will not go in to the card.

Ms JULIE BISHOP—So if it is unauthorised it will not take it up?

Mr Candi—It will crash or it will come out in a way that it is really bad—to put it in plain English.

Mr CADMAN—Can I just ask you a point of clarification there? So every composition and every rendition of every lot of music will have to be assessed and coded—watermarked?

Mr Candi—Yes. Each of the copyright record companies is going to have to watermark.

Mr CADMAN—Everything that mankind has ever done?

Mr Candi—Yes, those that they keep on the market. Technically, the thinking at the moment is the record companies will never have any deletions.

Mr CADMAN—Yes, but you are extending the use that the broadcaster is now making of it to my capacity to copy and perhaps broadcast it to my family or to our committee here.

Mr Candi—No. Instead of going to the shop and buying a physical CD, you dial up the record company shop on your computer.

CHAIR—Amazon.com.

Mr Candi—Yes.

Ms JULIE BISHOP—Tower.com.

Mr Candi—Yes, and you purchase a copy of the sound recording without the plastic packaging into your computer or into your magic stick.

Ms JULIE BISHOP—Yes, something like that.

Mr Candi—I think they call it the 'magic Sonygate' or something like that, because it is with Bill Gates. When you have that and you purchase it to store in your house, you have it in virtually the exact same form as this CD. You put it on, play it in your household and do what you do with this. If you are a broadcaster, it is a different matter. You have to have a broadcaster licence. You have to have a licence with PPCA to play the sound recordings. You have to have a licence with APRA to play the songs. By virtue of that licence, you acquire the product. In fact, record companies give you the product, but that is a different matter.

Mrs VALE—You have touched on the answer. I had difficulty in understanding the watermarking process and how that actually manifests itself, especially on the digital form. Could you try to explain that?

Mr Candi—I will have a go. I can actually get the world expert out here and he can do it in half—

Mrs VALE—No, it is just for me to understand. I am a dinosaur, you see. This is very difficult to get one's mind around.

Mr Candi—Let me tell you, no excuses are necessary. I find it very difficult. At the moment, with any computer or any one of these MP3Mans or little digital download machines, you can download anything, whether it is an unauthorised copy of the Beatles or Cold Chisel or whether it is the authorised copy. That is a problem that we have. We need two things to turn the Internet, which is about another retail channel, into a legitimate retail channel. We need a law that says you should not be communicating a copyright product unless you own it or have a licence to communicate it. We also need technical shorthand watermarks to make sure that, if someone is downloading a recording, these machines recognise that it is the legitimate one and not an illegitimate one.

I have seen the technical people say, 'It's possible.' I still find it very hard to believe how it is going to work, which is why I say we need really good laws. What they explained to me is that there will be a watermark embodied in the sound recording. It will be in various parts during the sound recording so that it cannot be easily seen and stripped out. The watermark will be really difficult, but not impossible, to separate from the

communication of the recorded music. Therefore, when it gets to these and, if the people who manufacture these devices incorporate those standards, when I try to download at home or any other person tries to download a recording at home which does not have the proper watermark in it, it will crash or come out in a garbled manner in the same way as, if you do not have the black box to get Foxtel or Optus, what do you get? You get all these little dots.

Mrs VALE—So there will be a device in that little receiver?

Mr Candi—Yes. The industry has gone to the manufacturers of these devices and said, 'Here's the SDMI specification. Will you adopt it?' If they do, the record industry with these laws and with this technology can move to provide to the consumers direct to home every recording that they have ever made and every recording they will start to make. That should mean a good time for the people who make these as well. At the moment, these people are often away with sales because there are enough boffins out there who will go and download illegitimate music from the Internet. There is a whole body of music on there that should not be on there.

Mrs VALE—How far have those negotiations proceeded?

Mr Candi—As I understand it, phase 1 will be implemented either before Christmas or shortly after Christmas. I have forgotten exactly what phase 1 means.

Mrs VALE—Are the manufacturers amenable to that suggestion?

Mr Candi—Most of them are, yes. Phase 2, which is supposed to be implemented next year, will mean that, unless it is encoded properly, it will crash when you get to this stage. The first question I had to ask our techno guy was, 'How undoable is the watermark?' His answer was, 'You would find it very difficult to break,' because I have only just learnt to turn a computer on, 'but a pretty smart guy who understands computer programs could undo it.' It is not a defence as in a standard government defence. So that is where we are at.

CHAIR—That means there will exist, no doubt, a black market in the program which will allow you to overcome the watermark device.

Mr Candi—Exactly. That is why the communication right, the anticircumvention rights and the definitions of effective technological measures are so critical. Coming back to where we were a little while ago, that is why we say the prescribing of a circumvention is important. Because it can be undone.

CHAIR—We are running out of time, Mr Candi, so we might stop there. We look forward to your written submission covering these matters. It may be that we want to speak to you again, but we are on a tight time frame in relation to this inquiry. We certainly look forward to your written material.

Mr Candi—Thank you for the opportunity. I really would like the opportunity to come back and deal in detail with those anticircumvention provisions and the technological measures. I also did not get to three other items; two that are missing from the bill, which I will supply notes on; and one dealing with retransmission rights, which are also pretty

important. From a fairly large industry, I would very much welcome the opportunity to come back another day. Thank you for your time.

CHAIR—Thank you.

Resolved (on motion by **Ms Bishop**):

That the materials provided by Mr Candi be received as evidence to the inquiry.

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

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 10.40 a.m.